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The Chairperson of the Ad Hoc Committee
to Initiate and Introduce Legislation
Amending Section 25 of the Constitution
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Attention: Honourable Dr Mathole Motshekga, MP
Mr Vhonani Ramaano

Per email: section25@parliament.gov.za

WRITTEN INPUTS ON THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL, 2019

Honourable Dr Motshekga

Agbiz would like to thank the Ad Hoc committee for the opportunity to submit written comments on this important Bill. We trust that our comments will assist the Committee and the Assembly in its deliberations.

1. Who we are

The Agricultural Business Chamber (Agbiz) is a voluntary, dynamic and influential association of agribusinesses operating in South and southern Africa. Key constituents of Agbiz include the major banks in South Africa, Development Finance Institutions, short term and crop insurance companies, commodity organisations, agribusinesses and co-operatives providing a range of services and products to farmers, and various other businesses and associations in the food and fibre value chains in the country. Conservative estimates attribute 14% of South Africa's GDP to the food and fibre value chain, although its proportionate contribution to the rural economy and rural job creation is significantly higher.

Agbiz's function is to ensure that agribusiness plays a constructive role in the country's economic growth, development and transformation, and to create an environment in which agribusinesses of all sizes, can thrive, expand and be competitive. One way in which we seek to achieve this is by providing thoroughly researched inputs on draft laws and policies affecting our members.

Agbiz is also an active member of Business Unity South Africa (BUSA) and participates in many Nedlac activities through the Business Constituency.

2. Introduction

Agbiz and its members are committed to building an agricultural sector that is dynamic, efficient, inclusive and sustainable. Although the majority of our members operate in the value chain and are not large landowners per se, the entire upstream and downstream value chain relies on a successful and growing primary agricultural sector. Many of the Agbiz members are also directly involved in agricultural finance where international lending criteria require financiers to request security as part of their due diligence assessments. The transformation of the agricultural value chain is likewise a core objective of Agbiz and land reform naturally plays a significant role therein. As a result, the Agbiz membership has a direct interest in legal developments relating to compensation for land that may be expropriated for the purposes of reform.

Our comments are intended to contribute to a legal dispensation where land reform can be accelerated without distorting land markets or business confidence in the sector as envisioned by chapter 6 of the National Development Plan (NDP). These comments are consistent with the pragmatic approach outlined in the NDP and which we have advocated for to date.

3. Reservations about the need for a Constitutional amendment

Agbiz has always viewed the extension of strong property rights and the success of the land reform programme as two sides of the same coin. Meaningful transformation is not only needed to ensure the long-term sustainability of the South African economy, it is also the morally correct thing to do. The history of dispossession, skewed patterns of ownership and insufficient access to land for economic and settlement purposes in South Africa must be remedied and it is for this reason that transformation is a core focus area of Agbiz and its members.

It is within this context that we have invested a considerable amount of time and resources over the past eight years to promote the success of land reform, both through inputs on policy and draft legislation, as well as formulating alternative funding mechanisms to speed up the process in a sustainable manner. Agbiz was involved in the various workstreams known as the NAREG process following the publication of the Green Paper on Land Reform in 2011, played a leading role in the Inter-Departmental Task Team on Outcome 7 led by the Department of Rural Development and Land Reform (DRDLR), and continues to participate and lead the Business delegation in several task teams at the National Economic Development and Labour Council (NEDLAC) deliberating on legislation that affects land rights and land reform. In association with the Banking Association of South Africa (BASA), we developed a blended financing model based on the public-private-partnership principle to facilitate private sector lending to accelerate land redistribution. These blended funding partnerships are currently being pursued through the presidential job summit process.

Our individual members have also been very involved in individual land reform projects through financing joint-ventures and providing training, extension and various forms of support to beneficiaries. In this sense our members well and truly "walk the walk" when it comes to land reform.

We sought to draw the Committee's attention to our member's efforts not to claim credit or to seek approval, but merely to assure you of our *bona fides*. This is necessary because we have always supported transformation and will continue to do so, but we are not supportive of expropriation at nil compensation as a means to achieve this.

In our submission to the Constitutional Review Committee, we cautioned against a constitutional amendment. We believe the land reform objectives can be achieved without resorting to expropriation at nil compensation, if the administrative process is overhauled to ensure efficient administration. We furthermore cautioned that there is little legal merit in amending a provision which has scarcely been used in the previous 25 years and harbour increasing concern that the inherent risk in weakening property rights will far outweigh any benefits as there is no guarantee that it will accelerate land reform as currently administered. There are numerous international examples that showcase how land reform can be achieved by rather extending property rights.

3.1. The weight of the 'purpose of the expropriation' has not been fully tested

A comprehensive reading of section 25 reveals that expropriation has always been a legitimate option to effect land reform where *bona fide* negotiations to obtain land earmarked for reform by less intrusive means have failed. This is evidenced by the fact that section 25 (4) (a) explicitly states "the public interest includes the nation's commitment to land reform…".[1] Special provisions inserted into the compensation clause[2] which were not present in the interim constitution[3] supports the argument that the current wording was drafted with social justice and reform as central considerations.

Whilst expropriation under the Constitution is not limited to land reform, section 25(3) contains unique provisions which seem to cater directly for the land reform imperative to be taken into account when awarding compensation. The fact that section 25 (3)

[1] Du Plessis 2014 *PELJ* 807; Van der Walt *Constitutional Property Law* 426-427; It is argued that the inclusion of both public purpose as well as public interest in the formulation of section 25(2)(b), read with the express reference to land reform in section 25(4)(a), negates the possibility of an expropriation for the purposes of land reform not being regarded as falling within the public interest merely because it is undertaken to transfer property from one private person to another. Although not in the context of land reform, it was confirmed in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others* 2009 (5) SA 661 (SE) that an expropriation can be in the public interest where it benefits an individual.

[2] Section 25 (3) Of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the *Constitution*).

[3] See section 28 of the Interim Constitution Act 200 of 1993.

expressly lists the "purpose of the expropriation"[4] as well as the "history of the acquisition and use of the property"[5] to be considered when determining just and equitable compensation indicates that social justice considerations must be taken into account when expropriating land for reform.

Section 28 (3) of the Interim Constitution made provision for the expropriation of property subject to just and equitable compensation, taking into account all relevant factors including the use, history of acquisition, market value and value of investments. It stated:

> *"**28 Property***
>
> *(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of the acquisition, its market value, the value of investments in it by those affected and the interests of those affected"*

Whilst the list of considerations was not exclusive,[6] it did not expressly list the purpose of the expropriation as a relevant factor. When section 25 (3) of the final Constitution was drafted, the essence of section 28 (3) was retained but the purpose of the expropriation was an express addition. Van der Walt[7] argues that this addition was inserted to create a distinction between the compensation awarded for land expropriated under reform programmes versus property expropriated for "business-as-usual"[8] purposes such as infrastructure development.[9]

Unfortunately, we have limited caselaw outlining the influence which the purpose of the expropriation has on the determination of compensation. The only real attempt at

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[4] Section 25 (3) (e) of the *Constitution*

[5] Section 25 (3) (b) of the *Constitution*.

[6] Use of the word "including" indicates that all relevant factors must be considered even if they are not expressly listed. The analogous wording in *section 25* of the Constitution was interpreted as such by the Constitutional Court in *Du Toit v Minister of Transport* 2006 (1) SA 586 (CC) at para 28 noted that *"section 25(3) provides an open-ended list of relevant circumstances to be taken into account".*

[7] Van der Walt 2005 *SALJ* 773.

[8] Van der Walt Ibid.

[9] Van der Walt 2005 *SALJ* 773 argues that the public interest requirement should not influence the amount of compensation for business as usual purposes since the burden for public projects should be spread equally across the tax base. However, Van der Walt does recognise that an exception should apply where the property is expropriated for land reform purposes. His argument does not rest on the public interest requirement in s 25(2) of the *Constitution*, but on the explicit inclusion of the purpose of the expropriation as a listed factor in s 25(3) of the *Constitution*.

testing the weight which this factor should carry was the *Msiza case.*[10] After correcting the market value to exclude developmental potential, the Land Claims Court deducted an additional amount as *"The national fiscus should [not] be saddled with extravagant claims of financial compensation, when the clear object of taking the land is to address a pressing public interest concern such as land reform".* This decision was however overturned by the Supreme Court of Appeal.[11] The court held that the deduction was arbitrary and that there was no justification to argue that the compensation was unaffordable to the state since the state offered to pay the market value.[12]

Aside from this single set of facts, there is no additional caselaw which comprehensively sets out the weight which the purpose of the expropriation should carry. This is unfortunate as the introduction of this factor in the final Constitution was expressly intended to allow the social justice consideration to play a leading role when land is expropriated for reform. It is for this reason that Agbiz has argued that no further amendments are necessary to section 25. Instead, a robust body of caselaw should be developed to determine the circumstances in which land reform as the purpose of the expropriation will play a leading role in determining the compensation. We submit that the ambiguity surrounding the weight which the purpose of the expropriation carries is not a fault of the Constitution's wording but rather a consequence of the state's failure to use it. To date, the state has never used its powers to initiate expropriation proceedings within the context of land reform[13] and as such the courts have had precious little opportunity to clarify the ambiguity which the preamble of the Bill refers to. Advocate Tembeka Ngcukaitobi captured the essence of this argument in a recent article for Mail & Guardian where he states:

> *"The Constitution is the wrong target. Post-liberation politics have failed the Constitution. Legal constraints to governmental power are necessary. What has slowed down transformation of property relations are the design flaws, inefficiencies of the land administration system, endemic corruption and*

[10] *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12.

[11] *Uys N.O. and Another v Msiza and Others* 2018 (3) SA 440 (SCA).

[12] Ibid at para 26.

[13] Where the courts have been able to make a ruling on just and equitable compensation it has not come about as a result of the State initiating expropriation proceedings but rather where an agreement is reached to acquire the land through other means and the courts are called upon to make a ruling on what the just and equitable amount should be under section 23 of the Land Reform (Labour Tenants) Act 3 of 1996 or section 42E of the Restitution of Land Rights Act 22 of 1994; See *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12, *Uys N.O. and Another v Msiza and Others* 2018 (3) SA 440 (SCA), *Emakhasaneni Community v The Minister of Rural Development and Land Reform and Others* (LCC 03/2009), *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affiars* [2000] 2 All SA 26 (LCC), *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012), *Moloto Community v Minister of Rural Development and Land Reform and Others* (LCC 204/2010), *Nhlabathi and Others v Fick* (LCC42/02) [2003] ZALCC 9 (8 April 2003).

misapplication of the Constitution, particularly the slavish adherence to market-driven compensation models. For its part, the Constitution is necessarily open-ended and transformative."[14]

3.2. Economic considerations motivating against an amendment

Property rights underpin high levels of local and foreign investment in all sectors of the economy. The global Property Rights Index clearly shows a correlation between the recognition of property right and high levels of economic growth. Continued uncertainty regarding the continued recognition of property rights in South Africa will place investment at risk.

The fact that the bounds of section 25 (3), and section 25 (3) (e) in particular, have not been tested is one of the principle reasons why Agbiz motivated against a Constitutional Amendment. In our submission to the Constitutional Review Committee, we furthermore highlighted the following considerations to motivate why we believe that section 25 of the Constitution should not be amended:

- The state has never used its powers of expropriation within the context of land reform;
- The courts have not had the opportunity to clarify the meaning and scope of "just and equitable" within the land reform context;
- The recognition of property rights is the basis of economic freedom, prosperity and liberty;
- In the State of Food and Agriculture report compiled by the FAO is 2012, it is clearly stated that investment by farmers themselves constitutes by far the largest portion of investment into the sector. And amongst other factors such as good governance, macroeconomic stability and transparency, respect for property rights plays a central role in investment decisions. This is supported by local data showing a significant trend of reduced foreign investment into the agricultural sector and reduced gross capital formation;
- Explicit nil compensation is out of line with international standards;
- Explicit nil compensation can have adverse effects on investment, capital formation and agricultural productivity;
- Business confidence has shown a consistent decline despite variation in agricultural conditions which is indicative of policy uncertainty as a leading cause. Low business confidence results in low level of capital formation and investment;
- The resulting harm to the economy could exceed the costs of simply paying just and equitable compensation; and

[14] Ngcukaitobi T, 2019, "What section 25 means for land reform" *Mail & Guardian*, accessed online at < https://mg.co.za/article/2019-12-13-00-what-section-25-means-for-land-reform/?amp> accessed on the 16th of January 2020.

- Various alternatives are available to promote land reform, including blended finance models whereby the state and private sector co-fund land acquisitions for reform.

Kindly see our written submission to the Constitutional Review Committee attached for detailed motivation.

4. Specific comments

Notwithstanding our principled opposition to a Constitutional amendment as outlined above, we have been a trusted contributor to the legislative process relating to expropriation and land reform for the better part of a decade and wish to continue doing so. We also understand that the Ad Hoc Committee operates on the mandate given to it by the National Assembly, namely to propose wording for an amendment opposed to debating the merits of an amendment. It is with this understanding that we seek to engage with the specific wording proposed in the Bill. We request that you kindly consider our inputs on the proposed wording despite our reservations about the actual need for an amendment.

4.1. The proposed amendment of section 25 (2) (b)

There are several aspects to the proposed insertion that warrant consideration. We note that the text does not prescribe that the circumstances to be listed in national legislation must be expropriated at nil compensation but instead states that *"a court may"* determine that the amount is nil. The notion that the decision must be taken by a court, as well as the use of the word *"may"*, is workable provided it provides guidance without being prescriptive.

The determination of just and equitable compensation is not a technical exercise nor can it be reduced to a simple mathematical equation.[15] It is a contextual exercise in which the rights of the individual must be weighed up against the interest of the fiscus where normative elements such as fairness and equity hold sway. Our courts are best placed to make this value judgement and it is critical that the courts retain discretion as compensation may even differ between properties of a similar value depending on the circumstances of the owner and the expropriation.[16]

[15] Gildenhuys A *Onteieningsreg* 2nd ed (Butterworths Durban 2001) at 167. Persuasive authority for Gildenhuys' contention can be found in the jurisprudence of the German Constitutional Court. With reference to article 14.3 of the German Basic Law which also requires an equitable balance between the public and private interests to determine compensation. The court in the *Deichordnung case* (BVerfGE 24, 367) held that a fixed formula for compensation was not compatible with the flexible nature of article 14.3 of the German Basic Law which requires the balancing of rights in an analogous manner to Section 25 (3) of the Constitution.

[16] Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" in Hoops et al (eds) *Rethinking Expropriation Law III* (Eleven International Publishing, The Hague 2018) 191-222.

One aspect which should perhaps be reconsidered is the inclusion of improvements under the proposed amendment. Notwithstanding our principle opposition to nil compensation as a means to effect land reform, it is understood that the underlying argument in favour of nil compensation relates to social justice. If circumstances are such that an owner's property rights came about solely as a result of forced dispossession and is in no way attributable to the application of his own capital and labour, social justice considerations could carry a great deal of weight. It is difficult to imagine the same rationale being applied to improvements, especially those made to the property by subsequent owners and successors in title.

From a legal point of view, fixed improvements attach to the property but a purposive interpretation of the Constitution should seek to give effect to the underlying social justice objective and not a slavish adherence to common law principles. Where the value of the land has increased due to fixed improvements that were made by an owner and not tainted by a historical injustice, it should not be treated in the same light as the land itself. The purpose of the expropriation should only be relevant where property rights have been tainted by a historical dispossession. Improvements that have no link to a historical dispossession should not be treated the same.

4.2. The proposed insertion of section 25 (3A)

It is understood that the Constitution itself *"paints in broad strokes on a large canvass…"*[17] and hence cannot contain a comprehensive list of circumstances in which nil compensation may be just and equitable. There are however inherent risks should the legislature be expected to come up with such a list.

In the first instance, the contextual nature of compensation based on a balancing of rights require each case to be dealt with on its own merits. Properties of a similar value, with similar attributes and expropriated for a similar purpose may not necessarily attract the same amount of compensation as the circumstances surrounding the current owner and the properties' acquisition may differ.[18] By mandating legislation to identify the specific circumstances where nil compensation may be awarded, one runs the risk of arbitrary decision making if all properties listed in the legislation are treated the same irrespective of the owner or properties' specific circumstances. We therefore favour an approach where the text rather places an obligation on the legislature to list additional factors that may be considered opposed to prescribing circumstances under which it may be just and equitable. It is impossible to list all circumstances that may be relevant to a specific set of facts and one also runs the risk of limiting the understanding of which factors may be relevant by making reference to a listed circumstance where nil compensation may be just and equitable. It could also pre-empt the weighting which listed circumstances, where relevant, should play in the determination of compensation. By listing additional "factors" in primary legislation that

[17] Attorney-General v Dow 1994 (6) BCLR 1 (T).

[18] See foot notes 15 and 16 ibid.

should be considered to determine whether nil compensation is just and equitable opposed to "circumstances", it allows the courts to assign the appropriate weighting to that factor given its relevance to the set of facts.

Secondly, by allowing primary legislation to define which categories of properties are entitled to just and equitable compensation versus nil compensation, it undermines the constitutional safeguard provided for in s74. It is well understood that a 2/3 majority is required to amend the Bill of Rights versus a 50% plus 1 majority to pass primary legislation. The proposed amendment will not change this but it will allow primary legislation to redefine the scope and application of the compensation guarantee between different categories of property. One should guard against creating the impression that the proposed amendments will give Parliament a 'blank cheque' to exempt the state from paying compensation for properties that fall within the circumstances listed in the primary legislation. By replacing "circumstances" with "factors" that must be considered, this risk can be mitigated.

5. Desire to retain the courts as the final arbiter on the quantum of compensation

Whilst it is not currently provided for in the Amendment Bill, we have been made aware of media reports indicating that the ruling party favours an amendment that would allow the executive, and not the judiciary, to be the final arbiter of compensation. As a rule, we do not wish to comment on speculations nor media reports unless there are concrete proposals on the table. At this stage we have not seen an amended version of the Bill that caters for this possibility and as such it is difficult to pass substantive comments on this matter.

However, we would like to re-emphasise the need for the judiciary, and not the executive, to remain the final arbiter. The nature of our compensation clause does not lend itself to the executive acting as an adjudicator as it will always be a party to the proceedings. The compensation clause (25 (3)) calls for a balance between the interests of the expropriating authority and the parties affected by the expropriation. Considering that the Expropriating Authority is part of the executive, it would be fundamentally flawed for the executive to decide where that balance lies as it has 'skin in the game', so to speak. It will never be regarded as a fair procedure if the executive is both a litigant and a party in the same proceedings.

Our compensation clause furthermore cannot be reduced to a mere formula or technical calculation. According to Gildenhuys,[19] section 25(3) of the *Constitution* was designed to be a flexible mechanism that can be applied differently according to the context. As such, it does not lend itself to the application of a rigid formula. Persuasive authority for Gildenhuys' contention can be found in the jurisprudence of the German

[19] *Onteieningsreg* at 167.

Constitutional Court. With reference to article 14.3 of the German Basic Law,[20] which also requires an equitable balance between the public and private interests to determine compensation,[21] the court in the *Deichordnung case* held that a fixed formula for compensation was not compatible with the flexible nature required by article 14.3 of the German Basic Law.[22]

Whist factors such as the property's value and the value of historic subsidies can be numerically calculated, they are merely indicative and must be weighed up against a host of other factors to determine what is just and equitable. The over-arching requirement remains the balance between the interests of the state and the individual. No one is better placed to weigh up such normative factors than the courts.

There are instances to be found internationally where administrative bodies such as specialist arbiters,[23] industry experts[24] or specialist courts[25] can determine compensation in the absence of agreement but these are always subject to 2 qualifiers in order to provide for a fair procedure. Firstly, the decision of such a body must still be subject to appeal to a court of law. Where this right is limited, all affected parties must consent to the determination by these bodies and in so doing, waive their right to access the courts directly.

6. Conclusion

Ultimately, the judiciary will need to build up a robust body of caselaw to provide legal certainly in relation to compensation for expropriation. It is incumbent upon the executive to bring cases before the courts where the set of facts are sufficiently diverse so that the judiciary can give content to just and equitable compensation under different circumstances. The legislature can aid the courts in this endeavour by providing additional factors that the courts could consider. Such guidance will be especially helpful to aid the courts in considering the entirety of factors that may be relevant where land is expropriated for reform. We would however caution against a prescriptive approach whereby the legislature attempts to pre-empt the outcome of the compensation based on the presence or absence of a few circumstances only. The correct approach would be to broaden the range of factors that could be considered, where relevant.

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[20] Of 1950.

[21] Du Plessis *Compensation for Expropriation under the Constitution* 147-150; Kleyn 1996 *SAPR/PL* 442; Van der Walt *Constitutional property clauses* 150, 151.

[22] *BVerfGE* 24, 367 at *paras* 50, 83.

[23] See s 42(1)(c) of the Land Acquisition Act of Tasmania 23 of 1993 (Tasmania).

[24] See s 80 of the Lands Acquisition Act 15 0f 1989 (Australia).

[25] See the Administrative Appeals Tribunal Act 91 of 1975 (Australia), Administrative Appeals Tribunal Act 51 of 1989 (Australian Capital Territory), Civil and Administrative Tribunal Act 35 of 2008 (Australian Capital Territory), Environment, Resources and Development Court Act 63 of 1993 (New South Wales), Land and Environmental Court Act 204 of 1979 (New South Wales), Northern Territory Civil and Administrative Tribunal Act 28 of 2014, South Australian Civil and Administrative Tribunal Act 59 of 2013 (South Australia) and the Victorian Civil and Administrative Tribunal Act 53 of 1998 (Victoria).

The argument has previously been made that it would be too costly and slow to allow the courts to build jurisprudence around this point. Whilst this is noted, it is worth considering that the courts have in fact been able to do so in relation to eviction law. Through a series of judicial pronouncements, the courts have given content to normative considerations of fairness and equity and created legal certainty as they were presented by a diverse set of facts to adjudicate on. The same can be done in relation to compensation for expropriation.

We thank you once again for the opportunity to submit comments and trust that you will consider our comments favourably.

Yours sincerely

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