

AWARENESS DOCUMENT OF THE EXPROPRIATION BILL B23-2020

Introduction

The basis for this awareness document of the Expropriation Bill (the Bill) tabled for public comment is the position of Free State Agriculture as mandated by the 2019 Free State Agriculture (FSA) Congress obtained from our members:

FSA has worked with Agri SA who together with an expert appointed legal team has been part of the engagements processes on a new Expropriation Bill ever since 2008. They have participated actively to align the bill to the mandate provided to Agri SA by their members. Sections have however been added to the Bill that list instances where the state can expropriate property in the public interest without paying for it.

The agriculture community is in the process of compiling a detailed analysis and comment on the current bill and FSA will continue to contribute to this document. The purpose of this FSA document is to raise the most worrying issues arising from the Bill within our specific mandate from our members.

First and foremost this document aims to support and guide our members to make their informed voices count in this democratic policy formulation process.

Secondly we would like to inform the general public of the risks of this amendment to **all private property** and raise their support as well in opposition of the Nil Compensation door that this Bill opens.

The Intentions of the Bill

In the preface to the 15 October 2020 version of the Bill as presented to the Portfolio committee in parliament (B23-2020), it was very clearly pointed out what the intention of the Bill is, namely:

"To provide for the expropriation of property for a public purpose or in the public interest; to provide for certain instances where expropriation with nil compensation may be appropriate in the public interest; and to provide for matters connected therewith."

The definition of public interest is very clear – to bring about reform to ownership patterns of all of South Africa's natural resources – including land and water rights:

"... 'public interest' includes the nation's commitment to land reform, and to reform to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices;"

Expropriation for public purposes is not new. When expropriation for public purposes occurs and is implemented by governments that are not marred by corruption, this activity is accepted by the population as legitimate. In these cases, expropriation for public purposes is used to provide specific public infrastructure and services. Importantly such a process is limited and closely and competently managed. A defining attribute of expropriation for public benefit is that the owner of the affected property is compensated to be at least as well off as he or she would have been before the expropriation took place. Current expropriation legislation law allows for such a process.

Free State Agriculture is of the view that this new Bill is not merely intended to update the previous Expropriation Bill. This is made clear by the professed intention of the Bill. This law seeks to expand the rights of government to expropriate. It expands both the purpose of expropriation and the justification that can be provided and decentralises the expropriation process.

As defined, public interest does not refer to the building of roads, bridges, and dams. Public interest is described as a political imperative.

In addition, the definition of public interest is overly broad. This definition does not identify specific circumstances or events or projects that might be interpreted as a reasonable and isolated case for expropriation. Rather public interest is intended to be a blanket definition. This creates an opportunity for government officials to act in any situation in the “public interest”.

This interpretation of the Bill is further justified when considering the unjust and illegitimate approach to compensating victims of state expropriation.

A further significant concern is the definition of “expropriation”. In essence this definition is extremely narrowly defined and as such opens possibilities for regulatory and third party takings that are not addressed in the Bill. A broader discussion of this major concern will be contained in the final submission that will be presented to Parliament.

Intended compensation

Chapter 5 describes the Compensation methods for expropriation. Specifically Clauses 12 to 20 generally deal with compensation for expropriation. These clauses express the requirements of section 25(3) of the Constitution and thus sets the standard for all expropriation undertaken by an Expropriating Authority in the three spheres of government.

The overarching requirements for the determination of just & equitable compensation in terms of section 25(3) of the Constitution include the –

- a) current use of the property;
- b) history of the acquisition and use of the property;
- c) market value of the property;
- d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

e) the purpose of the expropriation.

A so called “innovation” of the Bill is the explicit provision in clause 12(3)(a)-(e) of relevant circumstances which may result in the payment of nil compensation.

The payment of nil compensation may, in such a situation, be regarded as just & equitable after satisfying the balancing of rights process and the requirements of sections 25 and 36 of the Constitution.

Under Clause 12(3) relevant circumstances that may justify the payment of nil compensation include:

- a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
- b) Where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
- c) Notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937(Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
- d) Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
- e) When the nature or condition of the property poses a health, safety or physical risk to persons or other property.

Market value is the agreed price that reflects the value of any item. It is reflective of the value perceived by free and independent parties that agree to transact. Such a value is determined by the price others are willing to pay, the underlying purchase costs, improvement cost and changes in economic value over time. The market value of any product, service or asset must be determined in such a way in order to derive a just and equitable transaction price. Paying less for an asset than what it is worth is unjust and not equitable. The constitutional framework should be interpreted against such a backdrop. Any other view will severely impact the rights of individuals to any property.

The Expropriation Bill’s assertion that circumstance do exist where nil compensation is regarded as just & equitable compensation is worrying. Clause 12(3) list a number of the circumstances that is open to wide interpretation. What would it mean if land is not used for the owner’s main purposes? What does failure to control land mean? What constitutes private property posing a health, safety or physical risk? Who will make such decisions? These clauses can be applied to any property.

Read together with the clear intent of public interest it becomes clear that these very broad categories are open to misuse, misinterpretation and could be used as a tool for intimidation of individuals. More importantly this law creates a significant uncertainty regarding all property and the rights associated with it.

The Bill focus on all property

The definition of property in the Constitution of the Republic of South Africa, Section 25 (4) (b) clearly states that “*property is not limited to land.*” Hence any fixed property such as houses and buildings as well as immovable property such as vehicles and even intellectual property can be included here.

Section 25 (4) (a) For the purposes of this section- states: “(a) *the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;*”

So as already done with mineral rights and through state custodianship over water rights, property encompasses all natural resources which includes land as a crucial factor of production.

Legitimate expropriation exists to assist the process of the delivery of public services and infrastructure. This law goes beyond that. The description intentionally indicates that all assets are targets for expropriation. This means that the authors foresee a situation where government could have the power to take other property from citizens. This means that houses, shares, savings, and any other asset can be targeted under the (undefined) auspices of so-called public interest. This interpretation was confirmed in 2013 television interview by the then deputy minister for public works, Minister Jeremy Cronin - watch www.youtube.com/watch?v=zcrIZ1miS50&feature=youtu.be (9 minutes into the interview).

Our view is that the Bill is not a mere attempt to update the 1975 Act. This law can be seen as an attack on the property rights of all South Africans and an attempt to set in place a process to deprive citizens of their rights. The impact of this proposed legislation will be severe.

The Impact of the Expropriation Bill

If this legislation is promulgated with South Africa's current debt status, expounded by COVID, will lead to instant further credit down grades, capital flight and a collapse of our economy leading to worse levels of poverty.

- Nearly 1 million agricultural jobs could conceivably be lost.
- The proven ability of the commercial farming sector to produce safe and affordable food for an urbanized population will be decimated!
- Furthermore the agricultural sector is the main economic activity of most rural communities; remove commercial agriculture and all the related agricultural support services collapse as well. Rural South Africa will collapse, with significant humanitarian crises.

This Bill waters down title to all property (not just agricultural land) with centralised state control which has proved disastrous where applied internationally.

Less than market-value compensation can lead to a breakdown in production, loss in productivity and poor cash-flow affecting food security. We cannot afford to open a gap that can undermine the open market value of all property.

All this for an undefinable “public BEST interest”

Conclusion

The **position of FSA** on the legislative issue regarding property rights include the following:

1. FSA rejects any amendment to section 25 of the Constitution (Act 108 of 1996) or any current similar bills of which FSA is of the opinion that such amendment may have a negative impact on any form of private property rights. At the same time, any expropriation of any form of private property without compensation is completely rejected.
2. FSA will oppose any legislation that may have a negative impact on any form of property right or expropriation of any form of private property
3. FSA supports future-oriented economically sustainable agricultural development that aims to pursue the expansion of the agricultural sector as well as food security to the people of South and Southern Africa.
4. The state must fulfil its responsibility with regard to infrastructure, extension services and other agricultural support services in cooperation with the private sector to help build the entire agricultural sector.
5. The state, commercial banks and other financing institutions must establish models to provide financing that provides full title to all new entrants to agriculture.
6. Property rights must be expanded to be accessible for all South Africans. The Expropriation Bill diminishes and threatens property rights.

In line with the position of the organisation’s mandate from our members, Free State Agriculture rejects the unacceptable provisions of the Expropriation Amendment Bill. In addition FSA calls upon civil society to join their efforts to stop this Bill in its current form and to petition for amendments addressing the issues raised in this document. As the action plan of FSA, we will this actively do the following:

1. FSA will take part in drafting the detailed written submission in collaboration with Agri SA and our members.
2. FSA will mobilise the public to oppose the problematic clauses in the Expropriation Bill in its current form.
3. FSA will formally present to parliament the submissions from all members of the public that signed this memorandum.
4. FSA will actively take part in the public hearings following the period for written representation.
5. FSA will oppose any legislation that may have a negative impact on any form of property right, or expropriation of any form of private property



We call upon all South Africans who value their freedom and who own and trade in property of any sort to support us! We need all owners of private property to unite against these provisions made in the Bill.

