

## NEDLAC MEETING HELD ON 5 DECEMBER 2019:

### EXPROPRIATION BILL

- Department of Public Works presented to NEDLAC on section 12(3) of the Expropriation Bill. The Minister had an induction meeting with this Chamber, two weeks ago. The Minister made certain commitments. Legal delegation: Florence Rabada, Mr Lewando, Joe Lekalala, Mr Mquela, Mr Naidoo, Ms Fourie.
- Ms Radaba and Adv Naidoo presented. Original clause 12(3) published for public comment in December 2018. Constitution sets 5 conditions for a valid expropriation:
  - Must be non-arbitrary
  - Law of general application,
  - For public purpose or in public interest. Adv Naidoo explains the difference between the two;
  - Subject to compensation.
  - Amount and time and manner of payment must be determined by consensus between the parties or determined by a court.
- Standard of compensation is just and equitable. Must reflect a balance between the public interest and the interests of those affected. Historical context is an important consideration.
- There will be very few instances where a private individual has no interest that is worthy of protection. One instance is where the individual has abandoned the property.
- Section 25(3) requires that all relevant factors must be considered. At a minimum, the 5 listed factors must be considered.
- Section 25(4) underlines the importance of redress to enable access to natural resources.
- Section 25(8) highlights land, water and related reforms as being important in the public interest. When expropriating land or water, the purpose is considered as being particularly important.
- Constitution identifies three ways in which redress should happen, through restitution, tenure reform and redistribution.
- Property clause recognises the social function that property serves in our country. Land is not merely a commodity; it has a social context.

- Clause 12(3) of the Bill is limited on land and to expropriations in the public interest. All relevant circumstances must be considered, including the 5 listed factors in section 25(3) of the Constitution.
- The object of the assessment is to ascertain whether the payment of just and equitable compensation could be nil;
- It **may** be nil; it will not always be the case. The circumstances in 12(3) are not elevated above, those in section 25(3).
- The court is not impelled to decide that no compensation should be awarded. It is permissive, not compulsive. It indicates to the court which circumstances are to be awarded weight in considering what is just and equitable.
- The section merely makes clear what is implicit in section 25 of the Constitution.
- Categories include:
  - Land that 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. It is not intended to target property development.
  - Where an organ of state holds property that it is not using for its core functions and it was acquired for no consideration.
  - Where an owner has abandoned the property by failing to exercise control over it;
  - Where the market value is lower than or equivalent to the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land;
  - When the nature or condition of the property poses a health, safety or physical risk to persons or property. This may be the case with unsafe inner-city buildings.
  - When a court or arbitrator determines the amount of compensation in terms of section 23 of the Labour Tenants Act, it may be just and equitable for no compensation to be paid, having regard to all circumstances. This is now in a separate subclause, which is 12(4). Labour tenancy is a contemporary form of feudalism. This is fundamentally problematic and more needs to be done to secure the tenure of these individuals. The reason why it is now in its own subclause is because the power to expropriate is granted by the Labour Tenants Act to the court. In 12(3) it is a member of the administrative arm of government that makes the decision to expropriate.
  - Clause 12(3) and (4) do not make provision for new powers to expropriate, but merely makes clear the intention already included in the Constitution to, in limited circumstances, expropriate at nil compensation.

### **Responses:**

**Community:** Raises concerns about willing buyer-seller. If market value and above is still a possibility, what is the purpose of the section?

**Labour:** Bill speaks of property, but section 12(3) deals only with land. This will make it difficult for government to achieve other objectives. Why is it limited to land? Why is the land of organs of state included? Government should not be paying government money. We want an explanation on what 12(4) will mean for labour tenants.

**Business:** Questions of process. Section 12(3) is not the only amendment. The 2013 NEDLAC report is outdated. We request that we refer the new issues back to the task team. **Labour** agrees to this. **Government** will deal with this by a way forward. **Business** raises questions of clarity: Difference between land and immovable property. "All relevant circumstances, including:" What does this mean? Subsidies – what kind of subsidies will be taken into account? Agricultural Credit Board? Land that has been redistributed.

**Government** responses: Is clause 12 superfluous in the light of section 25 of the Constitution and does it constrain what the Constitution currently provides? No, it is not and does not. It is not prescriptive. It signals a legislative intention to allow for nil compensation in certain specific cases. It neither constrains, nor expands section 25(3) of the Constitution. Any property used or unused can be expropriated. There may be circumstances where the payment of nil compensation may be just and equitable and clause 12(3) sets out what those circumstances may be.

What role does willing-buyer-seller play in expropriation? Government can always buy land. This is different from expropriation, which is compulsory. Where expropriation takes place, there is no willing seller.

Other types of property, (other than land), can also be expropriated at nil compensation. Clause 12(3) has no impact on this.

Why should government pay compensation to another government entity? Clause 12(3)(b) refers to an organ of state. This is not limited to government departments. It is any entity that performs a public function or has been established in terms of legislation.

Clause 12(4) has reference to section 23 of the Labour Tenants Act which provides for expropriation by the court.

It is difficult to imagine a scenario where private parties would have no interest in the land, even if they acquired it for free. Where property may have been transferred to a third party for fair value, the third party should not be prejudiced.

Regarding Businesses questions: Difference between land and immovable property? Land is not defined. Any property that accedes to land, such as a building is considered as part of the land. Servitudes are rights in land and are taken into the balance in determining just and equitable compensation.

Clause 12(3) states that it may be just and equitable to expropriate at nil, considering all relevant circumstances. The listed 5 factors do not get any preference to other relevant factors. All relevant factors will have to be considered. The 5 listed circumstances are to signal Parliament's intent of the importance of these factors.

Organ of state: The judiciary is not an organ of state. Organs of state are not limited to government.

Abandonment of property: Where an owner has attempted to exercise control, this will have to be considered as a relevant circumstance.

**Chair:** We will have a task team to engage on the Bill during the first three months of next year.

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