

## **Comments by the Helen Suzman Foundation on the Draft Expropriation Bill, 2019**

**18 February 2019**

### **1. Introduction**

The Helen Suzman Foundation (“**HSF**”), as a non-governmental organisation, has been an active participant in a variety of public interest areas in South Africa over many years. Its essential aim is to promote constitutional democracy in South Africa, with a focus on good governance, transparency and accountability.

Given the importance of the Draft Expropriation Bill (the “**Bill**”), also within the context of land reform and the debate surrounding whether Section 25 of the Constitution needs to be amended to provide for expropriation without compensation, the HSF wishes to submit its comments to the Director-General of the Department of Public Works.

### **2. HSF submissions on the Bill**

The HSF’s comments on specific aspects of the Bill are the following:

#### **2.1 Any changes to Section 25 of the Constitution may require a re-run of the public consultation process relating to the Bill**

Section 25 of the Constitution is quoted in full in the Preamble to the Bill. In the current Parliamentary process on the potential change to that section, there is no clarity yet as to whether it will be changed and if so, what the extent of the change will be. It is also not clear what the timing of any proposed constitutional change will be. If Parliament does in fact decide to change Section 25, the nature of any change may well require another round of public consultation on the Bill. In the absence of clarity as to any potential amendments to Section 25 of the Constitution, the public consultation process on the Bill may therefore be premature and may have to be re-run.

Our view is nevertheless that the Draft Expropriation Bill is in keeping with the current wording of the Constitution, and that there is no need to change the latter to make provision for expropriation without compensation, especially with reference to Section 25(8) of the Constitution.<sup>1</sup>

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<sup>1</sup> Section 25(8) reads: “No provision of this Section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this Section is in accordance with the provisions of Section 36(1).”

## **2.2 Repeal of the Expropriation Act of 1975**

We are in favour of this repeal. The question may nevertheless be asked why it has taken until 2019 to do so if land reform is considered to be such an imperative by Government.

## **2.3 Respecting the rights of owners**

We support the basic approach of the Draft Expropriation Bill, as set out in Section 2(3), that a power to expropriate may not be exercised unless the expropriating authority has without success attempted to reach agreement with the owner on reasonable terms.

However, it is not clear how this is reconcilable with the content of Section 12(3), which provides for the possibility of nil compensation in certain circumstances. How are reasonable terms achievable in a case of expropriation without compensation? This aspect needs further attention in the Bill.

## **3.3 Problems with the land reform process**

It is common knowledge that the land reform process has been beset with corruption, inefficiency and incompetence. This is best described in the words of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, as published in November 2017:

“Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date - other constraints, including increasing evidence of corruption by officials, the diversion of land reform budget to elites, lack of political will, and lack of training and capacity have proved the more serious stumbling blocks to land reform.”<sup>2</sup>

Against this background, it is crucial that any expropriation process is conducted with the necessary transparency. A lack of transparency is one of the main enabling factors for corrupt behaviour. We would therefore suggest that Section 26 (headed “Expropriation Register”) should be amended to read as follows (with the added portion underlined):

“26. (1) The Director-General must ensure that a register of all expropriations that are intended, effected and withdrawn, and of decisions not to proceed with a contemplated expropriation by all expropriating authorities, is opened, maintained and accessible to the public.

(2) All expropriating authorities must deliver to the Department a copy of any notice of an intended expropriation, expropriation and withdrawal of expropriation, and of any decision not to proceed with an intended expropriation, within 20 days of the service or delivery of such notices and such copies must be included in the register referred to in subsection (1).”

## **3.4 Mediation and determination by court**

We note the principle of, in the first place, attempting to resolve disputes by mediation. If this is unsuccessful, the matter will be referred to a competent court. We support this mechanism.

We also take note of the fact a dispute on the amount of compensation alone shall not preclude the act of expropriation.

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<sup>2</sup> The Report of the High Level Panel On the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017, Chapter 3, Dr Aninka Claassens, p. 300.

#### **4. General comments on expropriation by state authorities for purposes of land reform**

The comments in this paragraph do not address specific provisions of the Bill, but they are included in this document as they emphasise the need for an overall legislative, administrative and financial framework to manage the land reform process in a rational and efficient manner. It is often forgotten that the statutory procedure to expropriate represents only one part of this process.

Prior to an overall legislative, administrative and financial framework for land reform being established, clarity first has to be obtained on a number of different issues which would have a direct effect on any expropriation process. The wide range of issues which need to be addressed are illustrated by the following questions (which are by no means exhaustive)<sup>3</sup>:

- How will decisions be taken on land that is to be expropriated? What criteria are relevant in any decisions? Who will take the decisions?
- Who is to be given the expropriated land? Who will decide on who is to be a beneficiary? On what criteria? Will the policy be targeted to benefit the poor?
- How much land is to be targeted for land expropriation?
- How will sufficient transparency be given to the process to avoid public discontent?
- Presumably, both urban and rural land reform is envisaged. What should the balance be between urban and rural land reform? What are the needs for each category? Will any land redistribution be subject to feasibility studies which set out what can realistically be achieved in any specific case? Have the environmental implications been taken into account in an adequate manner? If urban development is foreseen, will it fit into larger urban development programmes (including transport and basic infrastructure)?
- Is post-settlement support by Government to be provided, or will beneficiaries (presumably mainly the poor) be left to their own devices?
- On what legal basis is the land to be held by beneficiaries? With full legal title or through a lease from a local authority? If it is the latter, what security of tenure will beneficiaries have? Is any form of tenure reform envisaged by Government for this purpose?
- Will the process be managed by an adequately resourced and staffed land reform agency? Will appropriately qualified staff be available for this?
- Will Government be able to fund this whole undertaking, in stark contrast to the purely nominal funding dedicated to land reform up to now?

The wide scope which is covered by these questions shows that any land reform policy which includes the possibility of expropriation without compensation, not only requires policy clarity in many different areas, but also extensive planning and careful implementation. However, it is striking that none of these issues have been raised in the public debate so far. The focus has been exclusively on the principle of expropriation without compensation and the supposed need for the Constitution to be amended to cater for it.

If the questions which are set out above are not dealt with in an adequate manner (together with the establishment of a suitable legislative/administrative framework), the consequences will be the following:

- Legal challenges based on the irrational/arbitrary exercise of executive power will bring the process to a grinding halt very quickly - this can be expected as an unavoidable

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<sup>3</sup> The Report of the High Level Panel raises many of these questions. See p 220.

consequence if a suitable legislative and administrative framework is not put in place and implemented, to enable a process which is based on rational decisions and an absence of corruption/elite capture.

- The problems which already exist in the land reform process, specifically those of corruption, elite capture and an inefficient administrative system, will continue, leading not only to a stalled process, but also to perceptions of a failed policy, further fuelling public dissatisfaction.
- Business and investment confidence will experience a serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy. Any policy on land reform that increases uncertainty and unpredictability will have materially negative consequences not only for the agricultural sector, but for the economy as a whole.
- A lack of a clear policy framework also increases the perceived risk to private property rights and will have direct financial consequences in the form of urban and rural ventures being unable to source funding from banks (since the banks would not wish to lend if the activities they are financing are on land where ownership is not considered to be secure).

Taken together, these consequences will ensure the failure of any land reform programme, however well-meant it may be in principle, unless Government takes the necessary measures which are outlined above. Unless land reform is dealt with on a holistic basis, the Minister and Government Department responsible for the administration of a new Expropriation Act, will be confronted with a myriad of demanding and troublesome legal and administrative issues which will be difficult to resolve.

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