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GENERAL NOTICE

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DRAFT POLICY ON THE EXPROPRIATION BILL

"EXPROPRIATE FOR PUBLIC PURPOSE IN THE PUBLIC INTEREST"

A. INTRODUCTION

1. In 1659, a little war of plunder broke out between the Dutch and the Khoisan. After many years of abuse at the hands of the Dutch, the Khois had decided to wage resistance. At the time, Jan van Riebeeck, was the commander of the Dutch in the Cape. The war ended at about the beginning of 1660. The leader of the Khois, Autshumao (also called 'Harry the Strandloper') had been captured during the war and imprisoned at Robben Island.

2. In April 1660 after the war, he was brought back for peace negotiations. During those negotiations Van Riebeeck told Autshumao that not enough grazing land was available for the cattle of both the colonies and the Khoi-Khoi. Autshumao then asked van Riebeeck

> "*If the country is too small, who has the greater right; the true owner or the foreign intruder?*"

3. The response of Van Riebeeck as recorded in his diary was:

"We have won this country in a just manner through a defensive war, and it is our intention to keep it".[1]

4. Van Riebeeck's response is seminal. It was the beginning of a colonial process of land deprivation that continued for more than 250 years, and sparked many violent conflicts.

5. The Land Act of 1913, the Urban Areas Act of 1923 and the subsequent amendments to it and the Native Trust and Land Act, 1936, are some of the primary laws directed against African population. The effect of these Acts was that only approximately 8% of South Africa's total land area was set aside as native reserves.

6. The land Act of 1913 was an atrocious piece of legislation. It drove Sol Plaatje, a gifted writer, famously to exclaim:

"Awaking on Friday morning, June 20, 1913, the South Africa native found himself, not actually a slave, but a pariah in the land of his birth."[2]

7. To the Coloured people of the Union the Group Areas Act comes as a first attack on their land rights. As far the Indians community is concerned, laws dealing with its land restrictions also go back into history. In the Transvaal, Law 3 was enacted in 1885. We have the history of the "Class Areas Bill" and the 'Areas

[1] Sampie Terreblanche "*A History of Inequality in South Africa 1652 to 2002*" pgs 154 to 155
[2] S T Plaatje *Native Life in South Africa* (1916)

Reservation Bill" introduced before the so-called Cape Town Agreement of 1927. There was the Natal Pegging Act of 1943 and in 1946 the Asiatic Land Tenure and Indian Representation Act was passed. The Group Areas Act is indeed a climax to the many laws that came before it seeking to attack the property rights of the Indian community.

8. Not withstanding the unjust and discriminatory laws of the past which were institutionalised by the Nationalist Party, during the period of negotiations for the interim constitution an attempt was made to arrive at a peaceful settlement that would usher in our new democracy. Understandably, the provisions of the interim constitution were the result of a compromise. The approach of the white minority parties were broadly libertarian and sought to entrench, perpetuate and protect individual rights whereas the African National Congress was committed to egalitarian values which were underpinned by the values of equality, equity, redress and social justice.

9. Because of the anxieties and uncertainties in the first phase of the negotiations the interim constitution prior to 1994 the property clause did not expand adequately on the nation's commitment of land reform, land restitution and land redistribution. In the final constitution however the clear intention and commitment to the developmental challenges of land reform programmes and equitable access to all South Africa's resources including land was set out in greater detail. Among other things it expanded the scope for expropriation by the state beyond public purposes as contained in the interim constitution and existing legislation.

10. Certainly the debate about expropriation in South Africa must occur against the backdrop of many centuries of systematic exploitation and deprivation of land and property of black people in South Africa.

B. THE PROPERTY CLAUSE IN THE CONSTITUTION

11. Expropriation as a concept is wide and covers "*property*" as opposed to "*land*". The argument, however, advanced in this policy position is that the most contentious area of expropriation is the expropriation of land. Given the history of South Africa, it was not surprising that during the drafting of the Constitution the question of land was central to the negotiation of a Bill of Rights. When the Constitution was adopted, there was a debate about whether the Constitution should provide for protection of the right to property, or not. There were two strands of thought: those in favour of protection and those opposed to it.

12. Those in favour of the constitutional protection of property rights pointed out that these rights are protected in most constitutions. On the one side, some argued that the protection of property is fundamental to democracy itself. They also argued that the function of the Bill of Rights is to provide re-assurance to those who fear that their rights may be infringed by Government, and that in the South African context, the fear of the confiscation of property is widespread and leads to great anxiety. It was argued that precisely because property is a contentious issue in South Africa, a property clause would be an effective means of mediating the conflict between free economic activity and the imperatives of

social policy.[3]

13. On the other side, it was pointed out that a significant number of modern constitutions do not entrench property rights. Reference was made to Canada where after extensive debate a conscience decision was taken to exclude property rights from the Charter of Rights and Freedoms. Major reasons for this included the unintended consequences of constitutionalising property rights, and the fear that constitutionalised property rights might prevent the exercise of Government's regulatory functions. It was also argued that to entrench existing property rights in the South African Constitution was to legitimise and entrench, as a human right, the consequences of generations of colonialism, dispossession and land deprivation.

14. In order to allay the fears of the white minority without compromising the commitment to equality and social justice the matter was resolved on the basis of a broad but definitive elaboration of the need for land reform and restitution and access to land and the natural resources of the nation in Section 25 of the Constitution.

15. The principle legislative framework for expropriations in South Africa is the Expropriation Act of 1975 . In all there are over 100 acts and ordinances dealing with expropriations. Some legislations prescribes specific procedures adapted to the functional areas which it regulates. Specific expropriation ordinances still exists in some provinces, also providing a procedure different to that of the Expropriation Act. Most critical though is the fact that the plethora of procedures

[3] Budlender et al "*Juta's New Land Law*" (2000) 1- 3

and regulations including provisions of the expropriation act do not comply with the Constitution.

16. Principally, expropriation in the constitution as an instrument can be used in respect of the following broad categories for public purposes and public interests which includes:

16.1 For municipal purposes (cemeteries)
16.2 To establish roads;
16.3 To establish cultural heritage sites, including museums;
16.4 To facilitate township development;
16.5 To establish nature reserves;
16.6 For educational purposes;
16.7 For the provision of utility services—(telephone, water and electricity);
16.8 For land settlement (restitution)
16.9 For land reform
16.10 For security of land tenure

C. OBJECTS OF THIS POLICY FRAMEWORK

17. It is clear that there is a need to create a legislative framework for expropriation. The primary object of the policy framework is to give effect to the Constitution. It is important that the ability of Government to expropriate property is regulated in accordance with the principles contained in the Constitution. There are also several other values and guidelines contained in the Constitution which should form the bedrock of expropriation in South Africa.

17.1 At a primarily level, expropriation must be infused with the values of

equality, human dignity and the achievement of freedom. If expropriation is infused with those values, the centuries of colonial dispossession can be reversed and social justice progressively achieved. In terms of Section 9(2) the state is obliged and enjoined to take legislative and other measures that are designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. This suggests that particular attention must be paid to the public interest which is defined in Section 26(4) to include the nations commitment to land reform and to bring about equitable access to all South Africa's natural resources.

17.2 At a secondary level, expropriation must be subject to the constraints imposed by Section 25 of the Constitution. Chief amongst those constraints is that expropriation may only happen through a law of general application and no law may permit arbitrary deprivation of property.

17.3 At a tertiary level, expropriation ought to be regulated by the constitutional right to administrative action that is lawful, reasonable and procedurally fair.

18. It is also important that the expropriation of property should be supported by procedures which are clear, consistent and transparent and do not unduly inhibit the ability of government to fulfil the duties imposed on it by the Constitution and should always be seen through lens of balance the public interest against the interest of affected persons.

D. THE CURRENT FRAMEWORK

19. Section 25(2) of the Constitution provides that property may be expropriated only in terms of law of general application. It will be recalled that the provisions in the Final Constitution are substantively different to those in the IC. The Constitution seeks to set out clearly the circumstances in which expropriation may be permissible. It also provides guidance on the exercise of the powers of expropriation by the expropriating authority. Accordingly, it is clear that there was an intention to shift the paradigm from a narrow regime which was in vogue during the IC to a broad egalitarian regime under the Constitution (1996).

20. The Constitution provides further that expropriation may occur where the expropriation will serve a public purpose or is in the public interest and subject to compensation. The amount of compensation, the time and manner of payment can be agreed by the owner of the property and the Government. In the absence of an agreement, the amount of compensation must be "decided or approved by a court of law, having jurisdiction." It is unclear whether the word "decided" is used conjunctively or disjunctively with the rest of the provision. Both interpretations produce different results. If the words are used conjunctively, it is possible to construe the Constitution to mean that a court does not have to make the primary decision on the compensation. Such decision can be made by the Executive, subject to the factors enumerated under Section 25(3), and further subject to the approval of the Court. Such approval could for instance be by way of judicial review proceedings initiated by any person whose rights or interests are affected by the expropriation. The word "decided" in Section 25 2(b) must be read conjuctively.

21. When a court of law approves compensation it must be guided by what is **just and equitable** and the need to reflect an **equitable balance** between the **public interest** and the **interests of those effected**. To determine what is just and equitable a court must have regard to relevant factors, including:

21.1 The current use of property;

21.2 The history of the acquisition and use of the property;

21.3 The market value of the property;

21.4 The extent and direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

21.5 The purpose of the expropriation.

22. The Constitution also clearly sets out factors to be taken into account in considering the concept "*public interest*". It states that public interest includes the nations commitment to land reform, and to reform is to bring about equitable access to all South Africa's natural resources. Property is also not limited to land. It includes, as the Constitution specifically states "*all South Africa's natural resources*". This notion of pubic interest, is a radical departure from the restrictive definition of Expropriation Act 63 of 1975 (as amended).

23. The Expropriation Act 63 of 1975 regulates expropriation in South Africa. There are three primary difficulties with the Act. Firstly, the Act predates the

Constitution. Its focus is to formalise existing property relations. It is not infused with the transformative intent, which is at the heart of the Constitution. Secondly, the Act is not consistent with comparable modern statutes elsewhere in the world. Thirdly, and more importantly, the Act is inconsistent with the Constitution. For these reasons, it is crucial to establish a new legislative framework, to give effect to the nations' commitment to land reform as expressly provided for in the Constitution.

24. The areas in which the Act for instance can be criticised for inconsistency with the Constitution are the following:

24.1 The Expropriation Act provides for expropriation for a *"public purpose"*. The construction in the Constitution is broader than public purpose. It provides for expropriation for the public purposes or *"in the public interest"*. The Act therefore restricts the ability of Government to expropriate only for public purposes whereas the Constitution permits Government to expropriate in the public interest. There is a material distinction between public purpose and in the public interest. In general a public purpose is limited to a function linked with governmental activity in a narrow and limited sense. On the other hand, the phrase in the public interest encapsulates a variety of activities which may be for both a public purpose but would exceed the scope of the narrow definition eg. Land expropriated or land reform, land restitution and providing access to land resources (e.g. Water and energy) to denied hitherto citizens on the basis of discrimination.

24.2 The formula for payment of compensation in the Act is inconsistent with that set out in the Constitution. Where land is expropriated, the Act gives the owner the right to claim the market value of the land, plus an amount to make good the "*actual financial loss*" caused by the expropriation, plus a *solatium*. In most cases, this will result in determination based almost exclusively on the principle of the willingness – willing seller to the exclusion of the other factors enumerated under Section 25 (3) higher compensation than compensation calculated in accordance with the Constitution. It is suggested that this inconsistency be avoided by specifying in any draft legislation that compensation should be just and equitable as provided for in the Constitution. The risk, however, continues that where Government expropriates land under the Expropriation Act, it will potentially pay higher compensation than that prescribed in the Constitution.

24.3 It therefore becomes necessary that legislation be revised in order to create a framework that is consistent with the Constitution.

E: A BRIEF SURVEY OF OTHER JURISDICTIONS

25. In developing South Africa's expropriation regime, it may be useful to refer to different jurisdictions which not only have expropriation legislation, but have experience in the implementation thereof. In addition, our Constitution requires our courts to have regard to foreign law when interpreting national legislation and the Constitution.

26. The comparative analysis also shows that there is no uniform way of regulating expropriations or determining the amount of compensation payable as a result of compensation. Different countries tend to craft legislation which is suitable to their societies with their unique circumstances. In South Africa, of course, we are guided by the Constitution which sets out the parameters within which expropriation must occur. A comparison between the approach between the USA and Germany illustrates the difference in foreign jurisdictions.

27. The United States of America

27.1 The Fifth Amendment of the Constitution of the United States of America provides that

> *"No Person shall be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use without just compensation".*

27.2 There is no specific formula in interpreting just compensation.

27.3 Fair market value is usually accepted as "just compensation". It is ultimately the court which determines whether or not compensation was just. That, however, does not mean that Congress has no role in the *process* leading up to the *determination* of compensation.

In general, the view taken by the courts of the US is that just compensation is the value of the property at the time of the expropriation.

It does occur the owner of the property could have paid more or less at the time the property was sold. That, however, does not influence the decision in relation to just compensation. Just compensation is determined based on objective factors, primarily the prevailing market value.

28. Germany

28.1 Perhaps, a constitution which comes close to the provisions of the South African Constitution is the German Constitution. The Basic Law for the Federal Republic of Germany that compensation must reflect a fair balance between the public interest and the interest of those affected.[4]

28.2 Van der Walt,further states:

> *"According to case law, 'just terms' is not synonymous with full compensation, but a measure that has to be determined probably for each case individually, with reference to fairness in view of both the interest of the individual affected and the community interest. The market value of the property, described as the price which a reasonably willing purchaser would be prepared to pay rather than lose the purchase, or which a reasonably willing vendor would be willing to accept and a reasonably willing purchaser would be prepared to pay at the date of purchase is still regarded as an underlying principle for the determination of just terms, but factors*

[4] Van der Walt, *Constitutional propertyclauses,* 121

such as the value of the property for the owner and the results of the loss must also be taken into account."

F. PRINCIPLES OF DRAFT LEGISLATION

29. The following principles should underpin the policy on expropriation.

30. Expropriation in the public interest

30.1 The concept of public interest as stated, amongst others, includes the injunction in the Constitution: the nation's commitment to land reform and to reform is to bring about equitable access to all South Africa's natural resources.

30.2 This means that for the constitutional promise to be met, it is necessary to adopt a legislation which recognises and permits expropriation for purposes of land reform, restitution and redistribution in order to facilitate greater access not only to land but also to other natural resources.

31. Expanding the scope of the protected rights

31.1 The Act does not provide for compensation for all expropriations of rights and property. As far as land is concerned, compensation is payable to the owner, the holders of all registered rights, and the holders of certain specified unregistered rights. Other interests in land, such as leases, do not give rise to a statutory right to compensation.

31.2 Accordingly, it is necessary to amend the legislation in order to provide for compensation for expropriation of all rights in property. This includes, for instance, rights such as others held by tenants in property.

32. **Compensation**

32.1 It is also important to align the payment of compensation with the provisions of the Constitution. Compensation is, by virtue of the provisions of sections 25(2) and (3) of the Constitution a constitutional issue, which means that the compensation award has to fulfil the requirements of the Bill of Rights. The amount of compensation has to be "**just** and **equitable** reflecting an equitable balance between the **public interest** and the **interests of those affected"** having regard to all relevant circumstances, of which market value is but one factor. Market value is something which is capable of quantification - but only as one of the various factors. Once the market value has been determined, an upward or downward adjustment can be made taking into account other factors in the constitution.[5]

32.2 Accordingly, our Constitution, just like the German Constitution recognises that market value of the property is not the be-all and end-all in relation to compensation. What must be considered is what is just and equitable and what is in the public interest. Through this policy framework,

[5] See in a different but related comments *Haakdoornbult Boedery CC v MM Mphela and 217 others* (SCA decision delivered on 30 May 2007).

the legislation will give effect to the Constitution by making it clear that the guiding principle is what is just and equitable and balance the public interest against the interest of the affected person.

32.3 There is no doubt that compensation lies at the heart of South Africa's expropriation regime. The Constitution provides that the amount, time and manner of payment of compensation must either be agreed or decided or approved by a court of law. In this scheme nothing prohibits the Minister from making a determination subject to approval by court, way of judicial review or other legal proceedings.

32.4 The bill therefore must provide for a system in which the Minister may make interim determinations on the amount of compensation. Of course, such determinations will have no final effect until approved by a court of law as required by the Constitution, or, agreed upon by the parties.

33. **A common framework supported by minimum norms and standards**

Given the large number of authorities within the national, provincial and municipal spheres of government who have the power to expropriate property. Government is of the view that there is a need to ensure a common framework to guide the processes and procedures for the expropriation of property by all organs of state.

34. **The process of expropriation**

Expropriation has three distinct phases, each with a number of mechanisms that support the process during that phase. The phases are the following.

35. **Phase 1 Decision to expropriate**

35.1 During this phase:

35.1.1 The property to be expropriated is identified based on the rational for expropriation and the information about the project is gathered. This must include the identification of the public purpose or public interest.

35.1.2 Interested parties are notified in writing that the decision to expropriate is contemplated.

35.1.3 Everyone including the holders of unregistered right is afforded the opportunity to make submissions or object in respect of a decision to expropriate, within a defined period.

35.1.4 The decision is then taken on the basis of the relevant information, submissions and objections, that are considered.

35.2 The process to expropriate is supported by the following mechanisms:

35.2.1 The expropriating authority must give reasons for its decisions and a decision may be taken on review. In urgent cases, a court of law

may grant leave to expropriate without the procedure having been followed.

35.2.2 In order to expedite the gathering of necessary information on the property including all rights, the expropriating authority may issue a notice to the owner requiring compliance.

35.3 Phase 2: The process of expropriation

35.3.1 During this phase:

35.3.1.1 A notice of expropriation is served on the owner and where appropriate on the holders of registered rights and subsequently holders of unregistered rights.

35.3.1.2 A notice of expropriation must contain certain particulars including a description of the property which is expropriated, the date of its expropriation and the intended date upon which the possession of the property will be taken.

35.3.1.3 The expropriating authority takes ownership and possession of the property.

35.4 Phase 3: Compensation

35.4.1 During this phase:

35.4.1.1 Agreement is reached on compensation.

35.4.1.2 In the absence of agreement the Minister makes an interim determination which is subject to review or approval by a court.

35.4.1.3 The test for compensation is what is just and equitable by balancing the public interest against the interest of the affected. In considering what is just and equitable the market value of the property is one of the factors to be taken into account. It is, however, not the only and overriding factor. Other factors such as current use of the property, history of the acquisition and use of the property, extent of direct state investment and purpose of the expropriation and other relevant factors are also taken into consideration.

G. WITHDRAWAL OF EXPROPRIATION

It is important that the legislation should enable withdrawal of an expropriation with it is in the public interest or otherwise expedient. Given the extensive impact of expropriation, the legislation must set out clear guidelines and limitations.

H. IMPACT ON OTHER LEGISLATION

The legislation on expropriation should recognise the existence of national and provincial legislation which empowers and regulates expropriation. Guidance may be sought from interpretations of constitutional era statutes such as the Restitution Act, which continues to form the anchor of land reform and redistribution in South Africa.

The legislation must also consider the authority of the Land Claims Court where its jurisdiction is affected.

CONCLUSION

The principles set out in this policy document will hopefully inform public debate on the issues identified in the paper. Thereafter, it is envisaged that legislation will be prepared. The issues covered in the policy are of great national importance. The policy hopes to generate sufficient public interest in the debate on the principles that should inform the new expropriation bill and allows for a consultative and participatory process.

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