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Our ref: WD SPIES

Your ref.

15 April 2024

The President of the Republic of South Africa
His Excellency Mr Cyril Ramaphosa
Union Buildings
Pretoria

By E-Mail

By Hand

Dear President Ramaphosa

SIGNATURE OF THE EXPROPRIATION BILL BY THE PRESIDENT

1. We act on behalf of Afriforum NPC, a civil rights initiative.
2. Our instructions are that the Expropriation Bill has been passed by the National Assembly and the National Council of Provinces ("NCOP") and has been forwarded to your offices for your signature as President of the Republic of South Africa.
3. The Bill, as passed by both houses of parliament, is still materially defective and unconstitutional as it is still infringing upon the fundamental provisions contained in Section 25 of the Constitution.
4. Section 25 (2)(a) and (b) of the Constitution provides that property may be expropriated only in terms of law of general application for public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a Court.

5. Section 25(3) of the Constitution provides that the amount of the compensation and the time and manner of payment (must be just and equitable) reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.
6. An effort to amend Section 25 of the Constitution through an act of parliament to also allow for nil compensation is nothing more than expropriation without compensation. It is entirely contrary to the intended meaning of compensation in terms of section 25 of the Constitution. It did not meet the required constitutional threshold when it was put to the National Assembly and the NCOP.
7. Parliament has passed a law that does not meet the constitutional requirements, which is against the purpose and spirit of section 25 of the Constitution.
8. In this regard, our client submits that, in particular, section 12(3)(a) of the Bill is unconstitutional. This sub-section provides that an owner may be expropriated for nil compensation where the owner merely acquired the land for investment purposes in order to benefit from the appreciation of its market value. Effectively, the provision forces any investor in the land to either use it by developing it or to generate income from it, failing which the owner stands to lose it against nil compensation. It completely disregards then the amount that an investor has paid for such land as an investment. Use of property is not qualified in the Constitution as not deserving of the protection afforded by the property clause in section 25.¹
9. Furthermore Section 12(3)(c) provides for expropriation of land against nil compensation where an owner fails to exercise control over it. Failure to exercise control is then regarded as abandonment. This provision is vague and lends itself to arbitrary decisions as to the meaning of exercising control. The provision is contrary to the common law concept of *res derelictae*, where more is required, such as an intention by the owner to relinquish ownership. It may be that an owner has lost control because of unlawful land occupation or squatting, which does not equate to an intention to abandon.
10. Section 3(1) of the Bill grants an overbroad scope of powers to the Minister of Public Works to expropriate property in the “*public interest*” or for a “*public purpose*”.
11. The definition of public interest goes further than the intended meanings in terms of section 25(4) (a) of the Constitution. The attempt to define “public purpose” in the Bill is problematic and overbroad, and it is too vague to the extent that any subjective government view that regards expropriation to be for a public purpose and for the public benefit makes such expropriation lawful. In this regard, it should be mentioned that expropriation of property is not limited to land and may include corporeal movable property. Vagueness pertaining to the meaning of public purpose opens expropriation to arbitrariness and makes the Bill irrational and unconstitutional. The meaning of

¹ See **First National Bank v Commissioner SARS**, 2002 (4) SA 768 (CC) at paras [54] and [56]

public purpose is pivotal and should be more fully described so as to bring clarity to the meaning.

12. In addition, section 3(3) provides for even extended powers to the Minister to expropriate, not limited to the meanings of *public purpose* and *public interest* as it includes the power to expropriate property to be used for the provision and management of the accommodation of land and infrastructure needs of any organ of state. This provision, therefore, gives an extended meaning to public purpose and public interest and lends itself to arbitrary decision-making, which is not only what the Constitution seeks to avoid but is also contradictory to section 2(1) of the Bill.
13. Section 19(8), read with section 7(6)(a) of the Bill, enables expropriation to proceed notwithstanding an appeal on the decision of a court on the amount of compensation to a higher court. This effectively allows expropriation to proceed before a person has exhausted all remedies of appeal and notwithstanding the fact that a person could have reasonable prospects of success on appeal. Such provision is contrary to the fundamental principle in or law that a judgment of a court is suspended pending an appeal. Therefore, we submit that section 19(8) is contrary to the interests of justice and unconstitutional.
14. Section 25(2)(b) of the Constitution states explicitly that expropriation can only take place subject to compensation of which the amount, time and manner of payment has either to be agreed upon or decided or approved by a Court. This means that agreement with the affected party or determination by the Court is a pre-condition for expropriation. Determination by the Court also means final determination after exhausting the right of appeal. Therefore, any expropriation should not proceed until all remedies have been exhausted on appeal.
15. The effect of section 9(1)(d) is that when the state expropriates a property subject to a mortgage bond, it is to be expropriated free of the said mortgage bond. Coupled with this is the provision that where the expropriated holder and the mortgagor cannot reach an agreement on their respective compensation money, within 30 days then, the money is deposited with the Master, which can be highly prejudicial to both the mortgagor and the owner.
16. Section 18(1)(a) is problematic in that it does not provide for the situation where expropriated property devolves upon heirs in terms of intestate succession and to whom compensation is paid in such instance. Section 18(1)(a) is also vague and non-sensical in that it refers to “undetermined beneficiaries” in terms of a will. Heirs or beneficiaries are determined in terms of a will, and where an executor is appointed in terms of a will or by the Master where the testator dies intestate, the executor of the estate should be entitled to receive the compensation into the estate account opened in terms of the Administration of Deceased Estates Act.
17. Section 20 gives the state the power to expropriate property on an urgent basis, which suspends the operation of procedural requirements of Sections 5, 6 and 7 of the Bill. Urgent expropriation should, in every case, including when section 20(2)(a) applies,

be subject to judicial oversight and approval. The Bill excludes judicial oversight when section 20(2)(a) applies.

18. Given the serious concerns regarding the constitutionality of the Bill that still remain, our client requests you to exercise your powers in terms of section 84(2)(b) of the Constitution by referring the Bill back to the National Assembly for reconsideration of the constitutionality of the Bill with specific reference to the issues highlighted above.
19. Should you decline the request, then our client requests that you provide full reasons for your decision.
20. In such an event our client requests an opportunity to make further submissions to you before you decide to assent to and sign the Bill.
21. Our client's rights in this regard remain fully reserved and we trust that your favourable consideration of our client's urgent request will be communicated shortly.

Yours faithfully,



HURTER SPIES INC.

Per: WD Spies

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