

## Press Release – 3 April 2008

### Draft Expropriation Bill not clearly unconstitutional

Since the tabling of the draft Expropriation Bill in the Portfolio Committee on Public Works on 26 March, a variety of alarmist claims have been made about what the Bill means.

These include a statement attributed to Lew Geffen (*Business Day* 1 April 2008) that ‘the new expropriation law ... is arguably the most ominous attack by the national government on the sovereignty of land ownership in this country’.

In the same report, Nichola de Havilland of the Centre for Constitutional Rights is quoted as saying that the Bill ‘is neither constitutional nor lawful and poses a serious threat to property rights’.

Some of these claims may have been fuelled by the slightly misleading explanation of the Bill in the Minister of Public Works’ briefing to the Portfolio Committee.

In the text of her Powerpoint presentation, the Minister says that the ‘test used by the court [to decide on the lawfulness of a particular decision to expropriate] will be that set out in the PAJA [Promotion of Administrative Justice Act]. In other words, a review of the Minister’s decision will be process driven and not necessarily amount to a reconsideration of the decision on the merits.’

This statement may have created the impression that the power of courts in relation to decisions taken by expropriating authorities in terms of the Bill will be restricted to ensuring that the correct procedures have been followed.

In fact, the Bill clearly contemplates that courts will have the power to review the merits of any decision made by an expropriating authority.

This conclusion follows first from the reference to the Promotion of Administrative Justice Act (the PAJA) in clause 24(2) of the Bill, and, secondly, from the use of the word ‘approve’ in clause 24(3)(a).

One of the well-known grounds of review under the PAJA is ‘reasonableness review’. This standard, though it does not allow the court to substitute its view for that of the administrative agency, is nevertheless substantive in the sense that it empowers the court to strike down decisions that a reasonable decision-maker could not have taken.

In addition, where such a decision touches on fundamental rights, as it would by definition in this case, the standard of reasonableness review rises, approximating something just short of a full-blown proportionality enquiry, i.e. an inquiry in terms of which the court asks whether the invasion of the aggrieved party’s rights was proportional to the legislative end sought to be achieved.

Clause 24(3)(a) of the Bill goes on to provide that ‘any party to an expropriation, may request a court ... to *approve*’ the timing, manner of payment, and amount of any compensation determined by the expropriating authority.

The word ‘approve’ here refers back to section 25(3) of the Constitution, which says that the form of compensation must either have ‘been agreed to by those affected or decided or approved by a court’.

It is not clear from the Constitution exactly what standard of review is implied by the word ‘approve’. It may mean merely the kind of merits-based review authorised by the PAJA, or it may mean a higher standard in terms of which the court would be able to revisit the decision taken by the expropriating authority in its entirety.

If the former, the draft Expropriation Bill would clearly satisfy the constitutional standard. If the latter, the Bill as it stands would be capable of being read in conformity with the Constitution, since clause 24(3)(a), in using the word ‘approve’, expressly tracks the language of section 25(3).

Whether reviewing the decision of an expropriating authority for reasonableness in terms of the PAJA, or effectively retaking the decision in terms of full merits-based review, the courts would be empowered to consider whether the expropriating authority’s decision struck a constitutionally defensible balance between the public interest and the interests of those affected by the expropriation.

Both the draft Expropriation Bill and the Constitution say that this balance depends on the weighing of a number of factors, including the ‘current use of the property’, ‘the history of the acquisition of the property’, ‘the market value of the property’, ‘the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property’, and ‘the purpose of the expropriation’.

The Constitution itself does not rank these factors. In applying them in other cases, however, the courts have generally said that the market value of the property should first be ascertained, after which the other factors should be used, either to arrive at a compensation amount less than market value, or more than market value.

In the *Du Toit* case, a four-judge minority of the Constitutional Court disagreed with this approach, arguing that it would inevitably ‘privilege market value at the expense of other considerations relevant to justice and equity’.

Clause 15(3)(b) of the Bill, which says that ‘an expropriating authority must not give undue weight to a single factor over any other’, may be understood as an attempt to enact this aspect of the minority judgment in *Du Toit* into law.

It does not follow, however, that 15(3)(b) is unconstitutional. For it to be unconstitutional, clause 15(3)(b) would not only have to be read as endorsing the minority judgment in *Du Toit*, but also as contradicting the majority judgment.

A careful reading of the majority judgment in *Du Toit* reveals that this is highly unlikely: first, because the majority judgment was expressly restricted to the facts of that particular case; and, secondly, because the majority judges in *Du Toit* nowhere implied that market value should be prioritised in the calculation of compensation.

In short, several of the public comments on the draft Expropriation Bill thus far have not been informed by a proper understanding of its provisions or the applicable case law.

Either this is because the commentators concerned have not taken the trouble to read the Bill properly, or because they have decided wilfully to misinterpret the Bill for political purposes.

If the first scenario is true, these commentators are being irresponsible. If the second, their strategy is likely to backfire. South Africans have enough real problems to be alarmed about without being alarmist about problems that don't exist.

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