

SYMPOSIUM: LAND HERITAGE AND HUMAN RIGHTS – EXPROPRIATION OF LAND IN TERMS OF SECTION 25 OF THE CONSTITUTION – ADV LEKS MAKUA

INTRODUCTION

Programme Director, Ladies and Gentlemen. Today as I stand before you, our politicians are voicing their opinions about expropriation of land with or without compensation without guidance of the voice of professionals like yourself.

While politicians are known for enjoying the field of robustness, there is a need for us as professionals to map a destiny which guides us into understanding what expropriation of land entails.

I address you today on a topic which has gained prominence in the minds of many South Africans, a topic which is becoming controversial and if not managed correctly could be costly and divisive. A discussion about land ownership, property rights is a topic which raises emotions. It is our responsibility as South Africans to be emotional about what belongs to us but at the same time remain be responsible and focus on our common destiny to build one Nation.

Any debate about expropriation of land without mentioning the Constitution is bound to frustrate us. We are fortunate that to have section 25 of Constitution to guide our discussions and deliberations.

ISSUE TO BE CONSIDERED IN SECTION 25

The main issue to be considered in section 25 is whether the section can sufficiently address the question of expropriation of land to address land equity without the temptation to amend the constitution-of course the response is Yes, section 25 is correctly placed to resolve issues of land equity in our country but we should first understand and acknowledge what brought land inequity in our country.

BRIEF BACKGROUND INFORMATION

To give context to an issue to be considered, it is important to deal with historical context of land inequity. The origin of land injustice in

our country started in 1913 with the enactment of Natives Land Act 27 of 1913. This is the Act which cursed our country's property regime and made black South Africans foreigners in the country of their birth. Section 1(1) of the Act states "*Except with the approval of the Governor-General - a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover’*". Some in our country termed Natives Land Act an act of criminality or cruelty by the apartheid regime on black people.

Whatever angle of debate one finds himself/herself, the question of land ownership in terms of the Natives Land Act is bound to raise feelings of betrayal and emotions. As a result of the Natives Land Act there are voices across the land and breath of South Africa calling for expropriation of land without compensation. Such voices cannot be ignored and we ignore them at our own peril. Within such voices there are calls for solutions in the form of enacting legislation similar to Natives Land Act to redress its terrible effects on land ownership for black people. There are other voices calling for practical solutions within the ambit of our Constitution e.g. land CODESA as voiced by Archbishop Makgoba and other imminent South Africans.

Land inequity in our country is real and the question to ask ourselves is whether there should be Constitutional amendment to cater for expropriation of land without compensation or, whether to use the provisions of section 25 to correct the terrible effects of the Natives Land Act 1913 on land ownership. Lets have close look and our Constitution and see how it can address expropriation of land and speed up land equity.

CONSTITUTION

But what does expropriation mean. Our Constitution does not define what expropriation means but case law does. In *Harksen v Lane NO 1998 (1) SA 300 (CC)* expropriation was defined as '*the compulsory acquisition of rights in property by a public authority*'. The meaning of expropriation was further defined in *Phoebus Apollo Aviation CC v*

Minister of Safety and Security 2003 (2) SA 34 (CC) where the Constitutional Court said '*expropriation is the compulsory taking over of property by the State to obtain a public benefit at private expense*'.

There are three criteria for expropriation to happen in terms of section 25 (2). These are:

- Expropriation should be made in terms of a law of general application;
- Expropriation must be in the public interest or for a public purpose; and
- A just and equitable compensation be provided.

The first requirement would be met if the State enacts a law of general. The second requirement is satisfied once expropriation is applied for purposes of land reform and other reforms to bring about equitable access to all South Africa's natural resources.

A just and equitable compensation is made in terms of section 25(2) (b) and (3) of the Constitution. The time and manner of payment of compensation is required to be just and equitable. To understand what just and equitable means, lets deal with how to interpret various sections of the Constitution or sections 25 itself with special references to the current Expropriation and Act 63 of 1975 and section 26 of the Constitution.

In *First National Bank, First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002* (4) SA 768 (CC) The Constitutional Court dealt with interpretation applicable to Constitutional provisions in section 25 as follows '*The historical context in which the property clause came into existence should be remembered. These provisions emphasise that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations*'.

In terms of section 25(2)(b) property may only be expropriated "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."

Compensation is a constitutional validity of expropriation in terms of the provisions of section 25(2)(b) of the Constitution. The questions however are:

- When can compensation be made?
- Should compensation be made before expropriation or after expropriation?

The Expropriation Act 63 of 1975

The process of expropriation in terms of the above Act unfolds as follows:

- Once the Minister has “decided to expropriate”, starts with service of a notice of expropriation on the owner of the property.
- The notice must state the date of expropriation and the date upon which the State will take possession of the property.
- The Minister may offer an amount of compensation in the notice.
- In that case of offer of compensation the owner of the property must within 60 days from the date of the notice deliver a written statement to the Minister indicating either acceptance of the offer or the amount of compensation.
- If no offer has been made in the notice the owner must similarly within 60 days from the date of the notice deliver a written statement indicating the amount of compensation claimed.
- If the Minister is not prepared to pay the amounts claimed in these circumstances, he must within a reasonable period offer a revised amount of compensation.
- In those cases where no compensation was offered in the notice and the owner did not indicate the amount claimed in response, the Minister must, within a reasonable period, offer an amount of compensation.

- Where no final agreement is reached between the parties on the amount of compensation the Minister must give notice to the owner to make application to court before a certain date, failing which the owner shall be deemed to have accepted the offer made by the Minister.
- Ownership of the property vests in the State on the date of expropriation mentioned in the notice of expropriation. In terms of the Act the State shall take possession of the property on a date stated in the notice of expropriation or on a date agreed upon between the parties.

Currently there is a Bill adopted by Parliament on Expropriation of Property but it has since been sent back to Parliament by the President on the basis that there was no proper consultation. Of interest to know is that our Constitutional Court in the matter of *Haffejee NO and Others v eThekwini Municipality and Others* 2011(6) Sa 134 (CC) decided the question of compensation in terms of section 25 of the Constitution and the Municipality's power to expropriate in this case was made in terms of its ordinance which its power from the Expropriation Act 63 of 1975.

The Constitutional Court in Haffejee case decided the question of when to make compensation in terms of section 25 as follows:

- "(a) *The provisions of section 25(2)(b) do not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation under section 25(2);*
- (b) *Generally the determination of compensation, in accordance with the provisions of section 25(3), before expropriation will be just and equitable;*
- (c) *In those cases where compensation must be determined after expropriation, this must be done as soon as reasonably possible, in accordance with the provisions of section 25(3);*
- (d) *Eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision; and*

- (e) *In disputed cases of eviction the courts must grant orders that ensure just and equitable outcomes in accordance with the provisions of sections 25(3) and 26(3) of the Constitution”.*

COMING PROBLEMS

There is a possibility that our current problems as a result of the willing-buyer-seller model may not go away as Act No 17 of 2014 – *Property Valuation Act* may resurrect them e.g. “**market value**” is defined in the Act 2014 as ‘‘the estimated amount for which the property should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion: Provided that in determining market value for purposes of section 12(1)(a), prices paid by the State for any acquisition of property must be excluded: Provided further that in the event that no other credible data is available, prices paid by the State for any acquisition of property may be considered’’.

Further problem area is the location of Valuer General’s Office and the Expropriation Bill /Act which may slow land reform or land equity. Current Bill on Expropriation is cumbersome on processes as it puts more emphasis on investigation before expropriation. Emphasis should be on use of land to meet public interest and not individual ownership of land.

CONCLUSIONS

Taking into account decisions of our Higher and Constitutional Court on section 25 of the Constitution and the Expropriation Act 63 of 1975 I hereby recommend as follows:

- There is enough clarity to use section 25 of the Constitution in expropriation of land. The section does not provide for willing-buyer-willing seller model. Willing-buyer-willing-seller be removed from the definition section of the Property Evaluation Act No 17 of 2014.
- The current Expropriation Act 63 of 1975 be amended and bring it into conformity with the Constitution especially the ‘deeming provisions’. The reasoning behind keeping Act 63 of 1975 is that there are already high court and Constitutional

Court decisions on its interpretations. To enact a new Act on Expropriation is going to delay land equity as the new act and its provisions will be challenged in Court and some of its provisions or the entire Act may be challenged on constitutional grounds.

- Property Valuation Act 17 of 2014 which gives rise to Office of Valuer General and the Expropriation Act should locate in one Ministry for accountability and speedy resolution of disputes relating to expropriation of land.

All the best to Universities of Nelson Mandela, Pretoria and Kara Institute for hosting this Symposium. Thank you for listening to my lecture and look forward to further engagement during the panel discussions.

Thank you All.