

Does Expropriation Bill have any stone unturned?

The Speaker of the National Assembly and the Chairperson of the National Council of Provinces (NCOP) are expected to advise President Jacob Zuma on the process followed by Parliament in passing the Expropriation Bill.

This, after the President sent the Bill back to Parliament in July 2016, saying the NCOP had failed to facilitate sufficient consultation with the public before the adoption of the Bill, and that the Bill had not been referred to the National House of Traditional Leaders as required in terms of the Traditional Leadership and Governance Framework Act.

The Expropriation Bill [B4 – 2015] was passed by Parliament and referred to the President of the Republic for assent and signing into law in May 2016. The President received petitions against the signing of the Bill into law from individuals and various organisations. According to the Department of Public Works, the petitions raised procedural issues, a clear indication that on content or substance; the Bill has ticked that box. The major procedural matter raised is the interaction between the Expropriation Bill and the National House of Traditional Leaders.

The tabling of the Expropriation Bill [B4 – 2015] in Parliament was preceded by consultations with key stakeholders. Noteworthy among these was the National House of Traditional Leaders. On 09 May 2013, Deputy Minister of Public Works, Mr Jeremy Cronin made a comprehensive presentation to the national House of Traditional Leaders on the draft Expropriation Bill. On that occasion, the principles enunciated by the presentation on the draft Bill were embraced.

The institution of traditional leadership was again considered as a mandatory requirement during the compilation of the Memorandum on the Objects of the Bill. This process is necessary to determine the probability of any impact on the institution of traditional leadership in order to avoid unintended consequences.

Accordingly, the Chief State Law Adviser advised at paragraph 5.6 of the Memorandum on the objects of the Expropriation Bill, 2015, that it was not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No 41 of 2003). The reason advanced was that the Bill does not contain provisions pertaining to customary law or customs of traditional communities.

The procedural requirement for the referral of the Expropriation Bill and consultation with the National House of Traditional Leaders was raised during the processing of the Bill by Portfolio Committee on Public Works (National Assembly). It was dealt with to the satisfaction of Honourable Members of the Portfolio Committee.

On several occasions, during the deliberations of the Portfolio Committee on Public Works and the public hearings hosted by both the National Assembly and the National Council of Provinces, Deputy Minister

Jeremy Cronin, stated categorically that the Expropriation Bill, 2015, neither intends to confer nor usurp any expropriation powers currently exercised by any public authority within the three spheres of Government.

The Bill deliberately seeks to create a uniform expropriation framework across the three spheres of Government. It further ingrains the expropriation terrain with the constitutional values of equality, property guarantee to all, administrative justice and the public interest.

In addition to the above, the following points have to be made:

- The local sphere of Government covers the entire inhabited and surveyed surface area of South Africa. Should any part of property falling under the jurisdiction of a municipality be considered for expropriation, the procedure set out in the Bill would be applicable. For instance, the entire clause 6 of the Bill is dedicated to a consideration of all aspects pertaining to municipal planning.
- The institution of traditional leadership forms an integral part of the governance structure at the local sphere of Government. The Municipal Structures Act, 1998 (Act No 117 of 1998) caters for this as follows:

“Participation of traditional leaders”

81 Participation in municipal councils

- (1) Traditional authorities that traditionally observe a system of customary law in the area of a municipality may participate through their leaders, identified in terms of subsection (2), in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.*
- (2) (a) The MEC for local government in a province, in accordance with Schedule 6 and by notice in the Provincial Gazette, must identify the traditional leaders who in terms of subsection (1) may participate in the proceedings of a municipal council.*
(b) The number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the council has fewer than 10 councillors, only one traditional leader may so participate.
© If the number of traditional leaders identified in a municipality’s area of jurisdiction, exceeds 20 per cent of the total number of councillors; the MEC for local government in the province may determine a system for the rotation of those traditional leaders.
- (3) Before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.***

- (4)** *The MEC for local government in the province, after consulting the provincial House of Traditional Leaders, may, by notice in the Provincial Gazette –*
- (a) regulate the participation of traditional leaders in the proceedings of a municipal council; and*
 - (b) prescribe a role for traditional leaders in the affairs of a municipality.*
- (5)** *(a) When participating in the processing of a municipal council, a traditional leader is subject to the appropriate provision of the Code of Conduct set out in Schedule 1 of the Local Government Systems Act, 2000.*
- (b)(i) A traditional leader who participate in the proceedings of a municipal council is entitled to the payment of out of pocket expenses in respect of such participation.*
 - (ii) A municipal council must determine the criteria for, and calculation of, the out of pocket expenses referred to in subparagraph (i)*
 - (iii) Out of pocket expenses referred to in subparagraph (i) must be paid from the budget of the municipality in question.”*

- It is therefore clear from above that it is virtually impossible to enforce an expropriation on land held by a traditional authority without that institution’s knowledge. Approaching it otherwise would make the expropriator vulnerable to an accusation of an arbitrary exercise of power.
- Without straying into the territory of the Preservation and Development of Agricultural Land Framework Bill, 2014 (PD-ALFA), here are some observations pertinent to the aspect of custodianship raised by other commentators on this Bill.
 - ✓ It is arguable that the sense in which the concept of custodianship is applied in the Government Immovable Asset Management Act, 2007 (GIAMA) (Act No 19 of 2007), differs from the manner in which it is applied in the PD-ALFA.
 - ✓ The distinction between the concepts as applied in the two pieces of legislation vary in as far as the outcomes of the impact of their application is concerned. The object of custodianship in GIAMA is immovable property that vests in a sphere of government in terms of legislation, whereas in terms of the PD-ALFA the object of custodianship is all agricultural land (public and private).
 - ✓ Custodianship as used in the PD-ALFA does necessarily amount to divesting one of property or property rights in the legal sense as such an arbitrary action could defy the principle of legality as well as violate the property guarantee clause. The application of this concept in the PD-ALFA can therefore be interpreted as just a mere expression of a moral obligation.
 - ✓ This view is fortified by the inclusion of the Minister’s powers to expropriate in clause 65 of the PD-ALFA.

In conclusion, we hold the institution of traditional leadership in high regard. We have ensured that there was thorough consultation with the institution in the course of processing the Expropriation Bill. Traditional leaders were given an opportunity to present their views on the Bill during the public hearings that were held on the 4th of August 2015 in the National Assembly.

Presentations were made to the Portfolio Committee by representatives of the National House of Traditional Leaders (NHTL), Congress of Traditional Leaders of South Africa (CONTRALESA), Jonkershoek Forestry Community and the Batlhakoane ba Manzimnyama community.

The traditional leadership structures and the communities alluded to above expressed support for the Bill.

It is the Department of Public Works' (DPW) considered view that the Expropriation Bill is consistent with the Constitution of the Republic of South Africa. It responds adequately to the problem statement. It is also crafted in such a manner that replies to concerns and fears that some would have about it. It should be admitted that the Bill might not address all the questions of the alarmists. It might also not satisfy all the fears of those who have trust issues pertaining to both government and governance. The bottom line is that Expropriation Bill reflects what is contained in the Bill of Rights and particularly Clause 25 of the South African Constitution.