



AFRA | Association
For Rural Advancement

Securing land tenure for an inclusive society

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TO:

The Ad Hoc Committee on the Amendment of Section 25 of the Constitution of the Republic of South Africa, 1996

Attention: Mr V Ramaano

3rd Floor, 90 Plein Street, Cape Town, 8000

Per email: section25@parliament.gov.za

1. Introduction

The Association for Rural Advancement (AFRA) is a land rights non-profit organisation based in Pietermaritzburg, KwaZulu-Natal. AFRA was started in 1979 to assist rural communities in their struggle against apartheid land dispossession and mass evictions. Since the election of a new democratic government in 1994, our work has supported rural communities to regain the land they lost, to find constructive ways of settling disputes over land and to ensure that marginalised rural people's land and development rights are upheld during these processes.

AFRA is working to support marginalised black rural people, with a focus on farm dwellers, towards an inclusive, gender equitable society where rights are valued, realised and protected, essential services are delivered, and land tenure is secure. We work intensively with communities in and around the uMgungundlovu District Municipality in KwaZulu-Natal, South Africa, and extensively in offering support and advice. Our vision is an inclusive and gender equitable society where rights are valued, realised and protected. Our objective is to identify, promote and support pathways to achieve security of tenure and access to services. Our development goal is that the living conditions of rural people have improved, as they have secure land tenure and they are able to access services to improve their livelihoods. We therefore have a deep interest in property rights, particularly the rights of those subject to the power dynamics of land owners. The proposed Constitutional amendments to Section 25 are of direct interest to the constituencies we support.

During the Constitutional amendment consultation national roll-out, AFRA supported farm dwellers in the uMgungundlovu District to participate and make their voices heard. The majority supported the proposal of the African National Congress that it should be possible for land to be expropriated with nil compensation. While they presented a range of arguments in support of their views, farm dwellers emphasised that their homes are on farms and their lives and the lives of their families are all directly affected by Government's failure to implement land reform effectively, leaving them to squeeze out lives on the margins of commercial farms.

Our mandate accordingly necessitates that we ensure that the voices of rural people are heard in legislative and policy making processes. For this reason the following submission has been prepared for your consideration.

2. Background and Interest in the Constitutional Amendment

AFRA has made submissions to various fora on the need to rethink property rights in the country, including the High Level Panel, the ANC Land Summit, the Presidential Panel of Experts. These submissions have included:

- The current formulation of the Section 25 of the Constitution implicitly suggests that under certain circumstances the value of property could be determined to be nil. These circumstances are prescribed by Section 25 (3) that provide principles for determining what should be considered in deciding the value of compensation in the case of expropriated land.
- Labour tenants, long term farm occupiers, people living in shack settlements on land abandoned by owners, customary rights holders living on land under traditional governance are all examples of statutory rights-holders that our Constitution gives recognition to. We have argued that these are property rights of a different kind from ownership rights and should be valued and recognised as such.
- Further, where a labour tenant or long-term farm occupier lives on a portion of land owned by another, that land cannot be valued at market rates because it is already occupied by a statutory rights holder. Those portions, in effect, have no value on an open market.
- AFRA has pointed out that the history of farm dweller occupation came about under conditions of extreme racism and hardship for rural black people. They came to live on farms because there was nowhere else to live and they had no choice but to do so. Nevertheless, they made homes, raised families and made lives on these portions of land, including working on farms often with no remuneration other than the right to live on the farm, or such low remuneration that their survival depended on using the land for their own farming purposes. This history of occupation is important in determination compensation.
- Where such land is subject to expropriation for the purposes of land reform, including securing tenure, and therefore in the public interest, this land could conceivably be valued at nil, and therefore the compensation payable for those portions would be zero.

AFRA believes that this recognition in law is already contained implicitly in the Constitution, and it therefore supports the proposal to amend the compensation clauses in Section 25 to make explicit that which is implicit. AFRA also believes that such an amendment will greatly expedite land reform in these areas and will achieve tenure security for statutory land rights holders.

3. AFRA Submission on Amendments to Section 25 of the Constitution

This submission on the proposed amendments to Section 25 of the Constitution is structured into three sections:

- i. The first provides a short review of what Section 25 currently states;
- ii. The second examines the proposed amendments as set out in the Draft Constitution Eighteenth Amendment Bill, 2019, and;
- iii. The third sets out AFRA's proposals for amendment of Section 25.

3.1. What does the Constitution currently state in relation to property rights?

Section 25 of the Constitution (the so-called property clause), as currently articulated states the following:

25 (1) states that no one can be deprived of property except in terms of a law of general application, and that such a law of general application cannot allow arbitrary deprivation of property. Thus, the Constitution does allow for the expropriation of property, but that such expropriation needs to take place in terms of law, and that in such law expropriation cannot be arbitrary. The law referred to in the Constitution is the Expropriation Act.

25 (2) (a) goes on to state that in terms of such a law of general application property can be expropriated for a public purpose or a public interest. Section 25 (4) then goes on to state that public interest includes land reform and reforms to bring about equitable access to SA's natural resources.

25 (2) (b) states that the property that is to expropriated is subject to compensation, and that this compensation is either agreed to by the affected party, or is decided upon and approved by the courts.

Thus, as currently articulated the Constitution is clear that any property expropriated is subject to compensation, although it does not allude to the scale or quantum of compensation. By omission it could therefore be implied that compensation could range from nil to full market or any other value. The Constitution is also clear that where such compensation is agreed to by the affected party such property is expropriated, and the process ends there. The Constitution does, however, not explicitly state who makes that initial determination of compensation. Where such compensation is disputed, however, the courts will step in and will mediate and make a judgement on the said dispute. Again, this role of the courts is implied and not stated explicitly.

25 (3) states that compensation must be equitable, and must reflect a balance between the public interest and the interests of those affected.

25 (3) (a-e) sets out some of the relevant circumstances that should be considered in determining compensation. In other words, the list of circumstances set out in the Constitution are not comprehensive or all-encompassing. This sub-section is self-explanatory in setting out some of the circumstances that need to be taken into account in determining compensation. This sub-section implies that the relevant law of general application (Compensation Act) will provide a more comprehensive set of determinants for calculating compensation.

AFRA's point of departure in assessing the amendments to Section 25 that are proposed in the Draft Constitution Eighteenth Amendment Bill, 2019 is therefore the extent to which the proposed amendments address some of the lack of clarity in the currently articulated property clause of the Constitution. Do the proposed amendments address the issues / factors that are currently implied in the Constitution, but not made explicit? The following section examines the proposed amendments in this light.

3.2. What does the Constitutional amendment to Section 25 propose?

In terms of amendment to Section 25 of the Constitution, as set out in the Draft Constitution Eighteenth Amendment Bill of 2019, the following proposals have been made:

In terms of Section 25 (2) (b) the proposed amendment would leave sub-section (2) (b) as currently stated, but would add the following to this sub-section:

“Provided that in accordance with subsection (3a) a court may, where land and any improvements thereon are expropriated for the purposes of land reform determine that the amount of compensation is nil”.

Thus, the only issue that this proposed amendment provides clarity on (i.e. makes explicit) is that, when an offer of compensation is challenged by the affected party, +a court can deem the value of compensation for property to be nil. None of the other issues that are implied in the current wording are made explicit – for example, the role of executive in executing legislation and role of courts in mediating disputes; the fact that compensation can already be on a scale of value ranging from nil to full market or any other value; etc. Without making these issues explicit the current amendment, and its reference to the court can easily be misinterpreted as saying that only a court can deem compensation as nil. In AFRA’s opinion, this interpretation is not correct.

In terms of Section 25 (3) the amendment proposes an insertion preceding paragraph (a) stating the following:

“The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any 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, including—”

This proposed amendment is self-explanatory, and from the point of view of AFRA is accepted if the issues identified in relation to the proposed amendment of Section 25 (2) (b) can be resolved.

Finally, the proposed amendments propose Inserting the following after sub-section (3):

“National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.”.

This proposed amendment is self-explanatory. If the issues identified in relation to the proposed amendment of Section 25 (2) (b) can be resolved, this proposed amendment to Section 25 (3) is accepted.

Based on the above, AFRA is of the opinion that the proposed amendments to Section 25 do very little in making explicit what is already implied in the Constitution. In fact the proposed wording for amendment of Section 25 (2) is likely to give rise to confusion by potentially giving the impression that the only the courts can determine nil compensation. As already argued above, AFRA is clear that that interpretation is incorrect, but to avoid any confusion, amendment to Section 25 needs to be much clearer. AFRA’s proposals below attempt to provide such clarity.

3.3. AFRA’s submission on amendment to Section 25 of the Constitution

Expropriation is a unique state power that allows the state to acquire property for public purposes (or in the public interest), in terms of a law of general application, following a fair procedure and against the payment of compensation, the amount of which could be determined to be nil. In terms of the Expropriation Act of 1975, this power lies with the Minister of Public Works. But, for instance, the National Roads Act gives powers to the Minister of Transport to expropriate property for building roads. On provincial and local levels, executives have similar power prescribed in legislation. Legislation curtails these powers and prescribes how it must be exercised. The power to expropriate thus stems from legislation that provides that a Minister may expropriate property.

Given the recent debates in the media initiated by the recent announcements following the ANC lekgotla, AFRA wishes to make clear that it understands the proposed amendment to Section 25 to locate the powers of deciding compensation in the executive and not in the judiciary. The amendment is preceded by the statement that where agreement cannot be reached on the amount (and manner of payment) of compensation, then a Court will decide. We therefore interpret the amendment as meaning that only in cases where the Minister's offer of compensation has been rejected by the expropriated owner may a court determine that the value could be nil. If the owner has accepted the Minister's determination of compensation, then there is no need for the judiciary to participate in the determination of the amount of compensation payable.

AFRA fully supports the view that the legislature makes law, the executive carries out the law and the judiciary adjudicates disputes arising from the execution of the law. If the judiciary were to make executive decisions, who would citizens appeal to? It is therefore our view that the exact powers of the executive to decide compensation in cases of land expropriation will be determined, and limited by the Expropriation Act, when it is amended, and by existing administrative law. AFRA also supports the view that all citizens are entitled to appeal decisions of the executive that directly affect them by taking matters to court. We do not believe that the proposed amendment intends to vary this legally established practice, and we do not believe that it should be changed. The separation of powers is an important accountability mechanism in democracies.

In light of the above, AFRA would propose the following amendments to Section 25 sub-sections (2) to (4) – (amendments and deletions are highlighted in yellow):

25. (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest, where the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) subject to compensation, the amount of which may range from nil to any justifiable value, and the time and manner of payment of which have either been agreed to by those affected or where disputed decided on or approved by a court.
- (3) The determination of whether any compensation should be paid, and if so the amount, time, and manner of any 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, including—
 - (a) the current use of the property including statutory and customary rights held by others on the same property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property, and whether there in fact exists any realistic market for the particular property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation and the extent to which it will fulfil social, ecological and economic functions.

(4) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is [may be determined as] nil.

(45) For the purposes of this section—

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

The above talks very much to what is being proposed in terms of the amendment to Section 25, but provides greater clarity on the separation of functions between the executive and the courts, the fact that compensation can already be determined as nil, and the circumstances that need to be taken into account when determining compensation.

In addition to the above, AFRA would like to state its agreement with many of the proposals set out the submission by Marc Wegerif, especially those proposals that seek to provide a stronger framing of the property clause in terms of the vital importance of land reform.

Thus, the proposal to remove the current sub-section (1) and replacing it with the following is an amendment that AFRA would strongly support:

- (1) All land in South Africa, and the natural resources linked to it, are an asset for our nation and should fulfil the social, economic and ecological function of land in order to contribute to meeting the needs and aspirations of our nation and all its citizens and future generations. In order for land to fulfil its social and ecological function, land use should:
 - (a) address historical and continuing racial and gender injustices;
 - (b) be for accommodation, production, and/or environmental purposes;
 - (c) be used in ways that respect people's dignity, benefits the owner/s and worker/s on that land; and enhances the environment; and
 - (d) not undermine labour laws, violate the dignity of any people, violate any environmental and planning laws and regulations, or damage the environment.

Such an amendment would address the way in which the property clause is structured. The current flow of sub-sections begins with stating the primacy of property rights (which in the case of South Africa) refers in large degree to property rights accrued through colonialism and through racially-discriminatory legislation over the Apartheid period. By more strongly referencing land reform in the opening sub-sections of the Constitution, it more closely aligns Section 25 with the intent of the Constitution as set out in its preamble.

4. Closing Comments

Despite a Constitution that defines significant transformation processes, a Land Reform White Paper, and a land reform programme intended to achieve redress, land ownership equity and secure tenure, these process have not delivered what South Africans expected of them. The result is a growing frustration and increasing demand that land must be returned to its original indigenous owners. A key constraint that has been identified across the country is the cost of land and the contestations around land identified for land reform, including land that continues to be occupied by labour tenants and other farm dwellers, and people desperately seeking livelihood opportunities in and near towns

and cities. In areas under traditional governance, many customary rights holders are also experiencing threats to their land rights from extractive industries.

AFRA therefore views the current process of amending Section 25 of the Constitution as being of critical importance. It is in light of this that AFRA has made this submission, and it is hoped that our proposals will be interrogated and taken into consideration.