

Submission to the Select Committee on Economic and Business Development on the Expropriation Bill

BUSINESS UNITY SOUTH AFRICA

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1. Background

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As a principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC).

BUSA engaged with Government, Organised Labour and the Community Constituency in NEDLAC on the Expropriation Bill [B-2015] ("the Bill"). The interaction was highly positive and few areas were recorded as areas of disagreement. The areas of disagreement centred around the definition of "public interest", the role of market value in compensation, the fact that the property was taken against the will of the owner which was not factored into compensation, the 80/20% payment (20% being withheld for outstanding municipal taxes etc.) and the issue of urgent expropriation.

2. General inputs

BUSA fully realizes that expropriation is standard practice everywhere in the world and we wish to commend the Department of Public Works and the Ministry on the

transparent and inclusive way in which consultations on the Bill took place and for a number of improvements which have been made to the Bill that was published in 2013.

However, in the current economic climate, it is critical that, as a country, we instill the utmost confidence in local and foreign investors to make our country an attractive investment destination once again. What investors, local and foreign, want more than anything else is certainty. In the context of expropriation, they want to know what kind of property can be taken, the extent to which their property rights can be regulated, whether they will be fairly compensated for loss, whether they will have unlimited access to the courts when disputes arise and how the process of expropriation will unfold. The essence of BUSA's submission is that the Bill fails to provide the requisite certainty on:

- the insertion of a (limiting) definition of "expropriation";

It is important to note that the current definition of "expropriation" was not included in either the Bill before NEDLAC, or the one tabled in Parliament. This definition was inserted during the Portfolio Committee stage. The Bill at that stage merely stated that:

"**expropriate**" includes the power to use a property temporarily and "**expropriation**" has a corresponding meaning".

3. Detailed comments:

3.1 Definitions:

The following three definitions are of concern to BUSA.

3.1.1 The Bill defines "**expropriation**" as: "**expropriation**" means the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and "**expropriate**" has a corresponding meaning."

The term "expropriation" is used in section 25 of the Constitution however it is not defined.

Internationally, the concept of "expropriation" (also known as compulsory acquisition or the state's right of eminent domain in some jurisdictions) has been developed by the courts on a case by case basis over a considerable length of time. The majority of these jurisdictions have opted for the courts to retain the discretion as to when government action which encroaches upon an owner's right to use and enjoy the property will amount to an expropriation. Any definition of "expropriation" should be

wide enough to include all possible permutations of expropriation recognised by courts internationally.

The danger of a narrow definition such as the current proposal in the Bill is that it may open the door for all kinds of government action that may severely limit property rights without compensation, or even acquiring property on behalf of third parties without compensation. If the definition is to remain, the focus should be on the loss that the owner suffers, not on acquisition by government organs.

Although the state did have powers of expropriation before the Constitution was enacted, the modern day constitutional state's authority to expropriate vests in section 25 of the Constitution. The Constitutional Court has the ultimate authority to make a binding interpretation of any provision of the Constitution. Should a court faced with a particular set of facts interpret the concept of expropriation as contained in the Constitution to be wider than a definition imposed by ordinary legislation, that provision would be inconsistent with the Constitution and can be struck down.

As a result, **BUSA is very worried about the current definition of expropriation that focusses on acquisition by the state and would like to propose the following definition:**"

"Expropriation means the compulsory acquisition or modification of property by an organ of state in the exercise of its statutory powers ".

3.1.2 The definition of "**public interest**" in the Bill, reads as follows:

*"**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 in order to redress the results of past racial discriminatory laws or practices."*

This is broader than the definition contained in section 25(4) of the Constitution, which provides that:

"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"

BUSA proposes that the Bill should not expand on the wording in the Constitution. The Bill does not clearly define what is meant by this additional wording. Therefore, this leaves the matter open to wide interpretation, which creates market uncertainty for both local and international investors, especially given the broad definition of property.

3.1.3 The definition of "**public purpose**" reads as follows:

*"**public purpose**" includes any purposes connected with the administration of the provisions of any law by an organ of state."*

BUSA submits that this definition is incomplete as there is a need for clear regulation of the “public purpose” requirement in legislation to ensure conformity with Section 25(2) of the Constitution. This would align the definition to international norms where the principle of requiring a strong indication of public necessity in applying the “public purpose” requirement is scrutinised by the courts and it places an onus on the State to provide a detailed and specific motivation as to the necessity for an expropriation to occur. **BUSA proposes that provision should be made for regulations which define “public purpose” to be promulgated.**

3.2 Other clauses:

3.2.1 Clauses 15 and 22: The scrapping of the deeming provision in clause 15 is to be welcomed. Previously, if an owner did not accept the state’s second counter offer and failed to institute legal proceedings within 60 days, he was deemed to accept it. This was amended to the effect that the parties can go to mediation or the state can initiate legal proceedings in terms of the reworked clause 21 of the Bill (mediation and determination by court). BUSA requested that mediation be brought into the process and that has now been done in clause 21.

3.2.2 Clause 17:

Section 17 (1) has been reworded to clarify that the owner is entitled to payment by no later than the date at which the right to possession passes (previously this was when the expropriating authority took possession), subject to sections 18 (mortgage bond), 19 (municipal rates) and 20 (deposit of money with the Master).

The section regarding the payment of 80% of the compensation has been removed. In its place, it states that full payment must be made on the date that the right of possession passes irrespective of any on-going disputes regarding the compensation. BUSA welcomes this amendment. However the timing of payment of compensation still poses a concern. If payment only takes place when possession passes, it may leave the owner and holders of unregistered rights little or no time to finance alternative accommodation. **BUSA proposes that compensation should be paid at least 15 days before possession passes to the expropriating authority as to enable the owner or rights holder to make alternative arrangements.**

3.2.3 Clause 27: Previously, a person would be guilty of an offence and liable to a fine or imprisonment not exceeding 6 months if that person failed to:

- inform the authority of any holders of unregistered rights known to him;
- inform the authority of any lease, purchase agreement or lien over the property; or

- the above information when the authority calls upon him to do so in the notice of intention to expropriate.

In the latest version of the Bill, the listed conduct would no longer constitute an offence but rather the expropriating authority can impose a civil (administrative) fine not exceeding an amount yet to be prescribed. BUSA welcomes this amendment.

4. The issue of compensation and the payment thereof

Compensation lies at the heart of this Bill. Whilst BUSA fully accepts that the Constitution stipulates that market value is only one of the factors to be considered in calculating just and equitable compensation, we would like to point out some economic realities that we think should not be ignored in the implementation of this legislation.

BUSA would like to emphasize the general point on Chapter 5 that in terms of global regulatory requirements, lenders are required to make use of market values as the basis against which mortgage loans are made. As a result, BUSA is in strong support of keeping 12 (1) (c) as is.

The Expropriation Act 63 of 1975 contains a similar provision on consequential loss and there is no valid reason for its exclusion as government has done in the Bill.

The Constitution's list of the factors relevant to compensation is not exhaustive which means that the non-listed factors can also be taken into account in striking "an equitable balance between the public interest and the interests of those affected". Expropriation is a drastic measure which places an inordinately heavy burden on the shoulders of particular individuals. If justice is to be done to those affected, the full extent of their consequential losses must be taken into account, not disregarded.

It is proposed that the compensation due to the owner must be paid in full 15 working days before ownership passes to the State, failing which the relevant notice of expropriation automatically becomes invalid and has no legal force.

It is advised that the Bill be brought in line with the Constitution as it is neither just nor equitable for individuals to be deprived of property ownership and then still have to suffer further injustices by waiting long periods for the State to make payment long after expropriation. The Bill has no penalty for late payments. Without these penalties, people affected by any expropriation will suffer grave injustices as they may not be in a position to afford to go to court to get their monies timeously.

BUSA proposes therefore that market value should be the point of departure – after market value has been determined, other relevant factors may come into play which can then lead to either a decrease or an increase in the determination of just and equitable compensation. This would reflect the current legal jurisprudence on expropriation as developed by our courts.

5. Conclusion

BUSA understands the need for expropriation but would like to urge government to do so with caution and in strict compliance with the Constitution, especially because expropriation itself places an inordinately heavy burden on the shoulders of particular individuals. Further, should the state expropriate property and it is viewed by the public as either being unnecessary or compensation levels are not just and equitable, the negative impact that this will have on local and international investor confidence will be marked and further, should lenders incur a loss, we envisage that they will either tighten their lending criteria to customers, increase their interest rates to compensate for this additional risk and if losses are severe enough, that some lenders may withdraw from the market.

Today, South Africa's economy is faced with its greatest challenges in light of a depressed global macro environment and the 2016 Budget is constrained by the need to consolidate public finances, in the context of slower growth and rising debt. We are also faced with the spectre of a possible ratings downgrade.

In light of the above, South Africa cannot afford to adopt the Bill in its current form in that it works against investment promotion and growth. In order for South Africa to raise the growth rate and create jobs, both the investment and business climates must be conducive.