

19 February 2019

BUSA SUBMISSION ON THE DRAFT EXPROPRIATION BILL, 2019

Introduction

BUSA is a confederation of business organisations, including chambers of commerce and industry, professional associations, corporate associations, and unisectoral organisations. It represents a cross-section of business, large and small, on macro-economic and cross-cutting policies and issues which affect business in all three spheres of government and at the international level. BUSA's function is to ensure business plays a constructive role in economic growth, development and transformation, and to ensure an environment in which business can thrive, expand and be competitive. As the principal representative of business in South Africa, BUSA conveys the views of its members in various national structures and bodies, both statutory and non-statutory, including the National Economic Development and Labour Council (Nedlac).

Background

BUSA engaged with Government, Organised Labour and the Community Constituency in Nedlac on a previous version of the Expropriation Bill. The interaction was highly positive, and few areas were recorded as outright areas of disagreement. Where disagreement did occur was around the definition of "public interest", the role of market value in compensation, the 80/20% payment proposal and the issue of urgent expropriation.

Subsequent to the Nedlac process, BUSA engaged Parliament on the 2015 version of the Bill that was returned to Parliament by the President on procedural grounds. The concerns articulated by BUSA are outlined in the attached Submission to the Select Committee on Economic & Business Development dated March 2016 (attached as **Annexure 1 & Annexure 2**).

Comments

It is worth noting that the current version of the Bill published on 21 December 2018 is substantially similar to the previous version of the Bill returned to Parliament on procedural grounds, and for this reason BUSA's previous concerns raised in its submissions to Parliament remain valid. These are

rehearsed in detail in the written comments of our affiliate members¹, which BUSA endorses and encourages government to consider. This submission will not repeat previous and supporting comments (attached to this submission) but rather focus on the changes to the previous version of the Bill. BUSA understands these to relate to the introduction of Sections 12 (3) and 2 (2).

At the outset, it is worth noting that the addition of the Sections 12 (3) and 2 (2) take place within the context of the recent Constitutional Review Process on the possible amendment of Section 25 of the Constitution and in this regard, BUSA's submission (**Annexure 5**) are relevant insofar as expropriation without compensation is concerned. Of critical importance is the fact that the very intentions of pursuing expropriation without compensation, namely, to advance socio-economic development and transformation, are likely to be undermined by undermining investor confidence in established property rights. Whilst BUSA is encouraged that the Bill (12 (3)) appears to require that the payment of nil compensation must be "just and equitable" taking into account all relevant circumstances, BUSA has a number of concerns regarding the current wording of 12 (3):

1. On its current wording, clause 12(3) does not limit the circumstances in which nil compensation may be paid to those set out in paras (a) to (e). In other words, paragraphs (a) to (e) do not constitute a closed list, which creates uncertainty. This is clear from the phrase "including but not limited to". Accordingly, the clause allows for the possibility of compensation being nil where that is just and equitable, provided that "land is expropriated in the public interest". The concept of public interest is wide. It includes but is not limited to land reform or natural-resource reform (s 25(4)(a) of the Constitution and the Bill's definition of "public interest"), and it could include any instance where there is some public benefit served by the expropriation. The effect would seem to be that the state may pay nil compensation for almost any expropriation of land where it is "just and equitable" to do so. While this is arguably in any event the position under s 25 of the Constitution as currently framed, BUSA proposes for the sake of investor certainty that the Bill more precisely identify circumstances in which nil compensation might be payable.
2. It is somewhat unclear whether paragraphs (a) to (e) are factors (or circumstances) to be taken into account in determining whether nil compensation is just and equitable or whether the listed circumstances are instances in which nil compensation is considered to be just and equitable.
3. The phrase "purely speculative purposes" in para (b) is unduly unclear and fails to take into consideration the fact that property acquisition for speculative purposes constitutes a fundamental component of a mixed economy. The danger lies in the fact that the current



¹ These include, *inter alia*, the submissions of the Agricultural Business Chamber (Annexure 3) & AGRI SA (Annexure 4).

broad wording may be interpreted to encompass all fixed property holdings where the property owner does not him / herself occupy the property as inherently speculative in nature. This would affect property developers, insurers, banks or any investors in property. The concern of BUSA is that although this may not necessarily be the intention of the government, which may not harbour any intent to interpret the provision this broadly, this is of little comfort to investors, both local and international, who require some degree of certainty of compensation in the event of expropriation.

4. Similarly, whilst BUSA has no in principle objection to 12 (3) (a) dealing with land occupied by labour tenants, this provision may conceivably apply to an overly broad range of land. In particular, the use of the phrase “used” (in addition to “occupied”) arguably extends the ambit of this provision materially. Again, investor certainty is reduced.

The publication of the Bill coincides with a period of persistently low economic growth. National Treasury’s forecasts for GDP growth in 2019 are 1.7% (forecasts in recent years have significantly over-estimated actual GDP growth) and the country has only recently emerged from a recession. At over 27% (according to the narrow definition), unemployment remains unsustainably high. With current economic growth levels lagging global GDP growth of 3.7% (and especially emerging market peers at 4.7% forecast growth), South Africa’s low growth levels appear to be the result of domestic structural constraints and the regulatory environment. It is trite to repeat that growth at current levels is insufficient to reduce unemployment or meaningfully impact over the long term on poverty levels. At 1.55% growth per annum, South Africa’s population growth is significantly exceeding GDP growth, implying that South Africans are becoming poorer. Income levels are also deteriorating – largely due to the high unemployment figures. On the demand side, consumers are under significant pressure with the recent VAT increase, excise increases and increases in administered prices. To compound matters, serious fiscal pressures exist with continued worry about ratings downgrades and outflows of capital. Fiscal relief, given high debt levels compounded by the debt levels of SOEs, is not possible for the foreseeable future, implying that investment should for the most part be forthcoming from the private, as opposed to the public, sector.

In this context, economic growth is essential and a regulatory environment supportive of growth-enhancing reforms to encourage investment and job creation are urgently required. However, a precondition of this is stable property rights and South Africa’s recent drop in global rankings (from 56 to 97 in the World Economic Forums Global Competitiveness Report 2017/18) appears to demonstrate uncertainty among investors regarding the country’s risk / return ratio. The introduction

of further uncertainty through overly broad clauses in the draft Expropriation Bill can only serve to reinforce this narrative, rendering recent objectives announced in the Jobs and Investment Summits of 2018 and State of the Nation Address difficult to achieve in practice.

Proposed Way Forward

Considering the above and detailed concerns raised by our affiliates, as well as the likely significant impact of the Bill on considerations by investors, BUSA proposes that the current version of the Bill be subjected to a credible Socio-Economic Impact Assessment (SEIAS) with substantial engagement with investors inherent therein. BUSA understands that a SEIAS was last undertaken on the 2013 version of the Bill. This is unfortunate given the potential risks to investor sentiment arising from the current Bill. Considering the importance of the Bill, and the fact that the Bill cannot be passed by the current Parliament, a cautious approach that seeks to understand the key risks and benefits of the draft legislation is advised. In this regard, BUSA is willing to facilitate such engagements with the Department and trusts that this submission will be favourably considered.