



PARLIAMENT
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MEMORANDUM

TO: Mr. JS Malema, MP
Member of Parliament : National Assembly

COPY: Ms PN Tyawa
Acting Secretary to Parliament
Adv Phindela
Acting Deputy Secretary (Core Business)

FROM: Adv Z Adhikarie
Chief Legal Adviser

DATE: 15 August 2018

REF: P6/2018

SUBJECT: South African Reserve Bank Amendment Bill, 2018

INTRODUCTION

1. Our Office was requested to assist Mr. JS Malema, MP ("Member") on a draft Bill to amend the South African Reserve Bank Act, 1989 (Act No. 90 of 1989) ("Act").

THE BILL

2. Our Office drafted the South African Reserve Bank Amendment Bill, 2018 ("Bill"). Attached, as Annexure A, please find a copy of the draft Bill that you may use for purposes of introduction, should you be satisfied with its content.

PART A: MOTION OF DESIRABILITY

3. NA Rule 286(4)(i) requires the relevant committee to, after due deliberation, “consider a motion of desirability on the subject matter of the Bill”. In our experience, a number of topics could affect the desirability of a Private Member’s Bill. We discuss a few of these below.

Constitutionality

4. Section 21 of the Act provides that the share capital of the South African Reserve Bank (“Bank”), shall be two million rand and shall be divided into two million ordinary shares of one rand each. The Bill seeks to amend this section by making the state the sole holder of the shares in the Bank. The effect of the amendment is that the shares currently held by the shareholders would be expropriated by the state. The Bill is silent on whether the existing shareholders would be compensated for their shares.
5. We advised the Member that a transitional provision is required to provide for the transfer of shares in accordance with Chapter two of the Constitution of the Republic of South Africa, 1996 (“Constitution”), especially section 25. Our instructions however indicated that expropriation of these shares should be without compensation. Section 25 of the Constitution provides as follows:

“Property

“25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) 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.

(3) The amount of the compensation and the time and manner of 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;

(b) the history of the acquisition and use of the property;

(c) the market value of the 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.

(4) 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...".

Legal Analysis

Meaning of property

6. The starting point would be to establish whether shares in the Reserve Bank constitute property within the meaning of section 25 of the Constitution. Section 25(4) of the Constitution provides that for the purposes of section 25 property is not limited to land. In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another*,¹ ("First National Bank case"), the Constitutional Court did not attempt a comprehensive definition of property, saying that the exercise would be practically impossible and judicially unwise.
7. The Constitutional Court stated in the *First National Bank* case that ownership of a corporeal movable (a car in that case), was a right clearly at the heart of the Constitutional concept of property, both as regards to the nature of the right as well as the object of the right and must therefore, in principle, enjoy the protection of section 25 of the Constitution.²
8. In the Bill of rights handbook, Kevin Iles³ argues that the "inclusion of personal rights within the term "property" is not surprising. A great deal of private wealth consists of personal rights: shares, unit trusts, private pension benefits etc." (Underlining my own emphasis). In *Law Society of South Africa v Minister for Transport*⁴ the Constitutional Court stated that "the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth."⁵
9. It is clear from the above discussion that our constitutional jurisprudence accepts that property is not only limited to land, thus, it is my submission that shares in the Bank constitute property within the meaning of section 25 of the Constitution.

¹ (CCT19/01) [2002] ZACC 5

² See 1 above at para 53-54

³ The Bill of Rights Handbook Iain Currie and Johan de Waal, 6th Edition, page 535

⁴ [2010] ZACC 25

⁵ At para 83

Deprivation of property

10. Deprivation of property is permissible according to section 25(1) of the Constitution provided that it is not arbitrary and is carried out in terms of law of general application. As stated before, the effect of the Bill is that the shares would be owned solely by the state, thus depriving the existing shareholders of those shares. The Constitutional Court held in *First National Bank* that a deprivation of property is arbitrary when the law does not provide sufficient reason for the particular regulatory deprivation, or when it is procedurally unfair. A complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. The more extensive the deprivation and the stronger the property interest, the more compelling the state's purpose has to be for having the regulatory deprivation in question in place. The aim of the Bill is to nationalise the Reserve Bank and make it state owned. This, in my view is persuasive enough to render the deprivation non-arbitrary. The deprivation envisaged by the Bill will further be done in terms of law of general application.

Expropriation

11. In the *First National Bank* case, the Constitutional Court stated that expropriation is a subset of deprivation. Interpreting the term expropriation in *Harksen v Lane*⁶ the Constitutional Court indicated that expropriation for purposes of section 28(3) of the Interim Constitution (an equivalent of section 25(2) of the Constitution), means the compulsory acquisition of rights in property by a public authority. For expropriation to have taken place, the state must acquire the substance or core content of what the property owner was deprived of in order for deprivation to constitute expropriation.⁷ In *Reflect-All*⁸, Nkabinde J said:

“Although it is trite that the Constitution and its attendant reform legislation must be interpreted purposively, courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state. . . . As I have said, the state has not acquired the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid.”

⁶ *Harksen v Lane* NO 1998 (1) SA 300 (CC)

⁷ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9

⁸ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24 para 64.

12. Based on the above discussion, it is my submission that to deprive the existing shareholders of their shares in the Bank and for the state to acquire those shares, constitute expropriation. The Bill is silent on the compensation for the shares to the existing shareholders.

13. In terms of section 25(2) of the Constitution, expropriation is only permissible for public purposes or in the public interest. Secondly, an expropriation is subject to payment of compensation for the property that has been expropriated. The principle of compensation as a requirement for expropriation was discussed by the Constitutional Court under the Interim Constitution in *Harken v Lane*⁹ wherein Goldstone J, stated:

“...section 28(3) sets out further requirements which need to be met for expropriation, namely that the expropriation must be for a public purpose and against payment of compensation...”.

14. The Constitutional Court in *Agri South Africa v Minister of Minerals and Energy*¹⁰ confirmed what it said in *Harken v Lane*. In *Agri SA v Minister of Minerals and Energy* the Constitutional Court held:

“...whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.”¹¹ (Underlining my emphasis).

Consequently, based on the above Constitutional Court's findings the expropriation envisaged by the Bill must be accompanied by compensation.

15. The Constitution requires the compensation to be just and equitable in its amount, timing and in the manner of payment but does not provide an explanation of what “just and equitable compensation” actually means. There are guidelines developed by the courts and a list of factors in the Constitution that must be taken into account by the courts when determining what is “just and equitable”. Even with these guidelines and factors the meaning of “just and equitable” is so vague that it is very difficult to predict what a court will determine as “just and equitable” on a case by case basis. Section 25(3) requires that a balance be struck between the public interest and the interests of those affected by the expropriation. In attempting to strike this balance, the Constitution directs the courts to take account of all relevant factors. In this regard also see the discussion below

⁹ See 9 above, *Harksen* at paras 32-3. In *Harksen* this Court interpreted section 28 of the interim Constitution which is the equivalent of section 25 of the Constitution

¹⁰ [2013] ZACC 9

¹¹ See 10 above para 48

on *Nhlabathi v Fick*¹², where the Court found that it was just and equitable for compensation to be nil.

16. The Constitutional Court held in *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)*¹³ that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property.
17. The expropriation of shares envisaged by the Bill is not immune from the requirements imposed by section 25 of the Constitution. Where provision is made for compensation, a Court could find that it would be just and equitable for compensation to be nil – but this would be after a careful consideration of all the relevant factors. If the Bill is passed as is that would mean that there is no discretion given to courts and thus no opportunity for the interest of the shareholders to be balanced against public interest. This would infringe the rights of shareholders under section 25. The state would be required to show that the infringement of that right is a justifiable limitation in terms of section 36 of the Constitution. There are two distinct views from the legal scholars on whether section 25 of the Constitution could be limited successfully under section 36 or not. Those views will be discussed below.

Limitation of the right to compensation

18. The rights in the constitution are not absolute. Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited, but only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose. As Ackermann J stated in the *First National Bank* case, 'neither the text nor the purpose of section 36 suggests that any rights in the Bill of Rights are excluded from the limitation under section 36 of the Constitution.' Further section 25(8) of the Constitution is explicit in making section 36 applicable to section 25.
19. The limitation clause applies generally to all the rights in the Bill of Rights. If considering the Bill, a Court would apply a two-stage approach: It will first determine whether the right in section 25 has in fact been infringed. We are of the view that the lack of a

¹² 2003 (7) BCLR 806 (LCC)

¹³ [2007] ZACC 4]

provision to provide for the consideration of compensation, infringes section 25(2), and accordingly the state would be required to show that the infringement is a justifiable limitation of that right in stage 2. This entails showing that the criteria set out in section 36 are satisfied.¹⁴

20. Some legal scholars, like Kelvin Iles, argue that the difficulty with the two stage analysis is that it makes the basis for justifying the infringement of section 25 the very reason why section 25 was infringed in the first place. For example, where section 25(2) is infringed by expropriation by means other than the law of general application, or an expropriation that was not for a public purpose or in the public interest, or an expropriation without just and equitable compensation.
21. Section 25 requires compensation for an expropriation to be fair and equitable in amount, timing and manner of payment. Compensation that does not meet this requirement can hardly be considered reasonable and justifiable.¹⁵ It seems then that section 36 can have no meaningful application to section 25 of the Constitution. Iles argues that the rights in section 25 of the Constitution have been qualified to such an extent that it is unlikely that any violation of those rights can be justified.¹⁶ The limitation of section 25(2) has not been tested in the Constitutional Court.¹⁷ If the Bill is challenged and the Court follows this view then the Bill will not pass constitutional muster.
22. The second view, shared by the Lands Claims Court, is that the general limitation provision of section 36 and the specific limitation provisions of section 25 apply cumulatively.¹⁸ The Land Claims Court in *Nhlabathi v Fick*¹⁹ applied section 36 to the infringement of section 25 of the Constitution. It held that legislation granting a right to family members of a deceased ESTA occupier²⁰ to bury a deceased on the land they occupied was an uncompensated expropriation of property. The court went on to hold that the legislation was a justifiable limitation of section 25(3). The statutory obligation of a landowner to allow an occupier to appropriate a gravesite on his land without receiving

¹⁴ The Bill of Rights Handbook by Iain Currie and Johan De Waal 6th edition

¹⁵ Bill of Rights Handbook, by Iain Currie and Johan de Waal, Chapter 25.3

¹⁶ See 15 above

¹⁷ In the First National Bank case, the Constitutional Court acknowledged the difficulties of applying the limitation clause to a violation of section 25(1) of the Constitution, but found it unnecessary to decide the question whether the property right could be justifiably limited. No final decision was taken by the Constitutional Court on the point to what extent an infringement of a right to property can be justified under section 36 of the Constitution. Some legal scholars argue that the brief limitation enquiry that the Court performed in that case illustrates the circularity problem.

¹⁸ See 12 above at para 33

¹⁹ See 12 above

²⁰ A person with the right to occupy in terms of the Extension of the Security of Tenure Act, 1997 (Act No. 62 of 1997)

compensation was found to be a minimal interference with the property right, and necessary to protect important cultural and religious interests. The court therefore found that it was just and equitable for compensation to be nil.

23. However, even if the Constitutional Court applies the *Nhlabathi* reasoning and judgment I am of the view the Bill would still fall short of being a justifiable limitation of section 25. The sections in ESTA that the Court considered in *Nhlabathi*, envisaged a prior relationship between the owner of the land and the deceased ESTA occupier, including prior permission from the owner or reasonable conditions set by the owner – thus envisaging a balance between the rights of the beneficiary and that of the person who is being deprived of property. Also, considering how the Courts have emphasised compensation when expropriation takes place it is unlikely that the Court will find the limitation of section 25 by the Bill, especially as the Bill does not even allow a discretion to the Court to award compensation at a nil value, justifiable in an open and democratic society based on human dignity, equality and freedom after taking into account all the relevant factors listed in section 36 of the Constitution.

Conflict with existing legislation or legislative processes

24. We are unaware of any existing legislation, other than the principal Act, or legislative processes that deal with the same subject matter of the Bill.
25. The Constitution was specifically considered for its relevancy to the subject matter and compared with the content of the Bill.
26. We are of the opinion that the Bill may not pass constitutional muster if it is passed as is, as the proposed expropriation of the shares does not allow any discretion for the consideration of compensation, which is contrary to what section 25 of the Constitution requires. Whether the infringement could be justified or not as a section 36 limitation is a grey area, which still needs to be tested and clarified by the Constitutional Court.
27. In conclusion, the Bill, in the context of the Constitution as it stands currently, may not pass constitutional muster and we will not be able to issue a certificate as is required by National Assembly Rule 279(4), but rather we will have to submit an opinion contemplated in NA Rule 279(5) setting out why we cannot certify the Bill. Parliament is in the process of reviewing section 25 of the Constitution. Expropriation without compensation is one of the key principles that is the subject of review. Until the Constitution is amended, the Bill must comply with the current formulation in the Constitution, which requires compensation for all expropriations.

PART C: LEGISLATIVE PROCESS

28. Should the Member agree with the recommendations in this opinion – whether wholly or in part – the Member may proceed to either submit the Bill and Memorandum on the Objects (or the Explanatory Summary) for introduction, or request our Office to effect such further changes to the draft Bill as the Member may wish.
29. Should the Member choose not to accept any recommendation contained in this opinion or its Annexures, the Member is requested to inform our Office of such decision in order for our Office to confirm with the NA Table to introduce the original Bill.
30. Once the Member feels satisfied that the Bill reflects the policy intent that the Member wishes to achieve, the Member may request the Speaker to introduce the Bill by submitting the relevant *Gazette* to the Speaker.²¹ If the House is in session, and the Member requires that the Bill must be read a first time, the Member must also submit a notice of First Reading of the Bill.²²
31. Should the Bill be introduced in the format contained in Annexure A, I am of the opinion that a recommendation should be made to the Joint Tagging Mechanism:
- 31.1. That the Bill should be classified as a section 75 Bill, a Bill not affecting provinces;
- 31.2. That the Bill need not be referred 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), as it does not contain provisions pertaining to customary law or customs of traditional communities.
32. Upon request by the relevant Committee, the content of this opinion related to the desirability of the Bill will be presented to the relevant National Assembly Committee.


Adv Zuraya Adhikarie

Chief Parliamentary Legal Adviser

²¹ NA Rule 279.

²² NA Rule 283(1).