Submission to the Portfolio Committee on Public Works on

Expropriation Bill of 2015

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From the
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1. Introduction

1.1. The Institute for Poverty, Land and Agrarian Studies (PLAAS) is a constituent unit of the School of Government at the University of the Western Cape.

1.2. PLAAS engages in research, training, policy development and advocacy in relation to land and agrarian reform, rural governance and natural resource management. PLAAS aims for rigour in its scholarship, excellence in its training, and effectiveness in its policy support and advocacy. It strives to play a critical yet constructive role in processes of social, economic and political transformation.

1.3. PLAAS has read and considered the implications of the Expropriation Bill of 2015, and submits the following comments and recommendations to the Portfolio Committee on Public Works.

2. Purpose of the Bill

The Bill brings legislation in line with the requirements of the Constitution of the Republic of South Africa, 108 of 1996.

To date, despite the efforts of progressive movements to ensure that expropriation would be provided for in our Bill of Rights, in support of land reform and the redistribution of access to land and other natural resources, our legal framework is still set by the Expropriation Act of 1975.

The current Expropriation Act is in contradiction to the requirements and entitlements contained in:

- Section 25(2) of the Constitution, on expropriation in the public interest,
- Section 25(3) on the amount of compensation and the time and manner of its payment and
- Section 25(4) on the definition of public interest, property and the nation's commitments.

3. Our response

We welcome the publication of the Expropriation Bill, and the effort to bring legislation in line with the Constitutional requirements and entitlements as contained in Sections 25(2-4) in particular.

Some of the salient points that we would like to address in an oral submission to the Portfolio Committee are:

3.1. **The need for expropriation:** we wish to present our research and analysis of the ways in which the absence of expropriation as a credible threat has impeded the land reform process, and in particular the resolution of land restitution claims. This we refer to as a 'landowner veto' in that land claims cannot proceed where current owners refuse to sell at prices offered by the state. This effectively privileges the property rights of current owners over the property rights of the dispossessed, which is contrary to the letter and spirit of Section 25 on Property Rights in the Constitution.

3.2. **Definition of the public interest:** we wish to draw the committee's attention the fact that the Constitution is permissive rather than prescriptive. The public interest "includes" the nation's commitment to land reform etc – what else does it include?

3.3. **Definition of property rights:** which rights should be compensated? We wish to discuss in particular secondary and other rights, other than private owners, who may be affected by an expropriation.

3.4. **Avoiding costly legal battles:** we wish to discuss whether "decided by a court" should be read conjunctively or disjunctively, noting that Chapter 6(21) confirms that, in the absence of agreement on compensation, the court must adjudicate the dispute between the expropriation authority and the expropriated owner. Key to avoiding costly legal battles is to develop policy and procedures for determining and calculating the level of compensation in cases of expropriation (see point 4 below).

4. Expropriation and the calculation of compensation

We wish to provide some background to the manner in which a court should determine the just and equitable compensation a landowner is entitled to under Section 25(3) of the Constitution, drawing on case law and specifically the case of the 'Mala-Mala' land claim and contestations over valuation.

In light of the creation of the Office of a Valuer-General, we propose that it would be important that policy and procedures are established to provide certainty to all parties on the approach to determining compensation.

The Constitution already sets out criteria for "*just and equitable*" compensation, having regard to all relevant circumstances, including:

> "*(1) the current use of the property;*
>
> *(2) the history of the acquisition and use of the property;*

(3) the market value of the property;

(4) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(5) the purpose of the expropriation."

The Policy and procedures for expropriation of land in terms of the Provision of Land and Assistance Act 126 of 1993 and the Extension of Security of Tenure Act 62 of 1997, adopted as policy in 1999, sets out an approach to determining just and equitable compensation, rather than paying market price. It draws on a formula developed by Judge Antonie Gildenhuys of the Land Claims Court for calculating compensation based on the criteria contained in the Constitution. The 'Gildenhuys formula', is as follows:

$$Compensation = C - k_o(B-A) - E_1 * k_1 - E_2 * k_2 - E_3 * k_3 \ldots$$

where

***C** is the present day market value of the property,*

$\boldsymbol{k_0}$ *is the inflation factor related to land acquisition, based on the CPI*

***B** is the market value of the property at the time of acquisition,*

***A** is the actual price paid at the time of acquisition,*

$\boldsymbol{E_1, E_2, E_3,}$ *etc., are the historical values of infrastructure and interest rate subsidies received, and*

$\boldsymbol{k_1, k_2, k_3,}$ *etc., are the corresponding inflation factors for these subsidies, based on the CPI.*

This is just one possible approach to interpreting the criteria in Section 25(3) and has been widely criticised. Ntsebeza (2007), for example, points out that it still takes market price (25(3)(c)) as a starting point and that, although it discounts for past subsidies and other support received (25(3)(d), it does not address the other three criteria cited in ss 25(3)(a) (b) and (e). Indeed, these are not easily reducible to a value in a formula. Rather, "having regard to all relevant circumstances", these are to be determined in each case. The Commission's own "Guidelines for Expropriation in terms of S42E of the Restitution of Land Rights Act 48 of 2003" describes the Gildenhuys formula as "flawed" (CRLR 2005: 123) but does not elaborate on its flaws.

President Zuma has announced on several occasions that the so-called "willing buyer, willing seller" approach to land reform is to be abandoned in favour of utilising the "just and equitable" provisions of Section 25(3). On 15 March 2013, a new Expropriation Bill was published. Unlike the Expropriation Act of 1975, this Bill allows for expropriation 'in the public interest' and with 'just and equitable' compensation, as provided for in Secction 25. These moves suggest that expropriation may be used more often in the

future, and also that the state will aim to use these criteria in negotiated sales as well – not only where properties are to be expropriated. The National Development Plan published in 2011 also proposes that an approach be developed to share the costs of doing land reform between the state and landowners.

Cabinet recently approved the establishment of an Office of a Valuer-General to address "the absence of a nationwide comprehensive, reliable hub for the assessment of property values in the country". According to the Department, the OVG will be a statutory office that will be responsible for issues such as:

1. the provision of fair and consistent land values for rating and taxing purposes;
2. determining financial compensation following expropriation under the Expropriation Act or any other policy and legislation which is in compliance with the constitution;
3. the provision of specialist valuation and property advice to government;
4. setting standards and monitoring service delivery;
5. undertaking market and sales analysis; setting guidelines, norms and standards required to validate the integrity of the valuation data; and,
6. creating and maintaining a data-base of valuation information.

Payment of compensation other than at market rates now looks increasingly likely. Until the OVG is established, the difficulty that all participants face – claimants, landowners and the state – is the absence of a clear policy, guideline or formula to determine what constitutes 'just and equitable' compensation in any particular case. In each case the participants either start with market value and then add or subtract estimated amounts based on the other s 25(3) factors. Or, as in this case, there is a debate about other possible methods for determining the value of property in a particular case.

The result is that there is – and will increasingly be if the OVG is not established or is unable to provide a clear policy approach – a bottleneck of court cases raising again and again the same issue: How do we determine just and equitable compensation?

The problem could be solved if the Commission was required or encouraged to develop a policy to guide the determination of "*just and equitable*" compensation. This would operationalize the criteria, demonstrating how these will be treated in different types of circumstances. Such policy would make land restitution (and other forms of land reform) more efficient, more transparent, more equitable and more predictable.

The policy need not be a formula such as that adopted by Gildenhuys. It could, for example, be based on a spectrum of circumstances. At the one end of the spectrum would be:

> ***Example A:*** *where a property was acquired by an owner immediately following dispossession for a price below market rate for the time, and has been held by this owner ever since, has benefited from state subsidies and*

> *improvements over time, yet at present is un-used or under-utilised. This would likely attract the lowest level of compensation.*

At another end of the spectrum would be

> ***Example B:*** *where a property has been only recently acquired by the owner at market rate, where no past state subsidies were received, where the property is extensively utilised. This would likely attract the highest level of compensation.*

Between these two might be a range of other situations, and a broad typology could be developed as an operational guide to state officials tasked with determining compensation.

The government has not adopted policy in this regard other than the unused policy for the Provision of Land and Assistance and ESTA discussed above, and the Restitution Guidelines. There is no integrated approach to determining compensation. The White Paper on South African Land Policy (DLA 1997) has clearly been overtaken by later policies, laws and practices, and there is no national policy framework for land reform that could guide an approach to compensation across all areas of land reform.

The Department of Public Works needs to work with other spheres of government, including Rural Development and Land Reform, Housing and the Commission on Restitution of Land Rights. In support of the OVG, they must develop policy which would satisfy the need to refer to the provisions of Section 25(3) while also refraining, as the courts, from making policy. The executive must and has not made this policy; it should be widely debated and, once finalised, widely publicised. The more predictable this process, the fewer court challenges are likely in the future, which is in the interests of everyone: claimants, landowners and the state.