

## Legal Resources Centre submissions on:

### THE RESTITUTION OF LAND RIGHTS AMENDMENT BILL

#### 19 August 2003

On 17 June 2003 the LRC submitted comments to the Chief Land Claims Commissioner to the Bill as published in the Government Gazette on 9 May 2003 (Notice 1331 of 2003 in the GG No. 24823).

An amended Bill was thereafter published in the Government Gazette of 25 July 2003 as a notice of intention to introduce the Bill into Parliament (Notice No. 1991 of 2003: GG No. 25217 but without a “[B - ]” reference number).

Shortly thereafter the further version of the Bill was published on the Internet as **[B42 – 2003]**.<sup>1</sup>

The Chief Land Claims Commissioner has also circulated a further and amended Draft, which includes amendments proposed by the Department of Land Affairs pursuant to a Cabinet Committee recommendation of 22 July and as, certified by the State Law Advisor on 29 July 2003.

It needs to be noted that the Memorandum attached to the Bill as published in the Government Gazette of 25 July also differs from the one as published on the Internet.

The latest proposed clause 42E published as **[B42 – 2003]** reads as follows:

42E. (1) The Minister may, purchase, acquire in any other manner or expropriate land, a portion of land or a right in land for the purpose of the restoring or awarding such land, portion of land or right in land to a claimant in terms of this Act or<sup>2</sup> for any other land reform purpose.

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<sup>1</sup> see: <http://www.gov.za/gazette/bills/2003/b42-03.pdf>

<sup>2</sup> The Bill published on 9 May 2003 indicated “or” and the version distributed by the Chief Land Claims Commissioner, indicates “and”. Whether “and” or “or” is used, the change as presently formulated does not have any effect because the additional cause for expropriation is for any “other” land reform purpose, in other words, “other” than for restitution purposes.

The clause 42E(1) in the version as circulated by the Chief Land Claims Commissioner reads as follows:

42E. (1) The Minister may, purchase, acquire in any other manner or expropriate land, a portion of land or a right in land for the purposes of the restoration or award of such land, portion of land or right in land to a claimant in terms of this Act and for any other land reform purpose.

The version of clause 42E in the Memorandum attached to the internet version refers to “or” and not “and”.

**COMMENT:****1. A preliminary point concerning the reference to Section 6(2)(b) of the Restitution Act:**

1.1 From the Memorandum as published in support of [B42 – 2003] we understand that the Minister needs the supplementary power to expropriate land for the purposes of Section 6(2)(b) of the Restitution of Land Rights Act.

In this regard the Memorandum notes that:

“A further problem which arises from the current provisions of the Restitution Act is that although the land may originally be intended for restitution purposes subsequent events may indicate that the land should rather be used for other land reform purposes. This is provided for in section 6(2)(b) of the Restitution Act.”

1.2 Section 6(2)(b), does however not cover the problem as explained. It merely notes that:

“The Commission may, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner make – . .

(b) recommendations or give advice to the Minister regarding the most appropriate form of alternative relief, if any, for those claimants who do not qualify for the restitution of rights in land in terms of this Act;”

1.3 The intention of Section 6(2)(b) is that the Minister (and not the Commission) needs to decide on assisting a “claimant” in terms of other land reform programmes and other legislation. Legislation to support other land reform programmes does make provision for expropriation.

1.4 The **Provision of Land and Assistance Act** No 126 of 1993 (which is the legal mechanism for the redistribution programme) and in the **Extension of Security of Tenure Act** No 62 of 1997 (ESTA) provide powers for the expropriation of land for land reform purposes.<sup>3</sup>

1.5 If the existing powers for the expropriation of land for reform purposes are inadequate for the purposes of Section 6(2)(b) (which is not necessarily so, and not motivated in the memorandum attached to the Bill), they should be supplemented in other legislation and not in the Restitution Act. The Land and Assistance Act should be amended or the required amendments could be appropriately contained in a Land Reform Laws Amendment Act, which could contain a free-standing provision to that effect.

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<sup>3</sup> We attach hereto an extract of the relevant provisions of the Provision of Land and Assistance Act and ESTA.

## 2 Regarding “or for any other land reform purpose”:

**The additional general expropriation provision “for any other land reform purpose” in the Restitution of Land Rights Act may cause confusion with regard to the law that needs to be used, and its requirements, and with regard to the Court that will have jurisdiction to adjudicate the matter.**

- 2.1 Apart from the issues concerning section 6(2)(b), a situation can be envisaged where the portion of land that needs to be expropriated for restitution purposes may form part of a larger piece of land and that the Minister in terms of the Restitution Act (at present) only has the powers to expropriate a smaller and undivided portion which may not be feasible, and for such purposes, she may wish to expropriate the additional portion which has not been claimed. Under such circumstances she does not have the power to expropriate such additional land in terms of the Restitution Act and she will not have it in terms of the “specific” provision of the Bill for **“the purpose of the restoring or awarding such land.”** It would appear that she does therefore need wider powers in terms of the Restitution Act (bearing in mind that she already has powers to expropriate for redistribution and tenure reform purposes in Act 126).
- 2.2 A further situation may be envisaged where a portion of land was earmarked, but subsequently it becomes clear that the claimed land will be wholly inappropriate and more appropriate piece of private land is then earmarked. The alternative piece of private land is not subject to a claim and can then only be acquired if it is expropriated. In this regard the Minister may need additional powers to expropriate in the Restitution Act (but again bearing in mind that she does have the powers as noted in Act 126).
- 2.3 While the Minister may need additional powers to expropriate land under such circumstances in the Restitution Act, care needs to be taken to ensure that such powers are aligned with similar powers in terms of which she may also expropriate land for “other land reform purposes”.
- 2.4 As the amendment stands, it does not provide criteria or a test which links the “general power” to expropriate “for any other land reform purpose” to the restitution process.
- 2.5 The amendment needs to clearly link the “general power” to the restitution process. It concerns process (such as planning and the appropriation of budgets)<sup>4</sup> and a legislative tests (for instance the ‘Minister needs to be satisfied that . . .’) to trigger the expropriation action. It also, in this case concerns the jurisdiction of the court that needs to decide the matter if it is contested.

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<sup>4</sup> In this regard see section 10 of the Provision of Land and Assistance Act that provides for “Financial assistance for acquisition, development and improvement of land or to secure tenure rights”.

- 2.6 The Act if amended as proposed, will then stand as is, without any explanation, test or procedure. It will then be possible to use the “general” provision of the Restitution Act to expropriate (not only for purposes linked to restitution) but for “any other land reform purpose”, despite the fact that, as referred to above, provision is already made for expropriation in terms of existing legislation.
- 2.7 The general and undefined provision is therefore bound to cause confusion and unnecessary litigation (whether “and” or “or” is used). It would appear that the drafters did not take this into account
- 2.8 The Land and Assistance Act and ESTA require different tests and different procedures for land to be expropriated for land reform purposes. It is not clear when or why a particular legislative route as opposed to the other routes may be used. Creating multiple powers of expropriation for the same purpose may lead to confusion as to which Act has been used, or should be used, in particular cases.
- 2.9 Expropriation for redistribution purposes in terms of the Land and Assistance Act must be adjudicated on by the High Court. Expropriation in terms of the Restitution of Land Rights Act must be adjudicated in the Land Claims Court. By providing different courts of the same standing with similar powers to adjudicate on a similar issue is bound to cause confusion about which court will have jurisdiction.
- 2.10 The exercise of all powers under the Restitution Act is subject to review by the Land Claims Court (sec 36(2)). If an expropriation for redistribution or tenure reform done in terms of the proposed “general” provision of the Restitution Bill, disputes about those expropriations will be heard in the Land Claims Court.
- 2.11 From the memorandum it is clear that the “general” expropriation powers is not required to supplement the already existing powers for expropriation for land reform purposes, but the amendment itself needs to make this clear to avoid confusion.

**3. Regarding the motivation that it is “imperative that the the process of settling rural claims be accelerated.”**

**The hope that the amendment will have the effect of accelerating rural claims, as referred to in the Memorandum, may not be well founded.**

- 3.1 The Minister will have to give the owner notice and a fair hearing before effecting an expropriation.
- 3.2 The owner will be entitled to full reasons for the proposed expropriation, and the factual basis for the proposed decision, before the Minister is able to expropriate.
- 3.3 Particular care will have to be taken to place full and accurate information before the Minister – and the owner will be entitled to this information before a decision is made. A decision to expropriate based on incorrect or inadequate information may, in the light of a recent decision of the Supreme Court of Appeal, be invalid.<sup>5</sup>

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<sup>5</sup> Pepkor Retirement Fund v Financial Services Board: case no 198/02, decided 30 May 2003.

- 3.4 The owner will be entitled to take the decision of the Minister on review in the Land Claims Court (as provided for in section 36), and will for the purposes of the review probably be entitled to challenge the validity of the claim.
- 3.5 The claim will therefore have to comply with the section 2 validity requirements of the Act.
- 3.6 The owner will be entitled to challenge the Minister's decision on the basis of the validity of the claim. Due to the rights that owners have to challenge a Minister's decision to expropriate, the expropriation route may cause the process to become even more protracted. For that reason too much hope should not be placed on acceleration due to wider powers to expropriate.
- 3.7 We believe that the only way to speed up the restitution is to make adequate staff and capacity available to the DLA and the Commission.

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**Annexure: PROVISIONS CONCERNING EXPROPRIATION:**

**EXTENSION OF SECURITY OF TENURE ACT 62 OF 1997:**

26(1) Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister may **for the purposes of any development in terms of this Act**, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

(2) Notwithstanding the provisions of the Expropriation Act, 1975, the owner of the land in question shall be given a hearing before any land is expropriated for a development in terms of this Act.

(3) In the event of expropriation, **compensation shall be paid as prescribed by the Constitution**, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975.

(4) Any right in land which derives from the provisions of this Act will be capable of expropriation in accordance with the provisions of any applicable legislation.

**PROVISION OF LAND AND ASSISTANCE ACT 126 OF 1993**

12(1) Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister may for the purposes of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

(2) Notwithstanding the provisions of the Expropriation Act, 1975, the owner of the land in question shall be given a hearing before any land is expropriated in terms of this Act.

(3) In the event of expropriation, **compensation shall be paid as prescribed by the Constitution**, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975.

(4) Any right in land which derives from the provisions of this Act will be capable of expropriation in accordance with the provisions of any applicable legislation.

[S. 12 substituted by s. 7 of Act 26 of 1998.]

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