

# NATIONAL PARTY PRELIMINARY SUBMISSION

## ITEM 14: SOCIO-ECONOMIC RIGHTS

### 14.1 RIGHTS IN PROPERTY

#### **1 Content of the right**

Section 28 of the Constitution 1993 provides for the entrenchment of rights in property including their acquisition, tenure and disposal by every person. It also prohibits deprivation of these rights otherwise than in accordance with a law and provides for expropriation of rights in property for public purposes only and subject to the payment of agreed or just and equitable compensation determined by a court of law.

While the NP in the interests of a settlement accepted the full text and wording of Section 28(3) at the World Trade Centre, subsequent developments have shown that many of the additional factors set out in that section have proved to be controversial and can lead to legal uncertainty. Furthermore, legislation contemplated in Section 121 to 123 of the Constitution 1993 has been enacted during 1994 catering for most, if not all, of these concerns.

Accordingly the NP proposes that Section 28(3) should be redrafted and updated as follows:

"28(3) No law referred to In subsection (2) shall provide for expropriation of any rights in property unless:

- (i) Such expropriation is for public purposes only;
- (ii) such law provides for full compensation which shall be just and equitable;
- (iii) such compensation is to be determined, in the absence of agreement, by a court of law; and
- (vi) such determination and payment of compensation shall be expeditiously made and effected

The NP believes that rights in property must be entrenched in the new text and regards this as fundamental to a sound economic system and investor confidence. The NP believes that every person, including juristic persons, must have the right to acquire, inherit, hold and dispose of rights in property. This is in line with international

declarations and Bills of Rights in other countries (Sec Art 17 of the U N Declaration 1948; Art 14 of the African Charter 1981 of OAU).

Sacob also subscribes to this view - see their submission to the C.A. on 4 April 1995 at pages 16 - 17 as do the submissions of the Council of Southern African Bankers on 17 February 1995 at page 11 and the Chamber of Mines on 31 March 1995 at page 14.

While rights in property must be fully protected against arbitrary or capricious action by the State, the NP nevertheless also recognises that every person or community dispossessed of rights in land before 27 April 1994 under any law inconsistent with Section 8(2) of the Constitution 1993, is entitled to claim restitution subject to and in accordance with Sections 121 to 123 of the Constitution and the subsequent legislation passed by Parliament.

Thus the NP's view is that there must be an even handed approach by the State which must recognise the vested interests of owners of rights in property and the claims of those dispossessed of property, particularly land, since 1913 under racially based laws.

## **2 Application of the rights**

### *2.1 Nature of the duty imposed on the State*

Primarily the rights apply against the State including all organs of State at every level of government and therefore impose a positive duty on the State. The position has already been further regulated by legislation. The holder of rights in property is also protected by other legislation and the common law against the illegal action of other persons.

### *2.2 Common law and customary law*

The rights should be applied to common law and to customary law (provided the term "rights in property" is retained). The NP supports respect for various customary usages of land such as lease agreements, traditional communal tenure, time-share schemes and usufruct. These usages inter alia can be beneficially employed to assist the disadvantaged who do not have the immediate capital to purchase their own property.

### *2.3 Actors other than the State*

The right applies vertically against the State. The relationship between the holder of the right and other persons is regulated by statute and common law.

#### 2.4 *Bearers of the right*

Every person, including a juristic person, is the bearer of this right.

#### 2.5 *Limitation of the right*

The State is under a duty to respect every person's rights in property. Accordingly any legislation which may regulate or limit the right in any way must always be subject to the criteria laid down in the general limitations clause.

### **The Wording**

Sections 28(1) and 28(2) should be retained with the addition in Section 28(1) of the word "inherit" after the word "acquire". Section 28(3) should be amended as set out in paragraph 1 of this submission.