

The South African Institute of Valuers

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General Secretary | Unit 11, Rynlal Building, 320 The Hillside Street, Lynnwood

Our Ref. : SAIV Comment Expropriation Bill [B4 -2015]

Your Ref.: Expropriation Bill [B4 – 2015]

05 May 2015

ATTENTION: MS AKHONA BUSAKWE

Portfolio Committee on Public Works
Parliament of Republic of South Africa
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Dear Madam

SUBMISSIONS ON THE EXPROPRIATION BILL [B4 – 2015]

1. Further to your notice in this respect, kindly find herewith the South African Institute of Valuers ("SAIV") submissions on the Expropriation Bill [B4 – 2015].
2. As per the invite in your notice the SAIV herewith also request the opportunity to make oral presentations during the public hearings, in support of this submission.
3. **SUBMISSIONS**

"CHAPTER 1 - DEFINITIONS"

- 3.1 **"court" means— (Page 4)**
"(a) a High Court;"



Point requires clarity. For example if the expropriated owner is domiciled in King Williams Town and the property is situated in Polokwane, which court has jurisdiction, and who will determine the applicable court? It could become costly for any owner to institute or defend legal proceedings in another province. The following replacement is suggested:

"(a) High Court, within whose area the claimant is domiciled;"

Included in par (b) of the definition of "court" is a Magistrate's Court "*having competent jurisdiction*". It is not clear what is meant by "*competent jurisdiction*". If it means jurisdiction in respect of compensation claims not exceeding the limit set in sec 29(1)(g) of the Magistrates' Court Act 32 of 1944 (at present, R100 000), it is acceptable. Compensation claims are often intricate, involving large sums of money. Such claims should not be adjudicated upon by magistrates who generally have little or no experience in expropriation and valuation issues. Par (b) of the definition should be clarified. It is suggested that the words "in terms of sec 29(1)(g) of the Magistrates' Court Act 32 of 1944" be inserted after the words "*having competent jurisdiction*".

3.2 "*land parcel*" (page 5)

The definition refers to "*land that has been surveyed*". Surveyed by who? It is suggested that the definition be amended as follows:

"means land indicated on a "diagram" as defined in sec 1 of the Land Survey Act 8 of 1997 and is either registered or yet to be registered in a deeds registry;"

Also, see par. 3.9.1 below. It is suggested that the following also be included:

"unit of use" may, and often does, consist of several "land parcels".

3.3 "*property*' is not limited to land and includes a right in such property;" (page 5)

For more clarification on what it meant by property and which is often referred to as "*land*" in the Bill, and to convey the fact that it may include improved property the SAIV suggest that it is extended to read as follows, i.e.:



"property" is not limited to land which includes vacant and improved immovable property registered in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937) and the Sectional Titles Act, 1986 (Act No. 95 of 1986), including a right in property and the right to use property temporarily, and also refers to land for the purpose of this act and includes a right in or to such property".

3.4 *"public interest"* (page 5)

The words "~~and other related reforms in order to redress the results of past racial discriminatory laws and practices~~" at the end of the definition extend the Minister's power of expropriation beyond what is permitted in terms of sec 25(2)(a), read with sec 25(4)(a) of the Constitution, and should be deleted.

3.5 *"public purpose"* (page 5)

The definition gives a much wider scope to the term "*public purpose*" than its ordinary meaning as used in the Constitution, and should be deleted.

3.6 *"registered"* (page 5)

It is suggested that a water license issued under the National Water Act 36 of 1998 is (or should be) a registered right for purposes of the Bill, and that the word "water" should be inserted in the definition of "*registered*" after the word "*minerals*", i.e.:

"registered" or "unregistered right" "means registered or recorded with a government office in which rights in respect of land, minerals, water or any other property are registered or recorded for public record in terms of any law;"

3.7 *"unregistered right"* (page 5)

It is not clear whether the statutory rights of an "occupier" as defined in the Extension of Security of Tenure Act 62 of 1997 or the rights of an unlawful occupier as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 or the rights which a person residing on land might have in terms of other consumer protection or land reform legislation are to be regarded as "*unregistered rights*" for purposes of the Bill. This should be clarified in the definition.



3.8 "value"

The SAIV believes it prudent to include **market value** to avoid any confusion in this respect, or what is meant by **value** in the Bill, as both the Constitution and the Bill refers to market value as one of the compensation considerations, and the Bill often refers to value. The SAIV would therefore suggest the inclusion of the following under definitions, namely:

"value"

"any reference to value means market value;"

3.9 "valuer in relation to land, means a person registered as a professional valuer or professional associated valuer in terms of section 19 of the Property Valuers Profession Act, 2000 (Act No. 47 of 2000)." (Page 5)

To ensure that only qualified valuers are engaged in this highly emotive process the SAIV suggest the following change, as many valuers with restriction imposed on them under the Property Valuers Profession Act cannot undertake certain valuations:

"valuer in relation to land, means a person registered as a professional valuer or professional associated valuer, without restrictions, in terms of section 19 of the Property Valuers Profession Act, 2000 (Act No. 47 of 2000)."

"CHAPTER 2 – POWERS OF MINISTER OF PUBLIC WORKS TO EXPROPRIATE"

3.10 "Section 3 - Powers of Minister to expropriate" (Page 6)

3.10.1 "Subsection 3(2)" (Page 6)

It is suggested that the term "~~land parcel~~" be replaced by "unit of use". A unit of use may, and often does, consist of several "~~land parcels~~". The expropriation of part of a unit of use may impair the economic feasibility of the unit to such an extent that it would be just and equitable to the owner that the remainder be expropriated. The definitions may have to be extended to include this



3.10.2

“Subsection 3(3)(a)” (Page 6)

It is suggested that the Bill should contain provisions obliging the Minister:

“(i) in cases where land or a registered right in land is concerned, to deliver a copy of the notice of expropriation to the applicable registration authority (which will, in most cases, be the Deeds Office) to be noted in its registers; and

“(ii) to take the necessary steps to have the land or the right in land registered in the name of the acquiring organ of state in the records of the registration authority concerned with a given period (say three months) after date of expropriation.

If the records of a registration authority does not reflect a change of ownership through expropriation, it may cause substantial loss to innocent third parties relying on the accuracy of such records.”

3.11

“Section 4 - Delegation or assignment of Minister’s powers and duties” (Page 6)

“Subsection 4(1)” (Page 6)

“The Minister may, either generally or in relation to a particular property or in relation to a particular case, delegate or assign to an official of the Department any power or duty conferred or imposed on him or her in terms of this Act.”

To ensure that this subsection is not in contradiction of subsection 2, make the following change:

“The Minister may, either generally or in relation to a particular property or in relation to a particular case, delegate or assign to an official of the Department ~~any powers~~ or ~~duties~~ conferred or imposed on him or her in terms of this Act.”



"CHAPTER 3 - INVESTIGATION AND VALUATION OF PROPERTY"

3.12 "Section 5 - Investigation and gathering of information for purposes of expropriation" (Pages 7 & 8)

3.12.1 "Subsections 5(4)(a), (b) and (c)" (Page 7)

These clauses are far too wide. The documents which the owner, tenant or occupier are required to make available, should be limited to official documents (such as title deeds), contracts and the like. The person conducting the investigation should not have access, for example, to the financial records of the owner or to reports and valuations obtained by the owner for purposes of assisting him in negotiating a sale of the property to the State or in anticipation of an expropriation. The owner may have obtained a valuation of the property with which he disagrees and do not intend to use. Why must he be compelled to make it available to the valuer undertaking the investigation, enabling the State to use it against him in future. The clauses, as presently worded, might intrude upon the owner's constitutional right to privacy. To the extent that the clauses are retained, there should be a provision that the information and documents given to the person undertaking the investigation and which are not already in the public domain, **must remain confidential.**

3.12.2 "Subsection 5(5)(b)(i)" (Page 8)

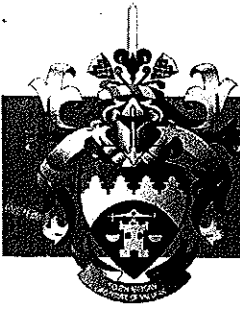
The wording "*on rights therein*" at the end of the sub-clause are unclear: rights in what?

"CHAPTER 4 - INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY"

3.13 "Section 7 - Notice of intention to expropriate" (Pages 9 & 10)

3.13.1 "Subsection 7(4)" (Page 10)

An owner or a holder of an unregistered right will in many cases be unable to determine the amount of its compensation claim and give full particulars of how it is made up within the prescribed period of 30 days. **It is suggested that the owner be permitted to request an extension of an additional 30 days, which the expropriating authority must allow.**



3.13.2 *"Subsection 7(6)(b)"* (Page 10)

Section 12(1)(a) of the Property Valuation Act 17 of 2014 provides that "whenever a property has been identified for purposes of land reform that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines." It should be clarified whether the compensation offers which the expropriating authority is obliged to make in terms of the Bill, are subject to section 12(1)(a) of the Property Valuation Act.

3.13.3 *"Subsection 7(7)(b)(ii)"* (Page 10)

The expropriating authority should not, if it elects to continue with negotiations on compensation, be allowed to do so indefinitely, thereby keeping the owner or right holder in suspense. It is suggested that the expropriating authority be allowed another 40 days to decide whether or not to proceed with the expropriation, where after it will be obliged to proceed.

3.14 *"Section 8 - Notice of expropriation"* (Pages 10-12)

3.14.1 *"Subsection 8(2)(c)"* (Page 10)

It is suggested that the Bill should contain provisions obliging the Minister:

"(i) in cases where land or a registered right in land is concerned, to deliver a copy of the notice of expropriation to the applicable registration authority (which will, in most cases, be the Deeds Office) to be noted in its registers; and

(ii) to take the necessary steps to have the land or the right in land registered in the name of the acquiring organ of state in the records of the registration authority concerned with a given period (say three months) after date of expropriation.

If the records of a registration authority does not reflect a change of ownership through expropriation, it may cause substantial loss to innocent third parties relying on the accuracy of such records."



3.14.2 ***“Subsection 8(2)(c)(iv)”*** (Page 11)

It is suggested that this subsection be amended as follows:

“if the property is subject to a contract contemplated in sections 7(4)(c)(i) and (ii), on the lessee or buyer; and”

3.14.3 ***“Subsection 8(3)(b)(i)”*** (Page 11)

It is unclear what is meant by the words *“in relation to the whole”*, and it is suggested that they should be omitted.

3.14.4 ***“Subsection 8(3)(b), 8(4)(b) and 8(4)(c)”*** (Page 11)

The use of the word *“approximately”* is too vague. There should be sufficient accuracy to enable the owner or rights holder to ascertain within reasonable limits what has been taken from him and to enable him to calculate his compensation claim. It is suggested that this word be removed from these subsections.

3.14.5 ***“Subsection 8(3)(g), 8(4)(d)”*** (Page 11)

Sec 12(1)(a) of the Property Valuation Act 17 of 2014 provides that *“whenever a property has been identified for purposes of land reform that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines.”* It should be clarified whether the compensation offers which the expropriating authority is obliged to make in terms of the Bill, are subject to sec 12(1)(a) of the Property Valuation Act.

3.14.6 ***“Subsection 8(5)(a) and (b)”*** (Page 11)

Informing different holders and owners in the same document about the quantum of compensation for each, will create numerous difficulties, as these offers will be played off against each other, without the parties necessarily understanding the different compensation nuances applicable to each. This will delay and frustrate any acquisition process. It is suggested that a separate notice be served on each, or alternatively at least a separate compensation offer be served on each party under Subsection 8(5)(b).



3.15 *"Section 9 - Vesting and possession of expropriated property" (Page 12)*

3.15.1 *"Subsection 9(1)(a)" (Page 12)*

It is suggested that the Bill should contain provisions obliging the Minister:

"(i) in cases where land or a registered right in land is concerned, to deliver a copy of the notice of expropriation to the applicable registration authority (which will, in most cases, be the Deeds Office) to be noted in its registers; and

(ii) to take the necessary steps to have the land or the right in land registered in the name of the acquiring organ of state in the records of the registration authority concerned with a given period (say three months) after date of expropriation.

If the records of a registration authority does not reflect a change of ownership through expropriation, it may cause substantial loss to innocent third parties relying on the accuracy of such records."

3.15.2 *"Subsection 9(1)(b)" (Page 12)*

Is a builder's lien an unregistered right which is expropriated together with the land, or should it be treated like a mortgage bond or a deed of sale? It is suggested that it should be treated similar to a mortgage bond or deed of sale, and that section 18 should be amended accordingly.

3.15.3 *"Subsection 9(2) and (4)" (Page 12)*

In cases where land is expropriated and the owner or rights holder or any other person residing on the land (for example, labour tenants or squatters) fail to vacate the land, it should be the responsibility of the expropriator to have them evicted in accordance with the applicable laws (including the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998). It must be clearly stated that the provisions of the Bill do not relieve the expropriator from complying with such laws.



3.16 **"Section 10 - Verification of unregistered rights in expropriated property" (Page 13)**

3.16.1 **"Subsection 10(5)(c)" (Page 13)**

The time limit of 20 days in this subsection commences on expiry of the time limit of 30 days in subsection 10(4). The time limit in subsection 10(4) comes into operation only if the expropriating authority has referred the claim to one or more of the Directors-General listed in subsection 10(3) for assistance. The expropriating authority is not obliged to refer the claim to a Director-General for assistance. If it has not referred the claim to a Director-General within a period of (say) 20 days after receipt of the evidence requested in terms of subsection 10(1), the expropriating authority must be obliged to inform the claimant whether or not it accepts the claim. Subsection 10(5)(a) should be amended accordingly.

3.16.2 **"Subsection 10(5)(a)" (Page 13)**

The expropriating authority cannot be the final decision-maker on whether a claim relating to an unregistered right in expropriated property is valid or not. If the expropriating authority does not accept the claim, the claimant should have the right to apply to a competent court for a declaratory order that the claim is valid, and at the same time apply for an order determining the compensation payable in respect of the claim.

"CHAPTER 5 - COMPENSATION FOR EXPROPRIATION"

3.17 **"Section 12 - Determination of compensation" (Page 14)**

3.17.1 **"Subsection 12(1)" (Page 14)**

"The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including—"



This subsection lacks the aspect of timing of compensation determination, which can leave it open to compensation determination and various difficulties which often raises its head in this regard. Similar to the old expropriation act a provision should be made on which date is such compensation is fixed and the following is suggested:

"The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, as the date of notice of expropriation, having regard to all relevant circumstances, including—"

3.17.2 **"Section 12" (Page 14)**

No explicit provision is made for compensation for actual financial loss. Although subsection 12(1) provides that all relevant circumstances must be taken into account in the determination of compensation, and the financial loss suffered by an expropriated owner might be a "*relevant circumstance*", it is suggested that, in order to place the matter beyond doubt, a provision be inserted in the Bill that regard must be had to any financial loss suffered by an owner or rights holders as result of the expropriation, to the extent that it is just and equitable to do so.

3.18 **"Section 14 - Compensation claims" (Page 15)**

"Subsection 14(1)" (Page 15)

The 20 day provision for an expropriated person to prepare a counterclaim is totally insufficient and it is suggested that the 20 days be extended to at least 40 days.

3.19 **"Section 15 - Offers of compensation" (Pages 15 and 16)**

"Subsection 15(3)" (Pages 15 and 16)

It is suggested that the expropriating authority and the claimant be authorised to agree to an extension of the period within which the claimant must institute legal proceedings, either before or after expiry thereof. Failing any such agreement, the claimant should be entitled to apply to a court for an extension of the period, either before or after its expiry, which the court may grant if it is just and equitable to do so.



3.20 **"Section 17 - Payment of amount offered as compensation" (Page 16)**

"Subsection 17(4)"

This subsection leave the decision of the payment date(s) in the hands of the expropriating authority. The following amendment is suggested:

"If the expropriating authority has proposed a later date or dates, to the date contemplated in subsection (1) for the payment of compensation and the expropriating authority and expropriated owner or expropriated holder, as the case may be, fail to reach agreement thereon, a court may on application by the expropriating authority or expropriated owner or expropriated holder, order payment on a particular date or dates~~such later date or dates.~~"

3.21 **"Section 18 - Property subject to mortgage bond or deed of sale" (Pages 16 and 17)**

Is a builder's lien an unregistered right which is expropriated together with the land, or should it be treated like a mortgage bond or a deed of sale? It is suggested that it should be treated similar to a mortgage bond or deed of sale in this section.

"CHAPTER 6 – ACCESS TO COURT, URGENT EXPROPRIATION AND WITHDRAWAL OF EXPROPRIATION"

3.22 **"Section 21 – Determination by court" (Page 18)**

"Subsections 21(2)"

Court proceedings for the determination of compensation in respect of an expropriation is constitutional litigation. It was held by Sachs J the Constitutional Court case of *Biowatch Trust v Registrar, Genetic Resources and Others*, 2009 (6) SA 232 (CC), that in litigation between the State and private parties seeking to assert a constitutional right, the State should ordinarily pay the costs of the private party if it loses. If it wins, the State should bear its own costs. The rationale for this general rule is threefold:



"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and the State conduct are constitutional is placed at the correct door."

The learned judge added a note of caution by stating: *"If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award."*

Subsection 21(2) of the Bill does not follow these principles, but introduces a formula for the determination of liability for legal costs, which might well be in contravention of the principles underlying the Constitution.

3.23 **"Section 22 - Urgent expropriation" (Pages 18 and 19)**

3.23.1 **"Subsections 22(2)" (Pages 18 and 19)**

"The power referred to in subsection (1) may only be exercised if suitable property held by the national, provincial or local government is not available under the following circumstances:"

It is suggested that the words "and" be inserted between the words "available" and "under" in the second line: it will clarify the meaning of the clause, i.e.:



"The power referred to in subsection (1) may only be exercised if suitable property held by the national, provincial or local government is not available and under the following circumstances."

3.23.2 *"Subsections 22(2)(b)"* (Pages 18 and 19)

It should be mandatory that an application for a court order authorising an urgent expropriation be served on the owner or holder of a right in the property concerned.

3.23.3 *"Subsections 22(4)"* (Page 19)

It is stated that an owner or a holder whose right in property has been taken is entitled to just and equitable compensation "*as calculated, determined and paid*" in terms of the Bill. It will be difficult, if not impossible, to apply the provisions of the Bill relating to the determination and payment of compensation for other expropriations to the taking of a right to use property temporarily. The procedure to be followed for the determination of compensation in the case of a taking under section 22 should be set specifically in section 22.

"CHAPTER 7 – RELATED MATTERS"

3.24 **"Section 24 - Service and publication of documents and language used therein" (Pages 20 and 21)**

"Subsection 24(2)(b)" (Page 20)

There should be an obligation on the expropriating authority to take all reasonable steps necessary to maintain the displayed notice for a reasonable period.

3.25 **"Section 25 – Extension of time" (page 21)**

The Bill contains numerous time limits regulating the expropriation process. Although the inclusion of time limits is supported, it might not always be possible for the claimant or the expropriating authority to adhere to them. It is suggested that a clause be inserted in the Bill permitting the parties to agree to an extension of any time limit, even after the time limit has expired. Failing such agreement, any party should be entitled to apply to court for an extension of the time limit, which the court may grant if it is just and equitable to do so.

The South African Institute of Valuers

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4. The SAIV fully supports the spirit of this expropriation bill which includes the relevant administrative requirements and constitutional provisions. It may go some way in addressing the burning issues already found with the state's land transformation program, and also ensure more due diligence in respect of professional valuations

5. The opportunity to have made a contribution is greatly appreciated. Should you have any enquiries in respect of our submission or require further assistance in this respect please do not hesitate to call on us. We will gladly oblige

Yours sincerely



J.F. du Toit

On behalf of

The South African Institute of Valuers

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