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NEGOTIATING MANDATE

To: Hon ER Makua
Acting Chairperson of the Select Committee on Economic
and Business Development

Name of Bill: Expropriation Bill

Number of Bill: [B 4B-2015]

Date of deliberation: 25 April 2016

Vote of Legislature: The Standing Committee on Transport and Public Works
reports that it confers on the Western Cape's Permanent
Delegate in the NCOP the authority to support the Bill
with the attached proposed amendments.

Signature

Date

Hon. L Max
Chairperson: Standing Committee on Transport and Public Works

(Negotiating mandate stage) Report of the Standing Committee on Transport and Public Works on the *Expropriation Bill* [B 4B–2015] (NCOP), dated 22 April 2016, as follows:

The Standing Committee on Transport and Public Works, having considered the subject of the *Expropriation Bill* [B 4B–2015] (NCOP) referred to the Committee in terms of Standing Rule 220, confers on the Western Cape’s delegation in the NCOP the authority to support the Bill subject to the following proposed amendments:

1. Definitions

- 1.1 The term “legal disability” is an ambiguous term, which raises issues of interpretation.
- 1.2 Clause 25(4) (b) expressly states that property is not limited to land but does not give a precise definition. This definition is arguably too broad and creates a great deal of uncertainty as to what the state may expropriate. From the wording of clause 25 it is arguable that only land and natural resources can be expropriated in the ‘public interest’ while expropriation for a ‘public purpose’ is an internationally accepted category and includes expropriations where the state needs to build roads, dams, electrical power lines etc. It is submitted that if there is certain property that is not subject to expropriation, then such property must be expressly stated so as to avoid uncertainty and the repercussions this will have for investment in our economy.

An alternate definition should be as follows:

“**property**” for the purposes of this Act shall be limited to; any land; any interest in land; immovable real rights in land including the right of a lessee of the land but shall exclude intangible commercial interests, including, but not limited to securities as defined in the Financial Markets Act 19 of 2013, shares as defined by the Companies Act 71 of 2008, contractual rights such as revenue sharing contracts, concession and other similar contracts, intellectual property rights such as copyrights, patents, trademarks, trade and business secrets, any rights conferred by law to conduct economic and commercial activities including licenses, permits and authorisations.

- 1.3 The definition of “**valuer**” only relates to the valuation of land, however the Bill provides for expropriation of property other than land. In instances where other forms of property are expropriated, the Bill does not clarify who will value such property. The definition should be expanded to include the valuation of property which does not relate to land. Furthermore, this definition makes no mention of the Office of the Valuer-General which is in the process of being created following the passing of the Property Valuation Act (17 of 2014) last year. The purpose of this office is to determine the value of property, yet there is no mention of it in the Bill.
- 1.4 The definition for “**expropriation**” is too vague and should be defined as in section 25(2) & (3) of the Constitution of the Republic of South Africa, 1996.

2. Clause 3(2)

The Minister may be satisfied that the particular property is required, but there are other factors that the Minister may need to take into account such as the current use of the property and the people living on the land. These are factors that should be considered before a decision to expropriate is taken. Therefore it is submitted that the wording should state “may” instead of “shall” or “must”. The fact that the organ of state requires the property is simply not enough to go ahead with the expropriation, other factors have to be taken into account.

3. Subclause 5(7)

Subclause 5(2) empowers an expropriating authority to allow a person with necessary skills to enter upon a property to, *inter alia*, survey and dig or bore on or into the land. Subclause 7 provides for repairs or compensation for any damages that occur as a result. However, it does not specify the standard of repair work or the level of compensation. It is submitted that this should be clarified in the Bill.

4. Clause 7

4.1 Subclause 7(2)(h)

This subclause provides that the owner and holder of a right will be obligated in the notice of intention to expropriate to deliver in writing to the expropriating authority within 30 days certain information which must include a written statement stipulating the amount claimed by him or her as just and equitable compensation. Subclause 7(4) similarly obligates a holder of an unregistered right in the property concerned. The response to the expropriating authority is complex in nature and requires detailed information which the owner or holder will have to obtain. The 30 days as provided for is inadequate. It is submitted that more time is afforded to the owner and the holder within which to respond to the expropriating authority.

4.2 Subclause 7(5)

The Bill should include a clause requiring the expropriating authority to provide notice of receipt of any objections/submission. Furthermore, in the interests of reasonableness, fairness and administrative justice, should the expropriating authority decide to go-ahead with the expropriation after considering any objections and submissions, the expropriating authority should provide affected persons with reasons for rejecting their objections.

4.3. Subclause 7(7)

This subclause provides that if no agreement on the amount of compensation has been reached within 40 days of receiving the owner or holder’s response in subclause 7(4), the expropriating authority must decide whether or not to proceed with the expropriation. Subclause 7(7)(b) provides that this decision must be communicated by the expropriating authority by notice to the owner or holder within a reasonable time. Up until this stage of the expropriation process, the owner or the holder has been negotiating the amount of compensation that should be paid. Whether the expropriating authority continues (or not) with the expropriation will only be revealed to the owner or the holder “within a reasonable time”. It is submitted that the owner

or the holder will be in limbo until receipt of the notice and will be unable to deal with his or her property. What constitutes a reasonable time is unclear and it is submitted that an express period is provided for in subclause 7(7)(b).

5. Clause 8

5.1 Subclause 8(3)(b)

It is important that there is certainty as to what portion of land is being expropriated or the position of the right in land.

5.2. Subclause 8(3)(e)&(f)

The Bill does not give expropriating authorities any guidance regarding the appropriate timeframe for the transfer of ownership and possession, thus vesting them with unilateral and unfettered discretion to make this crucial determination. It is submitted that this should be clarified in the Bill.

5.3. Subclause 8(4)(b) & (c)

It is submitted that the Bill should clarify as to what portion of land is being expropriated or the position of the right in land.

6. Clause 9

6.1 Subclause 9(1)(a)

This subclause provides that ownership of the expropriated property vests in the expropriating authority on the date of expropriation contained in the expropriation notice. The date on which compensation is paid to the expropriated owner may be after the date of expropriation. The Bill thus allows an expropriating authority to potentially take up ownership before paying any form of compensation at all. This places great pressure on the expropriated owner to accept the compensation offered by the state rather than have it decided by a court.

6.2 Subclause 9(1)(d)

Rationale as used for subclause9(1)(a).

6.3 Subclause 9(2)(a)

This subclause provides two options for the transfer of possession, either on the date provided in the notice of expropriation or on a date agreed to between the expropriating authority and the expropriated owner/holder. This implies that where there is no agreed date for transfer of possession, then the date stipulated in the notice of expropriation applies. This is in conflict with section 26(3) of the Constitution.

6.4 Subclause 9(3)(a)&(b)

These subclauses impose an arguably unreasonable burden upon the expropriated owner/holder and could result in them being expected to do more than they had been doing prior to the expropriation process commencing.

6.5 Subclause 9(3)(c) and 9 (5)

When interpreting these two provisions they appear to contradict one another. Subclause 9(3)(c) states that the expropriated owner/holder will be compensated for costs incurred in respect of care and maintenance following the date of expropriation. However, subclause 9(5) states that the expropriated owner/holder remains responsible for the payment of municipal property rates and other charges, if applicable, and normal operating costs and maintenance in respect of the expropriated property. It is submitted that this should be clarified in the Bill.

7. Subclause 12(1)

The difficulty with this subclause is that it leaves the power to determine market value in the hands of the expropriating authority, however, there is no guarantee that they are equipped and skilled to fairly determine the market value.

8. Subclause 17(1)

Many expropriated owners/holders may require payment of their compensation before they are able to find suitable alternative accommodation. In instances where agreement has been reached with regard to compensation at the time of expropriation and before the date on which possession transfers, it may be more appropriate for compensation to be paid at an earlier stage so as to provide the expropriated owner/holder with the opportunity to secure suitable alternative accommodation prior to the date on which possession of the expropriated property transfers to the expropriating authority.

9. Clause 18

9.1 Subclause 18(1)

This subclause provides that where expropriated property is encumbered by a mortgage bond or subject to a deed of sale the owner of the property and any financial institution or buyer in question will have to reach an agreement between them as to how the compensation will be paid out. Owners of land which is expropriated will not necessarily be compensated at market value and thus, where there is a mortgage bond over the property being expropriated, the compensation paid by the state might not only be less than the market value, but may fall below the amount owed to a bank or other financial institution in terms of the mortgage bond. This places banks and property owners in a very difficult position where loans cannot be seen as properly secured. Furthermore, expropriated owners may then be left without a house and still having to pay financial institutions for the outstanding amount owed.

9.2 Subclause 18(2)

This creates an extra administrative hindrance to the expropriated holder.

10. Clause 21

In the event where an owner of the property is opposed to the expropriation of the said property and is not financially empowered to approach a competent court to oppose the expropriation, the State should provide the necessary and reasonable funds.

11. Clause 22

11.1 This clause deals with urgent expropriation. It is unclear when the expropriating authority will be entitled to take possession of the property under the circumstances envisaged in this clause. It is submitted that express provision is made in this clause on which date the expropriating authority may take possession of the property.

11.2 Clause 22(5)

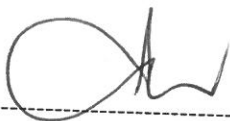
There must be a specific timeframe outlining the time period for payment, as it is currently worded the expropriated owner could be financially prejudiced.

11.3 Clause 22(6)

The degree of repair must be outlined in the subclause as this could lead to a situation where the damaged property is repaired with sub-standard materials.

12. Clause 28

It is submitted that the making of regulations by the Minister is an administrative act which is subject to the Promotion of Administrative Justice Act, 2000, and the regulations made thereunder. It is submitted that the period within which comments may be submitted on draft regulations is substituted with at least 30 days.



ADV LH MAX

CHAIRPERSON: STANDING COMMITTEE ON TRANSPORT AND PUBLIC WORKS

DATE: 22/04/16