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**CONTENT ADVISORY NOTE**

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| **Committee** : Select Committee on Transport, Public Service and Administration,   Public Works and Infrastructure  **Content Advisor**  : Dr Anneke Clark  **Meeting Date** : 22 February 2023 |

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| **Part b**  **PRESENTATION BY THE DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE ON THE Expropriation Bill [B23B – 2020]** |
| 1. **APPLICABLE LEGAL FRAMEWORK**     1. Section 25 of the Constitution   *(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*  *(2) Property may be expropriated only in terms of law of general application:-*  *(a) for a public purpose or in the public interest; and*  *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*  *(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:-*  *(a) the current use of the property;*  *(b) the history of the acquisition and use of the property;*  *(c) the market value of the property;*  *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*  *(e) the purpose of the expropriation.*  *(4) For the purposes of this section:-*  *(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and*  *(b) property is not limited to land.*  *(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*   * 1. As part of theSocio – Economic Impact Assessment (SEIA) on the Bill, the Department of Public Works and Infrastructure (DPWI) undertook an assessment of other laws or regulations linked to the Bill and indicates that no conflicts were identified in respect of applicable laws and regulations. These includes, amongst other, * Section 42E of the Restitution of Land Rights Act 22 of 1994, which empowers the Minister of Rural Development and Land Reform to expropriate land. * Section 49 of the National Forests Act 84 of 1998, which empowers the Minister responsible for forests, to expropriate land. |
| 1. **Problem Statement and Objects**     1. The Socio – Economic Impact Assessment indicates that the Bill is intended to empower the State to effectively remove institutionalised socio-economic barriers [emphasis added] to access property and natural resources. The removal of the socio-economic barriers alluded is said to require a special measure such as the Expropriation Bill, 2019 to grant the state extraordinary authority to compulsorily take immovable property from persons and corporations for use in the public interest. The public interest in the main refers to land and water reforms, the creation of a sustainable environment and sustainable human settlements. The Bill is further said to enable South Africans to access property and natural resources on an equitable and fair footing.    2. The Bill intends to repeal the Expropriation Act, 1995 and as part of the SEIA of the Bill, the Department puts forward that the legal regime had discriminated unfairly against black South Africans prior to 1994. This unfair discrimination hindered blacks from participating equally with their white compatriots in the economy. The Expropriation Act, 1975 is one of the legion of discriminatory legislative measures that were applied by the then governments to dispossess black South Africans of their properties and thereby reduce them to penury by denying them compensation or fair compensation, if at all.    3. The aim of the Expropriation Bill, 2019 is to foster a uniform expropriation dispensation for organs of state in the three spheres of government. This will be achieved through the reinforcement of the principles of co-operative government and intergovernmental relations and the introduction of an expropriation register. |
| 1. **OVERVIEW OF THE Bill**     1. In its Memorandum on the Bill, dated 9 February 2023, Counsel for DPWI provides important points of clarifications. It is clarified that the Bill governs only administrative and judicial expropriations and not expropriations that could occur by enacting legislation namely the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996). Administrative decisions to expropriate property, such as through the Bill, are subject to administrative law requiring procedural fairness, reasonableness and lawfulness as follows:   i. Decisions must be procedurally fair and rational. People whose rights might be affected by a decision should be heard before the decision is taken. And their representations should be considered during the decision-making process.  ii. Decisions must be reasonable, taking into account all relevant factors and considering all affected interests to reach an outcome.  iii. Lastly, decisions must be authorised by law of general application. An expropriating authority may not, for instance, expropriate property for a purpose not authorised by the legislation that gives it the power to take private property.   * 1. In its memo, Counsel for DPWI further clarifies that the Bill empowers the Minister responsible for public works to expropriate property for public works-related purposes (i.e. for the provision and management of the accommodation and land and infrastructure needs of an organ of state as set out in Clause 3 of the Bill). The Bill does not vest powers of expropriation on other expropriating authorities (i.e. Ministers and Municipalities), which must derive those powers from their own governing legislation. A useful example is given - if an MEC for Education wanted to expropriate land for a public school, the power to do so would need to be sourced in legislation on education, while the mechanism for exercising that power will be in the Bill.   **clause 1: definitions**  Key Definitions  **‘‘expropriating authority’’** means an organ of state or person empowered by this Act or any other legislation to expropriate property or to bring about the compulsory acquisition of property contemplated in section 2(3) for a public purpose or in the public interest;  **‘‘expropriation’’** means the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority, or an organ of state upon request to an expropriating authority, and ‘‘expropriate’’ has a corresponding meaning;  **‘‘public interest’’** includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources in order to redress the results of past racial discriminatory laws or practices;  **‘‘public purpose’’** includes any purposes connected to the administration of any law by an organ of state, in terms of which the property concerned will be used by or for the benefit of the public;  **CLAUSE 2: Application of Act**  These clauses cover the purpose and application of the Bill and key provisions are as follows:  Clause 2  *2. (1) Despite the provisions of any law to the contrary, an expropriating authority may not expropriate property or cause it to be acquired under subsection (3) arbitrarily or for a purpose other than a public purpose or in the public interest.*  *(2) Subject to section 20, a power to expropriate property may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or holder of a right in property for the acquisition thereof on reasonable terms.*  *(3) An expropriating authority may expropriate property in terms of a power conferred on it by law of general application and in accordance with sections 5 to 25 and 28.*  *(4) The power to expropriate includes the power to acquire a right to use property temporarily*.  CLAUSE 3 – 4: POWERS OF MINISTER TO EXPROPRIATE  These clauses cover the powers of the minister to expropriate and delegation or assignment of Minister’s powers and duties.  cLAUSE 3(1) to 3(3)  *3****.*** *(1) Subject to the provisions of Chapter 5, the Minister may expropriate property for a public purpose or in the public interest.*  *(2) The Minister may expropriate property on behalf of an organ of state, which has been established by or under any law but is not an expropriating authority, if—*  *(a) the member of the executive responsible for the administration of that law requests the Minister to do so in writing; and*  *(b) the Minister is satisfied that the organ of state requires the property for a public purpose or in the public interest.*  *(3) The Minister’s power to expropriate property in terms of subsections (1) and (2) includes the power to expropriate property to be used for the provision and management of the accommodation and land and infrastructure needs of an organ of state.*  **Clause 5 to 6: INVESTIGATION AND VALUATION OF PROPERTY**  These clauses cover investigation and gathering of information for purposes of expropriation and Consultation with municipality during investigation.  *Clause 5 (1) and (2)*  *5. (1) The expropriating authority must consider all relevant factors when deciding whether to expropriate property and must ascertain—*  *(a) the suitability of the property for the required purpose;*  *(b) the existence of registered and unregistered rights in the property; and*  *(c) facts relevant to calculating an amount of compensation that accords with section 12 and formulate an offer of just and equitable compensation for each person, who would be affected if the property were expropriated.*  *(2) Subject to subsection (3), if the property is land, an expropriating authority may authorise in writing—*  *(a) a person with the necessary skills or expertise, for the purposes of subsection 1(a), to—*  *(i) enter upon the property with the necessary workers, equipment and vehicles at all reasonable times or as may be agreed to by the owner or occupier of the property;*  *(ii) survey and determine the area and levels of the land;*  *(iii) dig or bore on or into the land; (iv) construct and maintain a measuring weir in any river or stream;*  *(v) insofar as it may be necessary to gain access to the property, enter upon and go across another property with the necessary workers, equipment and vehicles; and*  *(vi) demarcate the boundaries of the property required for the said purpose; and*  *(b) a valuer to enter upon the land and any building on such land and to do the necessary inspections and investigations for the purpose of valuing it.*  *Clause 5(7)*  *5(7) If the property in question is damaged through an act contemplated in subsection (2), an affected person may deliver written demand to the expropriating authority and the expropriating authority must repair the damage to a reasonable standard or compensate for the damage without undue delay.*  **CLAUSE 7 to 8: to INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY**  These clauses cover the notice of intention to expropriate, notice of expropriation, vesting and possession of expropriated property, Verification of unregistered rights in expropriated property, Consequences of expropriation of unregistered rights and duties of expropriating authority  *Clause 7(1) and 7(2)*  *7. (1) If an expropriating authority intends to expropriate property, it must—*  *(a) serve a notice of intention to expropriate on the owner, mortgagee and holder of a right known to it at the time; and*  *(b) publish the notice of intention to expropriate under section 22(2).*  *(2) A notice of intention to expropriate must include –*  *(a) a statement of the intention to expropriate the property;*  *(b) a full description of the property;*  *(c) a short description of the purpose for which the property is required;*  *(d) the address at which documents detailing the purpose of the expropriation may be inspected and at which particulars of the purpose may be obtained during business hours;*  *(e)the reason for the intended expropriation of that particular property;*  *(f) the intended future date of expropriation and, where the expropriation is for temporary use of the property in the future, the intended period of such temporary use;*  *(g) the future date on which the expropriating authority intends to take possession of the property;*  *(h) an invitation to any person who may be affected by the intended expropriation to lodge with the expropriating authority within 30 days after the publication of the said notice—  (i) any objections to the intended expropriation;*  *(ii) any submissions relating to the intended expropriation;*  *(iii) a postal address, email address or facsimile number for the expropriating authority to communicate with that person; and*  *(iv) the preference of official language for further written communication;*  *(i) the names of the recipients of the notice and their interest in the property;*  *(j) a directive to the owner, mortgagee and a holder of a right contemplated in subsection (1)(a) to deliver, within 30 days of service of the notice, a written list of the names and addresses of any holders of rights, other than those listed, and particulars of those rights of which the recipient is aware;*  *(k) an offer of compensation which the expropriating authority considers just and equitable and an explanation of how the amount was arrived at with reference to supporting information;*  *(l) a statement that the expropriating authority may adjust the amount of compensation under sections 10 and 11, if a holder of a right, of whom the expropriating authority had no prior knowledge, later claims compensation; and*  *(m) a statement drawing attention to sections 14, 19, 23 and 25.*  *Clause 8(4) and (5)*  *8(4) The notice of expropriation served in terms of subsection (1) must be accompanied by documents detailing the following:*  *(a) The date or dates on which the expropriating authority proposes to pay the compensation and any interest payable in respect thereof in terms of section 13;*  *(b) where the expropriation applies to a portion of a land parcel, a survey diagram or sketch plan showing the approximate position of such portion in relation to the whole;*  *(c) where the expropriation applies to a right in land, a survey diagram or sketch plan on which the approximate position of the right in land on such land is indicated, unless the right in land is accurately described without such survey diagram or sketch plan;*  *(d) an explanation of how the amount of compensation was arrived at, together with supporting documents;*  *(e) a statement that the expropriating authority may adjust the amount of compensation, if a holder of a right, of whom the expropriating authority had no prior knowledge before the compensation was agreed on or approved or decided by a court, later claims compensation; and (f) a statement drawing the attention of the expropriated owner, expropriated holder or any other affected person to the provisions of section 25.*  *(5) If the property expropriated is land—*  *(a) the expropriated owner must deliver or cause to be delivered to the expropriating authority, subject to section 23, within 30 days of the expropriating authority requesting the title deed to such land or, if it is not in his or her possession or under his or her control, written particulars of the name and address of the person in whose possession or under whose control the title deed is; and*  *(b) the person referred to in paragraph (a) in whose possession the title deed may be, must deliver or cause to be delivered the title deed in question to the expropriating authority within 20 days of the expropriating authority requesting it, subject to section 23.*  CLAUSE 12 – 18: COMPENSATION FOR EXPROPRIATION  The clauses cover the determination of compensation, interest on compensation, request for particulars, payment of compensation, Property subject to mortgage or deed of sale, Payment of municipal property rates, taxes and other charges out of compensation money and deposit of compensation money with Master.  *Clause 12*  *12. (1) The amount of compensation 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—*  *(a) the current use of the property;*  *(b) the history of the acquisition and use of the property;*  *(c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*  *(e) the purpose of the expropriation.*  *(2) In determining the amount of compensation to be paid in terms of this Act, the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take account of—*  *(a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;*  *(b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;*  *(c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;*  *(d) improvements made to the property in question after the date on which the notice of expropriation was served upon the expropriated owner or expropriated holder, as the case may be, except where the improvements were agreed to in advance by the expropriating authority or where they were undertaken in pursuance of obligations entered into before the date of expropriation;*  *(e) anything done with the object of obtaining compensation therefor; and*  *(f) any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated.*  *(3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—*  *(a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;*  *(b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;*  *(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;*  *(d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and*  *(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.*  *(4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.*  *(5) If the property is land, the expropriating authority must consider the amount of outstanding municipal property rates, taxes, levies and charges relating to the property when making an offer of just and equitable compensation.*  Potential Question: During the DPWI stakeholder consultation on the Bill, the issue was raised that the Bill will deter investors and the DPWI response was that there is no empirical evidence to support this observation. Has research been undertaken specifically on the impact of expropriation without compensation in those circumstances listed in Clause 12(3)(a) of the Bill. For ease of reference those circumstances are as follows:  *(a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;*    Potential Question: The Constitutional 18th Amendment Bill, which proposed the amendment to the Constitution to make explicit provision for expropriation without compensation, did not pass in the National Assembly. Is Clause 12(3) of the Bill, which attempts to introduce an equivalent provision not in conflict with the Constitution?  Potential Question: Is there precedent where South African Courts have found it just and equitable for nil compensation to be awarded in instances of expropriation? Can the Department provide the relevant case law.  *Clause 14*  *14. (1) The owner, mortgagee and holder of a right may request the expropriating authority, in writing, to provide reasonable particulars about the offer of compensation and particulars so requested must be furnished within 20 days of such request.*  *Clause 15(1) to (3)*  *15. (1) Subject to sections 16, 17 and 18, an expropriated owner or expropriated holder is entitled to payment of compensation by no later than the date on which the right to possession passes to the expropriating authority in terms of section 9(2) or (4)*  *(2) The payment, utilisation or deposit of any amount contemplated in sections 16, 17 and 18 does not preclude the determination of an amount by agreement or by a court: Provided that where the amount so determined is less than the amount paid, the difference must be refunded to the expropriating authority together with interest at the rate contemplated in section 13 from the date on which the amount was so paid, utilised or deposited.*  *(3) Any delay in payment of compensation to the expropriated owner or expropriated holder by virtue of subsection (2) or any other dispute arising will not prevent the passing of the right to possession to the expropriating authority in terms of section 9(2) or (4), unless a court orders otherwise.*  Potential Question: In terms of Clause 15(3) possession of property will still pass to the state even where the payment of the compensation has not yet taken place. What incentives would there be for the state to promptly pay the compensation if it can have make use of the property even before such compensation is paid?  *Clause 17 (1)*  *17. (1) The expropriating authority must pay outstanding municipal rates, taxes, levies and other charges out of the compensation money. 15 5 10 15 20 25 30 35 40 45 50 55 (2) If land which has been expropriated is subject to the charges contemplated in subsection (1), the municipal manager must, within 30 days of receipt of a copy of the notice of expropriation in terms of section 8(2)(c)(i), inform the expropriating authority in writing of such charges, as at the date contemplated in section 9(2) or (4), unless the expropriating authority is the municipal council of the municipality where the land is situated.*  **CLAUSE 19: MEDIATION AND DETERMINATION BY COURT**  *Clause 19 (1)*  *19. (1) If the expropriating authority and a disputing party do not agree on the amount of compensation, they may attempt to settle the dispute by mediation, which must be initiated and finalised without undue delay by either party. 16 5 10 15 20 25 30 35 40 45 50 55*  *(2) If the expropriating authority and disputing party do not settle the dispute by consensus or mediation, either party may, within 180 days of the date of the notice of expropriation, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation.*  *(3) The disputing party may, instead of instituting such proceedings himself or herself, within 90 days of the date of the notice of expropriation request the expropriating authority, in writing, to institute such proceedings and the expropriating authority must institute such proceedings within 180 days of receiving such request.*  *(4) A court may extend the time periods in subsections (2) and (3) on good cause shown and if the interests of justice so require. (5) The onus or burden of proof is not affected by whether it is the expropriating authority or the disputing party which institutes the proceedings referred to in this section.*  **CLAUSE 20 - URGENT EXPROPRIATION**  *Clause 20(1)*  *20. (1) An expropriating authority may, if a property is required on an urgent basis, exercise a right to use property temporarily for so long as it is urgently required for a period not exceeding 12 months.*  *(2) 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: (a) In the case of a disaster as defined in the Disaster Management Act, 2002 (Act No. 57 of 2002); or*  *(b) where a court grants an order that an expropriating authority is entitled to use the provisions of this section due to—*  *(i) urgent and exceptional circumstances that justify action under subsection (1);*  *(ii) real and imminent danger to human life or substantial injury or damage to property; or*  *(iii) any other ground which in the view of the court justifies action under subsection (1).*  Potential Question: Clause 20(1) permits urgent expropriation only where “*suitable property held by the national, provincial or local government is not available”.* Placing a similar requirement before the Minister can expropriate under Clause 3 (ordinary expropriation) of the Bill could provide a safeguard and requires government to ensure that it first fully explores its own property portfolio before expropriation is explored.  **CLAUSE 21 : WITHDRAWAL OF EXPROPRIATION**  The clause covers withdrawal of expropriation.  *21. (1) (a) Notwithstanding anything to the contrary contained in any law, the expropriating authority may withdraw any expropriation from a date mentioned in a notice of withdrawal, if the withdrawal of that expropriation is in the public interest, or the reason for which the property was expropriated is no longer applicable.*  **Clauses 22 – 25 RELATED MATTERS**  The clauses cover service and publication of documents and language used therein, extension of time, expropriation register, offences and fines, , Regulations, legal documents and steps valid under certain circumstances, Interpretation of other laws dealing with expropriation, repeal, transitional arrangements and savings and short title and commencement.  *Clause 22 (1) to (2)*  *22. (1) Whenever a notice in terms of sections 7(1), 8(1),11(2) or 17(3)(a) or a notice of withdrawal in terms of section 21(1)(b) is required to be served in terms of this Act, the original or a certified copy thereof must—*  *(a) be delivered or tendered to the addressee personally at his or her residential address, place of work, place of business or at such address or place as the expropriating authority and the addressee may, in writing, agree upon;*  *(b) be posted by pre-paid registered post to the postal address of the addressee; (c) be published in the manner contemplated in subsection (2)—*  *(i) if the whereabouts of the person concerned are unknown to the expropriating authority and is not readily ascertainable, after taking reasonable steps; or*  *(ii) in the case of fidei commissaries in respect of a property which is subject to a fidei commissum and it is not known to the expropriating authority who all the fidei commissaries are or will be; or*  *(d) if none of the modes of service set out in paragraphs (a) to (c) is practicable under the circumstances, be served in accordance with such directions as the court, on application, may direct.*  *(2) Whenever publication of a notice in terms of section 7(1) or (6)(b)(ii), a notice of expropriation or other document is required by this Act, publication must take place—*  *(a) in English and in any other official language commonly used in the area where the property is situated, once in the Gazette and, simultaneously therewith or not more than one week thereafter, once in two widely circulated and accessible newspapers of different languages circulating in the area in which the property is situated;*  *(b) if the property is land, by the display of the notice in the languages referred to in paragraph (a), on such land in a conspicuous place, from not later than the date of publication in the Gazette contemplated in paragraph (a); and*  *(c) if the expropriating authority deems it necessary in the circumstances, by the advertising in such languages as may be appropriate on television or radio, transmitting to the area where the property is situated in the languages commonly used in that area, the contents of the advertisement to adhere as closely as is practicable to the contents of the notice or document so advertised.*  *Clause 25(5)*  *25(5) A person who wilfully furnishes false or misleading information in any written instrument which he or she by virtue of this Act delivers or causes to be delivered to an expropriating authority, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three years.* |