



# **SC Transport, Public Service and Administration, Public Works and Infrastructure**

**27 September 2023**

# EXPROPRIATION BILL

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[B23B - 2020]

# ABOUT *FOR SA*

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# ARENAS FOR SA WORKS IN



Before Government:  
(draft) policies.

Before Parliament:  
(draft) legislation.

Before the Chapter 9s:  
investigations, issues,  
cases.

Before the Courts (incl.  
ConCourt):  
either as principal  
party, or *amicus curiae*.

# RELIGIOUS FREEDOM

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# THE CONSTITUTION

- **Sec 15 of the Constitution: Freedom of Religion, Belief and Opinion** (“religious freedom”)
  1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
  
- **Sec 31 of the Constitution: Cultural, Religious and Linguistic Communities** (“religious communities’ rights”)
  1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
    - a. to enjoy their culture, practise their religion and use their language; and
    - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

# CONSTITUTIONAL CONSIDERATIONS

- The **State has a duty to respect and protect** the religious convictions and beliefs of those believers who choose to meet together to practise their faith:
  - Sec 7(2) of the Constitution requires the State to **respect, protect, promote and fulfil (all) the rights in the Bill of Rights.**
  - Sec 8(1) of the Constitution states that the **Bill of Rights applies to all laws** and binds the State, including Parliament.
- **Religious communities can – and many do – own property and/or use property for religious purposes:**
  - I.e. property ownership and/or use is inextricably linked to exercising their religious freedom and religious communities' rights.
  - **Expropriation of property owned by religious communities and/or used for religious purposes** will have a severely detrimental **impact on the religious freedom and religious communities' rights** of that community – and even the public good.

# INTERNATIONAL LAW PROTECTION

- **Constitutional imperative to heed applicable international human rights law:**
  - Sec 39(1)(b) of the Constitution states that a court must consider international law when interpreting the Bill of Rights.
  - Sec 232 of the Constitution confirms that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
  - Sec 233 of the Constitution requires that every court, when interpreting any legislation, must prefer any reasonable interpretation that is consistent with international law.
- **Treaties and declarations protecting religious freedom:**
  - The African Charter on Human and People's Rights
  - The Universal Declaration of Human Rights
  - The International Covenant on Civil and Political Rights
  - Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief



# SYNOPSIS OF CONCERNS:

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## Procedural

# SUBSIDIARY LEGISLATION

- The **Constitution Eighteenth Amendment Bill** [B18-2021] – which attempted to amend sec 25 of the Constitution to allow expressly for expropriation without compensation (EWC) – was **rejected** by Parliament on 7 December 2021.
- This opens the Expropriation Bill to an **immediate constitutional challenge** because it **cannot circumvent the Constitution** by empowering the Minister of Public Works and Infrastructure to expropriate property for “nil compensation” – since this would be **against the rule of law (specifically, the principle of legality)**.
- **REQUEST:** Obtain a **declaratory order from the Constitutional Court** regarding whether “**nil compensation to be paid**” (i.e. **EWC**), as proposed in clauses 12(3) and (4) of the Bill, qualifies as “**just and equitable**” payment (i.e. **is constitutional**) as contemplated in sec 25(8) of the Constitution.

# SYNOPSIS OF CONCERNS:

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## Substantive

# DEFINITION OF PROPERTY

- **Definition of property (clause 1):**
  - Property is defined as “property contemplated in sec 25 of the Constitution” – and thus **overbroad** for the purposes of the Bill.
- According to sec 25(4)(b) of the Constitution, “property is not limited to land”:
  - Legal theorists suggest that **property means property rights** – i.e. the legal relationship to a thing (e.g. ownership, mortgage, lease, etc.).
  - This means, **all property** – from immovables to movables and intellectual – **theoretically falls within the ambit of the Bill** (i.e. can potentially be expropriated), which cannot be the intention of the legislature.
- Since the Expropriation Bill intends dealing with the expropriation of **immovable property (specifically land) and appropriate affected land-related property rights** – and not movable and intellectual property – the **definition of property must be corrected**.

# DEFINITION OF PUBLIC INTEREST

- **Definition of public interest (clause 1):**
  - Public interest is defined as “includ[ing] 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”.
- Vague terms **prevent legal certainty** and are **open to abuse**.
- The definition of public interest can be improved by aligning it to the **African Charter of Human and People’s Rights\*** (Banjul Charter) by requiring that any **land reform meets a public need**, as follows:
  - “public interest includes the nation’s commitment to land reform **to meet a public need**, 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”.

\* The Banjul Charter is international law that is binding on South Africa.

# EWC

- **Expropriation without compensation (EWC) (Clause 12(3)):**
  - Relates only to **land** expropriated in the **public interest**.
  - States that “it may be **just and equitable for nil compensation** to be paid where **land** is expropriated in the **public interest**”.
  - Includes an **open list** of criteria that must be considered before land may be expropriated without compensation.
  - Provides **no exceptions** for certain types of land (e.g. **land owned and/or used by religious communities for religious purposes**).
- Since Parliament rejected a Bill seeking to amend the Constitution to provide for EWC a little over a year and a half ago, it is **highly doubtful that clause 12(3) will be seen as reasonable** because it attempts to **legislate a constitutionally questionable provision (EWC) into law** without obtaining clarity from the Constitutional Court first.

# EWC

- EWC will not only affect property rights (sec 25 of the Constitution) but is also a **constitutionally unjustifiable limitation of religious freedom rights** (secs 15 and 31 of the Constitution).

- **CRITICAL QUESTION:**  
Is EWC of religious communities' property a reasonable and justifiable limitation on the right to religious freedom and religious communities' rights to own such property?



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# LIMITATIONS ANALYSIS

- **Sec 36 of the Constitution (limitations clause):**
  - According to sec 36(2) of the Constitution, **no law may limit any right entrenched in the Bill of Rights, except as provided in section 36(1)** or in any other provision of the Constitution.
  - In addition, sec 25(8) of the Constitution states that **any departure from the provisions of sec 25 must be in accordance with sec 36(1).**
  
- **Sec 36(1) of the Constitution (limitations analysis):**
  1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is **reasonable and justifiable** in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
    - a. the nature of the right;
    - b. the importance of the purpose of the limitation;
    - c. the nature and extent of the limitation;
    - d. **the relation between the limitation and its purpose;** and
    - e. **less restrictive means to achieve the purpose.**



# LIMITATIONS ANALYSIS

- **The relation between the limitation and its purpose:**
  - Findings of **The Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change** (HLP Report) regarding land reform:
    - “[P]olicy has shifted away from Constitutional imperatives such as equitable access to land, towards state ownership, which echoes apartheid-style notions of custodianship”.
    - “[L]and reform policy has drifted from its initial pro-poor focus to one marked by signs of elite capture. Implementation has also been dysfunctional”.
    - “[T]he need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform”.

# LIMITATIONS ANALYSIS

- **Insights from HLP Report regarding land reform:**
  - **Lack of funding is not the cause for the slow and failed pace of land reform** but rather a lack of political will, maladministration, corruption, and reverting back to Apartheid-style state stewardship and elite capture – meaning **EWC is the wrong remedy for the problem** (i.e. it will not provide a solution to the problem seeks to resolve and is likely to exacerbate existing socio-economic challenges and downgrade the South African economy even further).
  - **EWC is unlikely to meet the requirements of the sec 36 limitations test** because it **fails to meet the necessity of a relationship between the remedy and its purpose** (as required by sec 36(1)(d) of the Constitution) – meaning, it is **not a reasonable and justifiable limitation of religious freedom rights** (secs 15 and 31 of the Constitution).

# EWC

- **EWC as an order made by a court or arbitrator (Clause 12(4)):**
  - Provides that it is competent for a court or arbitrator to determine that nil compensation be paid “having regard to **all the relevant circumstances**” – yet “all relevant circumstances” are **neither defined nor linked to the list in clause 12(3)**.
  - For this reason, it is highly unlikely that clause 12(4) will pass constitutional muster considering both “rule of law” and “standard of reasonableness” concerns.

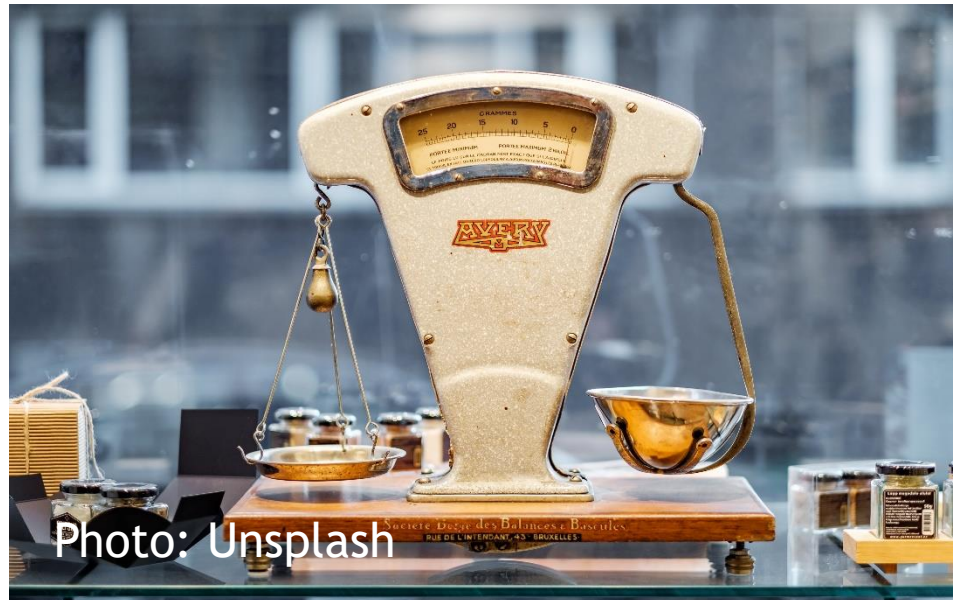


Photo: Unsplash

# URGENT EXPROPRIATION

- **Urgent Expropriation (Clause 20(1)):**
  - Clause 20(1) allows an expropriating authority to **temporarily use property it urgently requires for up to 18 months** (clause 20(1) read with clause 20(7)(c)), **subject to just and equitable compensation** being paid to the owner (clause 20(4)) – which **may be nil compensation** where land is concerned (clause 12(3)).
  - Clause 20(2) set outs the **circumstances** under which **urgent expropriation** may be done:
    - **A disaster in terms of the Disaster Management Act, 2002.**
    - Subject to a court order, in justifiably urgent and exceptional circumstances; or where there is real and imminent danger to human life or substantial injury or damage to property; or based on **any other ground** which in the view of the court justifies such action.

# URGENT EXPROPRIATION

- In light of both the:
  - **COVID-19 pandemic** which resulted in South Africa being in a **continual state of disaster from 15 March 2020 to 5 April 2022**; and
  - **Power supply difficulties experienced by Eskom**, which has resulted in South Africa again being in a **state of national disaster from 9 February to 5 April 2023**,

**FOR SA strongly objects to clause 20(2)(a) which allows for the expropriation of property without any judicial oversight.**

**Where a matter is of utter urgency, an urgent court order can be obtained.**

# RECOMMENDATIONS

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# RECOMMENDATIONS

- **Limit the definition of “property” in clause 1 to land and appropriate affected land-related property rights only.**
- **Align the definition of “public interest” in clause 1 with the Banjul Charter by including “to meet a public need”. I.e. that the definition reads as follows:**

“public interest includes the nation’s commitment to land reform **to meet a public need**, 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”.
- **Remove clause 12(3) (which provides for EWC), alternatively, provide a closed list of criteria for EWC in clause 12(3).**

# RECOMMENDATIONS

- **Remove clause 12(4) (which provides for EWC), alternatively, define what “all the relevant circumstances” means and/or link it to the list in clause 12(3).**
- **Insert a clause exempting land owned or used by religious communities, from expropriation. We propose the following wording:**

“Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of sections 12(3) and 12(4)”.
- **Remove clause 20(2)(a) (which provides for expropriation on an urgent basis), alternatively, expressly require judicial oversight in the exercise of clause 20(2)(a).**



# RECOMMENDATIONS

- That the Select Committee **approach the Constitutional Court for a declaratory order** regarding whether the “**nil compensation**” (i.e. EWC) as proposed in clauses 12(3) and 12(4) of the Bill, would qualify as “**just and equitable**” payment (i.e. **pass constitutional muster**) under sec 25(8) of the Constitution as it currently stands.



# QUESTIONS & ANSWERS

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Protecting and promoting  
freedom of religion in South Africa!

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