Ex parte

DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE

In re:

PUBLIC COMMENTS ON EXPROPRIATION BILL—DEPARTMENT'S INPUTS TO THE NATIONAL COUNCIL OF PROVINCES

ADVICE

Furnished to:

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INTRODUCTION

1. The NCOP's Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure (**Committee**) has invited the Department of Public Works and Infrastructure (**Department**) to give input on the public submissions concerning the Expropriation Bill [B23B—2020] (**Bill**).

2. The Department instructed Adv Budlender SC and me to help prepare its input to the Committee. Because of prior work commitments here and abroad, my leader has not had an opportunity to consider the public submissions or this memorandum before its submission to the Department. This memorandum of advice thus contains only my views, which are given subject to his further advice.

3. I have considered the Consolidated Submissions, helpfully summarised and tabulated by the Committee, the oral presentations made to the Committee on 27 September 2023 and 11 October 2023, and the written submissions provided.

4. My leader and I advised the Department on aspects of the Bill when it served before the National Assembly's Portfolio Committee on Public Works (**NA's Portfolio Committee**). The recent public submissions, to some degree, replicate the submissions that the NA's Portfolio Committee considered. I, therefore, refer the Department to our memoranda.

5. As discussed with the Department last week, this written advice will focus on new issues arising from the public submissions, which merit refinement or revision of aspects of the Bill. Owing to the length of the public submissions,[1] it has been impossible to respond to everything. I have, however, attempted to address common and recurring themes.

6. I advised that I would furnish my advice in two parts, owing to pressure of time. This is my supplemented advice.

[1] Over 230 pages in summarised format.

PUBLIC COMMENTS MERITING AMENDMENT

Counteroffers

7. The Committee Chairperson has raised a query about the absence of a provision in the Bill that would allow an owner or holder to make the expropriating authority a counteroffer on the amount of compensation, proposed in a notice of intention to expropriate.

8. The amount of compensation stated in the notice of intention to expropriate is the sum that expropriating authority considers just and equitable, as well as an explanation of its composition based on supporting information (clause 7(2)(k)).

9. As the Bill stands, the recipient of a notice of intention to expropriate can do one of three things: **(i)** accept the offer of compensation; **(ii)** ask for further particulars; or **(iii)** invoke the dispute resolution mechanisms—mediation or referral to court.

10. These three options do not cater for an affected person proposing, and reach agreement with the expropriating authority, on a different amount without having to declare a dispute under clause 19.

11. Allowing affected parties to make a substantiated counteroffer would facilitate engagement and consensus, potentially obviating the need for a mediator. But the Committee should be alerted to the potential downside of adjusting the mechanism.

12. *First*, introducing another step in the expropriation process will protract matters by the extent of the new prescribed timeframes.

13. *Secondly*, responding to a notice of intention to expropriate would not be the first time an owner or holder could reach agreement with an expropriating authority:

    13.1. Clause 2(2) requires an expropriating authority first to enter into good faith negotiations with an owner or holder to buy the property on reasonable terms.

This will be the first time an owner or holder engages with an expropriating authority, in terms of the Bill.

13.2. If an owner or holder is open, in principle, to selling its property to the expropriating authority, it can negotiate price and other terms. It would, in those negotiations, likely support its requested price based on credible information.

13.3. Expropriation will become a possibility only if the owner or holder: **(i)** is unwilling, to sell, regardless of price; or **(ii)** does not reach consensus with the expropriating authority on price.

13.4. So, the possibility of a counteroffer on proposed compensation in response to a notice of intention to expropriate would be the first time an owner or holder could engage with an expropriating authority *on the assumption that the property will be taken without consent*. But it would not necessarily be the first engagement between the parties on a purchase price.

14. *Thirdly*, an owner or holder is likely to base a counteroffer on perceived market value. This is but one element of several that must inform an offer of just and equitable compensation.

15. An owner or holder is less likely to weigh in the balance such factors the history of the acquisition of the property, the extent of direct state investment and subsidy and beneficial capital improvement of the property, and the purpose of the expropriation. This may be because of a lack of information or necessary skill. But the expropriating authority must consider these variables, along with all other relevant factors, and the valuer's report to arrive at a just and equitable figure.

16. Mediation can bring about agreement on the amount of compensation. But it will require the interposition of an intermediary to facilitate the settlement. If the Bill makes provision for a counteroffer mechanism, the parties will be left to their own devices. And if they do not agree, mediation or an approach to court will be the next step anyway.

17. Ultimately, whether to include further step in the expropriation process (the inclusion of a counteroffer mechanism), is a policy question for the Committee to decide. It will entail a substantial amendment.

18. If the Committee is so minded, clause 7(4)(a) could include the further option of making a counteroffer. And a separate clause (8?) could deal with the content of the counteroffer, for instance:

> 8(1) An owner, holder of a right or mortgagee/secured creditor who wishes to make a counteroffer for an amount of compensation, in terms of clause 7(4)(a)(iv?), must—
>
> (a) state the amount of compensation claimed;
>
> (b) furnish full particulars of how the amount has been arrived at, including any valuation reports;
>
> (c) if the property is land, furnish full particulars of any improvements to the land that, in their opinion, warrant an adjustment to the amount of compensation offered;
>
> (d) explain the effect of any unregistered rights, not already accounted for, on the amount of compensation offered, and furnish any written instruments evidencing those rights.
>
> (2) Subsection (1) applies to urgent expropriations under section 20.

Re: State inability to implement existing framework

19. Comments by the National Employers' Association of South Africa (**NEASA**) and by other members of the public online were that the Bill should signal a preference for an expropriating authority to use state-owned land over expropriating private property for the purpose in mind.

20. In some (but not all) cases, failure by an expropriating authority to consider acquisition or use of alternative land (including state-owned land) may result in a decision to expropriate being arbitrary and thus unlawful under the Bill.

21. The United Nations Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security state that, when expropriation is used as a tool for restitution or redistribution—

21.1. the process should be transparent and participatory (item 16.2);

21.2. consultations with affected persons should provide information '*regarding possible alternative approaches to achieve the public purpose*' (item 16.2); and

21.3. the potential effect on existing livelihoods, particularly of the poor and vulnerable must be considered sensitively, by avoiding or minimising the need for evictions (item 16.8).

22. While the Bill does not expressly provide for the items mentioned in paragraphs 21.2 and 21.3 above, where applicable, they would fall under relevant considerations.

23. Whether the Bill should expressly require an expropriating authority first to consider alternative state-owned land before expropriating is a policy choice for the Committee to make. The Bill already restricts the power of expropriation to instances when good faith negotiations to buy property have failed; if adopted, this preference (or requirement) would become a similar condition precedent on the power to expropriate.

Definition of '*deliver*', registered post and tension with clause 22

24. The Institute of Race Relations made oral submissions on the inappropriateness of registered post as means of communication. There is near unanimity across the written public submissions that, given the situation in which the South African Post Office finds itself, the Bill should not permit service of notices and delivery of other documents by registered post.

25. There is force in these concerns. The NCOP would do well to reconsider use of registered post as a prescribed method of service, given the prevailing circumstances.

26. Secondly, Agri South Africa and the Banking Association of South Africa (**BASA**) proposed that clause 22 provide for delivery by email. We supported this proposal when it was made to the NA's Portfolio Committee by other members of the public.

27. The repetition of the request, however, has highlighted a tension between the definition of '*deliver*' in clause 1 and the manner of deliver prescribed in clause 22.

27.1. The NA amended the definition of '*deliver*' to include delivery by email.

27.2. But doing so did not address clause 22, which prescribes the mode of delivery. The prescribed modes for delivering *notices* are personal delivery, registered post, publication in the *Gazette*, public display of notices, advertisements on television and radio, or any mode of service as a court may direct.

27.3. By stipulating specific means of delivery in clause 22, the Bill arguably *excludes* delivery by email inadvertently, despite the definition of '*deliver*' in clause 1. That is because definitions sections, traditionally, do not confer substantive rights, duties or powers.

27.4. Clause 22 should thus reflect the intention to include email expressly as a delivery option, where the affected person has nominated an email address for service.

27.5. Similarly, clause 22 requires delivery of *documents* to be to a postal, residential or other address by hand, fax or registered post. If a document is sent by fax, a confirmation copy must be sent by ordinary mail or '*another suitable method*' (which could include email). But email is not a prescribed option for delivery.

27.6. A similar adjustment to clause 22 should be made for delivery of notices by email, to be consistent with the intention behind the definition of 'deliver'.

Clause 2 and definition of '*expropriation*': exclusion of third-party transfers

28. BASA commented on third-party transfers in the public interest, for land reform purposes. It did so in relation to the definition of '*public interest*', but its comment points to a shortcoming in the Bill, about which we had advised the NA's Portfolio Committee. It bears repeating.

29. In *AgriSA*,[2] the majority of the Constitutional Court interpreted section 25(1) and (2) of the Constitution. It held that the differentiating factors between a mere deprivation of property and an expropriation of property are: '*(i) compulsory acquisition of rights in property by the state, (ii) for a public purpose or in the public interest, and (iii) subject to compensation.*'[3]

30. This means that, if the state *itself* does not acquire property by exercising its eminent domain power, the act will not be an expropriation. And if the act is not an expropriation, the Constitution does not guarantee compensation for it.

31. The Bill, therefore, must address the need to compensate persons affected by an expropriation, where an empowering provision permits the *transfer* of property directly to a third-party, non-state beneficiary in the public interest, instead of first being acquired by the state and then transferred.[4]

32. If empowering legislation were to do so—whether for land, water or related reform, to redress past racial discrimination—it would not trigger the compensation provisions under the Bill, as now formulated.[5] Parliament could not have intend that outcome.

33. We had proposed that, given the dictum in *AgriSA*, the Bill affords person affected by an expropriation a right to just and equitable compensation, if property is transferred to a non-state third-party without the expropriating authority itself acquiring it. This could become a mechanism for land reform.

34. Inclusion of a sub-clause in clause 2 (discussed below), which governs the application of the Bill, would fill this unintended gap. The NA did not accept our

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[2] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (***AgriSA***).

[3] At para 67. Emphasis added.

[4] Afrikanerbond is concerned about the risk of the state expropriating land for land reform purposes, but not transferring ownership within a limited time to the beneficiary. A direct transfer mechanism would eliminate any such risk.

[5] Section 42A(1) of the Restitution of Land Rights Act, 1994 currently provides:

> 'Where, in terms of this Act, land is acquired or expropriated in order to restore or award the land to a claimant, such land vests in the State, which must transfer it to the claimant.'

recommendation, but—in error—kept the cross-reference to the proposed insertion in the definition of '*expropriating authority*' (it still refers to '*section 2(3)*', which was our proposed insertion).

35. The proposed insertion was to this effect:

> 2(3) This Act applies, with the necessary changes, to the compulsory acquisition of property directly or indirectly by a third-party beneficiary through an expropriating authority in the public interest, including for the purposes contemplated in section 25(4) to (8) of the Constitution.

36. The definition of '*expropriating authority*' refers to '*bring[ing] about the compulsory acquisition of property contemplated in section 2(3)*'. This is a legacy reference to the proposed sub-clause, intended to make the Bill applicable to third-party transfers in the public interest. As the definition stands, the cross-reference to '*section 2(3)*' makes no sense.

37. For consistency, it would also be advisable for the definition of '*expropriation*' also to include third-party transfers through an expropriating authority in the public interest.

Definition of '*expropriation*', clause 2: constructive expropriation not expressly included

38. Organisations representing agriculture, Business Unity South Africa, the National Employers' Association of South Africa (**NEASA**), and BASA, among others, commented on a need for the Bill to address constructive or indirect expropriations.

39. Constructive expropriations have long been recognised in foreign jurisdictions. They occur when the state, through its regulation-making powers, restricts the use, enjoyment or exploitation of property, so that the effect is so disproportional as to warrant compensation. In those instances, the state does not acquire the property itself.[6]

[6] An example is in *Lucas v South Carolina Coastal Council* 505 US 1003 (1992), where regulatory action that deprived the owner of all economic use was found to be equivalent to a permanent physical invasion of property. The enquiry that the US Supreme Court undertook was heavily fact-dependent.

40. But a doctrine of constructive expropriation has not authoritatively been recognised in our law.

41. In the light of the *AgriSA dictum*, discussed from paragraph 29 above, a non-acquisitive act of deprivation by the state: **(i)** will not be an expropriation; and **(ii)** will not *require* compensation under section 25(2) and (3) of the Constitution.

42. The Supreme Court of Appeal has suggested that the door to recognising a doctrine of constructive expropriation in our law has not been closed.[7] But neither it nor the Constitutional Court has finally pronounced on the issue.[8]

43. The Constitutional Court in *AgriSA* held that, to determine whether the state has acquired property, there must be '*sufficient congruity*' but not '*exact correlation*' with the rights lost. It is thus likely that, in interpreting the Bill to achieve an equitable balance, courts will interpret '*acquisition*' creatively and incrementally, case-by-case.

44. There may thus be scope for some types of acquisitions, recognised as constructive expropriations in foreign law, to be recognised under the Bill. To give some examples—

    44.1. in *Manitoba Fisheries Ltd v The Queen*,[9] Canadian regulatory measures that deprived owners of fishing businesses and effectively transferred those rights to a crown-owned monopoly were held to be compensable; and

    44.2. the cancellation of a debt owed by the state to a private party might meet the definition of '*acquisition*', purposively interpreted, as much as the state would derive a benefit that substantially correlates with the debt lost.

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[7] *Minister of Water and Environmental Affairs and Another v Really Useful Investments 219 (Pty) Ltd and Another* 2017 (1) SA 505 (SCA) at fn 25.

[8] *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) at paras 6-9. The majority of. The Constitutional Court in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) at paras 65-66 expressed doubt about the applicability of the doctrine in our law, but did not decide the issue.

[9] 1979 SCR 101.

45. The Bill is designed to govern expropriations as envisaged in section 25 of the Constitution by the administration (and the judiciary, in the case of labour tenants). The Bill does not purport to regulate non-acquisitive deprivations.

46. That, however, does not prevent Parliament from enacting legislation that does provide for compensation for non-acquisitive deprivations in future, to confer greater statutory rights than what section 25(2)(b) of the Constitution guarantees. Section 34 of the Environment Conservation Act, 1989 contains such a provision.[10]

Definition of 'property': includes intangibles

47. Public submissions from various quarters were critical of the fact that intangible property could be expropriated under the Bill. Some framed their submission as a critique of the scope of the Bill, but it boils down to the ambit of '*property*', as defined.

48. The Bill has been designed to track the language of section 25 of the Constitution. The concepts of property and expropriation are inextricably linked. And the Constitution refers to property non-exhaustively: it includes but is not limited to land.

49. For the Bill to be consistent with section 25 of the Constitution, therefore, it should regulate expropriation of *all* types of constitutional property. That includes intangibles.

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[10] 34 of the Environment Conservation Act, 1989 provides:

'**Compensation for loss**

(1) If in terms of the provisions of this Act limitations are placed on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and the holder of a real right in, such land shall have a right to recover compensation from the Minister or competent authority concerned in respect of actual loss suffered by him consequent upon the application of such limitations.

(2) The amount so recoverable shall be determined by agreement entered into between such owner or holder of the real right and the Minister or competent authority, as the case may be, with the concurrence of the Minister of State Expenditure.

[Sub-s. (2) amended by s. 8 of Act 94 of 1993 (wef 7 July 1993).]

(3) In the absence of such agreement the amount so to be paid shall be determined by a court referred to in section 14 of the Expropriation Act, 1975 (Act 63 of 1975), and the provisions of that section and section 15 of that Act shall *mutatis mutandis* apply in determining such amount.'

50. The late Prof Van der Walt aptly observed that, with the increasing dephysicalisation of property, more intangible property is likely to be recognised as constitutional property. The Constitutional Court has also warned against adopting a categorical definition of constitutional property, an evolving concept.

51. It is thus advisable for the Bill to remain in step with that evolution by linking the meaning of '*property*' directly to section 25 of the Constitution. If it did not, it would leave an unregulated gap.

Definition of '*public interest*': broader than land reform

52. Section 25 of the Constitution refers to '*public interest*' in three senses: first as one of two conditions for the validity of an expropriation (the other being '*public purpose*'); secondly, as a consideration against which the individual interests of those affected by an expropriation must be counterbalanced, to determine compensation that is just and equitable; and thirdly, as a normative standard that underlies the constitutional commitment to transformation.

53. It is not so, as some of the public comments claim, that the public interest relates *only* to land reform. Section 25(4)(a) states that land reform is *included* under a broader notion of public interest. This necessarily means that public interest is a more expansive concept.

54. Further, as one of the twin requirements for a valid expropriation, the meaning of '*public interest*' in the Bill must have regard to the meaning of '*public purpose*', to which the Bill does ascribe an express meaning while section 25 of the Constitution does not.

55. Public purpose is non-exhaustively defined as: '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'. It means:

    55.1. The public purpose justifying expropriation of particular property is to be sourced in an empowering law.

55.2. The object of the expropriation is for the public at large to be able use the expropriated property directly, or that the property will be used indirectly for their benefit.[11]

56. The term '*public interest*' must mean something different from '*public purpose*' in the Bill. The public interest likely refers to the rationale for acquiring property not necessarily for the direct or indirect *use* by the public at large, but still in furtherance of a constitutionally sanctioned, socially beneficial objective.[12] Section 25 gives land, water, and reforms concerning all natural resources, designed to redress past racially discriminatory laws and practices, as examples.

57. The definition of '*public interest'* combines sections 25(4)(a) and 25(8) of the Constitution. The Minerals Council of South Africa considers omission of the provision in section 25(8) from the definition to be problematic.[13] But it not.

58. The Bill is legislation that seeks to regulate expropriations, which section 25 itself envisions and which is but one of many tools for bringing about the land, water and related reform contemplated in section 25(8). In defining '*public interest*' it is does not purport to go beyond section 25, to warrant justification under the general limitations clause. It deliberately stays faithful to the text of section 25 itself, to avoid a section 36 analysis.

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[11] Consider a highway, capable of direct use by all who can drive, and a public school, used by school-going children who have been admitted to it.

In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, the Supreme Court of Appeal found that expropriating property for effective security control and planning for an estate housing members of Cabinet was a '*public purpose*', as contemplated in the Expropriation Act, 1975.

[12] The mere fact that expropriation is for a third-party, non-state beneficiary does not necessarily exclude it from being a compulsory acquisition for a public purpose (as opposed to in the public interest). It would depend on the nature of the public function, if any, that the third-party beneficiary is performing. See *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) at para 15.

[13] Section 25(8) of the Constitution provides:

> 'No provision of this section may prevent the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).'

Clauses 2(4), 7(2) and 8(3): temporary use as expropriation

59. Public comments raise concern about temporary use being recognised as a form of expropriation outside of an emergency or urgent circumstances.

60. Clause 20 deals with urgent expropriations. It limits the right to use property, if needed urgently, to 12 months. It also allows an expropriating authority to agree with the owner or holder to extend the period of temporary use, or to ask a court to order an extension, so that the aggregate duration of use is increased to up to 18 months.

61. In contrast, clauses 7(2) and 8(3) empower an expropriating authority to use property temporarily, in non-urgent circumstances, but without any statutory limitations on the duration of use.

62. The Bill's failure to prescribe a maximum duration or any guidance for determining an appropriate duration of temporary use in non-urgent circumstances could be problematic.

63. It introduces a risk of an expropriating authority acquiring the benefits of using a property—possibly for a lengthy period—while saddling the owner with the responsibilities of ownership. An expropriating authority may prefer drawn-out '*temporary use*' as a less onerous alternative to outright acquisition of ownership to the detriment of owners or holders.

64. The Committee should be invited to consider refining the variables for temporary use, in non-urgent circumstances, including through the introduction of a time-limitation, whether in the form of an absolute value, a formula or some other objective criterion.

Clause 4: delegations to be gazetted

65. The Minerals Council of South Africa has proposed that the Bill should require any system of delegations employed by the Minister under clause 4 to be published in the *Gazette*.

66. Ultimately, this is a policy question that should be answered with reference to the need for transparency in the functioning of the administration.

67. But the request may assume, incorrectly, that the Minister is the only expropriator. If the Bill required the Minister to gazette all delegations made under the Bill, it should similarly require all expropriating authorities to gazette their delegation of expropriation powers. That could be unwieldy and ultimately of no real consequence, as an affected person may request the authority of an official purporting to exercise a power of expropriation, as needed.

Clause 5: Valuer General's format for valuations for land reform

68. The Office of Valuer General requested that the Bill be amended to provide for: criteria for determining value; procedures and guidelines on, among other things, the method of valuation; a specific organ of state to develop and implement a system to monitor compliance with the criteria and procedures for valuation; and to define and implement a valuation report format.

69. Valuers, under the Bill, can be professional valuers or professional associated valuers registered under the Property Valuers Profession Act, 2000 for valuing immovable property, or any person suitably qualified to value other kinds of property.

70. Section 12 of Property Valuation Act, 2014 reserves the power to value immovable property for land reform purposes to registered valuers, whom the Valuer-General has so authorised.

71. For land reform, section 12 of the Property Valuation Act empowers the Minister responsible for public works to make regulations prescribing the criteria and guidelines for valuing property to be used for land reform purposes.

72. It would thus be a duplication for the Bill to set the same requirement for valuations of immovable property for land reform purposes in prescribing the same for all valuations. The Property Valuation Act is specific legislation designed address immovable property valuation for land reform purposes, whereas the Bill is

overarching legislation that regulates the procedural and substantive aspects of expropriation: where the Bill requires land to be valued for land reform purposes, the relevant provisions of the Property Valuation Act will apply.

73. There is, however, merit in the request from the Office of the Valuer-General for criteria, guidelines and procedures. This may be addressed in the following way:

73.1. For valuing immovable property for land reform purposes, the Valuer-General should request the Minister to exercise his regulation-making power under section 20 of the Property Valuation Act, 2014.

73.2. For valuing other property under the Bill, a sub-clause in clause 5 could require the Minister to make regulations prescribing the matters referred to in paragraph 68 above, subject to any other laws regulating the valuation of property.

Clauses 7(2) and 8(3): reference to the empowering law

74. These clauses respectively stipulate the mandatory contents of a notice of intention to expropriate and a notice of expropriation. But under neither clause is the expropriating authority required to identify the empowering law under which it is acting.

75. The Bill merely sets the procedural and substantive framework for expropriations. But, except in the case of the Minister, it does not vest powers of expropriation on particular organs of state. That empowering function is left to other legislation, as the definition '*expropriating authority*' makes plain.[14]

76. The recipient of a notice of intention to expropriate or a notice of expropriation, therefore, should have their attention drawn to the relevant empowering law, under

[14] It defines an 'expropriating authority' as '*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.*' (Emphasis added.)

which the expropriating authority purports to act. The purpose of the expropriation will be circumscribed by the objects of the empowering legislation.

77. The Committee may propose inserting a new paragraph into clause 7(2) and 8(3) to the effect: '*reference to the particular law in terms of which the expropriation is authorised*'.

Clause 7(4): include oral contracts

78. Agri South Africa requested that details of oral contracts of lease, purchase or for a building agreement should not be excluded. There is merit in this proposal.

79. The Committee should include inserting a new paragraph (c) and change the existing paragraph (c) to (d). The new paragraph (c) could provide:

> 'if any of the contracts mention in paragraph (b) are oral, give particulars of the parties to that contract and the terms.'

Clause 7(6): reasonable time vs. fixed period

80. BASA criticises the requirement that the expropriating authority must inform the expropriated owner or holder of its decision to expropriate or not to expropriate within a '*reasonable time*'. Instead, BASA proposes a period of 30 days.

81. There is merit in BASA's critique that the term '*reasonable time*' does not lend itself to certainty, in a context where individual liberties could be affected. The length of the period is a policy choice for the Committee. Given the nature of governmental decision-making, a period of 20-30 days may not be inappropriate.

Clause 8: court order not constitutionally required to expropriate

82. The Institute for Race Relations proposed that the Bill be amended, so that an expropriating authority may expropriate property only on the strength of a court order to that effect. Essentially, the proposal would entail judicial expropriation of *all* property.

83. There is no textual basis in section 25 of the Constitution to *require* a court to play this role, in what is quintessentially an administrative process.

84. Section 25(2)(b) is an express exception: it requires a court to approve or decide on an amount of compensation, absent agreement between an expropriating authority and an expropriatee—but the Constitution does not give the courts the monopoly to decide *whether* property should be expropriated.

85. While there is nothing *preventing* Parliament from requiring all expropriations effectively to be made by courts (as it has done under the Labour Tenants Act), this would be ill-advised. The courts exist to resolve disputes about a breach or threatened of rights or duties, not to perform the job of government. Clause 19(6) respects the courts' powers of judicial review, which appears sufficient.

Clause 10(1): non-service of notice of expropriation qualification

86. Agri South Africa has proposed that clause 10(1), which governs verification of unregistered rights in property, be amended to refer to a person who has not been compensated *and* who was not served with a notice of expropriation.

87. Adding words to that effect would indeed clarify the provision.

88. Clause 10(1) is turgidly drafted. It could benefit from being divided into succeeding paragraphs.

Clause 12: interests of secured creditors

89. BASA and several organisations representing agriculture made submissions on the interests of secured creditors. Their fears are: secured creditors will lose their real rights of security and bear the risk that the compensation will not adequately discharge the underlying debts; and, if insufficiently compensated, expropriated owners will still owe their creditors the debts connected to their expropriated property.

90. *First*, the Bill does recognise the precarious position in which expropriation would otherwise place a *mortgagee*, and it compensates by requiring the expropriating authority to take mortgagees interests into account through these provisions:

90.1. the definition of '*disputing party*';

90.2. clause 5, which governs the investigation and information-gathering stage;

90.3. clause 7, which governs the intention to expropriate and agreement on an amount of compensation;

90.4. clauses 8 and 9, which governs the notice of expropriation, passing of ownership and the date on which the right to possession passes;

90.5. clause 14, which governs a request for particulars about the offer of compensation;

90.6. clause 16, which regulates payment of compensation (to the former mortgagee or expropriated owner) in respect of an expropriated property that was subject to a mortgage;

90.7. clause 18, which allows an expropriating authority to deposit the compensation with the Master, while a former mortgagee and expropriated owner resolve any dispute about entitlement to the compensation sum, or a portion of it; and

90.8. clause 21, which governs withdrawal of an expropriation.

91. As a creditor, which stands to lose its real security on expropriation, a mortgagee needs a measure of protection against a debtor who might otherwise fritter away the compensation while leaving the debt undischarged.[15]

[15] *Barclays Bank DCO and others v Tarajia Estates (Pty)* Ltd 1996 (1) SA 420 (T) at 423-C-F.

92. But because the mortgagee's interest—the real security right in the property—is *not*, and cannot also be, the subject property of the expropriation, the mortgagee does not meet the definition of '*owner*' or '*holder of a right*'.[16] The Bill thus makes special provision for a mortgagee.

93. *Secondly*, the Bill contains a legacy drafting error,[17] which adversely impacts on mortgagees. We had advised that clause 12(1) must balance the interests of *all* affected parties against the public interest when determining the amount of just and equitable compensation. But clause 12(1) refers only to '*an expropriated owner or expropriated holder*'—a mortgagee is neither of these things.

94. Clause 12(1) is thus lacking for its failure to include the interests of mortgagees or, more broadly, of secured creditors. The Committee should be invited to give serious consideration to amending clause 12(1) to insert the words '*and any other affected person*' after the word '*holder*'.

95. *Thirdly*, the focus on mortgagees, and not on other types of secured creditors, is a hang-over from the current Expropriation Act, parts of which inspired the Bill.

96. Organisations representing farmers explained that real rights of security over moveable property or future property (e.g., farm equipment, crops and livestock) are used to securitise agricultural loans. These types of property could not be subject to a mortgage, which applies only to immovables; but they could be subject to other types of real security (special or general notarial bonds, pledges, security by means of claims or hypothecs).

97. For the same reasons that the Bill requires an expropriating authority to consider a mortgagee's interest in the property, holders of other forms of real security over

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[16] The real right of mortgage is inseparable from the underlying debt that it securitizes. The expropriating authority's object would be the immovable property; it would serve no purpose for it to expropriate the mortgage to take over the debt. The mortgage is therefore not the subject property of an expropriation, only the mortgaged property is.

[17] This related to the use of the past participle 'expropriated'. At this stage, neither an owner nor a holder will have been expropriated. The determination of a compensation sum must, following the amendment of the Bill, precede any decision to expropriate. I refer to my advice dated 9 February 2023.

property being considered for expropriation should have their interests weighed in the balance. The Minerals Council of South Africa proposed including general and special notarial bondholders in the Bill.[18]

98. It would be useful to get more information from creditors on the kind of real security typically used to secure agricultural loans, about which the public—and organisations representing the agricultural industry in particular—has expressed considerable anxiety.

99. It appears that if these recommendations were accepted, much of the public's concerns about the perceived precariousness of secured creditors, including mortgagees, will be addressed.

Clause 12: past tense '*expropriated owner*' and '*expropriated holder*'

100. The NA changed the initial draft Bill on the sequence of determination of the amount of compensation and the date of expropriation. Clause 7(6)(a) now provides that the expropriating authority may decide to expropriate only *after* the question of the amount of compensation has been determined. This was, largely, predicated on the Institute of Race Relation's submission to the NA's Portfolio Committee.

101. Compensation may be settled by: **(i)** agreement between the expropriating authority and the owners or holders of rights; or **(ii)** a court's approval of the proposed amount of compensation or a decision on a different amount of compensation that it considers just and equitable. This closely tracks the language of section 25(2)(b) of the Constitution and selects the more favourable alternative to owners and holders: having compensation decided before expropriation.[19]

[18] In relation to clause 8(2)(c)(iv).

[19] Cf. *Haffejee NO and Others v eThekwini Municipality and Others* 2011 (6) SA 134 (CC). There, the Constitutional Court held that the determination of compensation was not a condition precedent for an expropriation, in terms of section 25(2)(b) of the Constitution; but determining compensation before expropriation will generally be just and equitable. The Bill, therefore, constrains the determination of compensation as soon as reasonably possible after expropriation to urgent scenarios.

102. Vesting of ownership happens only upon delivery of a notice of expropriation. And the right to possession accrues only after the date of vesting.

103. For these reasons, clause 12(1) must be adjusted. It now requires the amount of compensation to reflect a balance between the public interest and those of an owner and holder, who have *already* been expropriated.

104. That does not accord with clause 7(6)(a), which requires compensation to be agreed or approved or decided by a court to happen before any decision to expropriate.

Clause 12(2): no solatium provision

105. The Expropriation Act provides for payment of *solatium* (damages for the discomfort and inconvenience of having lost property through expropriation) to the expropriated owner or holder. Agri South Africa believes that a similar provision should be in the Bill.

106. But the need for a provision of solatium has fallen away in the light of the constitutional formula in section 25(3), which is replicated in clause 12(1)—subject to my reservations expressed from paragraph 100 above.

Clause 12(3): nil compensation

107. This is perhaps the most ardently contested part of the Bill. But, in the main, the public comments are influenced by misread the clause in its statutory and constitutional context.

Principles from section 25(3) of the Constitution

108. In *AgriSA*, the Constitutional Court held:

> 'Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation.'

109. What is at issue is whether the amount of mandatory compensation may, notionally, be nil. And, if so, how does the Bill assist an expropriating authority and a court (in the event of a dispute) to determine whether a nil amount would be just and equitable in the specific circumstances of a case.

110. That '*all relevant circumstances*' must be considered is mandated by section 25(3) of the Constitution. It sets the constitutional formula for just and equitable compensation.

111. Notionally, it is easy to conclude that an amount of nil compensation would achieve an equitable balance between the public interest and the interests of those affected, where the latter are entirely unaffected by an expropriation. But these cases may be rare, particularly where property is land, water or some other natural resource. Despite that, they remain possible.

112. The clearest example of private interests being unaffected would be where an owner abandons ownership, by relinquishing possession of the property and the intention to be owner. This applies to moveable property, which will become *res nullius* on abandonment; but, because the Deeds Registries Act, 1937 does not cater for the unilateral abandonment ownership of immovable property, another statutory provision (in the Bill) is needed to infer abandonment.

113. Where an owner wants to be relieved of land, it could simply agree to sell it to an expropriating authority. But where the owner is untraceable, despite reasonable efforts to find them, the expropriating authority can, at most, infer that an owner has relinquished the intention to remain owner from objective facts, like a failure to exercise physical control over the property.

114. An owner may allow a building in the inner city to degenerate. That would be one factor. An expropriating authority will need to consider all factors, which, on balance, may convey an intention retain ownership but an inability to take reasonable measures to exercise control over the property. Each case would have to fall to be evaluated individually.

115. For instance, it would be unsustainable to conclude an owner has abandoned land, where property has become unlawfully occupied because law enforcement agencies have failed or refused to assist in protecting the property[20] or because the state has failed to provide access to housing. A 'use it or lose it' attitude there would be difficult to justify.

116. Where private interests will be affected, even to a minor degree, limited compensation will likely be just and equitable. However, there may be exceptional cases. All other things being equal—

116.1. if land that could be used in a socially productive way (for agriculture, housing, or energy-generation, for example) is unused and not intend to be used, an expropriating authority may be justified in putting the owner to terms to 'use it or lose it';

116.2. if land is being used unlawfully, that would not on its own justify expropriation for nil compensation (which would effectively be forfeiture as a penal sanction), but if the purpose is to use the land to benefit a segment of society (and not to punish the owner), then nil compensation might be just and equitable;

116.3. if persons have been living on land for generations and providing free agricultural labour to the owner under a system based on racial discrimination, as is the case with labour tenants,[21] a case for nil compensation being just and equitable might be possible;

117. In all these instances the totality of the facts must be considered. Some scenarios may dictate that some positive compensation should be paid, despite obvious factors that would discount compensation. For instance—

[20] As was the case in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AgriSA and others, amici curiae)* 2005 (5) SA 3 (CC).
[21] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (5) SA 489 (CC) at para 46.

117.1. if land was acquired at a discount following forced removals of black people under apartheid, full compensation at market value may present the owner with an undue windfall; but if that land was on-sold to a third-party owner, the amount of compensation would depend on how directly that third-party benefitted from the discount;

117.2. if there is no market for the property, it can have no market value; but other relevant factors like the subjective significance of the property to the owner or the fact that the market value of the property may have been lost through state conduct or another event (like a natural disaster), could militate against nil compensation.

117.3. if the state invested heavily in land, to provide or improve it for use and occupation by the owner, then it would be fair to reduce the amount of compensation, at least to that extent; and in some cases this may be the value of the property entirely.

118. For South Africa submitted that, in the light of the fact that section 25 of the Constitution was not amended to provide expressly for nil compensation, it is unconstitutional for the Bill to contemplate nil compensation as being part of the range of potential just and equitable compensation.

119. But this argument rests on the false premise that the proposed amendment sought to introduce something new. In fact, the amendment was not passed because it was not needed; section 25(3) already permits the possibility of nil compensation if all relevant circumstances show that it would be just and equitable. The examples given above illustrate the point.

The nil-compensation possibility under the Bill

120. The point made by the South African Property Owners Association is that clause 12(3) of the Bill, which concerns nil compensation, '*seems merely to clarify the application of [clause] 12(1) which requires the amount of compensation to be paid to be just and equitable*

reflecting an equitable balance and the interests of the expropriated owner.' This encapsulates the effect of clause 12(3).

121. Clause 12(1) replicates (subject to the reservations expressed from paragraph 89 above) the constitutional formula in section 25(3). It emphasises the importance of determining an equitable balance, in the light of all relevant circumstances. And, at a minimum, the enquiry must canvass the factors in paragraphs (a) to (e).

122. Clause 12(3) also requires all relevant circumstances to be considered in deciding whether nil compensation would be just and equitable. It does not prescribe scenarios for when nil compensation will necessarily be just and equitable. Most of the public comments erroneously assume the latter.

123. That the public have concerns that clause 12(3) unqualifiedly prescribes instances when nil compensation will always be just and equitable perhaps points to a lack of proper emphasis in the language of the provision. Although the rider '*having regard to all relevant circumstances*' has that linguistic effect, it may be more effective if clause 12(3) placed the emphasis elsewhere by changing the word order. Clause 12(3) could instead provide:

> '<u>Subject to other relevant circumstances</u>, it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, including but not limited to—' (Emphasis added.)

124. The significance of listing the examples in clause 12(3)(a) to (e) is to do no more than to highlight to an expropriating authority and a court (in the case of dispute over the amount of compensation) is special consideration should be given to those factors. As proposed nil compensation is likely to be opposed, the ultimate arbiter will be the court.

125. It is not an instruction always to offer or award nil compensation in those instances, regardless of other circumstances, including those in clause 12(1)(a) to (e)—that would be untenable as a matter of statutory interpretation and inconsistent with section 25(3) of the Constitution.

126. Notably, primary residences and agricultural land are not singled out for special consideration in clause 12(3). The public anxiety that the Bill envisions large-scale seizure of residences and farmland for nil compensation is unfounded.

127. The counter-examples, which many of the public submissions proffer, illustrate scenarios where in injustice and inequity result. Those outcomes would not comply with the Bill.

128. If the Committee, in the interests of quelling the public disquiet about clause 12(3), wanted to insulate primary residences, productive agricultural land, businesses or places of religious significance (as For South Africa proposes) from the possibility of nil compensation, it would need to make a policy choice to that effect.

129. In that case, expropriations in the public interest of immovable property with those features would have to be some positive amount, the magnitude of which should still be determined under clause 12(3) save that it may not be nil.

130. This could be achieved by an express exclusion of those types of immovable property from clause 12(3), as an absolute ban, or they could be listed as important factors that would weight more heavily in the balance (in favour of the affected individual(s)), when determining an amount of just and equitable compensation.

Clause 12(3): referral to Constitutional Court for opinion on constitutionality?

131. For South Africa has proposed that the Committee refer clause 12(3) to the Constitutional Court for a decision on its constitutionality before the NCOP is asked to adopt the Bill.

132. It does not appear to me that the Committee, or the NCOP, has this power. Sections 73 to 82 of the Constitution govern the national legislative process. Section 79 allows the President to refer a Bill to the Constitutional Court for a decision on its constitutionality, if the President has already referred the Bill back to the NA and NCOP and still has reservations.

133. But no equivalent power vests in the NCOP before it has passed the Bill. Not even the NA has this power in respect of draft legislation. Section 80 allows Members of the NA to approach the Constitutional Court for a decision on the constitutionality of an Act of Parliament, but not of a Bill.

134. If the Committee, and the NCOP on its advice, has reservations about the constitutionality of the Bill or a clause 12(3), it should reject the Bill or that clause and refer the matter to the Meditation Committee, in terms of section 76 of the Constitution.

Clause 12(3)(c): abandonment of land and possible nil compensation

135. Agri South Africa and BASA observe, validly, that clause 12(3)(c) is framed too broadly. Perhaps an owner has failed to exercise control over land because of an inability to do so, because of circumstances beyond their control.

136. Mere failure to exercise control over land does not adequate convey the circumstance, alluded to in paragraph 115 above.

137. The Committee should be invited to consider qualifying clause 12(3)(c) words to the effect: '*despite being reasonable capable*'. That would introduce an objective standard.

Clause 15: the sequence of payment of compensation and taking of possession

138. The Bill makes it impossible for an expropriating authority to take property before **(i)** reaching agreement on an amount of compensation or **(ii)** a court approves or determines that amount.

139. The public comments on clause 15 seem to misconstrue the provision, by overlooking the process I have just described.

139.1. The general rule is that, in the case of non-urgent expropriations, payment of compensation precedes the date on which the expropriating authority may take possession of the property.

139.2. But if the property is subject to a mortgage, and the mortgagee and expropriated owner dispute how the compensation is to be divided, clause 15(2) and (3) ensures that the dispute between the two private parties does not hold up the expropriation.

139.3. Similarly, where a municipality belatedly disputes the amount of compensation owed to it, clause 15(2) and (3) ensures that the dispute with the expropriated owner does not hold up the expropriation.

139.4. Lastly, where it is necessary for the expropriating authority to deposit the compensation with the Master, because of a dispute about how the compensation is to be shared among affected parties, clause 18 permits this.

140. Clause 15 (3), however, bears a drafting legacy from when an earlier version of the Bill permitted the expropriating authority to decide on an amount of compensation, absent agreement, and to expropriate the property. The old formulation allowed an owner or holder to dispute the compensation sum afterward.

141. As much as clause 15(3) refers to '*any other dispute arising*', it is possibly inconsistent with clauses 7(4)(a)(iii) and 19, which require a dispute over the amount of compensation to be mediated or decided by a court before expropriation. Clause 15(3) should thus refer to disputes arising after the expropriating authority has decided to expropriate.

Clause 17(4)(a): transfer not required for ownership to vest

142. BASA correctly observes that expropriation is an original mode of acquisition, for which transfer is unnecessary. So, registration of transfer of title is a misnomer.

143. The clause should provide 'the Registrar of Deeds must register the change in ownership of the expropriated property'.

Clause 19(1): no limitation on access to court

144. BASA and the Minerals Council of South Africa have expressed concerns about the right of access to court being limited to disputes over the amount of compensation. But that is incorrect: clause 19(6) preserves any affected persons right to approach a court regarding any matter relating to the application of the Bill, including the decision to expropriate itself.

Clause 19: costs of dispute resolution

145. The public expressed concerns that an owner, holder or other affected person should not have to bear the costs of challenging the amount of compensation in court.

146. For that very reason, clause 19(3) provides that a disputing party may ask the expropriating authority to refer the issue of compensation to a court. This would be at the expropriating authority's cost. The court then has the discretion to make an appropriate order as to costs, depending on the outcome and the conduct of the litigation, in terms of clause 19(9).

Tax implications

147. Afrikanerbond made submissions on the tax implications of the Bill. These need to be considered more closely and more time is needed.

Socio-economic Impact Assessment

148. The Centre for Social Justice proposed subjecting expropriations to a social-impact assessment. The details of the matrix remain unclear, but the proposal could be dealt with in subordinate legislation that addresses the suitability of the property for expropriation and the relation between the suitability and the intended purpose. It need not be legislated in the Bill.

CONCLUDING REMARKS

149. This advice could not cover all the topics raised during public consultation in the time available. I am, however, available to provide supplementary advice on other points raised, should the Department and Committee require.

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22 October 2023