OPINION

Ex Parte

THE SOUTHERN AFRICAN BUS OPERATORS ASSOCIATION

("SABOA" or "the Consultant")

in re:

NATIONAL LAND TRANSPORT BILL

Prepared for:
Werksmans Inc
Consultant's Attorneys
Ref: B Hotz/K Motshwane

I. INTRODUCTION AND SUMMARY OF ISSUES

1. My Consultant is the **Southern African Bus Operators Association** ("SABOA" or "the Consultant").

2. SABOA's members have a number of contracts with the South African Government to provide subsidised transport on certain bus routes (collectively "the SABOA contracts").

3. The bulk of the SABOA contracts are extensions of interim contracts ("the interim contracts") concluded between SABOA members and the South African Government during 1997.

4. Pursuant to the provisions of the interim contracts, SABOA members have a right of first refusal in the event that the routes currently serviced by SABOA members under the interim contracts are put out to tender.

5. SABOA is in the process of preparing representations in response to the latest National Transport Bill ("the Bill") that is being presented by the National Department of Transport ("NDOT") for Parliamentary debate.

6. Section 50 of the Bill contemplates that the Government may enter into negotiations with existing operators, with a view to concluding negotiated contracts for periods of up to 12 years.

7. Section 55 of the Bill permits the Government to cancel any existing transport contracts (whether or not it is coupled to a right of first refusal) without compensation in certain circumstances.

8. My opinion has been sought on the constitutionality of the Bill, and particularly sections 50 and 55 thereof.

9. For reasons which are more fully explained below, it is my opinion that:

9.1 Section 50, which provides for negotiated contracts is probably unconstitutional in its present form. Its terms are vague and permit of arbitrary actions by Government. In that respect, it violates the *"doctrine of legality"*.

9.2 In addition, insofar as section 50 does not stipulate criteria to be adhered to in the event that contracts are negotiated, and lacks a deadlock-breaking mechanism, it probably conflicts with section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

9.3 Section 55 is probably unconstitutional because it violates section 25 of the Constitution in that it contemplates a deprivation of property that is arbitrary and not effected pursuant to a law of general application. It also appears to involve an expropriation without compensation.

9.4 Sections 50 and 55 appear to be ineluctably intertwined in the Government's scheme for restructuring the transport industry. Accordingly, the unconstitutionality of either section will probably render the other section unconstitutional.

II. THE FACTUAL BACKGROUND

A. THE RIGHT OF FIRST REFUSAL

10. Certain SABOA members provided subsidised bus passenger transport services prior to 1994. As an integral part of their operations, these SABOA members had, prior to the advent of the new democratic dispensation, acquired indefinite permits to operate buses.

11. After 1994, the Government concluded that it wished to change the existing bus operating services in South Africa into a competitive tender system.

12. The Government recognised that constitutionally those permits could not simply be withdrawn without compensation as they would involve a deprivation of property. However, the existing permits and vested rights which went with them could prejudice the envisaged tender system if operators who held indefinite permits did not voluntarily surrender their permits.

13. Accordingly, in order to facilitate this transformation, the Government agreed with existing operators to enter into interim contracts that would preserve existing jobs and operations and would gradually phase in the new tender system.

14. As a *quid pro quo* for operators abandoning their "evergreen permits", the interim contracts contained *"right of first refusal clauses"*. The interim contracts provide in relevant part that:

> "6.3 The Employer shall with the consent of the Operator and with prior notice of not less than three months, extend the contract under existing conditions, should it not be in a position to call for tenders for the services described in the Specification (Part 3).
>
> 6.4 At the end of the contract period the Employer may decide to invite tenders for the provision of services in substantially the same service area. If this is done, such invitation shall amount to a totally new contract on the terms and conditions set out in the new tender documents. The Operator shall have the right to be awarded the new contract at the rates and on the basis tendered by the tenderer which the State Tender Board has decided has submitted the most acceptable tender (which will not necessarily be the lowest tender), provided that –
>
> (a) the Operator has tendered for the new contract and his tender amount is not more than five percent (5%)

> higher than the most acceptable tender, and the Operator proves to the satisfaction of the Employer that he is able to perform the new contract at the rates applicable to the most acceptable tender."

15. The amount of 5% referred to in clause 6.4 was subsequently increased to 10% in September 1999 pursuant to a tripartite agreement concluded between the nine Provincial Departments of Transport (represented by the NDOT various participating labour unions, and SABOA.

16. When the terms of the interim contracts expired, most of them were extended by agreement between the Government and various SABOA members. Some of the routes were put out to tender in certain instances where SABOA members had successfully exercised rights of first refusal in order to obtain the tender awards.

17. Many SABOA members are currently operating routes under their original interim contracts pursuant to extensions of the interim contracts. Should those routes be put out to tender, the SABOA members concerned will be entitled to exercise their rights of first refusal in those tender processes.

B. THE BILL

18. The Bill that the Government is now proposing provides for the redesign of the transport system.

19. Chapter 5 of the Bill contemplates the integration of the current bus subsidy system into a larger public transport system (s 49).

20. Section 50 contemplates that this integration *"may"* take place in the first phase through "*negotiated contracts*". These contracts can be for a period of up to 12 years.

21. Section 1 of the Bill defines a *"negotiated contract"* as *"a negotiated contract for the first phase of an integrated public transport network contemplated in section 50(1)"*. This definition is circular as section 50 does not in itself define a *"negotiated contract"*. Nor does section 50 explain the rules of engagement for the proposed negotiation.

22. The Bill defines a *"subsidised service contract"* as *"an agreement between a contracting authority and an operator to operate a service provided for in an integrated transport plan and in terms of which the operator receives direct or indirect financial support in terms of a tendered contract"*.

23. An *"operator"* is defined as *"a person carrying on the business of operating a public transport service"*. Accordingly, the definition is not limited to operators that have existing subsidised service contracts with the Government.

24. Section 51 contemplates that subsidised service contracts will be put out to tender after the expiry of the negotiated contracts or any other contract that might operate for that period.

25. The relevant portions of the Bill as they have been recently amended by the National Department of Transport are as follows:

> **"Negotiated Contracts**
>
> 50(1) Contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to –
>
> (a) integrating services forming part of integrated public transport networks in terms of their integrated transport plans; or
>
> (b) promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination; or
>
> (c) facilitating the restructuring of a parastatal municipal transport operator to discourage monopolies...
>
> (2) The negotiations envisaged by subsections (1) and (2) should where appropriate include operators in the area subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.

(3) A negotiated contract contemplated in subsection (1) or in (2) shall be for a period of no longer than 12 years.

(4) The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.

...

"**Subsidised Service Contracts**

51(1) The contracting authority must take steps within the prescribed period and in the prescribed manner before expiry of contracts contemplated in subsection (2)(a), (b) or in (c) to put arrangements in place for the services to be put out to tender so that the services can continue without interruption.

(2) If after expiry of –

(a) a negotiated contract concluded under section 50;

(b) a subsidised service contract, concluded under this section; or

(c) a negotiated contract, interim contract, current tendered contract or subsidised service contract concluded in terms of the Transition Act,

or any extension thereof, the relevant services must continue to be subsidised, and this must be done in terms of a subsidised service contract concluded in terms of this section.

...

(4) Only a contracting authority may enter into a subsidised contract with an operator, and only if the services to be performed in terms thereof, **have been put out to public tendering and awarded by the entering into of a contract in accordance with prescribed procedures in accordance with other applicable national provincial laws.**

...

Lapsing of certain contracting arrangements

55(1)(a) Where a contracting authority is establishing an integrated public transport network contemplated in section 50(1) and is hampered in its efforts by an existing contract between itself and an operator, the authority must, **where feasible, make a reasonable offer to the operator of alternative services**; and

55(1)(b) if –

(i) the parties cannot agree on the involvement of the operator in such network and concomitant amendment or cancellation of the contract; or

(ii) the making of such an offer is not feasible; and

(iii) the operator fails or refuses to accept such offer where one was made

the contract shall lapse on the date determined by the planning authority and communicated in writing to that operator, **despite the fact that its validity period is longer and despite the existence of any right of renewal or right of first refusal in that contract, and the operator is not entitled to any compensation by virtue of such lapsing.**

(2) The contracting authority must adhere to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)."

[emphasis added].

III THE CONSTITUTIONALITY OF PROPOSED SECTIONS 50 AND 55

26. Sections 50 and 55 of the Bill, when read together, raise two main issues:

26.1 the constitutionality of the procurement of services by way of negotiated contracts rather than through a tender process;

26.2 the constitutionality of section 55 in so far as it contemplates the potential cancellation of existing contracts, some of which may have rights of first refusal attached to them.

27. In this section of the opinion, the two issues are separately considered. However, there is a significant interplay between the two sections. This means that, where each of the two sections is unconstitutional in itself, the totality of the two sections may render the whole scheme of the Bill even more constitutionally unacceptable.

A. SECTION 50 OF THE BILL

28. It is my opinion that the parameters and terms of engagement of the proposed negotiated contracts are so inherently vague and potentially arbitrary that the statute probably does not comply with the constitutional requirements for the legality of statutes.

29. In *Pharmaceutical Manufacturers Association of S.A. & Another: In Re Ex Parte President of the Republic of South Africa & Others* **2000 (2) SA 674 (CC) [para 17]** Chaskalson, P held:

"[17] In *Fedsure* this Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the interim Constitution. It stated:

> 'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.'"

(*Fedsure Life Assurance Limited & Others v Greater Johannesburg Transitional Metropolitan Council & Others* **1999 (1) SA 374 (CC) para [56 – 59]**; *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* **2000 (1) SA 1 (CC) [para 148]**).

30. In *Affordable Medicines Trust & Others v Minister of Health & Others* **2006 (3) SA 247 (CC), 288 para [108]**, the Court held:

> "The doctrine of vagueness is founded in the rule of law, which, as pointed out earlier is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The laws must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

31. In *Dawood, Shalabi and Thomas v Minister of Home Affairs* **2000 (3) SA 936 (CC), 966 para [47]**, the Constitutional Court held:

> "[47] It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorized by law of general application. **Moreover, if broad discretionary powers**

> **contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration official ... is constrained by the provisions of the Bill of Rights and, in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit.** If rights are to be infringed without redress, the very purposes of the Constitution are defeated.
>
> [54] We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. **It is for the legislature to ensure that, where necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution.** Such an approach would not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that dedicated legislation be properly enacted by a competent authority."

[emphasis added].

32. In the present case, the proposed legislation is vague and arbitrary and does not circumscribe the basis and extent of the Government's discretion in relation to negotiating contracts (*Dawood, Shalabi and Thomas* **para [43] – [44] and fn 73**).

33. The concept of a negotiated contract is so open-ended that it will make it easy for state officials who are so minded to act subjectively and favour operators based upon an official's own personal prejudices and biases (*Dawood, Shalabi and Thomas* **para [43] – [44] and fn 73**).

34. The Bill affords the Government a discretion in deciding whether to enter into a negotiated contract or to go out to tender. The Bill does not set out the criteria to be employed by the Government in determining which course to follow (*Dawood, Shalabi and Thomas* **para [43] – [44] and fn 73**).

35. The Bill also fails to stipulate whether operators with existing contracts are to be given preference in the negotiation process. If no preference is being offered, the risk of arbitrary deprivation of property (see below) is exacerbated.

36. The Bill does not identify the parameters within which such contracts are to be negotiated. It does not clarify what the rights of the Government and the Operator will be in the negotiation process.

37. The Bill also contains no deadlock breaking mechanism in the event that the Government takes an unreasonable position. By way of example, a deadlock-breaking mechanism could take one of the following forms:

37.1 If preference is to be given to existing operators in the process of negotiating contracts and the Government fails to reach agreement with those operators, through negotiations, the contracts can be put out to tender.

37.2 Alternatively, the issues on which the parties differ can be submitted for determination by a court or by an arbitrator agreed upon by the parties.

38. In addition, section 50 is *prima facie* in conflict with section 51(4). Section 51(4) appears to mandate the award of contracts only through a tender system. It does not contain an exclusion appertaining to negotiated contracts. This linguistic conflict, adds to the inherent vagueness and uncertainty of the statute.

39. In the result, section 50 in its present form is vague, arbitrary, and inherently unfair to existing operators. As a result it does not comply with the doctrine of legality.

40. In its present form, the Bill may also fall foul of section 217 of the Constitution which provides as follows:

> "**217. Procurement.** – (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, **it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective**.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
>
> *(a)* categories of preference in the allocation of contracts;
>
> *(b)* the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."
>
> [emphasis added]

41. The national legislation required by section 217 has been passed. It is embodied in the Preferential Procurement Policy Framework Act, 5 of 2000 ("PPPFA"). Section 2 of that Act requires that a preference points system be implemented for the evaluation of tenders. In this respect, PPPFA serves as an indicator of the manner in which the constitutional mandate contained in section 217 should be executed.

42. A system of negotiated contract is not necessarily in itself antithetical to a procurement system that is *"fair, equitable, transparent, competitive and cost effective"*. However, the present Bill falls foul of the requirements of section 217(1), for, *inter alia*, the following reasons:

42.1 It is not *"fair and equitable"* to operators who have contracts or even to new operators because the criteria to be employed in negotiating contracts are not clear.

42.2 The procedure contemplated is similarly not *"transparent"* because it is arbitrary and does not enable existing operators or prospective new operators to test whether the negotiations have been conducted in good faith and in accordance with prescribed parameters.

42.3 It is not *"competitive and cost-effective"* because it is arbitrary and the terms on which the contracts are to be negotiated are not defined. As long as too much discretion is vested in the hands of officials, there is danger that the system will not be *"competitive and cost-*

effective". The official should not be at liberty to make decisions based on subjective factors.

43. The difficulties inherent in section 50 (i.e. the conflict with the principle of legality and section 217 of the Constitution) are significantly exacerbated by the apparently arbitrary forfeiture that may occur under section 55 of the Bill if no agreement is reached through a process of negotiation (see below).

44. Accordingly, it is my opinion that section 50 of the Bill is unconstitutional in the following respects:

44.1 It does not comply with the doctrine of legality in that it is vague and the principles under which it is to be implemented are not stated *"in a clear and accessible manner"*. The discretionary powers of the Government under the legislation are simply too broad.

44.2 It conflicts with the provisions of section 217 of the Constitution.

B. SECTION 55 OF THE BILL

45. It is my opinion that section 55 of the Bill probably violates sections 25 and 36 of the Constitution. In addition, the cumulative effect of section 55 read together with section 50 exacerbates the conflict between the Bill and section 217 of the Constitution. It also adds to the Bill's violation of the principle of legality.

46. Section 25 of the Constitution provides:

> "**25. Property.**– (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–
>
> ...
>
> *(b)* property is not limited to land."

47. Section 25(1) in itself contains limitations on the deprivation of property. Further limitations are imposed by section 36 of the Constitution, which provides:

> "**36. Limitation of rights.** – (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."
>
> [emphasis added]

(i) *Does section 55 effect a "deprivation of property"?*

48. The term *"property"* is not defined in the Constitution. South African constitutional cases that have dealt with the meaning of the term *"property"* have done so perfunctorily and in a manner that provides relatively little guidance to the specific problem under consideration. Resort to foreign judgments also provides little guidance because the language and socio-political milieu of the foreign statutes is different in each instance.

49. In *Transkei Public Service Association v Government of the Republic of South Africa & Others* **1995 (9) BCLR 1235 (Tk), 1246-1247**, Pickering J. held:

> "**To those schooled in traditional notions of 'property' the idea that 'property' might encompass interests against the State, such as employment, benefits and subsidies, might, at first blush, seem somewhat startling.** However, as pointed out by Cachalia *et al*

Fundamental Rights in the New Constitution at 92, the concept of property has been broadened, particularly as a result of the influence of Charles A Reich *The New Property* (1964) 73 Yale LJ 733. ...

As to the theory of 'new property' van der Walt *Property Rights, Land Rights and Environmental Rights : Rights and constitutionalism* ed. van Wyk *et al* at 455 states at 465:

> 'According to this theory, the property clause originally guaranteed rights with regard to corporeal things, but this kind of "thing" - ownership has been replaced in modern society by a variety of social and economic interests and benefits so that it became necessary to attach an increasingly wider interpretation to the property clause in order to secure constitutional protection for the new forms of social benefits such as State contracts, pension and medical benefits, employment rights, and so on, but it can also be applied to social rights such as workers' rights, political rights, such as the right to vote, and others.'

In *Goldberg v Kelly* 397 US 254 (1970) at 262 the Court stated:

> 'It may be realistic today to guard welfare entitlements as more like "property" than as "gratuities". Much of the existing wealth in this country takes the form of rights which do not fall within traditional common law concepts of property.'

In *Logan v Zimmerman Brush Co* 455 US 422 (1982) at 430, the Court stated:

> **'The hallmark of property ... is an individual entitlement grounded in State law which cannot be removed except "for cause"** ... Once that characteristic is found, the types of interest protected as "property" are varied and, as often as not, intangible relating to the whole domain of social and economic factors.'

In an article entitled *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth* 1993 (9) SAJHR 388, Matthew Chaskalson refers at 406-407 to certain decisions of West Indian Courts and states that the species of new property most recognised by the West Indian Courts is State employment. See for instance *Nobrega v Attorney General, Guyana* (1967) 10 WIR 187 (GCA) **in which the Court of Appeal of Guyana confirmed that State employment constituted property**; *Guyana Sugar Corporation v Teemal* (1983), WIR 239 (GCA) in which the Court of Appeal **set aside on grounds of unconstitutionality the reduction of a State employee's salary in terms of certain austerity measures which had been introduced administratively in Guyana**; *Attorney General v Alli* (1989) LRC (Const) 474 (CA) **in which legislation allowing for the retrospective reduction of salaries was ruled to be unconstitutional and in which the Court held that the austerity measures deprived civil servants of their property**.

It would seem, therefore, on the above somewhat cursory examination of

> certain of the authorities, **that the meaning of "property" in s.28 of the Constitution may well be sufficiently wide to encompass a State housing subsidy**. ..."
>
> [emphasis added]

50. In *Hewlett v Minister of Finance and Another* **1982 (1) SA 490 (ZSC), 497F-H**, a Zimbabwe case, the Applicant had applied for and been awarded compensation by a board appointed under the Victims of Terrorism (Compensation) Act. Before he had received payment, the War Victims' Compensation Act was passed. This Act provided that no further compensation was to be paid whether or not awards had already been made or judgments given entitling anybody to compensation. The Zimbabwe Supreme Court held:

> "I come then to the first main question: whether these debts owed by the State to the Applicant are property within the meaning of that word in s.16(1) of the Constitution. Although there is no definition of the word, the section refers to 'property of any description or interest or rights therein'. **This seems to embrace the widest possible range of property and to include at least any money debt due including such a debt due by the State**. It would require very strong indications, particularly having regard to the principles of interpretation which have to be applied to a provision of this nature, to limit these very wide words. After all, the purpose of s.16 is to afford protection to property, following as it does the statement of principle in s 11*(c)* that the Constitution is designed to afford 'protection for the privacy of the home and *other property* and from the compulsory acquisition of property without compensation'. The ordinary meaning of the word *"property"* I have already dealt with, and it clearly includes a debt payable to a person."
>
> [emphasis added]

51. In the result, the Zimbabwean Court held that the debt owed by the State to the Applicant was a *"property right"*.

52. In my opinion, the right (or claim) of the operator against the Government under an existing contract (including the right of first refusal) is "*a property right*". Accordingly, in so far as section 55 contemplates the cancellation of contracts with existing operators and the concomitant extinction of the operator's right against the Government, the statute contemplates "*a deprivation of property*".

(ii) *Is the law one of general application that does not permit arbitrary deprivation of property?*

53. As the Bill effects a deprivation of property rights, it is required to be a law of general application and not arbitrary in its effect. It is my opinion that section 55 is not a law of general application and that it may permit of arbitrary deprivation of property. In the result, section 55 is unconstitutional in so far as it conflicts with section 25(1) of the Constitution.

54. Section 55 does not define when it would be *"feasible"* to make an offer or what constitutes a *"reasonable offer"*. There is too much scope in these terms for arbitrary action.

55. The potential for arbitrariness is exacerbated by the failure of section 50 to define the rules of engagement for negotiating contracts or to afford preference to operators with disputed contract rights.

56. The new section is formulated in such a way that it compels an operator to whom an offer is made that the Government considers to be *"reasonable"* to accept that offer or face a forfeiture of its contractual rights without compensation. If the unfortunate operator rejects the offer and then fails to convince a court that the offer was unreasonable the operator will forfeit all rights. If the operator accepts the offer, it will waive its right to challenge its reasonableness or fairness. Insofar as section 55 compels the operators to make such a judgment call, the section is inherently unfair. In this respect the section falls foul of sections 25 and 217 of the Constitution.

57. Section 55(1)(b) is not a *"law of general application"* because it does not apply to all contracts – only those where it will not be *"feasible"* for the Government to make a *"reasonable offer"*.

58. Insofar as section 55(1)(b) does not define the words *"feasible"* or what constitutes a *"reasonable offer"*, it leaves too much scope for arbitrary action. It is not clear that it is circumscribed by objectively ascertainable guidelines.

59. The reference in section 55(2) to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") does nothing to ameliorate the arbitrariness of the statute. Whether or not the Bill expressly says so, PAJA would in any event be applicable to any administrative action taken by any official under section 55 of the Bill. The Bill cannot be saved from invalidity by the incorporation of a statute that in any event limits the action of officials (see *Dawood Shalabi & Thomas v Minister of Home Affairs* **2000 (3) SA 396 (CC) para [48] and [54]**).

60. Accordingly, it is my opinion that section 55(1) is unconstitutional. It is not a law of general application. It is inherently unfair. It also permits arbitrary deprivation of property. It does not comply with the doctrine of legality.

(iii) *Is the proposed deprivation in violation of section 36 of the Constitution?*

61. In so far as section 55(1) does not contemplate a deprivation of property by way of a law of *"general application"*, it is also a violation of section 36(1) of the Constitution.

62. It is my opinion that the proposed inroad on the operators' property rights (i.e. their claims against the Government) is also not

"reasonable and justifiable in an open and democratic society". The section permits of arbitrary and non-transparent action.

(iv) *Is the proposed deprivation of property also an expropriation?*

63. It is my opinion that the contemplated deprivation of property probably also constitutes an expropriation.

64. In *Harksen v Lane NO & Others* **1998 (1) SA 300 (CC), para [32],** Goldstone J. held:

> "[32] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. ..."

See also *Beckenstrater v Sand River Irrigation Board* **1964 (4) SA 510 (T) at 515A-C.**

65. In *Hewlett's* case, the Court held that the applicant's claim against the Government for compensation did not amount to an expropriation because no property was transferred to the Government.

66. The outcome of the *Hewlett* case has been criticized in **Cheadle, Davis & Haysom, SOUTH AFRICAN CONSTITUTIONAL LAW 2002, p455** as follows:

> "In a different political setting, a straightforward application of the definition of expropriation later used in *Harksen* would have produced the opposite result. **As a purely accounting matter, the cancellation of a State debt does not amount to the extinction of property in the hands of the creditor. Rather, it amounts to the compulsory transfer of property to the value of the debt to the State.**"
>
> [emphasis added]

67. In my opinion, there is merit in Cheadle's criticism of the *Hewlett* decision. When a contractual claim is extinguished, there is a resultant gain by the debtor, in this instance, the Government.

68. This view is bolstered by an *obiter dictum* of the Supreme Court of Appeal in *Steinberg v South Peninsula Municipality* **2001 (4) SA 1243 (SCA), paras [6] to [9]**. Cloete AJA held:

> "[6] The principle of **constructive expropriation** creates a middle ground, and blurs the distinction, between deprivation and expropriation. According to that principle a deprivation will in certain circumstances attract an obligation to pay compensation even although no right vests in the body affecting the deprivation. It is the determination of these circumstances which can give rise to problems. The appellant's counsel urged this Court to have regard to the position in the United States of America.
>
> [7] It is extremely difficult to distil any single principle from the body of case law built-up in the Supreme Court of the United States of America around the Fifth Amendment and the Fourteenth Amendment to the Constitution. ...
>
> [8] Despite the clear distinction made in s 25 of the Constitution between deprivation and expropriation, there may be room for the development of a doctrine akin to constructive expropriation in South Africa **particularly where a public body utilizes a regulatory power in a manner which, taken in isolation, can be categorized as a deprivation of property rights and not an expropriation, but which has the effect, albeit indirectly of transferring those rights to the public body**: ... However, development of a more general document of constructive expropriation, even if admissible in view of the express wording of

> s 25 of the Constitution, may be undesirable both for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by executive action could for instance adversely affect the constitutional imperative of land reform embodied in ss(4), (6) and (8) of s 25 itself."
>
> [emphasis added]

69. Accordingly, I am of the opinion that the proposed deprivation of property amounts to an expropriation.

(v) *Does the statute provide for compensation to the disappointed operator?*

70. The statute expressly provides that the operator will *"not be entitled to any compensation"* by virtue of the lapsing of its contract. In this respect, it is in direct conflict with section 25(2)*(b)* of the Constitution, which requires that expropriation can take place only if it is coupled with compensation.

71. Accordingly, section 55 is unconstitutional in so far as it provides for an expropriation without compensation.

IV CONCLUSION

72. It is my opinion that the entire scheme contemplated by sections 50, 51 and 55 of the Bill is unconstitutional for the following reasons:

72.1 Sections 50 and 55 do not appear to comply with the doctrine of legality. They are vague provisions which grant

unnecessarily broad discretionary powers to the executive that are not subject to *"express constraints"*.

72.2 Insofar as Sections 50 and 55 fail to define with reasonable precision the terms of engagement for the negotiation of a contract and fail to provide a deadlock-breaking mechanism, they also seem to violate section 217 of the Constitution in that they are antithetical to procurement by the Government pursuant to *"a system which is fair, equitable, transparent, competitive and cost-effective."*

72.3 It is also not clear from section 50 when the Government would be entitled to enter into negotiated contracts rather than going out to tender. There is too much scope for arbitrary action by Government if it chooses to favour certain operators over others based on subjective criteria.

72.4 The sections may also violate section 25(1) of the Constitution in that they contemplate a *"deprivation of property"* other than by way of a "*law of general application*" and they may permit *"arbitrary deprivation of property"*.

72.5 The sections also seem to violate section 25(2)*(b)* of the Constitution in that they amount to an expropriation without compensation.

72.6 The sections may also violate section 36 of the Constitution in that the proposed limitation on the operators' property rights is not *"reasonable and justifiable in an open and democratic society"*.

P N Levenberg, SC
Chambers, Sandton
21 July 2008