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SOUTH AFRICAN RESEARCH CHAIR IN PROPERTY LAW

27 February 2021

To: Ms Nola Matinise

Sent by email: expropriationbill@parliament.gov.za

WRITTEN INPUTS ON THE EXPROPRIATION BILL, 2020

To whom it may concern,

Thank you for the opportunity to submit comments on the Expropriation Bill published on 9 October 2020.

We are a group of academics loosely associated with the NRF South African Research Chair in Property Law of Prof Zsa-Zsa Boggenpoel. We are experts in the field of Property Law in general, and Constitutional Property Law specifically. We make the submission as a group, based on our scholarly research and knowledge.

We offer this submission with the knowledge that legislative writing is a long and arduous process, and that it is impossible to cover all possibilities, foreseen and unforeseen, in legislation, and that meaning often gets refined in court cases.

We tried to keep the comments as brief as possible without oversimplifying the issues. We are happy to expand on the comments, if so needed. We are also willing to make an oral submission.

Our submission will start with general comments on the Bill, after which we will comment on each Clause, where necessary, in order.

The submissions are based on our own expert opinions and should not be attributed to any of the institutions we work for.

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1 General comments

1.1 Interaction with the Constitutional Amendment Process

The history of this Bill is fairly detailed. The first attempt at a new Expropriation Bill, aligned with the Constitution, was in 2008. That Bill was shelved for fears of unconstitutionality, as it seemed to have excluded the courts' role in the expropriation process.

The current Bill is a changed version of the 2013 Bill, which became the 2015 Bill and which was withdrawn in 2018 because a process of amending section 25 of the Constitution was embarked on. This further refinement of the Bill therefore, always ran alongside the possible amendment to section 25.

The process of amending section 25 is nearing completion, but the outcome thereof is uncertain. All we have is a draft proposed amendment with an incomplete public participation process. There is little clarity on what the final wording might look like, whether that final wording will need to go through another public participation process, and whether the amendment will be voted in by the National Assembly.

Therefore, it should be noted as a point of departure that the incompleteness of that process makes it difficult to comment on the Expropriation Bill's constitutionality. It is a well-known principle that legislation may *extend* the protection afforded to persons in the Constitution, but may not decrease the protection.[1] With that in mind, we assess the Bill based on the current wording of section 25. We also work from the assumption that

[1] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 40.

"making explicit what is implicit" (normally the role of legislation such as this Bill) does not alter the *legal* position, but merely *clarifies* it.

1.2 Interaction with the Property Valuation Act[2]

It is unclear how the valuation done in terms of the Property Valuation Act fits into the Expropriation Bill process. From a procedural point of view, there seems to be a discrepancy between the time frames for the calculation of compensation (in land reform cases) between the two pieces of legislation.

When looking at these two pieces of legislation, it is also not clear how the authority of the Minister possibly overlaps with that of the Valuer General, with regard to the calculation of compensation. The proposal is that there should be a clear distinction between the determination of "value" and the determination of "just and equitable compensation". Value can be calculated by using the accepted methods of valuation used by qualified valuers. The determination of compensation and the requirement that such compensation must be "just and equitable" implies a discretionary power. This power should only be exercised by the Minister or the courts, with due regard to the specific circumstances, and there should be clarity on how this discretion should be exercised.[3]

Valuation might play a role in the decision to acquire land for land reform purposes (the investigation phase). The valuation process may precede the notice of intention to expropriate or the notice of expropriation. Pragmatically, this makes sense since the amount of compensation can influence the decision whether to expropriate or not. This

[2] 17 of 2014.
[3] This is in line with the wording of clauses 8(3)(g) and 8(4)(d), for instance.

will require the authority to use its discretionary powers in terms of clause 5. In that sense, the process in the Property Valuation Act seemingly runs parallel to the process in the Expropriation Bill. It would still be useful to have clarification on this.

On the other hand, since the determination of value is written in directory terms in clause 5 of the Expropriation Bill, the Property Valuation Act may be applicable only once the decision to acquire the property for land reform purposes (or on request of a department as per section 12(b) of the Property Valuation Act) is made and the expropriation process is started with a notice of intention to expropriate. Again, this needs to be clarified.

The valuation in terms of the Property Valuation Act will be used to determine the compensation offered in the notice of intention to expropriate and later (if needed) in the expropriation notice. This can be gleaned from the objectives of the Act,[4] most notably to provide for the valuation of property that has been identified for the purposes of land reform. This is further re-enforced by the interpretation maxim *generalia specialibus non derogant*,[5] where it is accepted that legislation that deals with a matter in specific terms (such as the Property Valuation Act and land reform expropriation) will not be repealed by later legislation that deals with matters in general terms (such as the Expropriation Bill). In other words, when we deal with valuation (value) for land reform purposes, then the Property Valuation Act will be preferred to the Expropriation Bill. The Bill, however, still leaves the Minster with the discretion to determine what is just and equitable *compensation* (which should not be equated to value).

[4] Section 2(c).
[5] See LM du Plessis *Re-interpretation of statutes* (2002) 73.

In that sense, the expropriating authority is not bound by the valuation of the valuer, but uses the valuation of the valuer to inform his or her decision on what is just and equitable compensation. The valuer therefore completes the valuation process in terms of the Property Valuation Act, and then hands over the report with the justification for the valuation to the expropriation authority, in order for the authority to exercise its powers (and discretion) to determine the compensation amount, in line with the Constitution and the Bill.[6]

1.3 Expropriation as original form of acquisition

There are some general principles of expropriation law that should be clarified at the outset, especially insofar as certain parts of Bill (for instance the definition section and section 9) are not satisfactory and cause some conceptual confusion. Expropriation is usually a unilateral act by the state that (on account of its eminent domain), based on operation of law, acquires private property, where the loss of property for the former owner is usually total and permanent. The property is ordinarily acquired by or on behalf of the state for a public purpose or in the public interest and compensation is payable.[7] There are four general requirements for a valid expropriation: the authority requirement, the public purpose requirement, the procedural fairness requirement and the compensation requirement.

[6] This is in line with section 15 of the Property Valuation Act 17 of 2014.
[7] For a more extensive definition see AJ van der Walt *Constitutional Property Law* (2005) 189.

In the Expropriation Act,[8] the property that can be expropriated is not restricted to movable and immovable tangible objects,[9] but includes incorporeal real and personal rights. This would include mineral rights, limited real rights, personal rights and immaterial property rights.[10]

Expropriation entails acquisition of property by the expropriator[11] and a loss of such property by the expropriatee.[12] What sets expropriation apart from a normal sale is that an agreement between the parties is not a requirement for the transfer of the property, and expropriation may therefore be effected regardless of whether there is an agreement between the parties.[13]

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[8] 63 of 1975. See also AJ van der Walt *Constitutional Property Law* 3rd ed (2011) 336-347.

[9] A Gildenhuys *Onteieningsreg* 2nd ed (2001) 62. The constitutional concept of property is likewise not restricted to land as outlined in section 25(4). The South African approach to the constitutional property concept is described as a wide approach that allows for new interests and rights to qualify as property on a case-by-case basis. The case-by-case approach that the courts adopt in this regard is evident in the following examples: In *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) paras 71, 83 trademarks were accepted as property; in *Phumelela Gaming and Leisure Ltd v Gundlingh and Others* 2007 (6) SA 350 (CC) paras 36-42 goodwill was accepted to constitute property; in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104 a grocer's wine license was accepted to qualify as property under section 25 of the Constitution.

[10] A Gildenhuys *Onteieningsreg* 2nd ed (2001) 63.

[11] *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A; A Gildenhuys *Onteieningsreg* 2nd ed (2001) 62.

[12] *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515. In *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) 975 the court regards this as the literal meaning of "expropriation".

[13] In *Mathiba and Others v Moschke* 1920 AD 354 363 Innes CJ ruled that "in my opinion the meaning of the Besluit is clearly that the Government was empowered to take private land required for a location and to give by way of compensation, not what the owner was willing to take but equal land or a fair price, whether the latter concurred in the offer or not and whether he was willing or not to dispose of his land on such compensation". See also *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C).

As an original form of acquisition[14] the state acquires title through operation of law and not through co-operation with the previous owner.[15] The expropriator acquires new rights in the land that are independent from the expropriatee's rights. Upon expropriation of immovable property, the property is subject to the rights registered in the land,[16] except mortgage bonds.[17] This includes the rights of lessees.[18] If the state wants the property free of the burden of the rights of third parties,[19] it needs to expropriate those rights as well.[20]

Expropriation terminates all other rights in the land, including the rights of persons who derive their rights from the expropriated property, and confers a duty on the expropriator to compensate for the expropriation.

There have been conflicting rulings as to when *the state acquires dominium*,[21] but it is now generally accepted that *dominium* is acquired on the date indicated in the

[14] See A Gildenhuys *Onteieningsreg* 2nd ed (2001) 119. This means that the payment of compensation is not a prerequisite for the transfer of ownership.

[15] In *Stellenbosch Divisional Council v Shapiro* 1953 (3) 418 (C) 424 the court stated that expropriation of property cannot be equated with a contract of sale, but that expropriation has the character of *vis major*, and that it is effected through the operation of law.

[16] Except rights in terms of bonds over the property as provided for in section 8(1) of the Expropriation Act 63 of 1975.

[17] Section 8(1) of the Expropriation Act 63 of 1975.

[18] *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C). The court also ruled in this case that the *huur gaat voor koop* rule is not applicable in expropriation cases.

[19] See *Minister van Waterwese v Mostert en Andere* 1964 (2) SA 656 (A) 667 where it is argued that when land is burdened with a real right it reduces the value of the property.

[20] For example a right of way or mineral rights. See section 8(1) of the Expropriation Act 63 of 1975.

[21] According to Caney J in *Minister of Defence v Commercial Properties Ltd and Others* 1956 (2) SA 75 (N) 79 *dominium* passes only once the property is registered in the expropriating authority's name, and expropriation is only possible when the steps laid out in the authorising Act are followed. In *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 328 (T) 333 the serving of an expropriation notice was found not sufficient to transfer ownership, and it was said that ownership can only pass once the expropriator has possession of the property.

expropriation notice (the date of expropriation)[22] and not the date of delivery or transfer.[23] Even though *dominium* is acquired on date of expropriation, it is still desirable to register such transfer in the deeds office "for security and greater certainty of title".[24] Accordingly, the expropriator must provide the registrar of deeds with a certified copy of the registrar's notice to endorse.[25] Thereafter, a deed of transfer will be registered in the deeds registry.

Currently, the state can only take possession on the date stipulated in the expropriation notice or a date agreed upon.[26] As stated previously, the state must exercise its authority and follow the procedure laid down in the Act.

[22] Expropriation Act 63 of 1975, section 8(1). Even before this Act, Van Blerk CJ stated in *Minister van Waterwese v Von During* 1971 (1) SA 858 (A) that the expropriatee is not deprived of property merely by the serving of the expropriation notice, but remains owner until the day stipulated on the notice. One of the consequences of this is that, by virtue of section 8(6) of the Expropriation Act 63 of 1975, municipal rates and taxes are the responsibility of the expropriatee until the expropriator takes possession of the property, and not on the expropriation date.

[23] See *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) 422 where the court ruled that the serving of the expropriation notice has a twofold effect under the common law namely (i) to put an end to the rights of the owner in and to the land and (ii) to vest *dominium* in such land in the expropriating authority. *Dominium* according to Van Winsen J is thus acquired by operation of law, and not by the transfer of rights from the owner to the expropriator. Therefore, the authority does not derive its rights from the previous owners, but "by reason of the consequences attached by law to the operation of a valid notice of expropriation". Upon serving of the expropriation notice, the owner merely has a right to compensation left. See also *Mathiba and Others v Moschke* 1920 AD 354 365 where Juta AJA ruled that *dominium* does not pass at registration, and that ownership passes to the expropriator without the co-operation of the previous owner.

[24] *City of Cape Town v Union Government* 1940 CPD 188 195.

[25] Deeds Act 47 of 1937, section 31(6). In terms of section 31(2) read with section 16, an endorsement on the existing title deed suffices, and that transfer by deed of transfer is only necessary in exceptional circumstances.

[26] Expropriation Act 63 of 1975, sections 7(2)(b) and 8(3).

1.4 Customary law rights

There is great uncertainty about how this Bill will impact on customary law rights that are often "invisible". Various clauses[27] make reference to "unregistered right in property", and clause 11 deals specifically with the duties of the authority when expropriating the unregistered rights.

"Unregistered right in property" is defined as a "right in property, including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered". While one can expect customary law rights in property to fall under the definition of "which is recognised and protected by law", recent case law indicated that communities living on communal land need special protection due to the special nature of their rights.[28]

It is also unclear how this Bill will interact with the Interim Protection of Informal Land Rights Act,[29] which is currently the only Act that offers protection for these kinds of rights before an expropriation. This needs to be clarified.

Recent case law[30] ruled that communities have a right to say "no!" to interferences with their land in certain circumstances, such as mining. The argument is that where there is interference (either direct or indirect) with property that will lead to an impact on the physical lives of people, as well as the communal way of life, which will have a significant

[27] In, *inter alia*, the definition of "expropriated holder" and "holder of a right", clauses 2(3), 5(1)(b), 5(5)(a), 7(2)(h)(i), 7(2)(i), 7(4), 8(1) etc.
[28] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC); *Alexkor Ltd v Richtersveld Community*2004 (5) SA 460 (CC); *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP).
[29] 31 of 1996.
[30] *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP).

impact on the lives of vulnerable communities, this right to say "no" should be available. At the very least communities should be able to negotiate the feasibility of the dispossession and the ensuing development.

This does not mean that the state is barred or precluded from expropriating property for a public purpose or in the public interest, but as with other expropriations, the state must motivate this. This might require a higher standard, especially where the expropriation is in the "public interest" (and in the wider definition this includes various reforms) that might come at a cost to an already vulnerable group of people. The protection that needs to be afforded to this group of customary rights holders might be different from other rights holders.

With a compensation standard that requires compensation to be "just and equitable", compensation for these customary law rights requires a different way of determining compensation. It is difficult to determine the true value of household, family and collective rights, and thus guidelines on this can be helpful. It should be indicated how fairly strong rights in the home will be compensated, alongside rights that individuals might have in common property. At the very least, the Bill should allude that these rights will be compensated appropriately.

Communities might also need different time limits to adhere to the requirement of participation and decision-making as required in terms of the Bill. This will provide the appropriate protection to people living on land and using resources in terms of customary law.

2 Chapter 1: Definitions and application of Act

2.1 Clause 1: Definitions

Definition clauses in legislation serves an important function, as they can limit the meaning or deviate from the ordinary meaning of a word and give it a technical meaning that will be applicable in that specific piece of legislation. Definitions will therefore be limited to the meaning ascribed to them in legislation (unless the context otherwise dictates).[31] Definitions also need to comply with the spirit, purport and the objects of the Bill of Rights.[32] With this in mind, we raise concerns on some of the ill-constructed definitions in the Bill.

2.1.1 "Expropriation"

The Bill defines "expropriation" as "the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and 'expropriate' has a corresponding meaning."

The requirement of compulsion is in line with existing law, and the reason why expropriation is an original form of acquisition (with the legal implications thereof). If the compulsion element is absent, then it will be a transfer of property (by derivative method) with the usual legal consequences attached

The importance of having an interference with property rights classified as an "expropriation" is the following: the consequence of an expropriation is that the state

[31] *Mosanto Co v* MDB *Animal Health (Pty) Ltd* [2001] ZASCA 4 para 10; LM Du Plessis *Re-interpretation of Statutes* (2002).
[32] Section 39(2) of the Constitution.

must pay compensation. This compensation may be nil if it is just and equitable to do so, but the obligation remains, and the state must prove why R0 is in fact just and equitable.

The same is not true for a deprivation.[33] Therefore, the way we define the term "expropriation" will directly influence the measure of protection that property rights enjoy, and the clarity of when compensation is due.

The focus on the "acquisition" element of expropriation is often problematic. Expropriation entails more than an "acquisition", and in some instances there might be a possibility of an expropriation without acquisition.[34] For instance: Expropriation mostly requires a final deprivation of property (whether it is temporary or permanent), while a deprivation limits the use and enjoyment of property;[35] deprivation of property (through regulation) usually affects a general category of property, while expropriation affects specific owners in specific circumstances only;[36] deprivation stems from the state's regulatory police power, while the authority to expropriate rests on the Constitution;[37] the intention behind a deprivation is usually not to acquire the property but to regulate it for public health and safety reasons, while with an expropriation the intention is to acquire the property for a specific public purpose or in the public interest.[38]

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[33] This usually refers to law that regulates land-use planning, building, environmental conservation etc.

[34] This is true in jurisdictions that recognise constructive expropriation – a situation where a regulation might destroy the property, and which then requires the state to compensate the owner for such destruction.

[35] See AJ Van der Walt *Constitutional property law* (2011) 196 336. Confiscation and forfeiture might be instances where there is a final loss of the whole property that will still be a regulation (deprivation) and not an expropriation.

[36] AJ Van der Walt *Constitutional property law* (2011) 338. Of course, there are exceptions to the rule, which is why a narrow focus only one element such as "acquisition" is problematic.

[37] AJ Van der Walt *Constitutional property law* (2011) 210.

[38] AJ Van der Walt *Constitutional property law* (2011) 210.

Therefore, to reduce "expropriation" only to "acquisition" is problematic. Even more so where the requirement is that the acquisition must be by an organ of state or expropriating authority. In the cases of land reform, it is unclear if the property will first be acquired by the state before it is transferred to a land reform beneficiary, for instance.[39] It can potentially lead to a situation where an argument is made that if the land is expropriated for land reform purposes and thereafter directly transferred to a beneficiary, it is not "acquired" by the state, in which case there will be no expropriation. The alignment between the definition that requires acquisition and other clauses, like clause 9(2)(a), which specifically deals with the vesting and possession of expropriated property also in the context of private beneficiaries, needs clarification.

A richer definition would focus on the sources of the power that the state uses; the purpose of the restriction; the effect of the interference; whether the property is acquired or not; and the permanence or finality of the interference. These should be factors that are considered together, without one being an absolute requirement.

Another way to make the meaning of expropriation clearer and more specific is to set, as a statutory requirement, that expropriation requires formal statutory authorisation (coupled with the exercise of an administrative discretion). This is also in line with the requirement in section 25(2) that expropriation must be done in terms of a law of general application (that will also set out the specific public purpose or interest for the expropriation). A preliminary suggestion for a definition would therefore be:

> "expropriation is, <u>but is not restricted to</u>, the compulsory acquisition of property by an expropriating authority ~~or an organ of state upon request to an expropriating~~

[39] See also comments on clause 9(2)(a) in this regard.

~~authority~~ and must be authorised by legislation that specifically provides for expropriation, that sets out the public purpose or pubic interest for the expropriation, and that makes provision for the payment of "just and equitable" compensation"

The reference is also only to acquisition of "property", and not "a right in property", which might restrict the application of the Bill unduly.

2.1.2 "Expropriating authority"

It is generally accepted, and as proposed above, that an expropriation must be authorized by statute that expressly authorises the expropriation, and that the person acting must have the express authority to do so in terms of legislation.[40] While the state should have this power to complete projects for a public purpose or in the public interest (in the case of deadlocks or hold-outs), the state's power should not be unrestricted. In this sense, the definition of "expropriating authority" is formulated in too wide, and unclear terms.

"Expropriating authority" is defined as "an organ of state or a person empowered by this Act or any other legislation to acquire property through expropriation". It is wider than the current Act.[41]

> In terms of section 239 of the Constitution, an organ of state means
>
> (a) any department of state or administration in the national, provincial or local sphere of government; or

[40] *Jahn v Germany* (46720/99) [2004] ECHR 36, 22 January 2004) 671.
[41] Expropriation Act 63 of 1975, section 2(1). Section 3(2) lists the various legal persons who are entitled to also expropriate.

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".

An organ of the state is not an agent of the state, but it is part of government.[42] The test is whether the state directly or indirectly controls a body or functionary.[43] This can include commissions of inquiry, the South African Police Service, the Receiver of Revenue, Transnet, Telkom and the SABC.[44] This is casting the net extremely wide, and should be reconsidered.

Of particular concern is the possibility that Traditional Leaders are organs of state. While this means that they are bound by the provisions of the Constitution, and specifically the requirements of administrative justice, it raises concern that traditional leaders might have the power to expropriate property.

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[42] *Directory Advertising Cost Cutters v Minister for Posts Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T).

[43] In terms of the interim Constitution *Mistry v Interim National Medical and Dental Council of South Africa and Others 1997* (7) BCLR 933 (D) 947B–948C; *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T) at 454B; *Directory Advertising Cost Cutters* (supra) was also followed. In respect of the final Constitution see *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 2 1998 (2) SA 109 (W) 113A–G and *Goodman Brothers (Pty) Ltd v Transnet Ltd* 3 1998 (4) SA 989 (W) 993G–994H.

[44] GE Devenish *A commentary on the South African Bill of Rights* (1999); R Malherbe "Privatisation and the Constitution: Some exploratory observations" (2001) 1 *JS Afr L* 7.

2.1.3 "Land parcel"

The definition of land parcel is problematic as not all land in South Africa is properly surveyed (think here specifically of land held in terms of customary law).

Furthermore, the definition of "land" is absent, and it is not clear (especially with reference to the Constitutional amendment) if it will include all the structures permanently attached to the land. For clarity, "land" and perhaps "rights in land" should be defined in the Bill.

2.1.4 "Public interest"

The definition of public interest is expanded on in the Bill. Section 25(4) of the Constitution states that "public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources". The Bill added "and other related reforms in order to redress the result of past racially discriminatory laws and practices".

It is accepted in our law that national legislation, especially if enacted to give effect to a right in the Constitution, may extend protection beyond a Constitutional right. This protection may not, however, decrease protection or infringe on another right.[45]

To ensure the protection afforded and the limits, this requirement of public interest, (or public purpose), will have to be governed by a law of general application. Such a law would need to set out the public interest for which the expropriation is undertaken. This issue can be clarified in the definition of "expropriation" as alluded to above that expressly

[45] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 40.

requires that expropriation can only be done in terms of legislation that expressly provides for it.

2.1.5 "Public purpose"

Along with a requirement of due process and the payment of compensation, the public purpose requirement ensures that government does not expropriate property arbitrarily, for a purpose that does not serve the broader public. What constitutes a public purpose should not be left to the opinion of an individual, and is best contained in legislation that sets out the purpose clearly and the parameters of the power. It is therefore desirable that the definition should include reference to an authorising Act that clearly sets out the purpose for which property may be expropriated.

2.1.6 "Unregistered rights"

This is defined as a "right in property, including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered". While customary law rights will be discussed separately later, it is prudent to emphasize this aspect here as well. One would accept that "and protected by law" would include the protection that (living) customary law, as a recognized source of law,[46] affords too. In terms of customary law, there is a distinction between the private property rights in person and house property and communal property rights in communal property, which rights are embedded in a social system. This definition does not really capture that nuance well, and it should be considered to expand on the definition to ensure that these rights

[46] Section 39(3) of the Constitution.

are protected the way that they are lived. In doing this, care should be taken not to vest the rights only in traditional leaders.

2.2 Clause 2: Application of Act

Clause 2 sets out the application of the Bill. Some of the newer legislation lays down guidelines for interpreting or applying the Act at the beginning of legislation. This often serves as "guiding principles", which the legislature presumably puts in to urge the interpreters of the text (including the courts) to follow a more constructive systematic or purposive and purposeful reading of the legislation.

It might be helpful if the legislature adds such an interpretative clause in the Bill to ensure that when the legislation is interpreted and applied, it is done with a specific purpose or goal in mind. This will guide decision-making, particularly where there is a discretionary power.[47]

Such guidelines will be helpful with regard to the determination of compensation. While it will provide guidelines for the interpretation and the purpose of the legislation, it will still not amount to rigid, inflexible rules that can lead to unjust results. It will therefore ensure that the transformative aims of the Constitution are reached, with the necessary restraining guidance.

2.3 Clause 2(2)

Clause 2(2) was inserted to make provision for the instances where property of state-owned enterprises (hereafter referred to as SOEs) can be expropriated. It provides that expropriation cannot take place without the co-operation of the minister responsible for

[47] See for example the Chapter 1 of the Consumer Protection Act 68 of 2002.

the particular SOE. This will meddle with the nature of expropriation: a compulsory acquisition. Expropriation as a method of acquisition is there in the cases where co-operation led to nothing. As such, it does not require the co-operation of the previous owner. Requiring co-operation therefore changes the nature of expropriation as an original method of acquiring acquisition. It will also mean that SOEs as owners will be treated differently from private owners without clarifying why this is justified.

This can cause problems in light of the compartmentalized decision-making regarding property and general problems with regard to co-operative governance. As such, this should be solved under the Intergovernmental Regulations Framework Act.[48]

This can be even more of a stumbling block where SOEs might want to keep the property on their books to balance their books or sell it to private developers at market value to address debts. If the property is registered in the name of the state but is merely under the management of a certain department, either the Government Immovable Asset Management Act[49] or the Public Finance Management Act[50] will be applicable. The land need not be expropriated then since the state is already the owner.

What can be useful to ensure that this property is utilised and that permission to expropriate is not unnecessarily withheld is to put in a requirement that the state should be barred from expropriating private land if it or an SOE has land that can be used for the purpose of the expropriation. This way, it is ensured that well-lying state land is used for public projects, especially in the housing context.

[48] 13 of 2005.
[49] 19 of 2007.
[50] 1 of 1999.

3 Chapter 2: Powers of Minister of Public Works and infrastructure to expropriate

3.1 Clause 3: Powers of Minister to expropriate

In most expropriations, the authority to expropriate will not emanate from the Expropriation Act itself, but from another Act authorising expropriation for a specific purpose, for instances, the Schools Act[51] for building schools, or the Restitution of Land Rights Act[52] for settling restitution claims. This way the authorising Act provides for a sound purpose to expropriate property and empowers the relevant executive authority to expropriate property for that very specific public purpose. This is also important for accountability. The comments made on clause 3 should be regarded in that light.

3.1.1 Clause 3(2)

Clause 3(2), speaking again of an "organ of state", enables such an organ or expropriating authority to satisfy the Minister that property needs to be expropriated. If the Minister is satisfied, the Minister "must" expropriate the property in line with the Act's provisions.

The "must" should be changed to "may", to leave the discretion to expropriate or not with the Minister (to expropriate in terms of the Expropriation Bill and its requirements). It needs to give clear guidelines as to what such an organ would need to show the Minister to "satisfy" him or her.

This is especially necessary considering the fairly wide definition of "expropriating authority". While this is somewhat limited by clause 3(3), in that the property must be

[51] 84 of 1996.
[52] 22 of 1994.

needed for the provision and management of the accommodation, land and infrastructural needs of an organ of state, the requirement that it should still be for a public purpose or in the public interest and duly sanctioned by law, should be included as a safety valve.

3.1.2 Clause 3(5)(a)

Clause 3(5)(a) clarifies when the state's ownership vests – namely the date mentioned in the notice of expropriation, which cannot be earlier than the date of the service of such a notice. The question that arises is what will happen in the instances where the date of the notice is earlier than the dates and deadlines for objections to the expropriations? In other words, can the date of expropriation be before the end of the expropriation process, considering the timeframes for objections? And if an owner or rights holder objects, what will be the effect of such an objection? Will such an objection suspend the acquisition of ownership? It might be prudent to clarify this matter.

3.2 Clause 4: Delegation or assignment of Minister's powers and duties

3.2.1 Clause 4(1)

In terms of this Clause, the Minister may delegate "either generally or in relation to a particular property or in relation to a particular case", its powers to an official of the Department. This Clause should be treated with circumspection and needs clarification.

While section 238(a) of the Constitution allows for such a delegation, it allows it to delegate to another executive organ of state. The official will, therefore, have to be part of the executive. This delegation needs to be exercised in line with the Bill and cannot confer onto such a person more powers than the Minister has. For that reason, a

delegation "generally", might not be in the parameters of this delegation power. The proposed discretionary powers of the Minister will not fall within the ambit of such a delegation.[53]

4 Chapter 3: Investigation and valuation of property

4.1 Clause 5: Investigation and gathering of information for purposes of expropriation

In general, it should be made clear that any gathering of information will be gathered in line with the Promotion and Protection of Personal Information Act,[54] and no owner or holder should be forced to part with personal information that does not pertain to the valuation of the rights in property to be expropriated.

On a technical level, there seems to be an extra "and" after clause 5(2)(a)(v).

4.1.1 Clause 5(5)

The time frames provided in the Bill might not be realistic for people and/or communities living on communal land. Furthermore, no specific provisions are made for the type of information required regarding rights in land of people living on communal land. For instance, rights held in the homesteads differ from rights held in the communal land for grazing or whatever purposes. Absent such information, it might be difficult to determine the compensation amount, as required later.

[53] J De Ville *Constitutional and statutory interpretation* 218.
[54] 4 of 2013.

5 Chapter 4: Intention to expropriate and expropriation of property

5.1 Clause 7: Notice of intention to expropriate

Clarity is needed regarding the different processes and notices: the negotiation phase, the "intention" phase, and the "expropriation" phase. An especially heavy onus is placed on the owner of property during the "intention" phase to provide information regarding holders of unregistered rights in the property. What would this look like in the context of communities? Or what will this look like in the context of owners of parcels of land where people reside, not necessarily with the owner's permission? Again, the timeframes seem to focus on land belonging to a single owner, not land that involves communities.

It is also not clear why, in terms of subclause (4)(a), it is the owner or the holder of the unregistered right to set out the amount of compensation claimed (an owner does not claim compensation, it is offered), including full particulars how it is made up. This can be a costly exercise for an owner who might not be able to reclaim the costs.

While the owner might have some idea of the value of the property, he or she would not have the capacity to determine the compensation by applying all the relevant (and other) considerations. An owner might be able to indicate the value of the property, but not "just and equitable" compensation. This is particularly of concern because owners of unregistered rights are already a vulnerable group – risk under-compensation because subclause (6)(a) empowers the state to accept their offer without further assessment. In other words, if an owner of an unregistered right undervalues their property due to lack of capacity or any other reason this undervaluation will bind them.

5.2 Clause 8: Notice of expropriation

5.2.1 Clause 8(3)(d)

In line with previous comments: expropriation should only be done in terms of legislation that authorises expropriation for a specific public purpose. In such as case, the reference to the "reason for the expropriation of that particular property" should include a reference to the legislation that specifically authorises such an expropriation. Such specific legislation will determine the parameters of the powers of the executive when expropriating property.

5.2.2 Clause 8(4)(d)

This is a very important clause, specifically in cases where "nil" compensation is paid. It should be made clear to the expropriating authority that the mere possibility of "nil" compensation does not allow for a blanket offer of "nil" compensation, but that the expropriating authority must still explain why, in that specific circumstance, after weighing up various factors as well as the interests of the parties involved, the offer of "nil" (or indeed any) compensation is "just and equitable".

5.2.3 Clause 8(5)

Care should be taken that it remains on the state to ensure that all the affected parties receive a notice of expropriation. It might not be desirable, as each holder of property rights, whether ownership or otherwise, have their own recourse against the state, should they disagree with the expropriation, the compensation offered, or if one of the legal steps has not been complied with.

5.3 Clause 9: Vesting and possession of expropriated property

5.3.1 Clause 9(2)(a)

The Bill here refers to the "expropriating authority, or the person on whose behalf the property was expropriated". It is not clear whether this, for instance, refers to a land reform beneficiary. Ordinarily, expropriated property vests in the state (it is also in line with the definition of "expropriation") and not in a private beneficiary. If this Clause indeed refers to those instances where land should eventually be transferred to a beneficiary, the Clause should clarify that this will only be applicable in those limited instances where property is expropriated in the public interest, with reference again to the enabling legislation. Alternatively, it should follow the correct process: the state expropriates the property, and becomes owner of the property, and then transfers the land to a land reform beneficiary that is selected following procedures set out in terms of validly enacted legislation. These actions can happen simultaneously in the deeds office, that must, in terms of the Deed's Registry Act[55] set out the legal causes.

In the absence of this, it can leave the door open to property being directly transferred to private beneficiaries, which is not normally allowed in terms of expropriation. Also, read with the current definition of "expropriation" it might have the unintended consequence of not being labelled an "expropriation", because the state never "acquired" the property.

[55] 47 of 1937.

5.4 Clause 10: Verification of unregistered rights in expropriated property

5.4.1 Clause 10(6)

This Clause can shift the obligations of the state on the owner. It might place an unfair obligation on the owner to provide information that they might not have or know how to obtain. This will have a disproportionate effect on vulnerable owners who do not have the means or the knowledge necessary for such an inquiry. At the very least, an element of intent to deceive must be present before an owner can be penalised in this manner.

5.5 Clause 11: Consequences of expropriation of unregistered rights and duties of expropriating authority

5.5.1 Clause 11(5)

As alluded to above at 5.4.1, the owner should not be expected to carry the state's responsibility and should not be expected to compensate for unregistered rights that they were not aware of.

6 Chapter 5: Compensation for Expropriation

6.1 Clause 12: Determination of compensation

Clause 12 replaces section 12 of the current Act and lays down the principles that must be adhered to when determining compensation. It makes it clear that the compensation standard is "just and equitable" and not "market value", thereby bringing it in line with the Constitution.

As mentioned previously, it might help to distinguish between "value" and "compensation", where value refers to the actual value of the property and compensation

involves questions of justice and equity, allowing for the exercise of discretion in determining what is just and equitable.

6.1.1 Clause 12(3)

We note that Clause 12(3) was inserted, presumably in the climate of the discussion on the Constitution's possible amendment, to indicate the instances where nil (presumably rand) compensation can be envisioned. The wording makes it clear that it is not "without compensation", thereby removing the obligation to pay compensation or at the very least justify the calculation of nil compensation, which is correct. Arguably the obligation to pay compensation, even if it is R0, is an integral part of expropriation, the absence of which would mean that it is no longer an expropriation.

It is important to note that nil compensation is not without compensation. It indicates that these are the circumstances where the state foresees that "just and equitable" compensation can be nil. However, it still leaves room to challenge that. It is also important to note that homes and productive agricultural land are not included in this list. Therefore, the Bill does not foresee large-scale seizure of land without compensation, and the clarification is thus welcomed.

Clause 12(3) provides the instances where it may (and not must) be just and equitable for nil compensation to be paid. This is a peremptory provision, which leaves a discretion with the expropriating authority whether the compensation will be nil or more. Since the authority is left with a discretion, it will be helpful to have guidelines on how such a discretion must be exercised.

Clause 12(3) only refers to "land" and not other kinds of property. It also limits it to cases where land is expropriated in the public interest and not for a public purpose. In South

African Property Law, land or immovable property refers to everything attached to the land. The question then is if this "nil compensation" will also be applicable to permanent fixtures and the other improvements on the land.

It should be noted that all of the examples listed in clause 12(3) refer to the "use" of the land, and it is unclear why this needs to be stipulated, seeing that "the current use of property" is a factor in terms of clause 12(1)(a) that can be taken into account, when determining just and equitable compensation. It is therefore not entirely clear *why* such a list is needed. Nonetheless, we comment on the various clauses below.

6.1.1.1 Clause 12(3)(a)

Clause 12(3)(a) was changed from "speculative purposes" to the requirement that land must not be used AND the owner does not want to develop land or use it to generate income, but to only benefit from the appreciation of the market value. This, therefore, attempts to clarify what is meant by speculative purposes. The concern is raised where land is not used in the sense of being built on or developed, but rather for environmental purposes, this will justify nil compensation. Who or what will determine that it is "not used"? What is acceptable or non-acceptable use for land?

6.1.1.2 Clause 12(3)(b)

Clause 12(3)(b) refers to land owned by state-owned enterprises and a state-owned entity. It should be noted that this is not state land, as the state need not expropriate its

own land.[56] This should also be read with clause 2(2) that authorises the Minister to only expropriate such property with the consent of the minister responsible for that entity. There might be some problems with requiring consent. For one, the very nature of expropriation is such that the owner does not need to consent to the expropriation – why are these owners treated differently?

Another problem is for instance that due to politicking, such property would never be expropriated. For example, housing is a concurrent national and provincial competency, while municipal planning is a municipal competency.[57] Therefore, if a municipality wants to plan low-cost housing sections and wants to include the state-owned entity's land, the possibility of doing so cost-effectively will hinge on the permission of the Minister in charge of the SOE. Often these entities are reluctant to let go of their assets if not at market value, as they need to balance their books. In fact, this land often gets sold to private developers. Since there can be different political parties in charge of the local government, provincial government and national government, this further complicates matters. It is submitted that SOEs must be treated the same as all other owners.

6.1.1.3 Clause 12(3)(c)

Clause 12(3)(c) looks at land that is abandoned by the owner. This needs to be clarified. In law, property is only considered abandoned when the owner gives up the intention to be an owner, usually with physical control loss.[49] But mere loss of physical control would

[56] Transfer between departments will be done in terms of the Government Immovable Asset Management Act 19 of 2007.
[57] It is noted and acknowledged that clause 6(2) does require the authorities to work together with the municipality on expropriation issues. This might address this issue to some extent.

not constitute abandonment. There is even further difficulty when it comes to the abandonment of immovable property – in South Africa, it is arguably not possible to abandon immovable property due to the lack of a mechanism that gives proper effect to the principle of publicity this regard. In most cases, these properties, although physically abandoned by the owner, are still legally owned by the owner. Concern is raised that in some instances owners leave their property because they can no longer effectively protect themselves and the property from unlawful invasions on land – would this also constitute "abandonment"?

In any event, should abandonment have the *legal* meaning, i.e. *res derelictae*, then it is not necessary to expropriate the property as it can be acquired through another means of original acquisition, namely *occupatio*. In the absence of abandonment having the legal meaning as outlined above, subclause (c) would presumably be speaking about owners who are not using their property or have deserted it for some reason. If that is the case, the question is then what is the difference between this subclause, and subclause (a).

6.1.1.4 Clause 12(3)(d)

Clause 12(3)(d) speaks to where the value of the land is equivalent, or less than, the value of direct state investment. It is not clear if this clause is targeting farmers who historically benefitted from state support, and whether it can also include current beneficiaries of land reform projects. Most of these farms are still registered in the name of the state. Other than that, it is not clear how this differs from the factor of "direct state investment" already mentioned in clause 12(1)(d).

6.1.1.5 Clause 12(3)(e)

This refers to instances where property poses a health risk. It should be noted that there are various options in law to force an owner to fix the property. It is not clear what authorizing legislation will be used to expropriate such property.

6.1.2 Clause 12(4)

Clause 12(4) makes provision that when a court or arbitrator determines the amount of compensation in section 23 of the Land Reform (Labour Tenants) Act,[58] it may be just and equitable for nil compensation be paid. It is not clear why provision is made for this class of claimants and not, for instance, for restitution claims.

A few comments in this regard: In the *Khumalo v Potgieter*[59] and the *Msiza v Director-General for the Department of Rural Development and Land Reform*[60] cases the court ruled that once an agreement is reached between the labour tenant and the owner, or once the Land Claims Court decided on the validity of the Labour Tenant's Claim, there is an expropriation. In the case of the Land Claims Court deciding, it will amount to a judicial expropriation. In *Msiza*, the Land Claims Court found that the award made by the court in 2004 amounted to a judicial expropriation. Relying on the judicial definition of "expropriation", as "the compulsory acquisition of rights in property by a public authority" and "the compulsory taking over of property by the State to obtain a public benefit at private expense", the 2004 judgment of the Land Claims Court was regarded as an act

[58] 3 of 1996.
[59] [2001] 3 All SA 216 (A).
[60] 2016 (5) SA 513 (LCC).

of expropriation. The land was thus acquired by the state, since the *effect* of the Court's 2004 order was to force the owners to surrender the land to Mr Msiza subject to "just and equitable" compensation. In terms of case law it is therefore clear that that is a moment of expropriation, and that compensation should be calculated from that moment.

It also bears mentioning that *Mwelase v Director General for the Department of Rural Development and Land Reform*[61] makes it clear that specifically in the case of Labour Tenants:

> "[t]he Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis."

Care should be taken that the department does not resort to clause 12(4) to dodge accountability because of this failure.

6.2 Clause 17: Payment of amount offered as compensation

6.2.1 Clause 17(3)

In general, we view the mechanisms that ensure that compensation is paid as inadequate, or not adequately spelled out. In line with the Constitution, as re-iterated by *Haffejee NO and Others v eThekwini Municipality and Others*,[62] the time and manner of payment of compensation must be just and equitable. This should remain the standard, and this

[61] [2019] ZACC 30 para 41.
[62] 2011 (6) SA 134 (CC).

should be included in the wording. The default position should be that the determination and the payment should be before expropriation. Absent of that, especially in cases where there is a dispute on the compensation amount, at least an amount of compensation should be paid. Litigation is a costly process, and an owner that finds herself without her property and then without any money, may not be able to contest the expropriation or the amount in court.

6.2.2 Clause 17(5)

The expropriating authority cannot use the Expropriation Bill to collect tax. They do not have the authority for it.

6.3 Clause 18: Property subject to mortgage or deed of sale

In line with the law, owners of property whose property is expropriated will remain liable for the outstanding amount on the mortgage, but without the asset to secure the debt. In cases of "nil" compensation, this can have dire consequences. Owners might not (and arguably should not) pay the debt for property they no longer own. As alluded to in clause 19(4)(c), it is quite onerous on the owner.

If one owner defaults, that might not have a big impact on the mortgage market. But if many or all owners default, it will lead to the collapse of the mortgage market. "Nil" compensation cannot be "just and equitable" if it leaves an owner in such a scenario. It is not clear how such owners will be protected.

6.4 Clause 19: Payment of municipal property rates, taxes and other charges out of compensation money

6.4.1 Clause 19[63]

It is important to note that since expropriation is an original form of acquisition, transfer does not take place upon registration in the Deeds Office, but rather on the date stipulated on the expropriation notice.[64] Clause 19(1) is confusing as it creates the impression that paying these charges is a prerequisite for *transfer* of ownership and consequent registration in the case of expropriation. In this respect, registration in the expropriation context is not a requirement for the vesting of ownership as registration is ordinarily a requirement for derivative acquisition (or transfer of ownership), not original acquisition (which expropriation is).

When property is transferred upon registration in the Deeds Office, section 118(1) of the Municipal Systems Act[65] must be complied with. This means that a rates clearance certificate must be obtained before registration takes place in the Deeds Office. This is not the case with an expropriation. The Deeds Office is compelled by law to record the expropriation.[66] There is not an application for registration with a deed of transfer, as

[63] Much of the input on this clause came from Ms Chantelle Goodwin-Woods, who is currently doing her doctorate on this topic.
[64] G Muller, R Brits, JM Pienaar and Z Boggenpoel *Silberberg and Schoeman's the Law of Property* (2019) 194.
[65] 32 of 2000.
[66] Section 16 of the Deeds Registries Act 47 of 1937.

during a normal process of transfer of ownership.[67] Rather, registration fulfils the role of updating the Deeds Office records in the context of expropriation.[68]

Therefore, the act of registration in the case of expropriation is not to effect a transfer, but to update the records to reflect the state as the true owner. Unlike in derivative forms of acquisition, ownership passed when all the legal requirements in the expropriation legislation were adhered to. Registration can therefore happen long after the state became owner of the property.

Clause 19 enables the expropriating authority to pay over monies to settle rates, taxes and other amounts owed to the municipality to obtain a rates clearance certificate. The monies are paid to the municipality and is deducted from the compensation offered to the expropriated owner. This, however, is not mandatory. It also does not require that a rates clearance certificate be obtained.

Municipalities need to be able to collect revenue to comply with their constitutional duties. Section 118 of the Municipal Systems Act was enacted to enable the municipalities to collect revenue in cases of transfer of properties. In line with section 118(1) of the Municipal Systems Act, the expropriating authority should therefore be compelled to ensure that outstanding monies be paid from the compensation, before a rates clearance certificate can be obtained and before expropriation takes place.

This might lead to a situation where the compensation offered is not enough to cover the outstanding rates and taxes, and that such a requirement might lead to the expropriating

[67] Section 31 does provide that parties to an expropriation can instruct conveyancers to lodge the relevant documents to obtain registration of the expropriation, if this has not been done in terms of the section 16 process. While it might be that this is to place an obligation on the expropriating authority to apply to have the expropriation registered (specifically in terms of section 31(6)(a)), this step is often not adhered to.
[68] *South African National Roads Agency v Chief Registrar of Deeds* [2009] ZAGPPHC 160 para 21.

authority to pay in monies, before expropriation can take place. This might make the expropriation prohibitively expensive.

If the expropriating authority is a municipality, this might not be too problematic because it would merely pay itself. However, where it does become problematic is where an "organ of state" other than a municipality is the expropriating authority. As each state entity has its own budget, and without this obligation, municipalities may not secure monies due to them. This will undermine their ability to provide municipal services to the communities that they serve.

Clause 19 should, therefore, expressly provide that a clearance certificate is needed before expropriation can take place. It must also be mandatory for the expropriating authority to use the expropriated owner's compensation money to obtain the rates clearance certificate (at least where there is no dispute to the amounts owed).

7 Chapter 6: Mediation and Determination by court

7.1 Clause 21

The addition of this clause is welcomed, as this will provide people expropriated with a cheaper alternative than costly litigation to address issues of compensation. It is not clear why it is only limited to compensation. It should be possible to mediate on less invasive means (other than expropriation), or question the reason for the expropriation.

In this respect, the lessons learned, especially regarding time limits, in the field of labour law (the CCMA) can be helpful. It is for this reasons that we propose that the "may" in clause 21(1) be changed to a "must", and that the requirements for the qualifications and expertise of mediators be spelled out, and whether it will be in terms of the court

mediation processes or a separate process. Clarity should also be given as to how this links to clause 17 – and if possession and acquisition can take place while the dispute is still going on.

An arbitration process will avoid possible expensive and protracted litigation.

8 Chapter 7: Urgent Expropriation

8.1 Clause 22: Urgent expropriation

8.1.1 Clause 22

Urgent expropriations are important mechanisms for the state to utilise in exceptional circumstances and is therefore justifiably made provision for in the Bill. However, it is unclear whether the description in clause 22(1) will comply with the definition of "expropriation", that requires an element of acquisition. An amendment to the definition – without the central focus being on acquisition – should circumvent such a problem.

9 Chapter 8: Withdrawal of Expropriation

9.1 Clause 23: Withdrawal of expropriation

9.1.1 Clause 23(2) – what is currently in the clause

9.1.2 It is important that owners be notified timeously, should the property no longer be required for the purpose for which it was expropriated. This clause places restrictions on this, but it is not clear if it goes far enough. We say this because there appears to be a discretion on the state regarding whether, once the purpose for the expropriation changes, it would want to withdraw the notice of

expropriation. This essentially places the obligation on the state to withdraw the expropriation if the reason for the expropriation is no longer applicable, and this should be done within three months from the date of expropriation.

There are several concerns with the provision as it currently stands. Firstly, it is questionable whether it is appropriate for the clause to be worded that the state MAY withdraw the expropriation and should have been phrased in more mandatory terms (requiring that the state MUST withdraw the expropriation if the purpose cannot be achieved). Does this imply that the state can change the purpose and then decide whether or not to withdraw? Moreover, if the purpose can no longer be achieved, what does this say about the investigation stage (chapter 3 of the Bill) that should have been done at the outset? The envisaged investigation required details of the justification for the expropriation, which could also have impacted the compensation offered and/or awarded. In any event, a change in purpose puts the whole process of expropriation including all the stages listed in the Bill, which required some indication of the reason for the expropriation, into question. Placing this provision in peremptory terms may result in expropriations that should be withdrawn because the purpose cannot be reached or is abandoned as being arbitrary. It is important for accountability.

9.2 Clause 23(2) – what should be included in the clause

The state having to show a valid public purpose or public interest (preferably set out in the Act authorising the expropriation), is an important check on the abuse of state power. The state must use the property for the purpose expropriated. Once that purpose falls away, that check on state power falls away too. Either there needs to be new scrutiny for

the new public purpose for which the property needs to be used, or the property needs to be "re-expropriated".

An important check on state power, especially in the interference with property rights, is so-called "re-expropriation". A re-expropriation provision applies when the underlying public purpose or public interest falls away after the expropriation, and allows an owner to re-acquire the land, usually at the same or similar price as the compensation amount that was paid. Since relocation might by now not be possible anymore, or in the case of communities impossible, there should be an option to purchase the property at the expropriated price. It should be noted that re-expropriation clauses should be provided for in the legislation, and the absence of such clauses will make it impossible for owners to claim the expropriated property back if the original purpose for the expropriation becomes impossible or was abandoned.[69] It would be imperative to include such a clause to provide for the eventuality that the purpose for the expropriation becomes impossible. The current clause dealing with withdrawal of the expropriation does not cater for this. This will preclude the state from expropriating land for purpose x and utilising it for purpose y, it constitutes a valuable insurance that expropriation will be used effectively and only when necessary, ensuring that the expropriation is not arbitrary.

10 Conclusion

Thank you for the opportunity to provide inputs. We trust that you will consider the inputs, and should you require engagement, we welcome the opportunity to make oral submissions during the public hearings.

[69] *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP). See also AJ van der Walt *Constitutional Property Law* 3rd ed (2011) 497.

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