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the way to prosperity

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The Chairperson: Portfolio Committee on
Public Works and Infrastructure
Parliament of the Republic of South Africa
Cape Town
8000

Attention: Hon. Ntobongwana
Ms Matinise

Per email: expropriationbill@parliament.gov.za; nmatinise@parliament.gov.za

AGBIZ WRITTEN SUBMISSION ON THE EXPROPRIATION BILL, 2022

Dear Honorable Ntobongwana, Ms Matinise

Agbiz would like to thank the Portfolio Committee for the opportunity to submit written comments. Should there be an opportunity to make oral submissions during public hearings, we would greatly appreciate the opportunity to make a substantive, oral input.

1. Who we are

The Agricultural Business Chamber (Agbiz) is a voluntary, dynamic and influential association of agribusinesses operating in South and southern Africa. Key constituents of Agbiz include the major banks in South Africa, Development Finance Institutions, short term and crop insurance companies, agribusinesses, commodity organisations and co-operatives providing a range of services and products to farmers, and various other businesses and associations in the food and fibre value chains in the country. Conservative estimates attribute 14% of South Africa's GDP to the food and fibre value chain, although its proportionate contribution to the rural economy and rural job creation is significantly higher.

Agbiz's function is to ensure that agribusiness plays a constructive role in the country's economic growth, development and transformation, and to create an environment in which agribusinesses of all sizes, can thrive, expand and be competitive. One way in which we seek to achieve this is by providing thoroughly researched inputs on draft laws and policies affecting our members.

Agbiz is also an active member of Business Unity South Africa (BUSA) and participates in many Nedlac activities through the Business Constituency.

2. Introduction

Agbiz and its members are committed to building an agricultural sector that is dynamic, efficient, inclusive and sustainable. Although the majority of our members operate in the value chain, Agbiz represents a considerable number of land owners who operate agricultural enterprises via the commodity organisations that Agbiz represents. Furthermore, the entire upstream and downstream value chain relies on a successful and vibrant primary agricultural sector for its existence. Many of the Agbiz members are also directly involved in agricultural finance where international lending criteria require financiers to request security as part of their due diligence assessments. As a result, the Agbiz membership has a direct interest in the Expropriation Bill as it affects land owners directly, the security held by lenders as well as the production base of the primary sector on which the success of the whole value chain is built.

Agbiz initially provided written inputs to the 2013 Bill, formed an integral part of the Business representation when the Bill was deliberated upon at Nedlac and continued to make constructive inputs throughout the Parliamentary process at both the level of the Portfolio Committee and the Select Committee in the National Council of Provinces. When the Bill was published again for comments in 2019, we submitted comments and led the Business engagements at Nedlac. Throughout this process, we have recognised the principled need for a law of general application that can align the process to be followed by all expropriating authorities and set a uniform standard for the calculation of compensation in line with section 25 of the Constitution. Minister De Lille even expressed her gratitude to the Nedlac team for the improvements made to the Bill and as such we are proud to have made a positive contribution to date.

As will become clear from the comments that follow, Agbiz does not support the insertions relating to nil compensation. Be that as it may, we have always acknowledged the necessity to regulate expropriation through a single process and advocated for the Bill to be finalised as a matter of urgency, both within Business and to broader society. We have also been a trusted contributor to the legislative process relating to this Bill for the better part of a decade and wish to continue doing so. As such, we have compiled a number of evidence-based inputs which we believe will improve the revised draft of the Bill. We trust that you will view these comments in this light.

3. General comments on the Bill

3.1. Expropriation at 'nil' compensation

Section 12 (3) has been retained, with some amendments, from the Bill published in 2019. We understand that these provisions were inserted in light of the on-going debate on expropriation without compensation within the context of land reform. We recognise that section 12 (3) does not prescribe a list of peremptory properties where 'nil' compensation will be paid. Instead, it remains the duty of the courts to consider all relevant circumstances, including those listed in 12 (3), to decide whether or not nil compensation is justified in a given set of facts.

Nevertheless, we are still concerned that this provision may be interpreted by expropriating authorities as a licence to offer nil compensation for any land parcel expropriated in the public interest, even in instances where the balance of relevant considerations does not support nil compensation. In this instance, the law would place an intolerably heavy burden on the owner or the holder of a right in the property as they would need to approach the courts to receive just and equitable compensation. Whilst we support their right to approach the courts, it is well known that the parties may not be equal litigants as the state has deep pockets. Section 12 (3) will therefore place owners or rights holders on the back foot and lead to unnecessary and costly litigation.

3.1.1. Internationally recognised motives for the payment of compensation

Expropriation is by no means a South African invention. The vast majority of democratic states have the power to acquire property through compulsion for public purposes. Whether it is referred to as expropriation, compulsory acquisition, compulsory purchase or the state's right of eminent domain, it is universally recognised as an instrument that should only be invoked as a last resort. Not only does expropriation represent the most intrusive limitation on a person's property rights, but it is also a lengthy and protracted process for the state. It truly is a lose-lose situation but one which may be necessary where the property cannot be obtained for a public purpose by any other means.

Another element which is characteristic of expropriation is the payment of compensation. This is such a central element that one can legitimately ask whether an acquisition is in fact an expropriation if no compensation is paid? The rationale for paying compensation has been well established internationally and include the following reasons:

Compensation ensures that an individual is not expected to carry the costs for an endeavour that benefits the public at large.[1] In other words, by compensation from the national fiscus, the public all contribute through their tax payments to the costs associated with public works or endeavours so that an individual property owner does not have to carry the expenses on his or her own. It prevents the affected individual from suffering more significant loss from the taking than the benefit they receive as a member of the public.[2]

The purpose of compensation is furthermore recognised as a form of insurance to investors against losses caused by state action.[3] It is intended to motivate investors by "*providing security for the fruits of economic endeavours*".[4] In this sense it motivates investment and economic development by ensuring that property lawfully acquired and paid for will not be taken away without compensation.

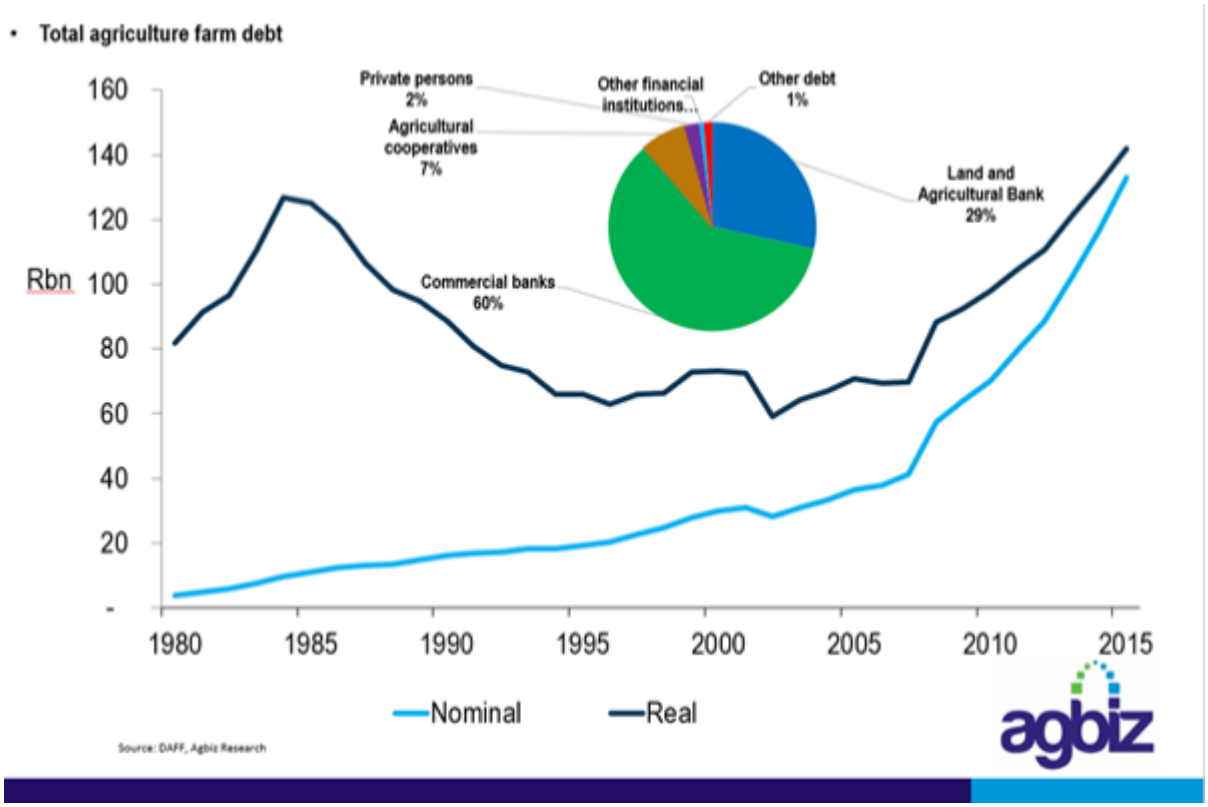
Finally, the payment of compensation is vital to ensure that expropriation remains a last resort for the state. The cost of compensation ensures that expropriation is not the most 'efficient'[5] manner for the state to acquire a person's property. Should 'nil' compensation be paid, the state may be tempted to resort to expropriation in the first instance when it should rather pursue less intrusive means. This argument is essential for a state built upon the recognition of fundamental rights. By requiring compensation to be paid, it is more efficient for the state to acquire property in a manner that does not limit a person's property rights more than what is required. Stated differently, the state will only expropriate (an extreme limitation of rights) when it is the last resort because it is not cheaper nor easier to expropriate property than simply buying it.

3.1.2. Possible impact of 'nil' compensation on the land market and collateral held by financial institutions

The impact of an amendment to allow for the expropriation of certain properties at nil compensation would put tremendous pressure on the institutions financing agriculture. As it currently stands, the total agricultural debt is estimated to be in excess of R180 billion, with roughly two-thirds of this value securitised using the land as collateral. Should nil compensation be offered for properties used to produce agricultural

[1] See *Armstrong v United States,* 346 U.S. 40 at p49 in relation to the *Fifth Amendment to the Constitution of the United States of America.*
[2] Jones W "Confiscation: A Rationale of the Law of Takings" 1995 *Hofstra L. Rev.* 1-88 at p 12.
[3] Jones 1995 *Hofstra L.* 7 - 10.
[4] Jones 1995 *Hofstra L.* 8
[5] Jones 1995 Hofstra L. Rev. 10; Du Plessis *Compensation for Expropriation under the Constitution* 2009 217 – 227.

commodites, it could have far reaching consequences for financial institutions, the existing commercial agricultural sector and especially new entrants to the sector.



A mortgage bond is a real right in property. When a property is expropriated, the owner's rights as well as the right of any bond holders are extinguished. Usually that would mean that an agreement must be reached as to how to apportion the compensation, and in the absence of an agreement a court would decide what amount is just and equitable for the owner and the bond holder respectively. However, where nil compensation is offered, the debt will become an unsecured loan, and with the owner no longer having access to the property, his or her ability to generate an income and repay the loan will be compromised. In the case of a bona fide farmer whose sole source of income was the farming activities, the financier will have little or no recourse and could suffer huge losses.

An unintended consequence of 'nil' compensation is that the owners of these propserties may struggle to access finance or may be financed at a higher rate to compensate for the risk. Whilst we accept that s12(3) does not prescribe nil compensation, the mere fact that they are listed increases the risk for a financial institution where the land is used as collateral. If these properties are no longer considered reliable forms of collateral, the risk profile of those properties will increase dramatically. To off-set the risk, financiers may either become more reluctant to lend to the sector, impose higher interest rates, or a combination of both.

Where these properties are used for agricultural purposes, it could have a substantial impact on the viability of their businesses as agriculture is highly reliant on credit. By its very nature, agricultural businesses have seasonal and sporadic incomes. Farmers therefore rely on credit to purchase inputs such as seeds, fertilizer and diesel, and to satisfy their cashflow requirements throughout the year. These debts are often paid once the crop is harvested or rolled over to the following year in the event that the harvest was unfavourable. Credit is also needed to purchase land, implements and fixed improvements. By listing these properties, it can endanger their access to finance or result in finance at a higher rate.

3.1.3. Land reform can be achieved without resorting to nil compensation

In the South African context, the debate surrounding 'nil' compensation has been centred on land reform, a critical and essential component of our Bill of Rights. Agbiz has always viewed the extension of strong property rights and the success of the land reform programme as central pillars needed to ensure the long-term sustainability of the sector and the South African economy at large. Furthermore, we are fully aware that land reform is not merely an economic consideration. It is an imperative given the history of dispossession, skewed patterns of ownership, and insufficient access to land for economic and settlement purposes in South Africa.

Within this context, Agbiz has invested a considerable amount of time and resources over the past eight years to promote the success of land reform, both through inputs on policy and draft legislation, as well as formulating alternative funding mechanisms to speed up the process in a sustainable manner. Agbiz was involved in the various workstreams known as the NAREG process following the publication of the Green Paper on Land Reform in 2011, played a leading role in the Inter-Departmental Task Team on Outcome 7 led by the Department of Rural Development and Land Reform (DRDLR), and continues to participate and lead the Business delegation in several task teams at the National Economic Development and Labour Council (NEDLAC) deliberating on legislation that affects land rights and land reform. In association with the Department of Agriculture, Land Reform and Rural Development and the Banking Association of South Africa (BASA), we developed a blended financing model based on the public-private-partnership principle to facilitate private sector lending to accelerate land redistribution. This initiative will hopefully be implemented in 2021. Our individual members have also been very involved in individual land reform projects through financing joint-ventures and providing training, extension and various forms of support to beneficiaries.

Given the above, we do not support 'nil' compensation for land expropriated for land reform because our land reform aspirations can be achieved without resorting to nil compensation. In addition to the blended finance initiative, which will make more

funding available, the state's land reform budget has been consistently underspent or diverted to other initiatives such as Agri Parks. Historical studies show that land acquisition peaked in 2009 but then trailed off dramatically as the Department languished under a policy paralysis and diverted funds away from land reform to other programmes. If the reforms recommended by Parliament's High-Level Panel[6] were to be implemented, land reform could be achieved without resorting to nil compensation. The report itself acknowledged; "Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform".[7]

We furthermore submit that the power to expropriate land for reform has existed in our law for nearly three decades but has never been used. It is premature to state that the payment of compensation inhibits land reform because no expropriations (for land reform) have taken place to date. Only once the Minister of Rural Development and Land Reform has exercised her right to expropriate (as a last resort), will we have a more unambiguous indication of what just and equitable compensation will be within the context of land reform. However, the 'nil' compensation provisions may well cause unintended harm to investor confidence at a time when the sector and the country can least afford it.

In our submission to the Constitutional Review Committee, we highlighted the following considerations to motivate why the current threshold of just and equitable compensation does not require amendments to achieve the land reform goals which we are striving for as a country:

- The state has never used its powers of expropriation within the context of land reform;
- The courts have not had the opportunity to clarify the meaning and scope of just and equitable within the land reform context;
- The recognition of property rights is the basis of economic freedom, prosperity and liberty;
- In the State of Food and Agriculture report compiled by the FAO is 2012, it is clearly stated that farmers themselves constitute by far the largest portion of investment into the sector. And amongst other factors such as good governance, macroeconomic stability and transparency, respect for property rights plays a central role in investment decisions. This is supported by local

[6] Parliament. 2017. High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. Led by former President Motlanthe.
[7] High-Level Panel report at p51.

data showing a significant trend of reduced foreign investment into the agricultural sector and reduced gross capital formation;
- Explicit nil compensation is out of line with international standards;
- Explicit nil compensation can have adverse effects on investment, capital formation and agricultural productivity;
- The resulting harm to the economy could exceed the costs of simply paying just and equitable compensation; and
- Various alternatives are available to promote land reform, including blended finance models whereby the state and private sector co-fund land reform.

3.2. Potential omission from the Bill

As per the Bill, the property may only be expropriated under a law of general application for a public purpose or in the public interest. Although difficult to quantify, the purpose for which the property was expropriated can also have an influence on the compensation that is paid. One of the issues that arose during the Nedlac discussions, was what would happen if a property was lawfully expropriated for a specific purpose but is no longer required for that purpose. Would this render the expropriation retrospectively unlawful (if no longer in the public interest or for a public purpose)? Would the compensation paid to affected parties have to be reviewed if the purpose of the expropriation affected the calculation of compensation?

The terms of reference at Nedlac did not allow constituencies to engage on the topic, but the Government did acknowledge that it is an omission which should be addressed after the Nedlac process. Unfortunately, there is no indication that this has been discussed in the current Bill. However, we strongly urge the Portfolio Committee to address the matter as an omission may well lead to unnecessary litigation or even a constitutional challenge if the situation ever arises.

Due to the complexity of expropriation, it may be practically impossible to reverse an expropriation. Expropriation under the Bill results in all registered and unregistered rights in the property being dissolved and compensation paid to the owner and the holders of all registered or unregistered rights. To reverse an expropriation, the compensation would need to be claimed back from all of these parties and their rights reinstated. This may not be practically possible, especially as far as unregistered rights are concerned.

With this in mind, the cleanest and most equitable solution would be to give the expropriated owner the first option to buy back the property at a rate equal to the sum of all compensation paid. This could result in the owner purchasing the property for more than the compensation paid to him or her individually but this should be off-set by the fact that the property is acquired free of any encumberments. This option should be subject to a time limit and if the owner fails to accept the offer within the time

allotted, or if he / she repudiates the offer, then the state should have the right to dispose of the property in terms of that organ of state's internal asset disposal policies.

4. Specific comments

4.1. Clause 1 - Definition of Expropriation

Unlike many other constitutional property law clauses around the world, the South African Constitution makes an explicit distinction between 'deprivations' and 'expropriation'. Any regulation which has the effect of limiting the owner's right to use and enjoy his property is regarded as a deprivation of property, but there is no obligation to pay compensation. Expropriation is a special form of deprivation which impairs the owner's property rights to the extent that it becomes just to compensate the owner or holder of the right.[8] The Constitutional Court has the ultimate responsibility to interpret the Constitution, including the right to adjudicate on when government action constitutes a compensable expropriation, or whether it is merely deprivation which does not attract compensation.

The current definition seeks to curb this discretion by limiting expropriation to instances where the state acquires the property. Whilst this will undoubtedly amount to expropriation, the definition may have the effect of excluding all instances where the state does not acquire the property but never-the-less limits the owners' rights to such an extent that it becomes of no value or where rights in state land are extinguished. Both aspects may be problematic for the reasons discussed below.

In the case of *Agri SA v Minister for Minerals and Energy*[9] the Constitutional Court held that the extinguishment of old order mineral rights did not amount to expropriation as the state did not acquire the rights, but merely held it as the 'custodian' on behalf of the nation. The action was regarded as a mere deprivation which does not attract compensation. Whilst this case does on face value support the definition, there are conflicting cases where the Constitutional Court interpreted the concept of expropriation slightly wider.

In *Arun Property Development (Pty) Ltd v City of Cape Town*[10] the Constitutional Court gave recognition to the so-called doctrine of constructive expropriation. According to the provisions of the Western Cape Land Use Planning Ordinance (LUPO), the City of Cape Town required Arun property developers to cede certain portions of its property to the City to be used as public spaces as a condition for approving the development

[8] Van der Walt *Constitutional Property Law* 2005.
[9] 2013 (4) SA 1 (CC).
[10] 2015 (2) SA 584 (CC).

of the property for residential purposes. The LUPO made provision for the municipality to require land in excess of what is required to be ceded without compensation but expressly stated that the developer was not entitled to compensation. Despite the fact that the legislation was explicit in that no compensation is payable, the Constitutional Court held that it is tantamount to an expropriation and ordered the payment of just and equitable compensation. In the court's opinion, the action amounted to an expropriation as contemplated in the Constitution, irrespective of what the legislation stated. One would do well to heed the warning implicit in this judgement, namely that the Court's interpretation of what does and does not amount to an expropriation will trump whatever is stated in the legislation.

The problem with the definition can manifest in various forms but we would like to draw the Committee's attention to two potential examples. Firstly, regulations can be passed that restrict the use of a property, to an extent that it loses all of its value, to the owner. This can occur if restrictive permits or licences are introduced that prohibit the use of a property without a licence and the owner fails to obtain a licence. Despite the owner losing all of the value of the property, it will not be regarded as an expropriation unless the state 'acquires' the rights. In other words, the owner's property rights are eroded and he or she is left with nothing but a hollow shell, however no compensation will be payable as the state did not 'acquire' the property. In this instance, the definition could well be challenged if the courts follow the judgement in *Arun* and hold that the action did in fact amount to an expropriation.

An equally relevant example is where a community lives on state-owned land but their rights are extinguished by state action. Almost one-third of South Africa's population live in the former homeland areas. In Kwazulu-Natal the land is now formally owned by a statutory trust called the Ingonyama trust whilst the remainder of the areas are formally owned by the national government. Despite formal ownership resting with the state, millions of people live in these areas and their informal rights are recognised through various legal (although informal) instruments. Should a community need to be moved to make way for a road, a bridge or a mine for argument's sake, it will not be regarded as an expropriation and the communities will not be entitled to compensation since the state did not technically 'acquire' the land as per the definition. The state is already the formal owner so the state cannot 'acquire' a title deed that already own (the state is the formal owner in law despite the existence of many rights in the property). These examples are not hypothetical as similar challenges have already been experienced where highly contested mining rights have been allocated in the *amaMpondo* region of the Eastern Cape. The definition, in its current form, has the potential to perpetuate such injustices.

In the first instance we propose that the definition be scrapped as the Constitutional Court will, in any event, decide which conduct amounts to an expropriation as intended in the Constitution. Alternatively, should the Committee determine that a definition is

required, we propose the following amendments to address the challenges outlined above:

> ***"expropriation"*** *means the compulsory acquisition of property, or a right in property, by an expropriating authority or an organ of state upon request to an expropriating authority including a deprivation of ownership or a right in property that is materially equivalent to a compulsory acquisition, and "expropriate" has a corresponding meaning;*

4.2. Clause 2 - Application of Act

Section 2 (2) requires the consent of the administrative authority responsible for a certain "state-owned corporation" or "state-owned entity" before expropriation takes place. From a drafting point of view, it is unclear exactly what entities are envisioned using the words "corporation" and "entity" in the absence of definitions. The term "state-owned corporation" does not exist in our law. The Companies Act[11] provides for the incorporation of "state-owned companies". We propose that the term "corporation" be replaced by "company". As far as state-owned entities are concerned, it is not entirely clear whether this refers only to statutory institutions or chapter 9 institutions and other state organs. Statutory institutions may be responsible to the Minister of Public Enterprises but there are organs of state that do not fall under the auspices of any member of the executive. Institutions such the CRL Commission, South African Human Rights Commission, Public Protector, The National Prosecuting Authority, Legislatures, municipalities and the Judiciary are property-owning entities but do not fall under the executive. The question then arises as to whose permission will be sought when land belonging to one of these entities are needed for a public purpose?

On a more fundamental level, we acknowledge the need for state entities to coordinate their processes when expropriation takes place so as to prevent one organ of state from undermining the developmental plans of another. Be that as it may, expropriation is by its very nature a last resort where one cannot reach agreement on the acquisition of property. Where there are conflicting demands from different organs of state regarding the acquisition of such land, the dispute should be resolved in terms of the Intergovernmental Relations Framework Act.

If, after following the exhaustive processes contained in that Act, the different organs of the state still cannot reach agreement on the transfer of the property then it is highly unlikely that the organ of state responsible for the state-owned entity will consent to the expropriation. This provision, therefore, has the potential to nullify all possibility of expropriating land owned by state-owned entities. If the organs of the state cannot

[11] Act 71 of 2008.

reach an agreement and one organ of state has to resort to expropriation, it is logical that the other organ of state will simply veto it.

Such a scenario will be unfortunate when one considers that the state owns an estimated 1,2 million hectares of strategically located land eligible for redistribution. It is also disconcerting that state land can only be expropriated with consent, whilst private institutions are not afforded the same opportunity. Expropriation, per implication, is an acquisition without the permission of the owner. By requiring the state to consent to its land being expropriated, it effectively shields the state from expropriation and discriminates against those who are not shielded from this possibility. We advise the Committee to reconsider this clause.

4.3. Clause 3 (2) - Powers of Minister to expropriate property on behalf of an organ of state

The provision states that the Minister of Public Works ***must*** expropriate property on the request of an organ of the state where he/she is satisfied that the property is required for a public purpose or in the public interest. Use of the word 'must' limits the discretion of the Minister substantially.

Whilst we acknowledge that the Minister still retains some discretion, it is severely limited. Section 3 (3) limits the scope somewhat in that the expropriation must be linked to the organ of state's mandate and is limited to the provision of accommodation, land and infrastructure. Furthermore, the Minister must be satisfied that the land is required in the public interest or for a public purpose. However, the Minister does not seem to have the discretion to refuse the request on any basis other than:

- It falls outside of the organ of state's mandate; or
- That it is not in the public interest or for a public purpose.

However, if these two requirements are satisfied, the Minister does not seem to have any discretion to refuse the offer on any other legitimate basis, i.e., that there is an insufficient budget at the time or that it is not a current priority. This may place the Department of Public Works and Infrastructure in a very compromised position. We, therefore, recommend that the word 'must' be replaced with ‘may’.

It is also unclear in whom the property vests when it is expropriated on behalf of an organ of state. With expropriation being an original form of acquisition opposed to a derivative form, does ownership vest with the Minister (who must in turn transfer it to the organ of state) or does ownership vest directly with the organ of state when the notice of expropriation is delivered? This should be considered as notations will have to be made in the Deeds Office to record ownership.

4.4. Clause 5 – investigation and valuation of property

The Expropriation Bill, as framework legislation, may be applied by various expropriating authorities who make use of their own valuers. If, however, land is valued for the purposes of land reform, the Property Valuation Act[12] places an obligation on the Office of the Valuer-General to conduct a valuation. The Act also permits the Office of the Valuer-General to produce a valuation report but allows up to six months for this to be completed. If the Property Valuation Act is followed, it could significantly delay the finalisation of expropriation procedures. We therefore recommend that the provisions of this Bill, including timeframes, should trump that of the Property Valuation Act.

Subsection (7) provides for the expropriating authority to compensate an affected party "If the property in question is damaged as a result of the performance of an act contemplated in subsection (2) …". Whilst we fully support this provision, we recommend substituting the phrase "if the property is damaged" with "if the affected person suffers damages". The proposal is merely intended to cover the instance where the property being surveyed is not damaged but an affected party may suffer damages as a result of the investigation. To use a simple example, if a farm is being valued and the valuer leaves a gate open for livestock to escape then the property (the farm) is not damaged but the owner may suffer damages.

4.5. Clause 7 – notice of intention to expropriate

After receiving the notice of the state's intention to expropriate, subsection (4) (a) requires the owner or holder of an unregistered right to deliver a notice setting out the amount of compensation that is claimed and the onus is on the owner or rights holder to include full particulars as to how the amount is made up. The onus is therefore not on the state to make an offer in the first instance, but rather on the affected parties to claim compensation and substantiate how they arrived at this amount.

We submit that it is unfair and unrealistic to place the onus on the affected parties since an ordinary owner or rights holder. An owner or holder may be able to estimate the property's *value*, but not the *compensation* that he or she may be entitled to. This is attributed to the notion that a difference may exist between the *value* of the property

[12] Act 17 of 2014.

and the *compensation* that an owner or holder is entitled to under section 25 of the Constitution.[13]

In *Du Toit v Minister of Transport*[14] the Constitutional court endorsed the two-stage approach to determine just and equitable compensation, namely to start at market value and then to apply all relevant considerations to increase or decrease the amount to arrive at just and equitable compensation. Several considerations such as the purpose of the expropriation and the history of the acquisition, not to mention the circumstances listed in 12 (3), are difficult to quantify and do not relate to the property per say but to the circumstances of the owner concerned. If the owner or rights holder is expected to make the first claim and substantiate how the amounts are made up, it implies that he or she must correctly apply all of these factors in conformity with the established case law. This is simply not practical. The most likely scenario would be that an owner always claims the *value* of the property followed by the expropriating authority rejecting it on the basis that it does not believe it to *just and equitable compensation.* Where there is no meeting of minds, litigation will ensue.

To remedy the situation, we propose that the text be changed so as to place the onus on the owner or rights holder to claim the *value,* of the property and include full particulars as to how the *value* was estimated. The onus should then be on the Expropriating Authority to consider the value, either accept it as a fair reflection of just and equitable compensation or to make a counter offer supplying reasons why it believes that the *value* is not just and equitable.

The precedent exists internationally as a similar provision was included in the Land Acquisition and Compensation Act[15] of Victoria, Australia. It reads as follows:

> *"The offer must set out the amount that the Authority, on the information available to it, has assessed as a fair and reasonable estimate of the amount of compensation [own emphasis] payable to the claimant under this Act on the assumption that the claimant held the interest in respect of which the offer is made.*
>
> *[…]*
>
> *In making the offer the Authority must have regard to a valuation of the land carried out by the Valuer-General or a person who holds the*

[13] See Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" in Hoops et al (eds) *Rethinking Expropriation Law III* (Eleven International Publishing, The Hague 2018) 191-222.
[14] 2003 (1) SA 586 (C).
[15] Act 121 of 1986.

> *qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960."*[16]

By splitting the concepts of *value* and *compensation*, stakeholders will know what is expected of them and make claims and counter offers accordingly. In addition, such a distinction will certainly assist the courts when called upon to determine compensation. It may likewise contribute to better precedents and assist us to build up a body of caselaw to accurately predict how non-quantifiable factors influence compensation.

4.6. Clause 12 (3) – Expropriation of land at nil compensation in the public interest

As outlined in the general comments section, with proper budgeting and alternative mechanisms in place, we believe that South Africa can reach its land reform ambitions without resorting to nil compensation. Without prejudice to these comments, we understand that section 25 of the Constitution is flexible enough to accommodate a wide variety of compensation outcomes. It is for this reason that it is absolutely vital that all relevant circumstances can be considered when a court is tasked with deciding whether or not nil compensation is just and equitable in a set of facts. It is our understanding that section 12 (3) has been drafted in this light and that any attempt to prescribe a 'list' of properties or instances where nil compensation is peremptory, would likely be unconstitutional.

That being said, investors, land owners and financiers who have been part of the *bona fide* debates surrounding expropriation without compensation require the greatest degree of clarity possible to minimise the adverse effects on investor confidence, food security and the perception of property rights. It is for this reason that we have included specific recommendations in relation to the circumstances listed in section 12 (3) despite being of the firm opinion that the provision in its entirety is unnecessary and could lead to a loss of investor confidence.

We furthermore note that this subsection only applies to ‘land’, however this term is not defined. Does it include all immoveable property including sectional title? Likewise, it is unclear whether this includes fixed improvements and buildings erected on the land. Further refinement may be required as confusion can arise where urban properties such as buildings, and especially sectional titles, are erected on the land.

[16] Ibid at section 31(3) & (5).

4.6.1. Clause 12 (3) (a) – Land not being used and the main purpose is to benefit from its appreciation in market value

In previous versions of the Bill, this item was termed "land held for speculation". Whilst we appreciate that the Department has attempted to clarify the meaning and scope of 'speculation', there is still some uncertainty as to why land as an asset class should be treated any differently than shares purchased on the JSE? Legitimate investment is the lifeblood of the economy and the complex nature of modern investment portfolios often results in multiple owners or intermediaries that use property to generate an income rather than a single owner. It is common practice that fund managers purchase shares in fixed property whilst another entity develops it or uses it to generate an income. In this scenario, the land may be developed or used productively but the actual owners merely seek a return on their investment.

There could furthermore be legitimate reasons why an owner cannot develop fixed property at any given time. For example, there may be challenges in obtaining the requisite permissions and permits from the local municipality or a developer may be in the process of obtaining finance or equity investments into the property before developments can occur. In all of these scenarios, there is no *mala fide* intent but rather practicalities which prevent an owner from immediately developing the property or using it beneficially.

Should the owner be punished in these circumstances by nil compensation, it could negatively affect investment and restrict these developers from accessing finance. Such a scenario should be avoided at all costs as it would result in reduced investments into the urban and peri-urban fringe, which in turn can have a knock-on effect on revenue generation and job creation in the construction sector in particular.

4.6.2. Clause 12 (3) (b) – land not required by an organ of state for its core functions

In line with our comments on clause 2 above, we do not believe it is justified that organs of state are provided with a more favourable dispensation than private entities. The qualifier that the land must not be needed for the organ of state's core function is problematic as it automatically places that policy intent in a superior position to the policy intent behind the expropriation.

For example, where a restitution claim is submitted over state land, it insinuates that land reform is an inferior consideration to whatever purpose the organ of state needs the land for. This cannot be the case. We propose that this provision be deleted and that conflicts be dealt with under the Intergovernmental Relations Framework Act.

4.6.3. Clause 12 (3) (c) – where an owner has abandoned the land by failing to exercise control over it

Similar to our comments on subsection (a), the latest version has been amended to clarify what is regarded as 'abandoned land' however the latest wording still poses difficulties.

In law, property only ceases to belong to the owner where the owner relinquishes control as well as abandons the intention to the owner. Where both conditions are present, nil compensation may be justified because the item in question is no longer the property of the owner. In such a situation the property would be *res derelicta*. However, clause 12 (3) (c) only embodies one of the requisite elements and implies that an owner 'abandons' property simply where he or she loses possession of it. This should not be the case as there are several examples where an owner's possession is taken away but it does not cease to belong to that person unless they abandon the intention to own it.

There are several possible instances where an owner could fail to exercise control over his property due to no fault of his own. One prominent example reached the Constitutional Court in the case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd.*[17] In this instance, the owner *de facto* lost control of the property due to the presence of a large number of unlawful occupiers. The owner took reasonable steps to vindicate the property but did not receive support from the local municipality. In this scenario, the owner failed to exercise control over the property not due to his own fault, but due to the municipality's failure to assist him. It would certainly not be just and equitable in this scenario. In fact, the Constitutional Court finally decided that it would be just and equitable to award constitutional damages to the owner precisely because the state had failed to protect his property rights from third parties. To now prescribe nil compensation for a similar situation would fundamentally contradict the court’s precedent. It is therefore critical that investors, land owners, financiers and even the courts have a clearer understanding of what is intended by the concepts of ‘abandoned’ property or land held for ‘speculation’.

Even in the event where the owner truly abandons both possession as well as the intention to own the property, the provision fails to cater for compensable, informal rights in the property that will be extinguished by the expropriation. There are several dilapidated buildings in metropolitan municipalities that are occupied. This provision implies that the nil compensation will be paid if the *owner* has abandoned the property but what about existing occupiers? Does *nil* compensation imply that no compensation

[17] 2005 (5) SA 3 CC.

will be paid to everyone? Even if there are existing occupiers who may have compensable rights? This aspect should be carefully considered.

4.6.4. Clause 12 (3) (d) – where the market value equals the value of state investment or subsidy

Both section 25 (3) (d) of the Constitution and section 12 (1) (d) of the Bill already mandates the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property to be taken into consideration when arriving at an amount that is just and equitable. In the case of *Du Toit v Minister of Transport,*[18] the Constitutional Court confirmed the approach adopted by the Land Claims Court to start with market value, as it is the only factor that can easily be quantified on its own, and then adjust the amount upward or downwards as other relevant factors are considered. The history of state investment, as a listed factor, will therefore be subtracted from the market value of the land in the ordinary course of calculating compensation. Where the extent of subsidy equals or exceeds the market value, the compensation arrived at by following the accepted methodology could naturally be nil. In that sense, this provision seems somewhat superfluous.

Be that as it may, this factor has only been applied where the benefit received was as a result of racially discriminatory laws or practices. The purpose of section 25(3)(d) of the Constitution was unpacked in detail by the Land Claims Court in *Msiza v Director-General, Department of Rural Development and Land Reform and Others.*[19] The court stated the following:

> *"The requirement to consider the history of the acquisition and the use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates. In such an instance, it would indeed be unfair to pay full market value in compensation as this would enable the owner to benefit twice from apartheid."*[20]

In other words, this consideration under the Constitution should only be relevant where the subsidies or benefit received from the state had a connotation with racially discriminating laws or practices. Section 12 (3) (d) of the Bill contains no such qualification. There may, therefore, be instances under the current wording where a

[18] 2006 (1) SA 297 (CC).
[19] 2016 (5) SA 513 (LCC).
[20] *Msiza case* at para 53.

property may be eligible for expropriation at nil compensation where subsidies were received with a racial connotation (e.g., homeland consolidation) or without one (e.g., to combat soil erosion), provided those subsidies were substantial enough to match the current value of the properties. It is also conceivable that a previous owner was the beneficiary of the subsidies but that the current owner bought the land at market prices. In both of these scenarios, the historical subsidies would not be deemed relevant by a court of law and disregarded.

As far as the prospective application is concerned, there is a real possibility that this provision would enable the state to reclaim the land transferred to land reform beneficiaries without compensation, since the state, and not the beneficiaries, paid for the land transferred under the land restitution programme as well as the LRAD and SLAG programmes of land redistribution. The effect is compounded by the fact that the state expenditure to acquire the land often exceeded the true market price due to inflated prices being paid. In many instances, the beneficiaries also received funds for recapitalisation and development which were used for the beneficial capital improvement of the land. With this in mind, one must carefully weigh up the benefits of a mechanical formula versus the requirement of equity, as this could, in turn, threaten the tenure security of land reform beneficiaries which is constitutionally protected under section 25 (6).

Once again, we would urge the Department to prescribe factors that the expropriating authority should consider when formulating an offer of compensation. These factors can include:

- Whether the subsidies or benefits received were as a result of past racially discriminatory laws or practices;
- The effect of discounting state subsidies on the tenure security of beneficiaries who received land rights from the state as part of the land reform programme; and
- Any other relevant factor.

4.6.5. Clause 12 (3) (e) – where the condition of the property poses a health risk

Clause 12 (3) (e), more than any other provision under clause 12, seems to confuse the calculation of compensation with the rationale for which a property is expropriated. Where a property poses a public health risk, various mechanisms exist in law to force the owner to remedy the situation. For example, fixed property cannot be transferred without an electrical clearance certificate and an owner may be required to remedy a default if it does not comply with municipal building regulations. The mere fact that a

property poses a public health risk does not mean that it may be expropriated. The property must still be required by an expropriating authority for the public purpose (or interest) which the empowering provision provided that authority with powers to expropriate.

Should a property legitimately be required for a purpose such as land reform, any costs incurred by the state to fix the property and remedy the public safety concern could be factored in as a relevant consideration. However, this should be capped at the actual costs incurred to remedy the defect. It seems incredibly unlikely that a court would deem it just and equitable to award nil compensation unless the actual costs exceed the value of the property.

4.6.6. Clause 12 (4) – Compensation under the Land Reform (Labour Tenants) Act

In the previous version of the Bill, there was no qualification to the effect that only verified claims (opposed to current labour tenants) were to be considered in the context of nil compensation. We acknowledge and commend the Department for the amendments have already been made as the scope of this provision has been rationalised. Be that as it may, we are still uncertain as to why labour tenants have been singled out in this Bill opposed to beneficiaries of other land restitution, redistribution or tenure reform.[21]

Labour Tenants who have submitted claims under the Act certainly need to be prioritised by the Department of Agriculture, Land Reform and Rural Development but it is a misguided insinuation that the processes will be sped up by offering nil compensation to the land owners. Labour Tenants are amongst the most vulnerable people in society and have a legitimate grievance about the process followed to date. There are an estimated 20 000 claims that have been lodged with the Department which has not been finalised, researched or verified. It is only once a claim has been processed and adjudicated to be valid where land acquisition and compensation for the land owner come into play. In the words of the Constitutional Court;

> *"If the Department fails to do this, there is an irreversible hold-up: the claim becomes inextricably snagged.4 As the Land Claims Court*

[21] The Land Reform (Labour Tenants) Act 3 of 1996, the Restitution of Land Rights Act 22 of 1994, the Extension of Security of Tenure Act 62 of 1997 and the Provision of Land and Assistance Act 126 of 1993 all contain empowering provisions for expropriation and all contain specific provisions relating to compensation.

> *observed, unless the Department acts to refer the claim, "the noble goals" of the Constitution and of the statute "will not come to pass."*[22]

Unfortunately, the delays have largely been down to the administrative lapses which have seen the majority of claims not finalised, researched or verified. Aside from a few known disputes, the salient challenge in relation to labour tenants has not been about land acquisition but about the state's failure to process the applications:

> *"[12] All this entailed a colossal statutory promise, of life-changing importance to especially vulnerable people. In expectant response, thousands upon thousands of labour tenants timeously lodged claims with the Department. But then . . . nothing seemed to happen. Or almost nothing: what the fifth applicant, the Association for Rural Advancement (AFRA), called "administrative lethargy" ensued. And prevailed. The applicants presented indisputable evidence that the majority of labour tenant applications have simply not been processed."*[23]

As such, we are concerned that listing labour tenants as a category in which it may be just and equitable to pay nil compensation may not result in an acceleration of the process as land acquisition cannot commence until the claims have been researched, verified and settled. This provision will therefore serve no purpose. The only way in which labour tenant claims can be expedited is for the Department to process the outstanding claims with haste, under the supervision of the Special Master appointed by the Court.

4.7. Clause 14 – compensation claims

Clause 14 (1) (a) requires "An owner or a holder of an unregistered right" to notify the expropriating authority whether they accept the compensation or make a counter claim. We understand that the compensation offered and paid to the owner and the holder of a registered right is somewhat independent of each other in that each must decide for himself whether they accept the compensation on offer. The role of a mortgagee is not entirely clear.

In section 1, the definition of an owner includes the holder of a right registered against the property at the Deeds Office. This is supported for the purposes of sections 7 and 8 as it implies that the bond holder must receive all the documentation that is delivered to the owner. However, it is somewhat more complicated when the "owner" is expected to make a counterclaim or accept an offer. Since both the actual owner and the

[22] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30 at para 11
[23] *Mwelase case* above at para 12.

bondholder are defined as "owners" under the Bill, who decides whether or not the compensation is sufficient?

We believe that this may be an omission in the Bill and we would strongly propose that the Committee inserts wording that requires the actual owner and the bondholder to reach an agreement as per section 18 before an offer can be accepted or a counter-claim made.

4.8. Clause 17 – Payment of amount offered as compensation

Clause 17 (3) states that any delay in the payment of compensation to the expropriated owner or holder due to a dispute on compensation will not prevent possession from passing to the expropriating authority. Section 25 (3) of the Constitution states that the amount as well as 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.

In the *Haffejee case,*[24] the constitutional court was called upon to determine if the passing of possession prior to the payment of compensation is constitutional. In its ruling, the court confirmed that a contextual approach must be followed as the facts of each case would determine whether it is just and equitable:

> *[35] The text of section 25 does not exclude an interpretation that compensation must precede expropriation. The language of the clause is compatible with compensation being a condition precedent to a valid expropriation, but the opposite is equally plausible.*
>
> *…*
>
> *[40] So one is faced with potential factual situations where, on the one hand, expropriation without attendant determination of compensation may be unjust, and, on the other, where insistence on the determination of compensation before expropriation may likewise be inequitable. The former is exemplified when people upon eviction will lose their homes or livelihood, and the latter in cases like natural disasters as mentioned above"*[25]

[24] *Haffefee NO and Others v eThekwini Municipality and Others* 2011 (6) SA 134 (CC).
[25] *Haffejee ibid* at para 35, 40.

In the case at hand, the court ruled that it was indeed constitutional in the case at hand as it would hold back socio-economic development if the municipality was required to settle and pay compensation prior to taking possession. However, from the text above, this may not be the case in all circumstances. In the instance where the expropriated owner is prejudiced by losing the possession his sole source of income (i.e., a farmer's farm) before receiving compensation, the scales may well tilt in the opposite direction. The current text of clause 17 (3) always favours the state. In line with the caselaw cited above, we propose that the text be qualified to the effect that the expropriating authority may only take possession before the payment of compensation where a delay would unfairly prejudice the expropriating authority and where it is just and equitable to do so.

Clause 17 (3) furthermore refers to a delay in payment by virtue of subsection (2) "…or any other dispute…". We propose that this phrase be deleted as it creates a great deal of uncertainty. A slight delay in payment by virtue of sections 18, 19 or 20 can be understood but there should be no other grounds for the expropriating authority to delay payment of the amount offered as compensation.

4.9. Clause 22 – urgent expropriation

As was discussed during the Nedlac engagements, Agbiz fully supports the need to made provision for temporary takings on an urgent basis where emergency situations or disasters arise. We therefore support the intention of section 22 but caution that there may be a technical error when read with the definition of "expropriation".

As discussed in detail above, the salient point at which the deprivation of property crosses over to an expropriation under the proposed definition is at the point where the state "acquires" the property. According to the Deeds Registries Act, registration at the Deeds Office is conclusive proof of ownership as far as land is concerned. When a permanent expropriation takes place, the title deed is amended to reflect the state as the owner. However, no change is made to the title deed when the state merely takes the property temporarily under an urgent expropriation. Does the state, therefore 'acquire' property that is the subject of a temporary taking? If not, does it even qualify as an "expropriation" as per the definition? If not, one would be left with an interpretive challenge as the entire Bill would technically not apply to an urgent expropriation.

4.10. Clause 23 – withdrawal of expropriation

Clause 23 (2) sets out 3 instances where an expropriation may no longer be withdrawn by the expropriating authority. This provision is broadly supported as it would be unfair to put an owner or holder through the rigours of expropriation only to cancel the action at an advanced stage. By the time that compensation is paid, the property registered in the name of the state etc. the owner and holders would likely have finalised

arrangements to move, incurred costs or entered into a new purchase or lease agreement if the object of the expropriation is immoveable property. Be that as it may, there are two additional aspects which need to be addressed.

Firstly, in the event that compensation has already been paid (clause 23 (2) (c)), the compensation may need to be reviewed if the authority no longer requires the property for the purpose it was expropriated for. Section 12 (1) (e) provides for the purpose of the expropriation to be taken into account when compensation is determined. If that purpose falls away, the amount of compensation could be incorrect in retrospect. This is particularly vital in the context of section 12 (4) as it places disproportional emphasis on the purpose of the expropriation.

Secondly, the clause is silent on what will happen to the property if the purpose falls away, and the expropriation can no longer be withdrawn. If the state intends to use it for a purpose which is not in the public interest or purpose, then the owner should be given the first option to purchase the property at a rate equal to the sum of all compensation paid.[26] The same should apply if the property is used for a different purpose even if that purpose is in the public interest or a public purpose. If this is not followed, then there is a risk that the original expropriation could be challenged on the grounds that it is *ultra vires*. Expropriation may only occur under a law of general application (clause 2 (4)) or by the Minister of Public Works and Infrastructure according to her mandate (clause 3 (5)). These empowering provisions explicitly set out the purpose and conditions under which property can be expropriated. If the property is not used for that purpose or if those conditions are not met, then the entire expropriation may be *ultra vires.*

4.11. Clause 26 – Expropriation register

This clause was not contained in previous versions of the Bill but its insertion is welcomed. There have been many instances in which just and equitable compensation has been decided upon by a court under a section 42D agreement.[27] These have commonly and incorrectly been referred to as instances of expropriation for the purposes of land reform, which is not technically correct. The Register should remove any such ambiguity.

Furthermore, when determining market value under expropriation, a court is required, as far as is possible, to disregard values paid by the state for similar properties that have been expropriated. This register can aid valuers in this regard.

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[26] Please refer to point 3.2 above for a detailed explanation.

[27] See section 42 D of the *Restitution of Land Rights Act* 22 of 1994.

4.12. Clause 29 – Regulations, legal documents and steps valid under certain circumstances

Clause 29 seeks to preserve the validity of steps taken under this Bill where the incorrect procedure was followed, provided that it is not material and does not prejudice any person. We are sympathetic to the intention of this clause, but the Bill is very unclear as who decides whether an error in the procedure is material or not? If the implication is that the expropriating authority can decide whether or not its own errors are material or not, then we would strongly oppose the clause. The expropriating authority should not be both a player and the referee.

Procedural matters are not trite. In fact, the very object of this Bill is to provide for a uniform procedure when the property is expropriated under any empowering provision.[28] A deviation from the prescribed procedure should therefore not be taken lightly. A deviation from the set procedure can also raise constitutional questions as section 33 (1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Where particular prerequisites were not followed prior to a decision being taken, it could lead to that decision being declared unlawful or procedurally unfair. The validity of the empowering provision allowing the deviation can be challenged.

As stated above, we are sympathetic to the intention for the sake of efficiency. As such, we propose that the clause be amended to allow con-compliance to be condoned where the expropriating party and the affected party agree to condone the non-compliance, failing which the defaulting party should be required to make an application for condonation to the court. In this manner, the affected party can either waive his procedural guarantees or a court can make the judgement call whether the non-compliance was material or not.

We believe that this amendment would strike a good balance between efficiency and procedural fairness that is currently lacking in the Bill.

5. Conclusion

Thank you once again for the opportunity to submit comments and trust that you will consider our comments favourably. We would also welcome the opportunity to make an oral submission or presentation during the public hearings.

[28] See section 2 (4) of this Bill.

Yours sincerely

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