

MEMORANDUM ON THE OBJECTS OF THE EXPROPRIATION BILL, 2015

1. Background

1.1 The Constitution of the Republic of South Africa, 1996, recognises expropriation as an essential mechanism for the State to acquire another's property for a public purpose or in the public interest, subject to just and equitable compensation being paid.

1.2 The Expropriation Act, 1975 (Act No. 63 of 1975), predates the expropriation mechanism provided for in section 25(2) of the Constitution. The Constitution is the supreme law of the Republic, legislation or conduct inconsistent with it is invalid, and the obligations it imposes must be fulfilled. The peremptory terms of section 2 of the Constitution strengthens the case for the redrafting of the Expropriation Act in order to ensure consistency with the spirit and provisions of the Constitution. The provisions of the Constitution alluded to are: The right to equality (section 9), property rights (section 25), access to information (section 32), and lawful, reasonable and procedurally fair administrative decision making (section 33).

1.3 Given the array of authorities within all spheres of government which have the power to expropriate property through various pieces of legislation, there is a need to ensure uniformity in the way organs of state undertake expropriation. The Expropriation Bill seeks to ensure consistency with the Constitution and uniformity of procedure of all expropriations without interfering with the powers of expropriating authorities.

2. Objects of the Bill

2.1 The Bill seeks to align the Expropriation Act, 1975, with the Constitution and to provide a common framework to guide the processes and procedures for expropriation of property by organs of state.

3 Chapter 1: Definitions and application of Act

3.1 **Clauses 1 and 2** contain definitions and deal with the application of the proposed legislation, determining that an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest. The expropriating authority is obliged to enter into negotiations with the owner of property required for such purposes and attempt to reach an agreement on the acquisition of the property before resorting to expropriation, except in circumstances where the right to use property temporarily is taken on an urgent basis (clause 22). The Bill proposes that no property may be expropriated unless the prescribed procedures have been followed.

4. Chapter 2: Powers of minister of public works to expropriate

4.1 **Clauses 3 and 4** grant a general power to expropriate to the Minister of Public Works. The Minister is empowered to expropriate property for purposes connected with the execution of his or her mandate, which includes the provision and management of the accommodation, land and infrastructure needs of organs of state.

The Minister may delegate or assign his or her powers and duties contained in the Bill to an official of the Department of Public Works, except for the power to—

(a) expropriate;

- (b) expropriate urgently on a temporary basis;
- (c) withdraw an expropriation; or
- (d) make regulations.

5. Chapter 3: Investigation and valuation of property

5.1 **Clauses 4 to 6** deal with the pre-expropriation phase and detail various procedures to be followed by an expropriating authority prior to an expropriation.

These procedures are used to ascertain the suitability of the property for the purpose for which it is required and to gather information on the existence of registered and unregistered rights in such property and the impact of such rights on the intended use thereof. It is also proposed in the Bill that the expropriating authority may authorise persons to enter the property with a view to surveying and valuating the property, amongst other things. Provision is also made for a person to claim compensation should the property concerned be damaged as a consequence of the evaluation of the property.

5.2 In gathering the information, the expropriating authority is obliged to consult with other organs of state that may be affected by the expropriation. The Departments responsible for rural development and land reform, for mineral resources and for and water affairs and sanitation and the relevant municipality must be consulted to ascertain the impact of the proposed expropriation on the rights administered by those Departments and in the case of municipalities, to ascertain the effect which an expropriation will have on spatial development and engineering services.

6. Chapter 4: Intention to expropriate and expropriation of property

6.1 Clauses 7 to 11 deal with the post-investigation phase. At this stage of an expropriation the expropriating authority would have gathered all information, consulted with all parties affected by the expropriation and decided to expropriate. The expropriating authority must serve all the affected parties known to him or her with the notice of intention to expropriate. This notice will amongst other things include the description of the property, the purpose for which the property will be expropriated, the reason for the expropriation and a directive to the owner and holders of rights to furnish particulars of holders of unregistered rights known to them. The notice must also call upon the owner or a holder of a right to provide a written statement stipulating the amount claimed as just and equitable compensation. Rights must be expropriated individually and separate notices must be given to separate right holders. All affected parties are given the opportunity to submit written objections within a stipulated period. The expropriating authority must consider all objections and submissions timeously before proceeding with an expropriation. If no agreement on the amount of compensation payable can be reached between the expropriating authority and the owner or holder of a right within a specified period, the expropriating authority must take the decision whether or not to expropriate. Provision is made for further negotiation on compensation with the owner or holder of a right.

6.2 Clause 8: The second part of Chapter 4 deals with the notice of expropriation. If the expropriating authority decides to expropriate a property, the expropriating authority must cause a notice of expropriation to be served on the relevant owner and holder of an unregistered right and on all affected parties of whom the

expropriating authority is aware. Extensive provision is made regarding the contents of the notice of expropriation. It must, amongst others, contain a full description of the property, a description of the purpose for which the property is expropriated, the reason for the expropriation, the date of expropriation and the amount of compensation offered or agreed to. The notice must furthermore be accompanied by documents setting out the date of payment of the compensation, indicating the property by way of a survey diagram or sketch plan, an explanation of what the offer of compensation comprises of, etc.

6.3 **Clause 9** states the effect expropriation has on the property concerned, which includes that ownership of the property vests in the expropriating authority and that all unregistered rights in the property are expropriated, subject to certain exceptions. A further effect is that the expropriating authority must take possession of the property concerned. Until the date of possession, the expropriated owner or expropriated holder who is still in possession of the property must take care and maintain the property. The expropriated owner or expropriated holder must be compensated for costs necessarily incurred for the maintenance of the property.

6.4 **Clause 10** deals with claims made in respect of unregistered rights in property, which property has already been expropriated. Provision is made for the submission of evidence to the expropriating authority and for the duties of the expropriating authority in this regard. In terms of **clause 11** an expropriated holder of an unregistered right in property that has been expropriated is entitled to compensation, subject to certain provisions.

7. Chapter 5: Compensation for Expropriation

7.1 **Clauses 12 to 20** deal with the determination and payment of compensation to persons whose property or rights are expropriated. Section 25(3) of the Constitution determines that the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

7.2 Provision is made in **clause 12** for factors which must not be taken into account when the amount of compensation is determined. These are—

- (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;
- (b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;
- (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
- (d) improvements made on the property after the date on which the notice of expropriation was served upon the expropriated owner and expropriated

holder; except where the improvements were agreed on or were undertaken in pursuance of obligations entered into before the date of expropriation;

(e) anything done with the object of obtaining compensation therefor.

7.3 **Clause 13** makes provision for the payment of interest on any outstanding amount of compensation once the expropriating authority has taken possession.

7.4 **Clause 14** deals with certain obligations of an owner or holder of an unregistered right who receives a notice of expropriation in terms of section 8(1). The owner must within 20 days of receiving the notice indicate whether he or she agrees to or rejects the amount of compensation payable. If the offer is rejected, the owner or holder must indicate the amount he or she claims as just and equitable compensation. Provision is made for particulars which the owner or holder must furnish. Provision is also made for the expropriating authority to extend the period of 20 days.

7.5 **Clause 15** provides that if the expropriating authority rejects the amount claimed by a claimant, the executing authority must within 20 days of delivery of the statement containing the amount claimed, make an offer of just and equitable compensation and furnish full particulars of how the amount is made up and calculated. Unless otherwise agreed to, if the claimant fails to institute legal proceedings for the determination of the compensation the claimant will be regarded to have accepted the offer made by the expropriating authority.

7.6 **Clause 16** provides for certain particulars the expropriating authority or claimant may request regarding the particulars of claims and offers.

7.7 **Clause 17** deals with the payment of the amount offered as compensation – how and when payment must be made.

7.8 **Clause 18** deals with instances where expropriated property is subject to a mortgage or a deed of sale. Provision is made to whom payment of the amount of compensation must be paid.

7.9 Provision is made in **clause 19** for the payment out of compensation money of property rates and other charges relating to the property concerned by the expropriating authority. Should a municipal manager fail to inform the expropriating authority of outstanding municipal property rates or other charges, the expropriating authority may pay the compensation to the expropriated owner or expropriated holder without regard to outstanding municipal property rates or other charges.

7.10 **Clause 20** makes provision for instances where the amount of compensation may be deposited with the Master of the High Court, e.g. if expropriated property was left in a will to undetermined beneficiaries or if the address of the person to whom compensation must be paid is unknown.

8. **Chapter 6: Determination by court, urgent expropriation and withdrawal of expropriation**

8.1 **Clause 21** provides that in the absence of agreement on compensation, the court must determine the dispute between the expropriating authority and the expropriated owner or holder on the compensation to be paid for the expropriated

property. Provision is also made how costs regarding any such dispute must be awarded.

8.2 **Chapter 6** also deals with urgent expropriations. In the case of a disaster or if a court so orders an expropriating authority may exercise a right to use property temporarily for a period not exceeding 12 months. The expropriating authority is exempted from certain provisions of the envisaged Act, should it exercise the right to take property temporarily on an urgent basis. The expropriating authority must within 45 days of the notice to use the property temporarily make a written offer of compensation to the owner or holder. Provision is made for compensation in the case of damage to the property concerned and for the extension of the period of 12 months by order of court.

8.3 **Clause 23** authorises an expropriating authority to withdraw an expropriation if the withdrawal is in the public interest or the reason for which the property was expropriated is no longer applicable. Under certain, specified instances an expropriating authority may not withdraw the expropriation. Provision is also made for the effect a withdrawal of an expropriation has on ownership of the property. Provision is made that the expropriating authority will be liable for all reasonable costs and damages incurred or suffered by the claimant as a result of the withdrawal.

9. **Chapter 7: Related Matters**

9.1 **Clauses 24 to 31** deal with—

- (a) delivery and publication of documents;
- (b) extension of time allowed for certain actions;
- (c) a register of all expropriations;

- (d) offences and other related matters;
- (e) the power of the Minister to make regulations;
- (f) impact on existing legislation;
- (g) the introduction of draft legislation directly or indirectly amending the envisaged Act;
- (h) repeal of laws; and
- (i) transitional arrangements and savings.

9.2 Provision is made for the service of documents, delivery thereof and publication of expropriation notices and related documentation. This includes the use of radio and television under specific circumstances.

9.3 The Department of Public Works will be required to establish and maintain a register of all expropriations, which register must be accessible to the public. All expropriating authorities will be obliged to provide the Department with copies of all notices of—

- (a) contemplated expropriations;
- (b) decisions not to proceed with contemplated expropriations;
- (c) expropriations; and
- (d) withdrawal of expropriations.

9.4 Chapter 7 also deals with offences relating to—

- (a) failure to provide information or documentation as prescribed in the Bill; and
- (b) wilful furnishing of false or misleading information by property owners or holders of a right.

9.5 As far as existing laws dealing with expropriation are concerned, clause 28 proposes that those laws continue to apply to the extent that they are consistent with the provisions of the envisaged Act. If there is a conflict, the envisaged Act will apply.

9.6 The Act seeks to repeal the Expropriation Act, 1975 (Act No. 63 of 1975), and laws amending that Act.

9.7 Finally, provision is made for certain transitional arrangements and savings. The envisaged Act will not apply to expropriations initiated prior to the commencement of the Act. Proceedings instituted before the commencement of the envisaged Act for compensation resulting from expropriation must be concluded as if the Act had not been passed. However, the parties may agree that the provisions of the Act apply.

10. Bodies consulted

10.1 In the development of the Bill, the Department sought advice from various prominent legal practitioners on specific constitutional and practical matters relating to expropriation. The draft Bill was gazetted for comment in March 2013. Wide-ranging submissions were received from organised agriculture; commerce and industry; the financial sector; the legal fraternity; the property industry; professional associations; public entities; government departments and members of the public.

10.2 Following thorough consideration of the public comments, a revised draft Bill was submitted to NEDLAC. A joint Task Team of the Trade and Industry and Development Chambers concluded its deliberations in November 2013, with

relatively few areas of disagreement recorded. There are, however, no areas of disagreement where Labour, Community and Business unanimously oppose any provision of the Bill. NEDLAC adopted the Task Team's report in February 2014.

11. Implications for Provinces

11.1 The Bill does not seek to interfere with the powers of expropriation conferred by specific legislation, but prescribes uniform procedures to be followed by all expropriating authorities when exercising their powers.

12. Financial implications for State

12.1 The Constitution, in sections 25(2) and (3), obligates the State to pay persons affected by expropriation compensation that is just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

12.2 The implementation of the uniform procedures for expropriation should not have a significant impact on the staff structures of expropriating authorities.

12.3 Implementation of the Act will have financial implications for the Department of Public Works, in that it will—

- (a) establish capacity to provide guidance on the uniform procedures to all expropriating authorities; and
- (b) be responsible for the development and maintenance of the expropriation register, which will require the development of a database accessible to the public and dedicated personnel.

13. Parliamentary procedure

13.1 Sections 74 to 77 of the Constitution contain the procedures that have to be followed in respect of different types of Bills introduced in Parliament. It is important to determine which section applies – colloquially referred to as the tagging of the Bill – in order to ensure that the Bill is passed in a constitutionally sound manner.

Sections 74 to 77 deal with the following:

- Section 74: Bills amending the Constitution;
- section 75: Ordinary Bills not affecting provinces;
- section 76: Ordinary Bills affecting provinces; and
- section 77: Money Bills.

13.2 The State Law Advisers have considered the provisions of the Bill and are of the view that sections 74, 75 and 77 do not apply in respect of the Bill, and that the Bill must be dealt with in accordance with the procedure prescribed by section 76(3) of the Constitution since the Bill in substantial measure falls within several of the areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution.¹

¹ The areas identified are: Administration of indigenous forests; Agriculture; Airports other than international and national airports; Consumer protection; Disaster management; Education at all levels, excluding tertiary education; Environment; Health services; Housing; Industrial promotion; Nature conservation, excluding national parks, national botanical gardens and marine resources; Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; Population development; Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; Public transport; Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; Regional planning and development; Road traffic regulation; Soil conservation; Urban and rural development; Welfare services.

13.3 This view is based on the application of the Tongoane judgment² of the Constitutional Court and the views held therein regarding the tagging of Bills.

13.4 In the Tongoane judgment the Constitutional Court stated that what matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, but rather, whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4. The Court furthermore stated that the tagging test focuses on all the provisions of the Bill in order to determine the extent to which those provisions substantially affect functional areas listed in Schedule 4, and not whether or not any of the provisions are incidental to the Bill's substance.³ The Court furthermore stated that the process of tagging of a Bill "...is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content."⁴

13.5 Since the Bill seeks to serve as a uniform legislative measure which would in future be applied by any expropriating authority to expropriate land in a constitutional manner and since the Bill seeks to repeal the Expropriation Act, 1975 (Act No. 63 of 75), the envisaged Act would find application in the performance of functions relating to the majority of areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution.

² Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC) (2010 (8) BCLR 741; [2010] ZACC 10): Par 58.

³ Tongoane at par. 59.

⁴ Tongoane at par. 60.

13.6 The State Law Advisers are therefore of the view that, since the Bill in substantial measure falls within functional areas listed in Schedule 4, it must be dealt with in accordance with the procedure prescribed by section 76(3) of the Constitution.

13.7 The State Law Advisers are furthermore of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.