**Alternative wording proposed for the Amendment Bill**

**Drafting note:**

**\_\_\_\_\_\_\_\_\_\_\_** Words underlined with a solid line indicate proposed insertions in existing enactments.

~~Strikethrough~~ Words in blue font that is struck through indicate proposed deletions to existing words of the draft of the Bill

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| **Wording of the Constitution / Bill** | **Proposal** | **CLSO comment** |
| **Bill: Preamble**  **WHEREAS** there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans and especially as the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern;  **AND WHEREAS s**ection 25 of the Constitution of the Republic of South Africa, 1996,must be amended to make explicit that which is implicit therein, so that an amount of nil compensation is explicitly stated as a legitimate option for land reform;  **AND WHEREAS** such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land;  **AND WHEREAS** such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs, | **AND WHEREAS** section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to remove any ambiguities, so that expropriation without compensation is the only legitimate mechanism for land reform;  **AND WHEREAS** such an amendment will contribute to address the colonial and apartheid historic wrongs caused by the arbitrary dispossession of land;  **AND WHEREAS** such amendments will further ensure equitable access to all land and will further empower the majority of South Africans to be productive participants in ownership of all categories of land including residential, industrial, commercial and agricultural. | The concept of compensation cannot be ousted, but it can be nil. Compensation as a concept is closely linked to the concept of expropriation. This is globally accepted. However, both our Constitution and International Law principles, by implication or expressly, recognizes that compensation may be less than market value.  The wording of the preamble was taken from the CRC report. “Historic wrongs” already include colonial and apartheid wrongs.  The concept of “land” includes all categories of land. It is not necessary to define the categories – also, by stating categories, you may inadvertently exclude a category that is normally included in the concept of “land” |
| **Constitution: Section 25(1)**  (1) No one may be deprived of property except in terms of law of general application, and no  law may permit arbitrary deprivation of property. | Delete | Policy decision  Will require:   * permission from the House; and * a further call for comments |
| **Constitution Section 25(2)**  **Bill: Clause 1**  *(a)* by thesubstitution in subsection (2) for paragraph (b)of the following paragraph:  *‘‘*(b)subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.’’; | Property may be expropriated without compensation  (a) only in terms of law of general application, or  (b) for a public purpose or in the public interest.  (The rest of the subsection to be deleted) | Property experts advised the committee that the concept of “compensation” is required as a part of the process of expropriation. Compensation as a concept is closely linked to the concept of expropriation. This is globally accepted. The Bill can thus not exclude the concept (by using the phrase “without compensation”), but the Bill can make the amount of compensation nil Rand, which in practice has the same effect (the land will be expropriated without the State having to pay money for it), and is a legally sound formulation.  We caution against the use of “or” between paragraphs (a) and (b). The legal interpretation of this wording is that property may be expropriated, either by a law of general application, or for a public purpose / interest. This means that property may be expropriated without a law that applies to all – the law could focus on one person as long as there is a public purpose or interest. Conversely, as long as the law applies to all, expropriation need not be in the public interest or for a public purpose. This cannot be the intention of the subsection. Both requirements must be present and thus the paragraphs should be joined by an “and”.  It is not recommended to delete paragraph (b): Paragraph (b) indicates that the amount and time and manner of payment of compensation may be agreed to, or determined by a court. It is necessary to state both instances so that it is clear that not all matters of expropriation needs to go to a court, and secondly that the jurisdiction of the courts is not ousted where parties cannot agree. |
| As presently formulated, only the national legislation is subjected in subsection (3A) to subsections (2) and (3), i.e. to the equivalence principle. The proviso in subsection 2(b) subjects the powers of the court to subsection (3A) i.e. the national legislation.  However, the power of the courts should not only be circumscribed by the national legislation, but by the Constitution itself. Therefore, the proviso to subsection 2(b) should be amended by adding before  (3A) a reference to subsection (3). It will then read:  “2(b)……………Provided that in accordance with subsections (3) and  (3A) the court may...” | The current amendment to subsection (3) links subsection to (2)(b). So the Courts power is circumscribed to the Constitution.  *SEE*  “3) The amount of the compensation **as contemplated in subsection (2)(b),** and the time and manner of any 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—” |
| Add (2)(c)(i) “subject to without compensation or nil compensation under conditions laid out in a law of general application”. | The insertion of this provision as subsection (2)(c) will result in interpretation challenges. The list in subsection (2) will then contain both “and” as joinder word as well as “or”: According between paragraphs (a) and (b), as well as (a) and (c) there will have to be an “and”. In respect of (b) and (c), there will be “or”. This is very difficult, if not impossible, to draft. This is why the Bill proposes a new subsection (“(3A)”) and makes a clear link between the new subsection (3A) and this amended subsection (2)(b).  Re the proviso (“subject to”): This is already included either in S25 itself, or in the proposed amendment: Subsection (2)(b) already incorporates subsection (3A) - and subsection (3A) speaks to national legislation that must comply with subsection (2) (i.e. must be a law of general application, must be for a public purpose or in the public interest, and compensation (including nil) must be just and equitable taking all those circumstances in (3) into account. So the Bill already states this.  Re “without compensation:” Property experts advised the committee that the concept of “compensation” is required as a part of the process of expropriation. The Bill can thus not exclude the concept (by using “without compensation”), but can make the amount of compensation nil Rand, which in practice has the same effect, but is legally sound.  Re “laid out in a law of general application”: The whole of section (2) must be read together. As the introductory phrase already reads “law of general application”, we need not repeat that in the paragraphs. It already applies to both paragraphs. |
| Remove “nil compensation” | Property experts advised the committee that the concept of “compensation” is required as a part of the process of expropriation. Compensation as a concept is closely linked to the concept of expropriation. This is globally accepted. The Bill can thus not exclude the concept (by using “without compensation”), but can make the amount of compensation nil Rand, which in practice has the same effect (the land will be expropriated without the State having to pay money for it), and is a legally sound formulation. |
| “… a court may”, should be “must” | Discretion is very important as various factors will play a role in determining compensation. It can this not be peremptory. |
| The proposed provision at s25(2) also be made subject to s25(3) and not only be made subject to the proposed s25(3)(a). *(Note: this should probably read “S25(3A)”)* | This is already the case: The proposed amendments (section 25(3) and the new (3A)) clearly link sections 25(2)(b) and the new section 25(3A) with section 25(3).  i.e. subsection (3) DOES apply to nil compensation and the national legislation envisaged. |
| Delete “improvements” | Improvements were including based on the land workshop that the Committee held.  Instructions are requested on whether it should be removed. |
| A definition is required for land reform: In s25(8) “land reform” is restricted to reform that addresses the consequences of past racial discrimination. A court may thus attach and wider meaning to “land reform” in section 25(2). | If the instruction is to add a definition, we will need the wording of such a definition.  Many submissions expressed concern about “land reform” being vague. This amendment need not be advertised again as it results from the inputs and suggestions received and does not change the meaning of section 25(2)(b).  *‘‘*(b)subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.’’; |
| The role of the executive v the courts must be made clear. | Agree – an amendment is required: Proposed amendment:  *(a)* by thesubstitution in subsection (2) for paragraph (b)of the following paragraph:  *‘‘*(b)subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) ~~a court may~~, where land and any improvements thereon are expropriated for the purposes of land reform, ~~determine that~~ the amount of compensation ~~is~~ may be nil.’’;  *(c)* by the insertion after subsection (3) of the following subsection:  ‘‘(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where ~~a court may determine that~~ the amount of compensation ~~is~~ may be nil.’’. |
| **Constitution: Section 25(3)**  (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—  (*a*) the current use of the property;  (*b*) the history of the acquisition and use of the property;  (*c*) the market value of the property;  (*d*) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and  (*e*) the purpose of the expropriation. | Delete | Policy decision  Will require:   * permission from the House; and * a further call for comments |
| **Constitution: Section 25(3)**  **Bill: Clause 1(b)**  *(b)* by thesubstitution in subsection (3) for the words preceding paragraph (a)of the following words:  ‘‘(3) The amount of the compensation as contemplated in subsection (2)(b), and the time and manner of any 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—’’; and | Add: “Where compensation is payable, the amount of the compensation and the time and manner of payment must be just and equitable, reflecting and equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—” | This proposal results in an interpretation challenge: If we add “Where compensation is payable” we are in fact removing those instances where compensation is nil, from the just and equitable test. But if we accept that we are making it explicit (as it is currently implied) that it can sometimes be just and equitable for compensation to be nil, how will it then be determined when that will be just and equitable? We will then have to add another subsection that deals with nil compensation and the requirement of just and equitable.  We do agree that it must be made clear that subsection (3) must not be interpreted as making nil compensation impossible. This is done by the reference to (2)(b) and including “any” before “payment”. |
| **New subsection (3A)**  **Bill: Clause 1(c)**  *(c)* by the insertion after subsection (3) of the following subsection:  ‘‘(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.’’. | The Bill should provide circumstances. | Policy decision  Will require a further call for comments |
| The Courts should review decisions of the Executive. Add:  “…any decision of the Executive Council may be reviewed by a court of law” | All administrative decisions are reviewable by a court of law. The amendment is unnecessary. |
| The Courts should provide a court order that compensation is nil in a specific case. Add:  “…Provided that in every case where the State expropriates at nil  compensation, the State has to obtain an order of court that it is just and  equitable to pay nil compensation in the specific case……” | Policy decision whether there needs to be an order of court for every decision. |
| **Constitution: Section 25 (7)**  (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. | **-** Delete (7)  - Replace 1913 with 1652 | Policy decision  Will require:   * permission from the House; and * a further call for comments |
| **Constitution: Section 25 (8)**  (8) No provision of this section may impede the state from taking legislative and other measures to achieve  land, water and related reform, in order to redress the results of past racial discrimination, provided that any  departure from the provisions of this section is in accordance with the provisions of section 36 (1). | Add: “…no provision of this section, including the requirement for payment of compensation, may impede the state…  Substitute: “the payment of compensation may not impede the state from taking legislative and other measures to achieve land reform...” | The words “no provision of this section”, already includes the issue of nil compensation as nil compensation will now be a part of section 25. |
| **Bill: Memo on objects**  “This Bill aims to amend the Constitution of the Republic of South Africa, 1996, by providing for the expropriation of land without the payment of compensation.” | It incorrectly refers to “without the payment of compensation”. | Recommend the following amendment: “This Bill aims to amend the Constitution of the Republic of South Africa, 1996, by providing for the expropriation of land ~~without the payment of~~ where the amount of compensation is nil.” |
| **New subsection** | “(1) The State, including Parliament, Executive and Judiciary carry an obligation to redress imbalances of the past through enactment of laws that will achieve redress and equitably redistributive all resources.” | Policy decision  Will require:   * permission from the House; and * a further call for comments   (if accepted, it will require a new subsection number) |
| **New subsection** | **“**(3) The State should be the custodian of all South Africa’s natural resources, inclusive of land, mineral resources and water, and relevant legislation should be passed to clearly define and contextualise State custodianship of natural resources. “ | Policy decision  Will require:   * permission from the House; and * a further call for comments   (if accepted, it will require a new subsection number) |
| **Re-word the entire section 25** | Section 25 of the Constitution shall be repealed in its entirety and the following shall be used instead:   1. All the land held by whites in South Africa is stolen property. 2. The primary purpose of the redistribution of land to the black majority is for historical redress. 3. All black people have a right to land in South Africa without any payment. 4. The eviction of farm workers and poor people from land is illegal (in this regard there must be an end to the strange distinction between legal and illegal evictions) 5. A new department, which shall be called the Department of Land Redistribution, must be established. Its sole mandate shall be the redistribution of land. (Right now South Africa does not have a department that solely focuses on land redistribution). 6. process must be outlined where land ceilings shall be effected in accordance with the soil capacity of each of the regions and provinces. 7. The value of mortgage bonds must be adjusted to a value that excludes land in determining housing price because land must be offered to all for free. 8. Land occupation by the landless is lawful | This suggestion changes the basic structure of the Constitution and is against the Rule of Law. |
| 1. Section 25 of the Constitution of the Republic of South Africa, 1996 is hereby amended- 2. The deletion of subsection (1). 3. substitution of subsection (1) by this wording "“Property, identified and designated by the state for a public purpose or in the public interest, including land reform, may be expropriated only in terms of law of general application without compensation”. 4. the deletion of subsection (2). 5. substitution of subsection (2) by this wording “Notwithstanding subsection (1), the state may be required to pay compensation for any significant structures constructed on land that has been identified and designated by the state for a public purpose or in the public interest, including land reform, provided that such structures are in use at the time the land is identified and designated by the state for expropriation without compensation” 6. the deletion of subsection (3). 7. substitution of subsection (3) by this wording “A previously disadvantaged individual who, not being the owner of rural or urban property, holds as his or her own, for 3 (three) uninterrupted years, without opposition, an area of land in the rural zone, not exceeding fifty hectares, making it productive with his or her labor or that of his or her family, and having his or her dwelling thereon, shall acquire ownership of the land” 8. For the purposes of this section— 9. the 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; and 10. property is not limited to land. 11. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. 12. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 13. the deletion of subsection (7). 14. substitution of subsection (7) by this wording "A person or community dispossessed of property after 6 April 1652 as a result of past colonial and racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, to restitution of that property or to equitable redress" 15. deletion of subsection (8). 16. substitution of subsection (8) by this wording "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination." 17. Parliament must enact the legislation referred to in subsection (6). | This sort of Blanket approach to Expropriation with nil compensation is likely to be against the rule of law. The SADC Treaty and the SADC Tribunal case of Mike Campbell v Republic of Zimbabwe held that access to courts is enshrined in international human rights treaties, the Zimbabwean amendment specifically prevented any person from seeking review from the courts. The Zimbabwean amendment furthermore provided a blanket type of expropriation without compensation, thus ignoring the circumstances of each case and removing discretion. This could be argued to be against the rule of law principle of “substantive legality “ |