

Our Ref.: SAIV Comment Expropriation Bill [B23-2020]

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24 February 2021

ATTENTION: MS NOLITHA NTOBONGWANA

The Chairperson
Portfolio Committee on Public Works and Infrastructure
Parliament of the Republic of South Africa

Per email: expropriationbill@parliament.gov.za

Dear Madam

SUBMISSION ON THE EXPROPRIATION BILL [B23-2020]

Further to the publication in the Government Gazette No. 43798 of 02 October 2020, the invitation by the Portfolio Committee to stakeholders and interested parties, kindly find herewith the South African Institute of Valuers (“SAIV”) submission on the Expropriation Bill, 2020 [B23-2020].

The SAIV would appreciate the opportunity to make oral presentations to the Portfolio Committee on Public Works and Infrastructure, in support of this submission.

1. PREAMBLE

Section 25 of the Constitution, as quoted in the Preamble to the Bill, follows the existing wording. Has the proposed constitutional amendment been abandoned? If not, meaningful comments on some of the sections can only be given after the wording of the proposed amendment has been finalised.

2. "CHAPTER 1 – DEFINITIONS AND APPLICATION OF ACT"

2.1 *"court" means— (Pages 4 & 5)*

Included in par (b) of the definition of "court" is a Magistrate's Court *"having competent jurisdiction"*. It is not clear what is meant by *"competent jurisdiction"*. If it means jurisdiction in respect of compensation claims not exceeding the limit set in sec 29(1)(g) of the Magistrates' Court Act 32 of 1944 (at present, R100 000), it is acceptable. Compensation claims are often intricate, inconsiderate of compensation amounts. Such claims should not be adjudicated upon by magistrates who generally have little or no experience in expropriation and valuation issues. Par (b) of the definition should be clarified. It is suggested that the words *"in terms of sec 29(1)(g) of the Magistrates' Court Act 32 of 1944"* be inserted after the words *"having competent jurisdiction"*.

2.2 *"expropriation" means— (Page 5)*

The definition seems to limit the concept of "expropriation" to cases where the expropriator acquires rights in property. It originates from a remark contained in the majority judgment by the Constitutional Court in *Agri SA v Minister for Minerals and Energy*¹. This definition excludes statutory limitations that undermines the economic utilisation of property or dismantle its content from the concept of expropriation, if they do not include the transfer of proprietary rights to the expropriator. Such statutory limitations are compensated in some form or another in almost all constitutional jurisdictions. South Africa is an unfortunate exception. It is suggested that, rather than define the concept of expropriation in the Bill, it should be left to the Courts to determine its ambit². The exclusion of severe statutory limitations on the use of property from the concept of expropriation could have a negative impact on investor confidence and the growth of our economy.

¹ 2013 (4) SA 1 (CC) at 19H/I, par [59]: "There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state."

² The following serves as an example of constructive expropriation which, if implemented by government, could have consequences for the farming community. The government may pass a law that no farming may take place without a permit. Such permits could contain very cumbersome conditions which could have a significant impact on the viability of the farming operation. An example, not entirely on all fours, is the negative impact which mining permits had on the mining industry.

2.3 “*land parcel*” (page 5)

The definition refers to “*land that has been surveyed*”. Surveyed by who? It is suggested that the definition be amended as follows:

“means land indicated on a “diagram” as defined in sec 1 of the Land Survey Act 8 of 1997 and is either registered or yet to be registered in a deeds registry;”.

Furthermore, various parts of the Bill refers to “*land*”, whilst there is no definition for land in Chapter 1. Either “*land*” should be reworded as “*land parcel*” in the remainder of the Bill, or “*land parcel*” should be changed to “*land*” only under Chapter 1. This will help avoid future legal interpretation differences.

2.4 “*Master*” (page 5)

There is more than one Master in South Africa. Consider an amendment along the following lines: “.... *the Master of the High Court for the area where the property is situated*”.

2.5 “*owner*” (page 5)

The definition may have to be expanded to include an owner and holder of real rights acquired through prescription, but not yet registered in their name.

What rights to compensation would a person who obtained ownership of property through expropriation have, if the property was not yet transferred into his or her name as at the date of expropriation?

2.6 “*public interest*” (page 5)

The legislature should not attempt to define the term “public interest” in section 25 of the Constitution, except by restating what is already contained in the Constitution. It is for the Courts, and not the legislature, to interpret the term “public interest” as used in the Constitution. If the Bill should contain a provision giving the term a wider meaning than its meaning under the Constitution, the provision could be viewed unconstitutional.

2.7 "~~public purpose~~" (page 5)

The definition gives a much wider scope to the term "*public purpose*" than its ordinary meaning as used in the Constitution, and should be deleted, as it could be viewed unconstitutional.

2.8 "*unregistered right*" (page 6)

It would appear that a right required by law to be registered but not actually registered, falls outside the scope of the definition. This could be unfair. For example, an unregistered right of way will be binding on the parties by whose agreement the right was established, but it will not be binding on their successors in title.

2.9 "*value*"

Six references are made in the Bill to "*value*". The SAIV believes it prudent to include **market value** to avoid any confusion in this respect, or what is meant by **value** in the Bill, as both the Constitution and the Bill refers to market value as one of the compensation considerations, albeit the Bill often refers to value. The SAIV would therefore suggest the inclusion of the following under definitions, namely:

"value"

"any reference to value means market value;"

2.10 "Section 2 - Application of Act" (page 6)

Would for example the National Department of Housing be entitled to expropriate land from Transnet for purposes of erecting low-cost housing, where the land was earmarked by Transnet for a marshaling yard, without the concurrence of the executive authority of Transnet? Probably not and if there is a conflict, it can be addressed in accordance with the principles of co-operative government set forth in section 40 and 41 of the Constitution. It is suggested that the term "*executive authority*" be defined: is it the responsible Minister, or the Board of the corporation or entity, or the chief operating officer?

A further question arises: may land owned by one arm of government be expropriated by another arm of government? For example, may the National or a Provincial Department of Housing expropriate land from a municipality for purposes of low-cost housing in cases where the municipality neglects to provide for low-cost housing for its inhabitants? The inclusion of a municipality in control of a public place, road or street in par (g) of the definition of "owner" seems to indicate that land may well be expropriated from a municipality by another arm of government. This requires clarification.

3. "CHAPTER 2 – POWERS OF MINISTER OF PUBLIC WORKS TO EXPROPRIATE"

3.1 "Section 3 - Powers of Minister to expropriate" (Pages 6 & 7)

"Subsection 3(5)(a)" (Page 6)

It is suggested that the Bill should contain provisions obliging the Minister:

- "(i) in cases where land or a registered right in land is concerned, to deliver a copy of the notice of expropriation to the applicable registration authority (which will, in most cases, be the Deeds Office) to be noted in its registers; and
 - (ii) to take the necessary steps to have the land or the right in land registered in the name of the acquiring organ of state in the records of the registration authority concerned with a given period (say six months) after date of expropriation.
- If the records of a registration authority does not reflect a change of ownership through expropriation, it may cause substantial loss to innocent third parties relying on the accuracy of such records."

4. "CHAPTER 3 - INVESTIGATION AND VALUATION OF PROPERTY"

- 4.1 Various reference under this section to "**property**", should be changed to "**land**" or "**land parcel**", for the sake of clarity and compliance with the Definitions.

4.2 “Subsection 5(3)(b)” (Page 7)

“the owner of the property has consented in writing to the performance of an act contemplated in subsection (2)(a); or”

Amend as follows to ensure valuer is included: *“the owner of the property has consented in writing to the performance of an act contemplated in subsections (2)(a) **and (2)(b)**; or”*

4.3 “Subsections 5(4)(a) to (c)” (Page 7)

The right given to a valuer requiring an owner or occupier of property to provide him with documents reasonably required for valuing the property, is too wide. Contrary, restricting the right to official documents only could be too narrow, i.e., a valuer may require copies of documents from which an expropriated holder derives the unregistered right in order to value the right. Many documents which land owners rightfully consider to be private, may have to be discovered and made available if the matter goes to court.

There should be some limitations to the type of documents which an owner or occupier can be required to provide to the valuer. Confidential financial statements and projections, and valuations upon which the owner or occupier does not intend to rely, should be excluded. Consider limiting the right to the following: contracts relating to unregistered rights over the land, documents in the public domain, contracts of purchase and sale relating to the land, building plans for improvements, dams and other infrastructure, valuations which the owner intend to use to support his or her compensation claim, and any other documents which a court on application may order the owner or occupier to make available.

4.4 “Subsection 5(5)(b)(i)” (Page 8)

The wording “**on rights therein**” at the end of the subsection requires clarification: rights in what?

5. **"CHAPTER 4 - INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY"**

5.1 **"Section 7 - Notice of intention to expropriate" (Pages 9 & 10)**

5.1.1 **"Subsection 7(2)(g)(iii)"** (Page 9)

Our postal service being what it is, delivery of mail has become very erratic. Facsimile communication is becoming less and less prevalent. It is suggested that an e-mail address be added. Lastly, an affected person may have no postal address and no access to facsimile or email communication. Communications to such a person should, whenever feasible, be by hand delivery.

5.1.2 **"Subsection 7(2)(g)(iv)"** (Page 9)

It is suggested that the word "*choice*" be substituted by "*preference*", to bring the subsection in line with subsection 24(6).

5.1.3 **"Subsection 7(2)(h)(ii)"** (Page 9)

It is not clear what is intended by the proviso. An owner does not have any rights under subsection 7(4), only obligations.

5.1.4 **"Subsection 7(2)(j)"** (Page 9)

It is entirely inappropriate that failure by the owner to provide the required particulars can be visited by a civil fine, particularly where any failure by the expropriator to provide documents or information is not subject to a similar penalty.

5.1.5 **"Subsections 7(4)(c)"** (Page 10)

There should be a provision that if the lease, deed of sale or building contract is an oral contract, particulars of the parties to and contents of the agreement concerned should be given.

5.1.6

“Subsections 7(4), 7(6) and 7(7)” (Page 10)

A significant frustration experienced by owners and holders of rights in the course of an expropriation process is that expropriating authorities, having initiated the process, sometimes disregard statutory time limits, fail to deliver prescribed documents in time, do not prepare their cases properly and do not co-operate towards achieving an expeditious hearing. The Bill provides remedies for expropriating authorities where owners or holders of rights do not comply with their obligations in terms of the Bill, but few (if any) remedies for owners or holders of rights if expropriating authorities do not comply. The purpose of the amendments proposed hereunder is to tighten the time periods within which expropriating authorities must comply with their obligations and to provide suitable relief for owners and rights holders should the expropriating authorities fail to do so. Especially subsection 7(7) is problematic in this regard and an amendment along the following lines is suggested as the interests of owners and holders of rights will be much better protected during the expropriation process.:

“7(7)(a) If no agreement on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right within 40 days after the expropriating authority has received the written statement of claim contemplated in subsection (4), the expropriating authority must decide within 10 days whether -

- (i) to continue with negotiation on compensation in accordance with section 16; or*
 - (ii) to proceed with the expropriation of the property; or*
 - (iii) not to proceed with the expropriation,*
- and inform the owner or holder of a right in writing of the decision taken.*

7(7)(b) If the expropriating authority has decided in terms of subsection 7(7)(a)(i) to continue with negotiation and no agreement on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right within 40 days after the owner or holder of a right has been informed of the expropriation authority's decision to continue with negotiation, the expropriation authority must decide within 10 days whether –

- (i) to proceed with the expropriation of the property; or
 - (ii) not to proceed with the expropriation,
- and inform the owner or holder of a right in writing of the decision taken.

7(7)(c) If the expropriating authority has decided in terms of subsection 7(7)(a) or (b) to proceed with the expropriation of the property, it must within 20 days after the owner or holder of a right has been informed of the decision, serve a notice of expropriation in terms of section 8(1).

7(7)(d) If the expropriating authority has decided in terms of subsection (7)(a) or (b) not to proceed with the expropriation, it must within 20 days after the owner or holder of a right has been informed of the decision, publish a notice of its decision not to proceed in terms of section 24".

5.2 **"Section 8 - Notice of expropriation" (Pages 10 to 12)**

5.2.1 **"Subsection 8(2)(c)" (Page 11)**

In terms of section 31(6)(a) and section 32(5) of the Deeds Registries Act³, a certified copy of the notice of expropriation must be lodged by the expropriating authority with the Registrar of Deeds. It is suggested that a reference to this obligation be included in the Bill. Failure to lodge a certified copy for noting against the title deeds of the property, could have dire consequences. It is suggested that this section contains the following additional provisions:

- "(vi) in cases where land or a registered right in land is concerned, to deliver a copy of the notice of expropriation to the applicable registration authority (which will, in most cases, be the Deeds Office) to be noted in its registers; and
- (vii) to take the necessary steps to have the land or the right in land registered in the name of the acquiring organ of state in the records of the registration authority concerned with a given period (say three months) after date of expropriation.

³ Act 47 of 1937.

If the records of a registration authority does not reflect a change of ownership through expropriation, it may cause substantial loss to innocent third parties relying on the accuracy of such records."

5.2.2 **"Subsection 8(2)(c)(iv)"** (Page 11)

It is suggested that this subsection be amended as follows: *"if the property is subject to a contract contemplated in sections 7(4)(c)(i) and (ii), on the lessee or buyer; and"*

5.2.3 **"Subsection 8(3)(h)"** (Page 11)

Replace "disputed" by "not accepted".

5.2.4 **"Subsection 8(4)"** (Pages 11 & 12)

The documents referred to should include a copy of any valuation or other report on which the offer of compensation was based.

5.2.5 **"Subsection 8(4)(h)"** (Page 12)

The possibility of imposing a civil fine as stated in section 27 is unacceptable.

5.2.6 **"Subsection 8(3)(b), 8(4)(b) and 8(4)(c)"** (Page 11)

The use of the word "approximately" is too vague. There should be sufficient accuracy to enable the owner or rights holder to ascertain within reasonable limits what has been taken from him and to enable him to calculate his compensation claim. It is suggested that this word be removed from these subsections.

5.2.7 **"Subsection 8(4)(d)"** (Page 11)

The meaning of "comprises of" is unclear. It is suggested that the wording of subsection 15(2) be adopted.

5.2.8 **"Subsection 8(4)(g)"** (Page 12)

It is suggested that the word "choice" be substituted by "preference", to bring the subsection in line with subsection 24(6).

5.2.9 ***“Subsection 8(5)(a) and (b)”*** (Page 12)

Informing different holders and owners in the same document about the quantum of compensation for each, will create numerous difficulties, as these offers will be played off against each other, without the parties necessarily understanding the different compensation nuances applicable to each. This will delay and frustrate any acquisition process. It is suggested that a separate notice be served on each, or alternatively at least a separate compensation offer be served on each party under Subsection 8(5)(b).

5.3 ***“Section 9 - Vesting and possession of expropriated property”*** (Pages 12 & 13)

5.3.1 ***“Subsection 9(1)(b)”*** (Page 12)

Is a builder's lien an unregistered right which is expropriated together with the land, or should it be treated like a mortgage bond or a deed of sale? Suggested that it should be treated similar to a mortgage bond or deed of sale, and that section 18 be amended accordingly. Consider whether, in the light of section 25 of the Constitution, a provision to the effect that when ownership of a property is expropriated, all registered rights over that property are simultaneously expropriated, can be valid to the extent that it may include unregistered rights held by a holder who was not aware of the expropriation.

5.3.2 ***“Subsection 9(2)(a)”*** (Page 12)

It is suggested that the following be added to the subsection, at the end thereof: "... or determined in terms of section 8(4)."

5.3.3 ***“Subsection 9(2) and (4)”*** (Page 12)

In cases where land is expropriated and the owner or rights holder or any other person residing on the land (for example, labour tenants or squatters) fail to vacate the land, it should be the responsibility of the expropriator to have them relocated in accordance with the applicable laws (including the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998). It must be clearly stated that the provisions of the Bill do not relieve the expropriator from complying with such laws.

5.3.4 “Subsection 9(4)” (Page 12)

The sub-clause continues to refer to a *"right to possession"* which could be accelerated, not to *"possession"* as such. What will happen if the right to possession passes to the expropriator, and the expropriator does not take actual possession. Must the owner continue to look after and manage the property? The last two lines should be replaced by the following: *"in which case the expropriating authority shall be deemed to have taken possession of the property on that date."* A similar wording is contained in the section's predecessor, section 8(5) of the existing Expropriation Act, No. 63 of 1975.

5.4 “Section 10 - Verification of unregistered rights in expropriated property” (Page 13)

5.4.1 “Subsection 10(1)” (Page 13)

It is assumed the clause relates to holders of unregistered rights of which the expropriating authority was either unaware or has not accepted their validity. Consider inserting, after the words *"that person has not been compensated"* in the first sentence, the phrase: *"and in respect of which a notice of expropriation has not been served on that person in terms of section 8(1)"*.

5.4.2 “Subsection 10(5)(a)” (Page 13)

If the evidence has been forwarded to one or more Directors-General and anyone of them fails to submit his or her comments within the 30-day period or at all, should the owner or holders of unregistered rights, who has no remedy against the Directors-General, be forced to tolerate the delay? It is suggested that the expropriating authority must take a decision on the claim within 50 days after receipt of the evidence requested in terms of subsection (1), and notify the claimant in writing of the decision.

5.4.3 “Subsection 10(5)(c)” (Page 13)

The time limit of 20 days in this subsection commences on expiry of the time limit of 30 days in subsection 10(4). The time limit in subsection 10(4) comes into operation only if the expropriating authority has referred the claim to one or more of the Directors-General listed in subsection 10(3) for assistance.

The expropriating authority is not obliged to refer the claim to a Director-General for assistance. If it has not referred the claim to a Director-General within a period of (say) 20 days after receipt of the evidence requested in terms of subsection 10(1), the expropriating authority must be obliged to inform the claimant whether or not it accepts the claim. Subsection 10(5)(a) should be amended accordingly.

Consider replacing "*not accept the claim*" by "*not accept the validity of the claim*" in the first line. The expropriating authority may accept that the claim is valid but not accept the amount claimed. Add a clause to provide that, if the expropriating authority does not accept the validity of the claim, the holder of the unregistered right may apply to the court for appropriate relief.

5.4.4 ***"Subsection 10(6) & 10 (7)"*** (Page 13)

These subsections will be difficult to enforce and should be deleted. Subsection 11(5) provides an adequate remedy to the expropriator.

5.5 **"Section 11 – Consequences of expropriation of unregistered rights and duties of expropriating authority" (Pages 13 & 14)**

5.5.1 ***"Subsection 11(1)"*** (Page 13)

Read with section 9(1)(b) of the Bill consider whether, in the light of section 25 of the Constitution, a provision to the effect that when ownership of a property is expropriated, all registered rights over that property are simultaneously expropriated, can be valid to the extent that it may include unregistered rights held by a holder who was not aware of the expropriation.

5.5.2 ***"Subsection 11(5)"*** (Page 14)

The expropriatee should only become liable to the expropriator for a loss suffered by the expropriator if:

(a) the expropriatee was not only aware of the existence of the unregistered right, but also knew that the holder of the right might have a claim for compensation; and

(b) the compensation paid to the expropriatee would have been less if the expropriator, before making payment to the expropriatee, knew of the existence of the unregistered right.

6. **“CHAPTER 5 - COMPENSATION FOR EXPROPRIATION”**

6.1 **“Section 12 - Determination of compensation” (Pages 14 & 15)**

6.1.1 **“Subsection 12(1)” (Page 14)**

“The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including—”

This subsection lacks the **aspect of timing of the compensation determination base date**, which can leave it open to compensation determination and various difficulties which often raises its head in this regard. This is a crucial consideration which cannot be disregarded. Due to various types of inflation compensation at a particular date, could be very different to compensation for the same property on a different date. Similar to the old expropriation act a provision should be made on which date is such compensation is fixed and the following is suggested:

*“The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, **as at the date of notice of expropriation**, having regard to all relevant circumstances, including—”*

6.1.2

“Subsection 12(1)” (Page 14)

It might be worth emphasizing that, according to section 25(3) of the Constitution, the modern approach for the determination of compensation is based on the principle of equality in the bearing of public burdens⁴. According to this approach, where one or more individuals have to bear the sacrifice in the form of the loss of their property, their excessive burden should be compensated by the community. It should not, partially or wholly, be imposed on the expropriated individuals⁵. The equality principle forms the basis for the determination in South Africa⁶. The wording is similar to the wording used in the German Constitution⁷. Prof D Kleyn stated in an article published in *SA Public Law* that: *"the equality principle does not allow nominal compensation nor, as a rule, does it justify less than market value. It may, in fact, be more than market value."*⁸

It is important that this principle must inform every determination of compensation, including a determination of nil compensation. It must be recognised that the principle of equality could in exceptional circumstances justify an award of nil compensation, such as where the sacrifice that the land owner has to bear does not warrant any compensation, *e.g.* where the owner acquired the land illegally or fraudulently⁹.

The European Court of Human Rights stated in the case of *Scordino v Italy (No 1)*: "The Court reiterates that interference with the right to respect for possessions must strike a 'fair balance' between the demands of the general interest and the requirements of the protection of the individual's fundamental rights.

⁴ This approach is sometimes referred to as the equality principle, the proportionality principle or the sacrifice theory. In France it is known as *égalité devant les charges publiques* and in the Federal Republic of Germany as the *Abwägungsgebot*.

⁵ Sluysmans & Waring, 'Core Principles of European Expropriation Law', *European Expropriation Law Journal*, Vol. 5, No. 3, 2016, pp. 159-160.

⁶ Section 25(3) of the Constitution.

⁷ Basic Law for the Federal Republic of Germany, 1949, Art 14(3): " ... Compensation [for expropriation] shall reflect a fair balance between the public interest and the interests of those affected".

⁸ D. Kleyn, "The Constitutional Protection of Property: A Comparison between the German and the South African Approach", *SA Publiekreg / Public Law*, vol 11, No. 2, 1996, p.442.

⁹ See the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Jahn and Others v Germany*, [2005] ECHR 444, June 2005. The wording of the principle of equality in the South African Constitution is a mirror image of the wording in the German Constitution.

Compensation under the relevant legislation is material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. Art. 1 [of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less reimbursement of the full market value.¹⁰

Although the principle of equivalence (which is not to be confused with the equality principle) should be adhered to in most cases, it must be borne in mind that there are exceptional circumstances where a deviation from the principle would be justified. The following judicial *dicta* on the equivalence principle could, however, be of interest:

- Lord Morris of Borth-Y-Gest remarked in a House of Lords judgment in England¹¹: "*The word 'compensation' would be a mockery if what was paid was something that did not compensate*".
- Moore J, in the Irish Supreme Court,¹² held that full compensation is required by "*common law, common sense and common decency*".

Section 25(3) of the Constitution requires that, in determining an equitable balance between the various interests, consideration must be given to all relevant circumstances, including five listed circumstances. The list is not a *numerus clausus*. Other relevant circumstances must also be considered. A noticeable omission from the list of circumstances is the actual financial loss suffered by the owner as result of the expropriation, over and above the market value of the property.

¹⁰ ECHR (2006) 276, (2007) 45 EHRR 7, 26 March 2006, par 97.

¹¹ *West Midland Baptist (Trust) Association (Inc) v Birmingham Corporation*: HL 1970, [1970] AC 874, [1969] 3 All ER 172.

¹² *Comyn v Attorney General* [1950] IR 142 at 167.

6.1.3

“Subsection 12(2)(a)” (Page 14)

The principle of disregarding the fact that a property has been expropriated without the consent of its owner in determining compensation, has been part of South African expropriation law for a long time, and is also applied in many other countries. It can, however, be interpreted as ruling out the possibility of making an award for *solatium*, which would be unfortunate. There is much to be said for providing, by way of an addition to the compensation amount determined in terms of clauses 12(1) and 12(2), a *solatium* for the disruption, inconvenience, additional work and trauma caused by the expropriation. The amount of the *solatium* can be a fixed percentage of the compensation amount, capped at a relatively low figure, **as it is generally the less affluent members of society who are traumatised by an expropriation.**

6.1.4

“Section 12” (Pages 14 & 15)

Under the existing Expropriation Act, compensation includes market value plus any actual financial loss¹³. No explicit provision is made for compensation for actual financial loss. Although subsection 12(1) provides that all relevant circumstances must be taken into account in the determination of compensation, and the financial loss suffered by an expropriated owner might be a “*relevant circumstance*”, it is suggested that, in order to place the matter beyond doubt, a provision be inserted in the Bill that regard must be had to any financial loss suffered by an owner or rights holders as result of the expropriation, to the extent that it is just and equitable to do so. Although the inclusion of an actual financial loss provision in the list of circumstances, is recommended, it must be accepted as a relevant circumstance. The drafters of the Bill probably did not want to expand the list of circumstances in the Constitution, leaving it to the Courts to do so.

¹³ Section 12(1) of the Expropriation Act No 63 of 1975.

6.1.5

“Section 12(3)” (Pages 14 & 15)

The following concerns are raised about the introduction in section 12 (3): (a) It is of the utmost importance that where an award of nil compensation is made, it be done in accordance with the equality principle contained in section 25(3) of the Constitution. The proposed wording of the introduction to section 25(3) might incorporate the equality principle, but it can be interpreted differently. (b) The proposed amendment to section 25 of the Constitution, aimed at allowing expropriation at nil compensation, seeks to add the following new subsection:

"25(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 nil¹⁴"

If the proposed new subsection is incorporated into the Constitution, national legislation will only be required to set out specific circumstances under which a determination of nil compensation may be made, and not add *"all relevant circumstances"* as a catch-all. The following amended wording should address both concerns:

"Where land is expropriated in the public interest a court may, in any of the following circumstances and where it is just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, determine that the amount of compensation is nil."

6.1.6

“Section 12(3)(a)” (Page 15)

An appreciation of value (eventual disposal value) is akin to the generation of income, making this a contradictory provision. This clause, as presently worded, is therefore unacceptable. There is nothing morally or legally wrong with speculation, or a generation of income through value enhancement, which will be subject to capital gains taxation.

¹⁴ Constitution Eighteenth Amendment Bill [B.....201....]

It is assumed the purpose of the provision is to prevent speculation by entrepreneurs who buy at a low price, land which is earmarked for acquisition by the State for land reform or other public purpose, with the intention of making a profit by on-selling the land to the State at a higher price, or by a higher compensation award, should the land be expropriated. If that is the purpose of subsection it should be reworded to limit its operation to circumstances where the purpose of the speculation is to make a profit from an on-selling the land to the State, or from an expropriation of the land by the State, with the following amendment suggested:

"where the land was acquired with the expectation that it will be expropriated, and purely for purposes of profiting from the compensation to be awarded for the expropriation."

6.1.7 **"Section 12(3)(b)"** (Page 15)

Although this subsection may have some merit, it is by no means clear whether an organ of state may, in law, expropriate land owned by another organ of state. It may also give rise to a dispute which has to be dealt with in terms of the Intergovernmental Relations Framework Act, Act 13 of 2005.

6.1.8 **"Section 12(3)(c)"** (Page 15)

This subsection might have merit if it is limited to situations where an owner fails to exercise control over his land whilst being well able to do so. There could be circumstances where property was "high-jacked" from its owner, and the owner is physically prevented from exercising control.¹⁵

6.1.9 **"Section 12(3)(d)"** (Page 15)

This subsection, to a large extent, duplicates subsection 12(1)(d) of the Bill, which in turn duplicates section 25(3)(d) of the Constitution. Under section 25(3)(d) of the Constitution, the extent of "*direct state investment and subsidy*" in the property has to be taken into account in the determination of compensation.

¹⁵ This happened in respect of several apartment blocks in Hillbrow, Johannesburg.

Its purpose can be illustrated by the following example: if the State has paid an amount of say R4 million to acquire a property to be given to a community, and the community strips the property and allows it to deteriorate and become barren, reducing its market value to say R1 million, will the community have any moral interest to compensation if the State takes the property back by expropriating it?

If the extent of the "*direct state investment and subsidy*" exceeds the market value of the property, the outcome could be a small amount or nil compensation. Section 12(3)(d) of the Bill is therefore unnecessary. It could also be in conflict with the Constitution, because even if the "*direct state investment and subsidy*" exceeds the market value of the property, the other factors to be considered in terms of the Constitution might well justify an award of some compensation. This would not necessarily be the case under subsection 12(3)(d).

6.1.10

"Section 12(3)(e)" (Page 15)

Most property which is governed by the Major Hazard Installation Regulations¹⁶ could pose "*a health, safety or physical risk to persons or other property*". Similarly, various other property like a filling station, hazardous industry and the like could pose such risks. Another example is a steep cliff on a rural property which can pose a safety risk, but similarly it provides panoramic views, which create significant value enhancement. The above does not mean these properties have no value. In fact, many of these are high value properties. It can surely not be the intention of this subsection to deal with such properties on a nil compensation basis.

If the nature or condition of a property poses a health, safety or physical risk, the relevant authorities will, in most cases, have a remedy in terms of existing legislation, which it should use rather than expropriate the property without compensation. If the subsection is retained, it should be limited to cases where the owner, despite demands, does nothing to address the risk and an expropriation is the only remedy to achieve this.

¹⁶ Promulgated in terms of the Occupational Health and Safety Act, No. 85 of 1993. The Regulations were published in GN R692 of 30 July 2001.

6.1.11 **"Section 12(4)"** (Page 15)

The right to occupation and use of land is part of the remuneration which the labour tenant receives for the labour which he or she provides. There will be very few, if any, circumstances which will justify an award requiring the land owner relinquish ownership of the land occupied and used by the labour tenant without any compensation. The only circumstance which might justify nil compensation would be where the labour tenant or his direct forebears were already in occupation of the land in accordance with indigenous title at the time when it became part of a farm given to white owners by the then government, in disregard of such indigenous title¹⁷. This will, in most cases, have been during the 1800's and early 1900's. If the 6 subsection is retained, it should specify the circumstances in which an award of nil compensation would be just and equitable.

Is this subsection at all relevant? As nil compensation has already been adjudicated by a court or arbitrator. Recommend that this subsection be deleted.

6.2 **"Section 13 – Interest on compensation" (Page 15) -**

6.2.1 **"Section 13(c)"** (Page 15)

Payment of interest by "*pre-paid registered post*" is not feasible, particularly where rental is deemed to have been paid on the date on which the cheque or warrant voucher was dispatched. Registered mail is notoriously unreliable. Letters sent by registered mail is sometimes received months after the date of dispatched, if received at all.

Payment should be effected by electronic transfer into an account nominated by the payee, or by warrant voucher handed personally to the payee¹⁸. There should also be a provision that information and documents delivered by a claimant to facilitate electronic payments are confidential, and that the expropriating authority should take appropriate measures to protect their confidentiality.

¹⁷ It might be argued that the existing indigenous title survived the subsequent award and registration of ownership of land (including the portion occupied by the labour tenant and his forebears), in accordance with the laws of the white government at the time.

¹⁸ Cheques and possibly warrant vouchers also are being phased out by commercial banks.

6.3 "Section 14 – Compensation claims" (Pages 15 & 16) -

6.3.1 "Section 14(1)(d)(i)" (Page 15)

If the unregistered right is, for example, a right of way over land, the improvements on the land can hardly be relevant for a claim by the holder of the right. It is suggested that the subsection be amended to require the holder of the unregistered right to provide particulars of improvements on the land only insofar as the improvements may be relevant to the claim.

6.4 "Section 17 – Payment of amount offered as compensation" (Page 17)

6.4.1 "Subsection 17(1)" (Page 17)

It is unclear whether this subsection will also apply where the amount of compensation has not yet been finalised. The expropriator may well argue that payment cannot be made before the amount of compensation has been finalised. There should be a provision that in such circumstance the amount offered by the expropriator in its latest offer must be "paid on account"¹⁹. If the final determination of the compensation is lower, the expropriatee will be liable to refund the overpayment plus interest to the expropriator. On the other hand, if it is higher, the expropriator must pay the shortfall plus interest to the expropriatee.

6.4.2 "Subsection 17(3)" (Page 17)

It is not acceptable that the expropriating authority be permitted to take possession of the expropriated land before the compensation which it offered to the owner has been paid. If there is good reason for a delay in the payment of compensation, the expropriating authority should, before taking possession of the property, obtain a court order in terms of subsection (4), authorizing a later payment date.

¹⁹ Section 11 of the Expropriation Act 63 of 1975 contains a similar provision, but limits the "payment on account" to 80% of the amount offered.

6.4.3 ***“Subsection 17(5)” (Page 17)***

It is doubtful whether there is any lawful basis on which an expropriating authority can withhold payment of compensation due to a claimant who is not tax compliant. The claimant may be late in the submission of a tax return or involved in a dispute with SARS. Withholding payment of compensation due to a claimant in order to put pressure on him or her to submit a late return or to settle a dispute with SARS, is unacceptable conduct. An expropriating authority is not a collection agent for SARS and this subsection may be unconstitutional.

6.4.4 ***“Subsection 17(6)” (Page 17)***

The subsection should also contain a provision that information and documents delivered by a claimant to facilitate electronic payments are confidential, and that the expropriating authority should take appropriate measures to protect their confidentiality.

6.5 ***“Section 18 - Property subject to mortgage bond or deed of sale” (Page 17)***

6.5.1 Is a builder's lien an unregistered right which is expropriated together with the land, or should it be treated like a mortgage bond or a deed of sale? It is suggested that it should be treated similar to a mortgage bond or deed of sale in this section.

6.5.2 There are various circumstances under which compensation for the expropriation of a property subject to a registered mortgage bond may be insufficient to settle the mortgage debt. If the compensation has been determined on the basis of the market value of the property, and the property has been bonded for an amount in excess of its market value²⁰, it is not unfair that the owner should remain liable for the difference. On the other hand, any inability of the owner to settle the mortgage debt in full because "just and equitable" compensation has been determined at less than market value and also less than the mortgage debt, could lead to his or her insolvency. This could be inequitable²¹.

²⁰ This might be the case if, for example, the bond is a surety bond for a debt in excess of its market value, or if the market value of the land has been reduced by an external event such as a devastating fire.

²¹ This might be the case if the amount of a direct state investment or subsidy in the acquisition or improvement of the property has, in terms of sec 12(1)(d), been deducted from the market value of the property.

It is understood expropriation legislation in other countries contains specific anti-insolvency provisions, which could inform an amendment to address the possible inequity.

6.5.3 ***“Subsection 18(3)” (Page 17)***

The absence of agreement on the apportionment of compensation between the owner and a mortgagee or buyer of the expropriated property is not always due to a dispute. Lack of *consensus* on the apportionment is not a dispute. The court should be authorised in the Bill to apportion the compensation between the owner on the one hand and the mortgagee or buyer on the other, as this may not ordinarily be within the jurisdiction of a court. Consider an amended wording along the following lines:

"In the absence of an agreement as envisaged in subsection (1), the parties may apply to court for an order:

- (a) apportioning the compensation money between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, and*
- (b) if the compensation money has been deposited with the Master, directing the Master to pay the compensation money to such persons, in such manner and on such terms as the court may determine."*

6.6 ***“Section 19 – Payment of municipal property rates and other charges out of compensation money” (Pages 17 & 18)***

Ownership of the expropriated land vests in the expropriator on date of expropriation²². In terms of the Deeds Registration Act, an expropriator must immediately after an expropriation, lodge a copy of the notice of expropriation together with certain additional documents, in the relevant Deeds Office²³. The Deed of Transfer, which is usually registered much later, contains merely a confirmation that ownership of the expropriated property has taken place²⁴.

²² Subsection 9(1)(a) if the Bill

²³ Section 31(1) of Act No. 47 of 1937

²⁴ Section 31(1) of the Deeds Registration Act, No. 47 of 1937

There should be a provision in the Bill that despite the provisions of any law to the contrary, the expropriatee is liable for rates and charges until ownership (and not registration of ownership) has passed to the expropriator, whereafter the expropriator will be liable. The provision "despite any law to the contrary" is necessary, because section 24(1) of the Local Government: Municipal Property Rates Act²⁵ provides that "a rate levied by a municipality on property must be paid by the owner of the property" and "owner" is defined in section 1 of the Act as including "a person in whose name ownership of the property is registered."

6.6.1 "Subsection 19"

This section should be further extended to also include all levies and charges due in respect of homeowner's associations, communal property associations and sectional title schemes, as per the relevant legislation governing these.

6.6.2 "Subsection 19(1)" (Page 17)

For purposes of accuracy and clarity, it is suggested that the "charges" referred to in subsection 1, be described as amounts due to a municipality as described in section 118(1)(b) of the Local Government: Municipal Systems Act²⁶.

6.6.3 "Subsection 19(2)" (Page 17)

It is suggested that the words "*inform the expropriating authority in writing of such charges, as at the date contemplated in section 9(2) or (4)*", be replaced by words to the following effect:

²⁵ Act No. 6 of 2004

²⁶ 118. (1) A registrar of deeds or other registration officer of immovable property may not register the transfer of property except on production to that registration officer of a prescribed certificate-

(a) issued by the municipality in which that property is situated; and

(b) which certifies that all amounts due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.

(2) In the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of this section are subject to section 89 of the Insolvency Act, 1936 (Act No. 24 of 1936).

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over a mortgage bond registered against the property.

".... issue a certificate to the expropriating authority, mutatis mutandis in accordance with section 118 of the Local Government: Municipal Systems Act, certifying the outstanding amounts of the charges as at the date contemplated in section 9(2) or (4)."

6.6.4 ***"Subsection 19(3)(a)"*** (Page 18)

Informing the registered owner by registered mail of outstanding charges will not be feasible. Many owners, especially if they live on rural land in outlying areas, will not be reachable by registered mail. Experience shows that, nowadays, registered letters often do not reach their destination within the 20-day period within which registered owners can object to the outstanding amount.

6.6.5 ***"Subsection 19(4)"*** (Page 18)

Keep in mind that the expropriating authority becomes the owner of the expropriated land on date of expropriation. The expropriating authority must file a copy of the notice of expropriation (together with some other documents) with the registrar of deeds, who must note the expropriation in his records. Ownership of the expropriated²⁷ land is not passed to the expropriating authority by virtue of the subsequent Deed of Transfer²⁸. The Deed of Transfer merely records that the expropriating authority is already the owner of the land.

It is doubtful whether a municipality is entitled to levy property rates on a person for periods during which he or she was not the owner of the property. If the date of possession is later than the expropriation date, the municipality may not be able to hold the erstwhile owner liable for property rates in respect of periods subsequent to the expropriation date. This issue may, however, require further investigation.

²⁷ Section 31 of the Deeds Registries Act, No 47 of 1937.

²⁸ Form D of the Deeds Registries Regulations.

7. **"CHAPTER 6 – MEDIATION AND DETERMINATION BY COURT"**

7.1 **"Section 21 – Mediation and determination by court" (Pages 18 & 19)**

7.1.1 **"Subsections 21(1)" (page 18)**

The absence of an agreement on the amount of compensation can hardly be described as a "dispute". It is suggested that the words "to settle the dispute" be replaced by "to reach agreement on the amount".

There should also be a provision that all discussions that took place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree otherwise.²⁹

7.1.2 **"Subsections 21(2)" (page 18)**

The provision "the expropriating authority must refer the matter to a competent court" is not workable. It has probably been borrowed from the Restitution of Land Rights Act, which provides that upon completion of the investigation of a land restitution claim and provided certain prerequisites are met, the claim must be referred to the Land Claims Court³⁰. The Act and the Rules of the Land Claims Court contain detailed provisions on how such a referral must be dealt with. Proceedings in the High Court are (subject to a few exceptions) initiated by way action or notice of motion. The relevant legislation and court rules make no provision for a "referral" of an expropriation matter to the Court³¹.

It is suggested that the subsection be reworded along the following lines:

(a)The compensation to be paid for any property expropriated by an expropriating authority shall, in the absence of agreement, be decided or approved by a competent court in an action instituted by any party concerned.

²⁹ The Resitution of Land Rights Act, section 35A(4) contains such a provision

³⁰ Section 14(1) of the Restitution of Land Rights Act, Act No. 22 of 1994

³¹ In the absence of prescribed rules, issues such as the following will arise: in what manner must the matter be referred to the court; what documents must be included in the referral; must the referral be served on any party and, if so, on which parties and in what manner; what is the nature of the proceedings before the court; are there plaintiffs and defendants; must any pleadings be filed, if so, what pleadings; must there be discovery of documents; which party is responsible for collating, paginating and indexing the Court file; may oral evidence be led at the hearing; which party has the duty to begin at the hearing; etc., etc

(b) An action for the determination of compensation for the expropriation of a property may not be instituted before the expiry of a period of 20 days from the date of expropriation.

(c) The proceedings shall be conducted in accordance with the rules and procedures applicable to civil proceedings in the court concerned, but subject to any orders or directions which the court or the presiding judge may issue for the preparation and hearing of the proceedings.

(d) Any judgment or order of the court shall be deemed to be a judgment or order in civil proceedings.

8. "CHAPTER 7 – URGENT EXPROPRIATION"

8.1 "Section 22 - Urgent expropriation" (Pages 19 & 20)

8.1.1 "Subsections 22(1)" (Page 19)

It is suggested that the owner or holder of a right should at least receive prior written notice that a right to use the property temporarily will be taken, stating when the right will be taken and for how long, giving a description of the right and setting forth why the taking is urgent.

8.1.2 "Subsections 22(2)" (Page 19)

"The power referred to in subsection (1) may only be exercised if suitable property held by the national, provincial or local government is not available under the following circumstances:"

It is suggested that the words "and" be inserted between the words "available" and "under" in the second line: it will clarify the meaning of the clause, i.e.:

"The power referred to in subsection (1) may only be exercised if suitable property held by the national, provincial or local government is not available and under the following circumstances:"

8.1.3 ***“Subsections 22(2)(b)”*** (Page 19)

It should be mandatory that an application for a court order authorising an urgent expropriation be served on the owner or holder of a right in the property concerned.

9. “CHAPTER 9 – RELATED MATTERS”

9.1 ***“Section 24 - Service and publication of documents and language used therein”*** (Pages 20 & 21)

9.1.1 ***“Subsection 24(1)(b)”*** (Page 20)

Service by registered post is no longer a reliable method to serve documents, especially important documents such as notices of expropriation, offers of compensation and compensation claims. Consider adding a provision that notices may be sent by e-mail if the addressee has an e-mail address and provided receipt of the e-mail is acknowledged.

9.1.2 ***“Subsection 24(2)”*** (Page 21)

“Whenever publication of a notice in terms of section 7(1) or (7)(b)(iii), a notice of expropriation or other document is required by this Act, publication must take place—”

Suggest that full reference is made to subsection numbers for consistency, i.e.:

*“Whenever publication of a notice in terms of section **7(1)(b)** or **7(7)(b)(iii)**, a notice ...”*

9.1.3 ***“Subsection 24(2)(b)”*** (Page 21)

There should be an obligation on the expropriating authority to take all reasonable steps necessary to maintain the displayed notice for a reasonable period.

Prescribe for how long the "display" of the "notice" should be maintained.

9.1.4 “Subsection 24(3)(b) & 24(4)(b)” (Page 21)

Service by registered mail and by facsimile transmission should be deleted. It can be replaced by service "by e-mail" or "by the sheriff, in accordance with Rule 4 of the Uniform Rules of Court".

9.2 “Section 25 – Extension of time” (page 21)

The Bill contains numerous time limits regulating the expropriation process. Although the inclusion of time limits is supported, it might not always be possible for the claimant or the expropriating authority to adhere to them. It is suggested that a clause be inserted in the Bill permitting the parties to agree to an extension of any time limit, even after the time limit has expired. Failing such agreement, any party should be entitled to apply to court for an extension of the time limit, which the court may grant if it is just and equitable to do so.

9.3 “Section 26 – Expropriation register” (page 22)

It should be stated that the expropriation register is open to the public, on such reasonable terms as the Director-General may determine.

9.4 “Section 27 – Civil fines and offences” (page 22)

In fairness, penalties for non-compliance with procedural requirements imposed by the Act should not only apply to the expropriatee, but also to the expropriator. Experience has shown that failures to comply are committed more frequently by the expropriator than by the expropriatee.

Civil fines are not an appropriate remedy for failure to comply timeously with the procedural obligations of the expropriation process, particularly where only the expropriatee and not the expropriator is liable for such fines. Timeous and proper compliance with procedural steps should be enforced by applications to Court, as is the position for failure to comply with the rules and procedures prescribed for civil litigation.

The party in default of compliance will usually be ordered to pay the cost of an application to enforce compliance, and that will serve as a deterrent against non-compliance. If there is any dispute as to whether there was proper compliance or not³², the Court can deal with the dispute and make an appropriate order.

10. The SAIV fully supports the spirit of this expropriation bill which includes the relevant administrative requirements and constitutional provisions. It may go some way in addressing the burning issues already found with the state's land transformation program, and also ensure more due diligence in respect of professional valuations.
11. The opportunity to have made a contribution is greatly appreciated. Much reliance was placed on one of our esteemed members, retired Judge Antonie Gildenhuys, in compiling this submission. Should you have any enquiries in respect of our submission or require further assistance in this respect please do not hesitate to call on us. We will gladly oblige.

Yours sincerely



J.F. ("Saul") du Toit

On behalf of

The South African Institute of Valuers

³² The dispute can, for example, be whether or not a property owner is obliged to make a particular document available to a valuer, if the valuer requires him to do so and the owner maintains that the valuer is not entitled to the document.