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the way to prosperity

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Attention: Mr Livhuwani Ndou
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Per email: Livhuwani.ndou@dpw.gov.za; Johannes.lekala@dpw.gov.za

WRITTEN INPUTS ON THE DRAFT EXPROPRIATION BILL, 2019

Dear Sirs

Agbiz would like to thank the Department of Public Works for the opportunity to submit written comments.

1. Who we are

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

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

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

2. General comments

Agbiz and its members are committed to building an agricultural sector that is dynamic, efficient, inclusive and sustainable. Although the majority of our members operate in the value chain and are not large landowners per se, the entire upstream and downstream value chain relies on a successful and growing primary agricultural sector. Many of the Agbiz members are also directly involved in agricultural finance where international lending criteria require financiers to request security as part of their due diligence assessments. As a result, the Agbiz membership has a direct interest in the Expropriation Bill as it affects both the security held by lenders as well as the production base of the primary sector on which the success of the whole value chain is built.

Agbiz initially provided written inputs to the 2013 Bill, formed an integral part of the Business representation when the Bill was deliberated upon at Nedlac and continued to make constructive inputs throughout the Parliamentary process at both the level of the Portfolio Committee and the Select Committee in the National Council of Provinces. Throughout this process, we have recognised the principled need for a law of general application that can align the process to be followed by all expropriating authorities and set a uniform standard for the calculation of compensation in line with section 25 of the Constitution.

The latest amendments appear to have been made in light of the on-going debate on expropriation without compensation within the context of land reform. Agbiz has always viewed the extension of strong property rights and the success of the land reform programme as central pillars needed to ensure the long-term sustainability of the South African economy at large. We are furthermore fully aware that land reform is not merely an economic consideration, it is an imperative given the history of dispossession, skewed patterns of ownership and insufficient access to land for economic and settlement purposes in South Africa.

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

ventures and providing training, extension and various forms of support to beneficiaries.

Agbiz is fully aware that the Minister of Rural Development and Land Reform has the power to expropriate land for land reform purposes. However, expropriation is merely one mechanism whereby the state can obtain land for reform purposes and should only be used as a measure of last-resort where bona fide negotiations to obtain land earmarked for reform by less intrusive means have failed. We, therefore, believe that it will never be efficient to pursue expropriation as the means of choice but rather be reserved for those instances where the specific property in question is required in the public interest, and the negotiating parties have reached an impasse that cannot be overcome in any other manner.

Be that as it may, we do not believe that it is necessary nor justified to deviate from the principle of just and equitable compensation (which is supported) merely because a specific property in question is required for land reform opposed to any other purpose that is in the public interest. In our submission to the Constitutional Review Committee, we highlighted the following considerations to motivate why the current threshold of just and equitable compensation does not require amendments to achieve the land reform goals which we are striving for as a country:

- The state has never used its powers of expropriation within the context of land reform;
- The courts have not had the opportunity to clarify the meaning and scope of just and equitable within the land reform context;
- The recognition of property rights is the basis of economic freedom, prosperity and liberty;
- In the State of Food and Agriculture report compiled by the FAO is 2012, it is clearly stated that investment by farmers themselves constitutes by far the largest portion of investment into the sector. And amongst other factors such as good governance, macroeconomic stability and transparency, respect for property rights plays a central role in investment decisions. This is supported by local data showing a significant trend of reduced foreign investment into the agricultural sector and reduced gross capital formation;
- Explicit nil compensation is out of line with international standards;
- Explicit nil compensation can have adverse effects on investment, capital formation and agricultural productivity;
- The resulting harm to the economy could exceed the costs of simply paying just and equitable compensation; and
- Various alternatives are available to promote land reform, including blended finance models whereby the state and private sector co-fund land reform.

Kindly see our written submission to the Constitutional Review Committee attached for detailed motivation.

Be that as it may, we have been a trusted contributor to the legislative process relating to this Bill for the better part of a decade and wish to continue doing so. As such, we have compiled a number of evidence-based inputs which we believe will improve the revised draft of the Bill. We trust that you will view these comments in this light.

3. Specific comments

3.1. Definition of Expropriation

Unlike many other constitutional property law clauses around the world, the South African Constitution makes an explicit distinction between 'deprivations' and 'expropriation'. Any regulation which has the effect of limiting the owner's right to use and enjoy his property is regarded as a deprivation of property, but there is no obligation to pay compensation. Expropriation is a special form of deprivation which impairs the owner's property rights to the extent that it becomes just to compensate the owner or holder of the right.[1] The Constitutional Court has the ultimate responsibility to interpret the Constitution, including the right to adjudicate on when government action constitutes a compensable expropriation, or whether it is merely deprivation which does not attract compensation.

The current definition seeks to curb this discretion by limiting expropriation to instances where the state acquires property. Whilst this will undoubtedly amount to expropriation, the definition may have the effect of excluding all instances where the state does not acquire the property but never-the-less limits the owners' rights to such an extent that it becomes of no value. This latter aspect may be problematic.

In the case of *Agri SA v Minister for Minerals and Energy*[2] the Constitutional Court held that the extinguishment of old order mineral rights did not amount to expropriation as the state did not acquire the rights, but merely held it as the 'custodian' on behalf of the nation. The action was regarded as a mere deprivation which does not attract compensation. Whilst this case does on face value support the definition, there are conflicting cases where the Constitutional Court interpreted the concept of expropriation slightly wider.

In *Arun Property Development (Pty) Ltd v City of Cape Town*[3] the Constitutional Court gave recognition to the so-called doctrine of constructive expropriation. According to the provisions of the Western Cape Land Use Planning Ordinance (LUPO), the City of Cape Town required Arun property developers to cede certain portions of its property

[1] Van der Walt *Constitutional Property Law* 2005.
[2] 2013 (4) SA 1 (CC).
[3] 2015 (2) SA 584 (CC).

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

We, therefore, propose that the definition be scrapped as the Constitutional Court will, in any event, decide which conduct amounts to an expropriation as intended in the Constitution.

3.2. Section 2 - Application of Act

Section 2 (2) requires the consent of the administrative authority responsible for a certain state-owned corporation or state-owned entity before expropriation takes place. There is certainly a need for state entities to coordinate their processes when expropriation takes place so as to prevent one organ of state from undermining the developmental plans of another. Be that as it may, expropriation is by its very nature a last resort where one cannot reach agreement on the acquisition of property. Where there are conflicting demands from different organs of state regarding the acquisition of such land, the dispute should be resolved in terms of the Intergovernmental Relations Framework Act.

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

Such a scenario will be unfortunate when one considers that the state owns an estimated 1,2 million hectares of strategically located land eligible for redistribution. We advise the Department to reconsider this clause.

3.3. Section 3 (2) Minister of DPW to expropriate property on behalf of an organ of state

The provision states that the Minister of Public Works ***must*** expropriate property on the request of an organ of the state where he/she is satisfied that the property is

required for a public purpose or in the public interest. Use of the word 'must' limits the discretion of the Minister substantially.

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

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

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

3.4. Section 8 (3) (g) and 8 (4) (d)– the offer of compensation

Section 8 (3) (g) provides for the expropriating authority, as part of the notice of expropriation, to make an offer of compensation. Section 8 (4) (d) likewise places an obligation on the authority to include a description of what the offer comprises of. This offer could be informed by a valuation conducted over the property (by the Valuer-General or an independent valuer). Whilst it remains the responsibility of the expropriating authority to make the offer, a great deal of confusion has slipped in over time as to what the role of the valuation is. Does the authority assess the accuracy of the valuation and then merely offer that amount as compensation? Or should the authority apply its mind to factors not captured in the valuation to compile an offer that it deems just and equitable?

This is a challenge that goes to the heart of the difference between the concept of 'value' on the one hand, and the concept of 'compensation' on the other. It is also a question which our courts have grappled with over time and created often contradicting precedents. In the pre-constitutional era, our courts have adopted an approach whereby it critically assesses the accuracy of valuation but then summarily accepts that amount as the compensation. In this regard, the court in *Estate Marks v Pretoria City Council*[4] stated:

> *"…the function of the Court a quo was to determine the amount of compensation to be paid, as distinct from deciding an issue solely dependent on the relative credibility of conflicting testimony… The valuation of property –*

[4] 1969 (3) SA 227 (A) at pp252-253.

> *I am disposed to think, particularly of urban property such as that in issue in the present case where so many different facets enter into the enquiry – is not a sphere in which a Judge ordinarily has any specialised knowledge."*

Similarly, the court in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*[5] described the role of the court as the 'super valuator' in that is assesses the valuation, after which it accepts same as the correct measure of compensation. The court stated:

> *"Notwithstanding, the law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuators make the task of the super valuator seemingly 'curiouser and curiouser'."*[6]

These judgements were, admittedly, made during a time when the threshold for compensation was market value. In other words, if the valuation correctly determined the market value, there was no reason to deviate from that in deciding upon the amount of compensation.

This has however changed with the advent of the Constitution as Constitutional Court was clear in the *du Toit case* that the peremptory requirement is just and equitable compensation. In this regard, there is a strong argument to make that a distinction should be drawn between the 'value' of the property and the 'compensation' that the owner or holder is entitled to.[7] At its core, there are certain elements which relate to the value of the land and certain elements which relate to the personal circumstances of the owner or holder. It may not be appropriate to expect the valuation report to inform the authority of those elements which relate to the owner's circumstances and not the inherent value of the land. These should be clearly distinguished from one another in the manner in which the state sets out its offer of compensation.

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[5] 1979 (1) SA 949 (W).

[6] At pp 955, 966.

[7] Du Plessis 'How the determination of compensation is influenced by the disjunction between the concepts of value and compensation' in Vastgoed, Omgeving & Recht *Rethinking Expropriation Law III* 2018.

The best example where expropriating legislation draws this distinction can be found in section 31 of the *Land Acquisition and Compensation Act* of Victoria, Australia. It states:

> ***"31….***
>
> *(3) The offer must set out the amount that the Authority, on the information available to it, has assessed as a fair and reasonable estimate of the amount of compensation payable to the claimant under this Act on the assumption that the claimant held the interest in respect of which the offer is made.*
>
> *(4) An offer under this section must be accompanied by—*
> *(a) a copy of the certificate of valuation to which the Authority has had regard in making its offer; and*
> *(b) a statement explaining the difference between its offer and the valuation referred to in paragraph (a) if these differ; and*
> *(c) a statement in the prescribed form setting out the principal rights and obligations of persons whose interests in land have been acquired under this Act.*
>
> *(5) In making its offer the Authority must have regard to a valuation of the land carried out by the Valuer-General or a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960."*

This provision clearly indicates that the authority must have regard to the valuation, but must apply its own mind to all relevant factors, including the valuation, to arrive at an offer which is just. We propose that section 8 be reworded in a similar manner.
Failure to do so will result in the continuation of this cycle whereby valuations (especially those conducted by the Valuer-General) will continue to be contested by land owners as there is confusion as to which elements the valuer should consider vis-à-vis the expropriating authority. Likewise, a rewording could guide our courts in arriving at better precedents if the offers of compensation disputed in court clearly distinguish between the value of the land and the weight which should be attached to other factors relating to the personal circumstances of the owner, holder or the state.

Agbiz is willing and able to assist the Department as substantial research has already been conducted into the comparative laws of other countries.

3.5. Section 12 (3) – new insertion for expropriation at nil compensation

As outlined in the general comments section, with proper budgeting and alternative mechanisms in place, we believe that South Africa can reach its land reform ambitions without having to resort to nil compensation. Without prejudice to these comments, we understand that section 25 of the Constitution is flexible enough to accommodate a wide variety of compensation outcomes and that a provision which gives greater guidance on the interpretation thereof, in the absence of sufficient caselaw, could be a feasible outcome given the current political climate. That being said, investors, land owners and financiers who have been part of the *bona fide* debates surrounding expropriation without compensation require the greatest degree of clarity possible to minimise the adverse effect that a provision prescribing nil compensation could have on investor confidence, food security and the perception of property rights. Whilst we appreciate that the Department has attempted to do so by inserting section 12 (3), the draft wording also creates new areas of uncertainty and can be improved to reduce ambiguity. Specific recommendations are made in relation to each category of land listed in section 12 (3) below.

We furthermore note that this subsection only applies to 'land', however it is unclear whether this includes fixed improvements and buildings erected on the land. Further refinement may be required as confusion can arise where urban properties such as buildings, and especially sectional titles, are erected on the land.

3.5.1. Section 12 (3) (a) – Labour tenants

The effective implementation of the Land Reform (Labour Tenants) Act has been hamstrung by several challenges over the past 20 years. In 2017, the Association for Rural Advancement succeeded in obtaining a mandatory interdict against the Department of Rural Development and Land Reform as it has failed to process and investigate the myriad of claims lodged under the Act. Labour Tenants are amongst the most vulnerable people in society and have a legitimate grievance about the process followed to date. There are an estimated 20 000 claims that have been lodged with the Department which has not been given effect to. Unfortunately, the delays have largely been down to the administrative lapses which have seen the majority of claims not finalised, researched or verified. Aside from a few known disputes, the salient challenge in relation to labour tenants has not been about land acquisition. As such, we are concerned that listing labour tenants as a category in which it may be just and equitable to pay nil compensation may not result in an acceleration of the process as land acquisition cannot commence until the claims have been researched, verified and settled.

Although the Labour Tenants Act does not explicitly provide for powers of expropriation, the Land Claims Court has previously confirmed[8] that the provisions of section 22 and 23 of the Act *de facto* amount to an expropriation of land to give effect to the object of the Act. This can only take place once an agreement has been reached or once the Land Claims Court has pronounced on the validity of the Labour Tenant's Claim. There is a technical mismatch in the wording of section 12 (3) (a) of the Bill in that it does not reflect the qualification that the claim must first be verified but merely refers to anyone that falls within the definition of a labour tenant.

The Labour Tenant Act defines a labour tenant as follows:

> *"(xi) "labour tenant" means a person*
> *(a) who is residing or has the right to reside on a farm;*
> *(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and*
> *(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker;"*

There is no qualification in the Act that a claim must be submitted and verified before one is regarded as a labour tenant. This is simply because the purpose of the Act is not limited to labour tenant claims, but also to ensure that labour tenants are not unlawfully evicted. However, the powers to acquire land through expropriation and to transfer ownership of the land to the labour tenant only vests if a claim is submitted, verified and finalised. If the Expropriation Bill refers merely to labour tenants as defined in the Act, a loophole is created whereby the owner may be expropriated (for example under the Provision of Land and Assistance Act) and he/she will not be entitled to compensation because the objective is to transfer it to a labour tenant as defined in the Act, irrespective of whether the labour tenant has submitted a claim and irrespective of whether that claim is valid.

We propose that this loophole be closed by amending the text to read as follows:

[8] *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 21; *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 68 at para 22; *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12 at para 6 – 31.

*"(a) Where the land **[is occupied or used]** has successfully been claimed by a labour tenant, **[as defined]** in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);"*

3.5.2. Section 12 (3) (b) & (d) 'land held purely for speculation' and 'abandoned land'

Section 12(3)(b) & (d) states that it may be just and equitable to award nil compensation where the land is held "purely for speculation" or where "the owner of the land has abandoned the land". There is a fine line between 'speculation' and legitimate investment which is the lifeblood of the economy. Whilst it is somewhat unclear what exactly is meant by speculation, there may be legitimate reasons why property owners, especially property developers, fail to develop land shortly after purchasing it. There could, for example, be challenges in relation to obtaining the requisite permissions and permits from the local municipality, the developer may be in the process of obtaining finance or equity investments into the property before developments can take place. In all of these scenarios, there is no mala fide intent but rather practicalities which prevent an owner from immediately developing the property. Should the owner be punished in these circumstances by nil compensation, it could negatively affect investment into new developments. Such a scenario should be avoided at all costs as it would result in reduced investments into the urban and peri-urban fringe, which in turn can have a knock-on effect on revenue generation and job creation in the construction sector in particular.

Similarly, there may be legitimate reasons why a property is regarded as 'abandoned' that is not due to the fault of the owner. One prominent example reached the Constitutional Court in the case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd.*[9] In this instance, the owner *de facto* lost control of the property due to the presence of a large number of unlawful occupiers. The owner took reasonable steps to vindicate the property but did not receive support from the local municipality. In this scenario, the owner has lost control of the property due to no fault of his own and has no choice but to abandon it. It would certainly not be just and equitable in this scenario to award the owner nil compensation as he/she lost control due to no fault of their own. In fact, the Constitutional Court in judgement finally decided that it would be just and equitable to award constitutional damages to the owner precisely because the state had failed to protect his fundamental property. To now prescribe nil compensation for a similar situation would fundamentally contradict

[9] 2005 (5) SA 3 CC.

the court's precedent. It is therefore critical that investors, land owners, financiers and even the courts have a clearer understanding of what is intended by the concepts of 'abandoned' property or land held for 'speculation'.

At a recent bilateral meeting between BUSA and Deputy Minster Cronin, we gained valuable insights into the drafter's intention when the Deputy Minister mentioned that the expropriating authority, when formulating its offer of compensation, maintains a large degree of discretion as the word *'may'* is used in relation to the 5 categories of land listed. The Deputy Minister also noted that the expropriating authority retains discretion as to when properties would be regarded as 'abandoned' or held 'purely for speculation'. Whilst we appreciate that it may be impossible to formulate all-encompassing definitions for these terms, it is necessary for the law to be predictable so that investors can accurately assess the risk when financing certain categories of properties. In this regard, we propose that provisions be inserted to guide the application of the expropriating authority's discretion by providing for factors which it must consider when assessing whether land falls within these contested categories.

The benefits of introducing guidelines are plentiful, including:

- It provides investors and financiers with greater legal certainty and allows them to tailor their actions so as to stay within the confines of the law;
- It provides the expropriating authority with greater certainty as to when and how it should exercise its discretion when formulating offers of compensation;
- It prevents arbitrary decision making and promotes consistency of application between different organs of the state applying the same provision, and finally;

It will reduce litigation and provide the courts with clarity as to the intention of the legislature, which in turn enables the courts to create clear and rational precedents when faced with a dispute.

We, therefore, propose that a new section 12 (4) and (5) be introduced to provide clarity. The proposed insertion could read as follows:

> *12 (4) When exercising its discretion to make an offer of compensation under section 8 (3) (g), the expropriating authority must take the following factors into consideration:*

(a) in assessing whether the land is been abandoned:

i. Any unpaid municipal accounts and the time since the owner's account has gone into arrears;

ii. Any unpaid municipal property rates and the time since the owner's account has gone into arrears;

iii. *The difference between the outstanding municipal account or property rates and the market value of the property;*
iv. *The extent to which the owner has maintained the property;*
v. *Whether any buildings plans or rezoning applications has been lodged with the local municipality, or have been prepared for lodgement; and*
vi. *Whether the owner has lost possession or control of the property.*
vii. *Any other relevant factor;*

(b) *In assessing whether the land is held purely for speculative purposes:*

i. *Whether any buildings plans, rezoning or development applications have been lodged with the local municipality, or have been prepared for lodgement;*
ii. *Whether the owner has applied for finance or attempted to acquire equity investment to finance development;*
iii. *Whether an application has been submitted to the relevant authority to subdivide the property;*
iv. *Whether the owner has advertised the property, or portions of the property, for resale;*
v. *Any other relevant factor;*

12 (5) In the event that the expropriating authority deems the property to be abandoned or held for purely speculative purposes, the notice delivered to the owner under section 8(3)(g) must include an explanation of the factors applied by the expropriating authority and an invitation to the expropriated owner and holder, where applicable, to make representations to the expropriating authority.

3.5.3. Section 12 (3) (e) – where the market value equals the value of state investment or subsidy

Both section 25 (3) (d) and section 12 (1) (d) of the Bill already mandates the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property to be taken into consideration when arriving at an amount that is just and equitable. In the case of *Du Toit v Minister of Transport,*[10] the Constitutional Court confirmed the approach adopted by the Land Claims Court to start with market value, as it is the only factor that can easily be quantified on its own, and then adjust the amount upward or downwards as other relevant factors are considered. The history of state investment, as a listed factor, will therefore be subtracted from the

[10] 2006 (1) SA 297 (CC).

market value of the land in the ordinary course of calculating compensation. Where the extent of subsidy equals or exceeds the market value, the compensation arrived at by following the accepted methodology could naturally be nil. In that sense, this provision seems somewhat superfluous.

Be that as it may, this factor has only been applied where the benefit received was as a result of racially discriminatory laws or practices. The purpose of section 25(3)(d) was unpacked in detail by the Land Claims Court in *Msiza v Director-General, Department of Rural Development and Land Reform and Others.*[11] The court stated the following:

> *The requirement to consider the history of the acquisition and the use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates. In such an instance, it would indeed be unfair to pay full market value in compensation as this would enable the owner to benefit twice from apartheid.*[12]

In other words, this consideration under the Constitution should only be relevant where the subsidies or benefit received from the state had a connotation with racially discriminating laws or practices. Section 12 (3) (e) of the Bill contains no such qualification. There may, therefore, be instances under the current wording where a property may be eligible for expropriation at nil compensation where subsidies were received with a racial connotation (e.g. homeland consolidation) or without one (e.g. to combat soil erosion), provided those subsidies were substantial enough to match the current value of the properties. It is also conceivable that a previous owner was the beneficiary of the subsidies but that the current owner bought the land at market prices. In both of these scenarios, the historical subsidies would not be deemed relevant by a court of law and disregarded.

As far as prospective application is concerned, there is a real possibility that this provision would enable the state to reclaim the land transferred to land reform beneficiaries without compensation, since the state, and not the beneficiaries, paid for the land transferred under the land restitution programme as well as the LRAD and SLAG programmes of land redistribution. The effect is compounded by the fact that

[11] 2016 (5) SA 513 (LCC).
[12] *Msiza case* at para 53.

the state expenditure to acquire the land often exceeded the true market price due to inflated prices being paid. In many instances, the beneficiaries also received funds for recapitalisation and development which were used for the beneficial capital improvement of the land. With this in mind, one must carefully weigh up the benefits of a mechanical formula versus the requirement of equity, as this could, in turn, threaten the tenure security of land reform beneficiaries which is constitutionally protected under section 25 (6).

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

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

4. Conclusion

We thank you once again for the opportunity to submit comments and trust that you will consider our comments favourably. Should there be ay uncertainly or should you believe that the Bill will benefit from a detailed discussion on our inputs, we would welcome such an engagement.

Yours sincerely

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