*Ex parte*

**DEPARTMENT OF PUBLIC WORKS**

*In re:*

**EXPROPRIATION BILL, 2020 [B 23—2020]**

**SUPPLEMENTED ADVICE ON PORTFOLIO COMMITTEE QUERIES**

Furnished to:

c/o State Attorney, Pretoria

Ref: V Mulaudzi

**G M BUDLENDER SC**

**U K NAIDOO**

Chambers, Cape Town

15 April 2022

# INTRODUCTION

1. Further public engagements were held across all provinces during 2021 on the Expropriation Bill, 2020 [B 23—2020] (‘**Bill**’). Based on the public comments, Members of the National Assembly’s Portfolio Committee on Public Works (‘**Committee**’) queried various clauses and requested input from Department of Public Works (‘**Department**’).
2. The Department sought our written advice, as a matter of urgency, on the legal issues arising. We presented our written advice of 28 March 2022 to the Committee on 30 March 2022. The aim was to assist the Committee with its deliberations on the Bill. Time constraints prevented us from completing the presentation on the selected issues on which we were able to comment.
3. Committee Members and the Parliamentary Legal Advisor (‘**PLA**’) raised questions during the meeting. Some of the questions call for written responses, which we provide here. The Committee invited us back to present on the issues that we were not able to canvass at the last meeting. We outline the points that we intend to cover in this supplemented written advice.
4. To avoid multiple drafts, we have updated our written advice dated 28 March 2022 and modified its contents in response to Committee Members’ questions and following our meeting with the Office of the Chief State Law Advisor (‘**OCSLA**’) and PLA on 14 April 2022.

# ANATOMY OF SECTION 25(2)(b) OF THE CONSTITUTION: WHO DECIDES?

1. At the last meeting, the PLA asked whether section 25(2)(b) of the Constitution means that an expropriating authority may ‘decide’ the amount of compensation.
2. The decision to expropriate lies with the administration, but only the courts have the constitutional competence to ‘decide’ the amount of compensation, if the expropriating authority and expropriatee do not agree on it.
3. Our reasons stem from the text of section 25(2)(b) of the Constitution. It is a subtle point and needs to be made in writing, not simply orally. The text provides:

25(2) Property may be expropriated only in terms of law of general application—

. . .

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

D

1. First, the text expressly identifies two sets of agents – ‘*those affected*’ and ‘*a court*’.
2. Secondly, ‘*those affected*’ may by agreement set the amount amount of compensation and the time and manner of its payment. By agreement with whom? Clearly, that is the state. The next question is, ‘Which arm?’
3. It is possible for any arm of state to expropriate property, where a law so provides. The Constitution does not enumerate them. The eminent author, Van der Walt, explained that expropriation most commonly is undertaken by the administrative arm of state; less commonly by the legislature; and even less commonly by the judiciary.
   1. Expropriation by the courts is a feature of the Land Reform (Labour Tenants) Act 3 of 1996. We identified this unique type of judicial expropriation in our opinion dated 21 October 2019.
   2. There may be instances where legislation itself brings about acquisition of private property by the state, without executive implementation. For instance, Parliament may enact a law that transfers identified property from an owner to the state, or a law that creates a state monopoly in a particular industry.[[1]](#footnote-1)
   3. The usual method of expropriation is by the administrative arm of state.
4. To set the amount, and timing and manner of payment, of compensation, ‘*those affected*’ may agree with whichever arm of state is doing the expropriation as a constitutionally authorised method.
5. Thirdly, a court may set the amount, and timing and manner of payment, of compensation by deciding or approving it.
   1. Approval necessarily implies that the court is presented with a proposal, which it finds compatible with justice and equity. The offer will have been made by the expropriating authority. (This would obviously not apply where the court is doing the expropriation itself, as in the case of the Labour Tenants Act.)
   2. Grammatically, ‘decision’ includes ‘approval’. ‘But each word in the Constitution bears its own meaning. ‘Decision’ must therefore mean something other than ‘approval’. ‘Approval’ means that someone else has made a decision, which requires approval by the court. ‘Decision’ means that the court itself decides the amount of compensation based on the evidence before it.
   3. Courts exist for the resolution of disputes. Decision or approval by a court is unnecessary if those affected agree with the expropriator on the amount of compensation and its timing and manner of payment.
6. Fourthly, the conjunctive phrase ‘*either . . . or*’ creates two possibilities: in the one case, the compensation has ‘*been agreed to by those affected*’; in the other case, the compensation is ‘*decided or approved by a court*.’

25(2) Property may be expropriated only in terms of law of general application—

. . .

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

1. Fifthly, the fact that ‘decided’ is not linked to another actor indicates that it is only the court which may decide on the amount of compensation and the timing and manner of its payment.
2. Sixthly, if an expropriating authority in the administrative arm of state could unilaterally ‘decide’ an amount of compensation, little would be served by providing for agreement with those affected. If the decision-maker could determine compensation finally, why bother with consent? The Constitution could never had intended that tension within section 25(2)(b).
3. Seventhly, if an administrative expropriating authority could ‘decide’ the amount of compensation and its time and manner of payment to the exclusion of a court, nothing would be left for the court to do other than approve. But the section 172(1) of the Constitution provides that the judicial authority of the Republic vests in the courts. The judicial authority involves making decisions about (amongst other things) disputes about rights. And section 34 provides that disputes that can be decided by the application of the law are to be decided by the courts or other independent tribunals.
4. For all of these reasons, we do not think that section 25(2)(b) of the Constitution can mean that anyone other than a court may decide the amount of compensation and the timing and manner of its payment, if those affected do not agree on those matters with an expropriating authority.

# LONG TITLE

1. This section is the same as the previous advice.
2. Hon. Graham-Mare (DA) proposed the removal of ‘nil compensation’ from the Bill’s long title.
3. We do not think it appropriate to omit reference to nil compensation in the long title, as this is plainly a matter regulated under the Bill. It also falls within the range of permissible types of just and equitable compensation under section 25(3) of the Constitution.
4. However, we have previously advised that the Bill’s long title would benefit from elaboration. At present it does not mention payment of just and equitable compensation as a condition of expropriation. Inserting this constitutional condition would counterbalance reference to ‘nil compensation’. The Member’s concern may stem from the fact that ‘nil compensation’ stands uncontextualized in the long title.
5. We advised (on 23 June 2020) that the Bill’s long title be expanded as follows:

*‘To provide for the expropriation of property for a public purpose or in the public interest; to regulate the procedure for the expropriation of property for a public purpose or in the public interest, including the payment of compensation; to identify certain instances where the provision of nil compensation may be just and equitable for expropriation in the public interest; to repeal the Expropriation Act 63 of 1975; and to provide for matters connected therewith.’*

# CLAUSE 1

## Definition of ‘court’ and ‘property’

### Intangible property

1. This answer is the same as our previous advice.
2. Hon Graham-Mare (DA) and Hon Van Staden (VP) requested that ‘intangible property’ be removed.
3. We advised (on 15 February 2022) that some personal rights are intangible property, and some personal rights are also recognised as constitutional property (e.g. the grocer’s liquor license or a claim in unjustified enrichment). A law may deprive a person of this type of property, and so it stands to reason that they are also capable of expropriation under section 25(2) of the Constitution.
4. There is no reason in principle to exclude them from what may be expropriated. It would be inadvisable to limit expropriation under the Bill to only one element of constitutional property (i.e., tangible property), as this would curtail the scope of section 25(2).

### Removal of Magistrates’ Courts

1. We have supplemented this response since the Committee meeting on 30 March 2022.
2. The Department requested us to consider replacing Magistrates’ Courts in the definition of ‘court’ and with ‘*a Court of similar status to the High Court*’.
3. We advised (on 30 August 2015) that certain Magistrates’ Courts may be established or designated by the Minister of Justice as having jurisdiction under the Promotion of Administrative Justice Act 3 of 2000, and that Magistrates may be trained to preside over administrative cases. We therefore recommended that Magistrates’ Courts which have been designated as administrative courts be included in the Bill.
4. However, we also advised (on 15 February 2022) that the Minister of Justice would need to adjust the monetary jurisdiction of the Magistrates’ Courts to determine disputes about the amount of compensation or other monetary claims connected to expropriation.
5. The Department has misgivings because Magistrates’ Courts are not courts of record, may not have adequate experience or capacity, and may impose an unnecessary layer in the appellate hierarchy.
6. While the Magistrates’ Courts are generally more accessible to the public outside urban areas, there is merit to the Department’s concerns. Ultimately, this is a policy question for the Committee to address with input from the Department of Justice.
7. Having considered the matter further, after the Committee meeting on 30 March 2022, we think that on the Bill as it stands, a magistrate’s court would only have jurisdiction if the amount of money in dispute falls within the monetary jurisdiction of that court. If it does not, the matter will have to be dealt with by the High Court.
8. Further, if the dispute is about the decision to expropriate, and not about the amount of compensation, it is unclear whether a magistrate’s court would have jurisdiction to entertain the dispute if the amount of compensation lies beyond its monetary jurisdiction.
9. If the Committee decides to keep the definition of ‘court’ as it is, these questions will need to be clarified.

### Definition of ‘court’

1. This is a new comment following the Committee meeting of 30 March 2022.
2. The Bill codifies the jurisdiction of a ‘court’ with reference to the place where the property is situated. But that presupposes that the property does not move. The Bill does not limit ‘*property*’ to immovable property, and so the basis for jurisdiction may be frustrated if the property ceases to be in the court’s area of jurisdiction.
3. We think that the solution is to pin the location of the property to a particular point in time – for instances, ‘*within whose area of jurisdiction the property is situated when the notice of expropriation is issued*’ or ‘*when the notice of intention to expropriate is issued*’.

### Land Court Bill

1. This answer is the same as our previous advice.
2. The Department requested our advice on how the Bill should account for the Land Court Bill [B 11—2021], if at all.
3. We have considered the Land Court Bill and its clauses governing jurisdiction in the limited time available to us. In our view, it would be undesirable for the Bill to define ‘court’ with reference to the Land Court Bill or to any legislation that ‘*deals exclusively with land*’ for the following reasons:
   1. First, the Land Court Bill is not (yet) law and the provisions of the Expropriation Bill should not be based on nascent legislation.
   2. Secondly, ‘property’ under the Bill (and the Constitution) is not limited to land. Defining a ‘court’ as both a court dealing exclusively with land and the High Court would bifurcate legal proceedings based on the nature of the property, which may be inconvenient.
   3. Thirdly, the jurisdictional provisions in the Land Court Bill are convoluted, vague and lack substantive content.[[2]](#footnote-2) They provide that the Land Court will have exclusive jurisdiction over matters that are left undefined. This necessarily ousts the jurisdiction of the High Court imprecisely.
4. We would, therefore, recommend that, if the definition of ‘court’ is to change, it should be amended to refer to ‘*the High Court and a court of similar status*’. That way, if the Land Court Bill is enacted into law, it will be covered by virtue of having the same status as a High Court but not because of any exclusive jurisdiction over matters relating to land.

## Definition of ‘deliver’

1. This answer is the same as our previous advice.
2. Hon Graham-Mare (DA), Hon Van Schalkwyk (ANC) and the Parliamentary Legal advisory (PL) suggested that email be included as a means of delivering notices and other documents.
3. We advised (on 15 February 2022) that we agree. Clause 24(1)(b) should be amended to include reference to email in clause 24(4). The definition of ‘deliver’ could be streamlined to refer simply to delivery in terms of clause 24(4).
4. As with transmission by fax, which might not always be a reliable mode of delivery, it may be necessary to state that a confirmatory copy of the email be delivered by ordinary mail within a defined period (see clause 24(4)(b)). Ultimately, this is a policy choice.

## Definition of ‘disputing parties’

1. This answer is the same as our previous advice.
2. Hon Graham-Mare (DA) is concerned that the definition of ‘disputing party’ is limited to an expropriated owner or holder who disputes the amount of compensation alone. The suggestion is that disputing party should include an affected person wishing to raise any dispute, including a dispute on the decision to expropriate.
3. The concern is unwarranted. Clause 21(6) of the Bill expressly provides for any person who disputes any matter relating to the application of the Bill (i.e., including a decision to expropriate) to approach a court for relief.
4. The reason for defining ‘disputing party’ is that section 25(2)(b) of the Constitution distinguishes between a decision to expropriate, on the one hand, and agreement or a decision on compensation, on the other. The decision to expropriate is made by an administrative authority, which the Bill regulates, and which is subject to review by a court; whereas in the absence of agreement on an amount of compensation, the decision on the amount of compensation is made by a court.
5. Parties that dispute the amount of compensation, therefore, need a mechanism different from judicial review of administrative action for the purposes of section 25(2)(b) of the Constitution. Clause 21 of the Bill provides that they may mediate that dispute or have the matter determined by a court. In the latter instance, the disputing party may approach the court or request that the expropriating authority commence those proceedings.
6. We note the concern about expropriations proceeding under the Bill despite the absence of agreement or a decision on the amount of compensation. We have addressed this in previous advice and summarise our recommendations in a separate section below.

## Definition of ‘expropriating authority’

1. Following the Committee meeting on 30 March 2022, we recommend that our response be read together with our views on clause 3(2) below.
2. Hon Graham-Mare (DA) considers reference to expropriating authority to be overbroad, to the extent that it refers to an organ of state.
3. We do not share this concern. The Bill does not confer the power to expropriate on all organs of state. Instead, it is framework legislation, which provides that *where other legislation confers expropriation powers on organs of state*, they must also comply with the procedures under the Bill.
4. The Bill does, however, empower the Minister of Public Works to expropriate on behalf of organs of state that do not have their own expropriation powers. The Minister may do so only if she is satisfied that the conditions for expropriation have been met – i.e., that it is for a public purpose or in the public interest, given the needs of the requesting organ of state.
5. To make it clear, we have suggested adding the following words to the definition of expropriating authority:

‘*means an organ of state empowered by this Act or any other legislation to expropriate property for a public purpose or in the public interest.*’

1. We address a recommended amendment to the definition of ‘expropriating authority’ in the discussion of the definition of ‘expropriation’ below.

## Definition of ‘expropriation’

1. We have amended our response in this section, following our meeting with the OCSLA and PLA.
2. Hon Graham-Mare’s concern about the definition of ‘expropriating authority’ raises an important point, which we identified in our advice regarding the public comments (on 15 February 2022). The definition of ‘expropriation’ was based on the Constitutional Court’s (‘**CC’s**’) judgment in *AgriSA*:[[3]](#footnote-3)

‘*“expropriation” means the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and “expropriate” has a corresponding meaning*’.

1. However, the definition does not cater for transfers of property to third-party beneficiaries of land, water and related reform, which section 25(8) of the Constitution expressly mentions.
2. The Bill would inadvertently not afford the procedural and substantive protections to persons whose property is taken for land, water and related reform and given to third parties *without first becoming the property of the state*. In other words, it does not apply where there is a direct transfer of property to third parties in the public interest.
3. This is clearly an error. Transfers of that kind are no less expropriatory than acquisitions of property by the state itself for a public purpose or in the public interest. And persons who have been deprived of their property accordingly should receive the constitutional guarantee of just and equitable compensation.
4. We therefore recommended that the definition of ‘expropriation’ be amended to provide:

‘*means the compulsory acquisition of property by an expropriating authority or a third-party beneficiary for a public purpose or in the public interest*’.

1. We proposed that ‘*third-party beneficiary*’ would cover individual beneficiaries of land, water and related reform and organs of state that request an expropriating authority to expropriate property on their behalf.
2. The OCSLA and PLA, however, raised concerns about our proposed amendment in the light of the CC’s exposition of expropriation in *AgriSA*:[[4]](#footnote-4) ‘*There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.*’
3. It may be impractical to require the state first to take ownership of land through expropriation before redistributing it to land reform beneficiaries in the public interest. It may also be problematic to permit the state to side-step the protections of section 25(2) by not acquiring ownership of property, but transferring property directly to third parties.
4. We strongly advise that the mechanism for expropriation under the Bill should also apply to transfers directly to non-state, third party beneficiaries in the public interest. We believe that this is constitutionally required.
5. To accommodate the OCSLA and PLA’s concerns, it we suggest the insertion of a new sub-clause in the Application clause 2. It could provide:

‘*The provisions of this Act apply to the compulsory acquisition of property directly or indirectly by third party beneficiaries in the public interest through an expropriating authority, including as contemplated in sections 25(4) to (8) of the Constitution.*’

1. If that recommendation is accepted, the definition of ‘*expropriating authority*’ must also be amended.
   1. At present it ‘*means an organ of state or a person empowered by the Act or any other legislation to acquire property through expropriation*.’ It therefore permits an expropriating authority to take property for a public purpose or in the public interest only if it itself, or an organ of state on whose behalf it expropriates upon request, acquires it.
   2. This precludes the possibility of an expropriating authority (for example) effecting a direct transfer of land for a public purpose from an owner to a land reform beneficiary.
   3. It also means that, if an expropriating authority wants to use expropriation as a tool for land reform, it must first acquire the property itself (which will be the act of expropriation) and then redistribute it. But the act of redistribution will not be part of the expropriation, even though it was the justification for the expropriation. This disjointedness is not logical.
2. We therefore recommend that the definition of ‘*expropriating authority*’ be linked to the new subsection in clause 2 that we proposed in paragraph 64 above.
3. On reflection, we also think that the definition of expropriating authority inadvertently excludes an organ of state which requests an expropriating authority to expropriate property on its behalf because it is not an expropriating authority itself. The Bill empowers the Minister of Public Works to do this for public works purposes under clause 2(3).
4. But if the definition of ‘*expropriating authority*’ posits that the authority acquires the property expropriated, then this may lead to redundancy of clause 2(3)(a). It provides that where the Minister expropriates on behalf of an organ of state, that organ of state becomes the owner on the date of expropriation. The Minister therefore transfers ownership directly using the power of expropriation.
5. To resolve these problems, we recommend that reference to acquisition be omitted from the definition of ‘expropriating authority’. The definition of ‘expropriating authority’ could potentially read:

‘ **“expropriating authority”** means an organ of state or person empowered by this Act or any other legislation to ~~acquire property through~~ expropriat~~ion~~e property or to bring about the compulsory acquisition of property contemplated in clause 2(xxx).’

1. Clause 2 (xxx) is the clause proposed in paragraph 64 above.

## Definition of ‘public purpose’

1. This answer is the same as our previous advice.
2. Amending the definition of ‘expropriation’ necessitates elaborating on the meaning of ‘public purpose’. It is important to ensure that when the state expropriates property, it does so for an identified purpose. A public purpose entails use by the public of the property.
3. The power to expropriate may not be utilised other than for a public purpose or in the public interest (which we address below). The state may not take property, using its powers of expropriation, for purely private use or for an object unconnected with the purpose of the empowering legislation.
4. It is, therefore, important add the following to the definition of ‘public purpose’:

‘*includes any purposes connected with the administration of any law by an organ of state, in terms of which the property concerned will be used by or for the benefit of the public.*’

1. Hon Graham-Mare (DA) questioned why public purpose refers to organ of state. We believe that we have addressed that concern above. It is only those organs of state that Parliament has authorised to expropriate that may do so.

## Definition of ‘public interest

1. This answer is the same as our previous advice.
2. Several Members regarded the definition of ‘public interest’ as too wide.
3. The definition paraphrases section 25(6) and (8) of the Constitution. To that extent, it is not only defensible but also necessary. The Bill should not limit the ambit of section 25 of the Constitution. If it does that, it will be liable to challenge.
4. Additionally, the ‘public interest’ has not been categorically defined by our courts yet. There is academic suggestion only that public interest is for the indirect benefit of the public, whereas public purpose is for the direct benefit of the public, but we believe that it is best left to the Courts to pronounce on that distinction, which is contained in the Constitution itself. The wording of the Bill permits that.

## Definition of ‘owner’ and ‘holder of an unregistered right’

1. We have amended this section following the Committee meeting on 30 March 2022 and our meeting with the OCSLA and PLA on 14 April 2022.
2. Hon Graham-Mare (DA) requested that unregistered owners be included in the definition.
3. We previously advised (on 6 May 2016 and 23 June 2020) that there is merit in treating owners (whose ownership rights do not need to be registered to have legal effect) as ‘owners’ for the purpose of the Bill and not as ‘holders of rights’. For that reason, a qualification was inserted into the definition of owner: ‘*where the ownership of the property or right in question is registered*’.
4. The qualification means that *if* ownership is registered (in those instances where the law requires it, e.g. ownership of a house), the owner is the person in whose name the property is registered or any of the other persons listed. But the ordinary legal meaning ‘owner’ includes people who own things for which registration is not necessary (e.g. a car, or clothing, or certain animals).
5. The confusion arises because ‘*holder of a right*’ apparently includes all rights that are not registered. But this should be corrected to make the position clear. Owners, whose ownership rights are not registered and do not need to be registered, should be excluded from ‘holder of a right’ by adding words to that effect to the latter’s definition.
6. This would mean that ‘holder of a right’ means holder of a right other than ownership (where ownership is not required to be registered and has not been so registered).
7. It occurred to us on further reflection after the Committee meeting on 30 March 2022 that this may pose a difficulty for some communal landowners under customary law and for joint owners, whose ownership is not registered. The concern relates to notice to those persons and to the obligation on ‘an owner’ to identify them to the expropriating authority.
8. We address this further when turning to clause 5, 7, 8, 10 and 11 below – essentially, non-registered owners, whom the expropriating authority has not identified, might slip through a legislative gap.

## Definition of ‘valuer’

1. This part of our advice is unchanged.
2. Members raised queries about the process of valuation under clause 5. We think it appropriate to respond here, in relation to the definition of valuer.
3. Clause 5 prescribes the process for inspection of property to ascertain whether it is suitable for the purpose of the expropriation. Clause 5(2) expressly relates to land. Clause 5(3), (4) and (6) cross-refers to sub-clause (2) and thus also relate to land. But the remaining parts of clause 5 are not limited to land. If property other than land is being considered for expropriation, the general obligation on the expropriating authority to examine its suitability remains.
4. The definition of ‘valuer’, similarly, is not limited to land. Where valuation concerns land, the definition expressly refers to persons authorised under the Property Valuers Profession Act, 2000.
5. The shortcoming with the definition is that it is silent on valuation for property other than land. This may lead to the incorrect assumption that property other than land does not need to be valued or have its suitability assessed. We also note the Department’s recent advice that the Land Affairs Board still has powers to value land.
6. For these reasons, we advised (on 9 November 2015) that the definition of ‘valuer’ should be amended:

‘*means a person who is suitably qualified to value particular property and includes a person registered as a professional valuer or professional associated valuer in terms of section 19 of the Property Valuers Profession Act, 2000 (Act No. 47 of 2000)*’.

# CLAUSE 2(2)

1. This part of our advice is unchanged.
2. Members criticised the distinction made between a state-owned corporation or state-owned entity, on the one hand, and other members of the public whose property is to be expropriated. Clause 2(2) provides that an expropriating authority may expropriate the property of the former only with the concurrence of the executive authority responsible for the SOE or SOC concerned.
3. We advised (on 15 February 2022) that there is a conceptual difficulty with requiring consent to expropriate. Elementally, consent is irrelevant to an expropriation.
4. In addition, it could be argued that the Bill unfairly or irrationally discriminates against private owners. There is, however, a distinction between public and private owners. Public owners may contend that they hold (and require) the property for public purposes. The expropriation of the property of a state-owned entity thus raises the possibility that the entity would then ‘counter-expropriate’, if it is an expropriating authority in its own right.
5. This requires a policy decision.

# CLAUSES 3(2) AND (3)

1. The only amendment that we have made here is to paragraph 107 below. (The word ‘*required*’ denotes that the Minister must be satisfied that the property is necessary for the organ of state’s accommodation, land or infrastructure needs.)
2. Hon Graham-Mare (DA) raised concerns about these clauses.
3. The clause empowers the Minister to expropriate property for the provision and management of accommodation, land and infrastructure needs for a public purpose or in the public interest.
4. The Minister may also do so on behalf of an organ of state that does not itself have the power to expropriate, only if the Minister is satisfied that the request will indeed be for a public purpose or in the public interest. To that end, we do not regard the word ‘must’ as problematic. If the Minister is satisfied that the expropriation is ‘*required*’, then there would be no reason to refuse the request.
5. We advised (on 6 May 2016) of our concern about the qualification ‘*in terms of the Minister’s mandate*’. This is not a term defined in legislation (yet) and it may inhibit, rather than advance, the Minister’s ability to expropriate for organs of state that have accommodation and infrastructure needs that fall outside the undefined mandate. We therefore recommend its deletion.

# CLAUSES 3(5) AND 23

1. We have added in new paragraphs regarding clause 23, which provides for withdrawal of expropriation. We have also, for discussion purposes, included a possible draft change-of-purpose clause.
2. Hon Graham-Mare (DA) recommended that provision be made to oblige the organ of state to use the property for the purpose of the expropriation. The Department has asked us to consider including a sunset clause and to advise on changes of purpose after expropriation.
3. We agree that that if property is not used for the purpose for which it was expropriated, and not intended to be used for that purpose, the justification for the expropriation will fail. That applies equally to expropriating authorities and all third-party beneficiaries. Hon Tim Mashele made this pertinent point.
4. But we do not think that clause 3 is the appropriate place to address this concern.
5. We advised on 15 February 2022, in response to several public comments about changes in the purpose of an expropriation after the fact:
   1. There are different views in foreign and international law on the topic. The fundamental question is: Does section 25(2) permit expropriation for only a specific public purpose or public interest, or for any public purpose or public interest?
   2. To be valid, an expropriation must satisfy the s 25(1) test of non-arbitrariness. It must also serve a public purpose or public interest. These two requirements are not hermetically sealed. The enquiry is fact- and case-specific.
   3. We agree that the public purpose or public interest envisaged in s 25(3) is specific in relation to a particular act of expropriation. The purpose for which property was expropriated is relevant to, and limits, the use to which property can be put following its expropriation.
   4. The content of the purpose will depend on the empowering legislation. A lawful purpose in terms of statute X cannot justify expropriation of property under the authority of statute Y. This is all the more so where the purposes of statutes X and Y differ.
   5. Some foreign jurisdictions recognise a right on the part of an expropriatee to reclaim its expropriated property, if the purpose for its expropriation becomes impossible, the purpose changes, or the property is not used for the stated purpose within a defined period. The Netherlands, Belgium, England, Scotland, France and Germany are among them.
   6. Some foreign law obliges the state to use (or commence use of) the expropriated property for the expropriated purpose within a defined period. (The Supreme Court of the Netherlands held that ‘the start of work’ means commencement of physical activity (i.e. building, demolishing, laying foundation) and not merely applying for a building permit.)
   7. But this raises the question whether, once property has validly been expropriated, it can never be used for another purpose? What if a new public purpose arises for which the expropriated property could be used? Does the fact that the property was originally acquired in good faith (with purpose A in mind) make a difference to whether the state may subsequently use the same property differently (for purpose B)?[[5]](#footnote-5)
   8. In our view, the expropriating authority should obtain the consent of the expropriatee for a change of purpose, if the expropriatee does not wish to reclaim the property. There should, however, be a statutory period after which a change of use or purpose will not require the expropriatee’s consent or trigger a right to reacquire the property. A period of 10 years might be considered. (A similar provision exists in English and French expropriation law.)
   9. This should be triggered only if the change of purpose is material. For instance, if property is expropriated under the Schools Act for construction of a pre-primary school and the need for a primary school later emerges, altering the scope of such a project would not be a material change of purpose. The Supreme Court of the Netherlands held that minor changes to the original plan are allowed under the change of purpose clause in its expropriation legislation.
   10. A complication may arise where there are multiple expropriated owners, who do not agree to reacquire the property. In that case, there must be a mechanism for the expropriating authority to acquire the right to use the property for any public purpose or public interest, unless all expropriated owners agree to reclaim the property.
   11. A further complication arises where the character of the property has been materially altered following the expropriation, but the state is no longer using the land for the expropriated purpose. For example, the state might have constructed a hospital, landing strip or other public building on the site.
6. This is a policy issue that Parliament must decide.
7. We suggest the following parameters for further debate on clause 23, which governs withdrawal of an expropriation, or a new clause:
   1. The expropriating authority must offer the expropriated property to the expropriated owner/holder for repurchase, if—
      1. the expropriating authority does not commence using or take effective steps to commence using the property for the public purpose/public interest for which it was expropriated, or for a materially similar purpose, within [?] years of the expropriation; [note that if property is to be developed, obtaining the necessary permissions and undertaking the development maybe a lengthy process]; or
      2. the expropriating authority ceases to use the property for the public purpose/public interest for which it was expropriated or for a materially similar purpose within a period of [?] years after the date of expropriation.
   2. The expropriated owner or holder should be able to find out how the property has been used without having to rely on the Promotion of Access to Information Act 2 of 2000. It should not have to depend on self-disclosure by the expropriating authority. This is particularly relevant where land was expropriated for land reform purposes and the expropriating authority does not have information on how the land is being used.
   3. If another organ of state, with its own expropriation powers, requires the property for a public purpose or in the public interest, it should be possible for it to obtain the property via the expropriating authority. But it cannot acquire the property on the same basis that the expropriating authority relied on to justify the expropriation. This would entail issuing a new notice to the expropriated owner detailing the change of purpose and the reasons for using that property, to justify the change.
8. It is clear that clause 23(2) does not fit with the notion of a change of purpose or use more than three months after the date of expropriation. This may unduly bind an expropriating authority to keep property that it no longer requires, and would denude expropriates of an opportunity to reclaim property where the substantive justification for the expropriation later falls away. It will need to be revisited.
9. For discussion purposes only, so as to identify the issues which have to be decided, we have prepared a potential change-of-purpose clause:

**Change of purpose after expropriation**

(1) The expropriating authority shall offer the expropriated property to the expropriated owner or expropriated holder for reacquisition, if the expropriating authority—

(a) did not *commence* with physical use of the property for the public purpose/public interest for which it was expropriated within three years (?) of the expropriation;\*

(b) *ceases* to use the property for the public purpose/public interest for which it was expropriated within a period of 10 (?) years after the date of expropriation; or

(c) no longer requires the property for the purpose for which it was expropriated.

(2) Subsection (1) shall also apply to an expropriating authority where a third party acquires property through the expropriating authority for a public purpose or in the public interest, and the third party satisfies any of the conditions in paragraphs (a), (b) or (c) of subsection (1).

(3) This section does not apply to property that has been materially altered after expropriation.

(4) Despite the provisions of the Prescription Act 687 of 1969, any right to reacquire the expropriated property will prescribe after 10 years from the date of initial expropriation.

(5) For reacquisition an expropriated owner or expropriated holder must repay the amount of compensation for the expropriated property (together with interest at the prescribed rate?), reduced by any costs incurred or damages suffered because of the expropriation and reacquisition, including relocation costs.

(6) Property belonging to multiple owners may be reacquired only with the consent of all of them.

(7) If the expropriating authority or another expropriating authority requires the property for a different purpose in terms of legislation, then the relevant expropriating authority must—

(a) obtain the written consent of the expropriated owner or expropriated holder to use the property for the new purpose; or

(b) issue a fresh notice under section 8 with the necessary changes.\*\*

(8) If the expropriated owner or expropriated holder repurchases the property, in terms of this section—\*\*\*

1. ownership of the property will vest in the formerly expropriated owner or expropriated holder on the date of payment of the repurchase amount;

(b) the expropriating authority shall issue a notice confirming the repurchase of the property, which it must serve on every person and organ of state on which the notice of expropriation was served;

(c) the Registrar of Deeds or the registrar of any other office at which such expropriated right was registered or recorded must, on receipt of the notice of repurchase, cancel any endorsement made in connection with the expropriation on the title deed and in any official registers.

\* applications for land use rights or other authorisations would not qualify as commencing physical use.

\*\* if it is not just and equitable to pay any additional amount of compensation, then the property may be (re)-expropriated for nil compensation.

\*\*\* adapted from clause 23(3)(a) to (b)

# CLAUSE 5(4)

1. This section is unchanged.
2. Hon Graham-Mare (DA) raised concerns about the protection of personal information during the investigation stage.
3. We agree that there is merit in the concern and advised (on 15 February 2022) that a clause to the following effect be inserted:

‘*The powers, authority and obligations conferred or imposed by this section are subject to the laws governing the protection of personal and private information, and must be exercised accordingly.*’

# CLAUSES CONCERNING MORTGAGES

1. We have added a paragraph concerning clause 14 in paragraph 128.10 and 1128.11 below.
2. Members have raised concerns about the fate of mortgagors and mortgagees under the Bill. We advised (on 9 May 2021) that while the Bill follows the existing Expropriation Act on the point, further amendments are needed. It is convenient to address our views about inter-related clauses under one topic.
3. We concluded that a mortgage, which is a limited real right in property, is constitutional property. When property that is subject to a mortgage is expropriated, the expropriating authority does not acquire the mortgage. That is because the mortgage is linked to the principal debt that the owner owes the lender (usually the bank).
4. But because the owner loses the property upon expropriation, the lender loses its security. This amounts to a deprivation of constitutional property. But the expropriating authority cannot acquire a mortgage by expropriation. And so the Bill, like the current Act, seeks to ameliorate the harshness by giving the lender (mortgagee) a preference to the compensation amount to satisfy the outstanding debt.
5. In doing so the expropriating authority does not assume the role of the debtor. Those parties must regulate their own contractual affairs privately. The Bill merely ensures that where there is a mortgagee, there is a mechanism to ensure that its debt can be satisfied from the compensation sum through negotiations with the expropriated owner.
6. Further, because the expropriating authority does not acquire the mortgage, the mortgagee is not an ‘owner’ as defined in the Bill. Nor is the mortgagee a ‘holder of a right’, as the mortgage must be registered to exist, and holders are by definition the holders of unregistered rights.
7. This means that, unless the Bill provides expressly for mortgagees at the various stages of the expropriation process, they will inadvertently be excluded in a way that adversely impacts their rights.
8. We therefore recommended:
   1. First, the investigation stage (clause 5) must expressly provide for mortgagees to be consulted. This will also bear on the enquiry into the suitability of the property for the purpose of the expropriation.
   2. If mortgagees are not consulted during the investigative stage, this may prove constitutionally problematic.
   3. Secondly, mortgagees must receive notice of intention to expropriate (clause 7). If such notice is not given, a decision to expropriate may be procedurally arbitrary or unfair. And, since a mortgagee’s interests will be affected by an expropriation, it may also result in substantive arbitrariness.
   4. Mortgagees will most likely want to make representations on the amount of compensation. They may also wish to object to an intended expropriation if they are unlikely to receive sufficient compensation to cover their debt.
   5. Thirdly, as the Bill stands, mortgagees will receive notice of expropriation (clause 8), but that is late in the process to meet the constitutional requirements. The mortgagee would be constrained to accept any agreement that the expropriating authority may have reached with the expropriated owner.
   6. Fourthly, clause 12 provides that compensation must reflect an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder. But this is narrower than the Constitution, which requires a balance between the public interest and the interests ‘*of those affected*’. A mortgagee will be *‘affected’* by an expropriation.
   7. We therefore recommend that clause 12(1) be amended to mirror the language of section 25(3) of the Constitution, and not be limited to the interest of expropriated owners or expropriated holders.
   8. Clause 12(1) refers to payment of the amount of compensation to an expropriated owner or holder. This too overlooks the prospect of a mortgagee receiving payment under clause 19.
   9. We therefore recommend that the words ‘paid to the expropriated owner’ be omitted, so that clause 12 simply requires the amount of compensation to be just and equitable, using the formulation of section 25(3) of the Constitution. (Payment is, in any event, regulated under clauses 17 to 19.)
   10. Fifthly, even if our proposal for streamlining the expropriation process is not accepted, clause 14 would still require amendment if property is subject to a mortgage. A mortgagee has a right not only to be informed of the intention to expropriate and the decision to expropriate, but also to make representations about the intended expropriation and proposed compensation.
   11. Because of the material interest that the mortgagee has in the compensation amount, the Bill should provide that the mortgagee and the owner may agree to the amount of compensation offered. Clause 14(1) will therefore need to be amended to include mortgagees.

# CLAUSE 7

1. Hon Graham-Mare (DA) echoed the public comments that the notice of intention to expropriate should include an offer of compensation from the expropriating authority. This is related to the concern about the right to possession passing before the amount of compensation has been decided, if not agreed.
2. We advised on (30 October 2018) that the Bill overcomplicates the process for negotiating and finally arriving at a compensation sum.
   1. First, it assumes that the Constitution requires the state to attempt to purchase property before expropriating it. That is not so. The state does not need expropriation legislation to give it the power to acquire property by consent.
   2. Secondly, the Bill places the onus on a property owner or holder to gather information about the value of the property and estimate what she thinks would be just and equitable, without necessarily having knowledge of all relevant factors. The expropriating authority may then accept the offer without more.
   3. This places owners and holders at a disadvantage. Unsophisticated persons may be particularly disadvantaged in that they may be unable to obtain a proper valuation. This could lead to a mismatch between the compensation sum agreed and a truly just and equitable amount.
   4. Thirdly, the expropriating authority is reactive rather than proactive in settling the amount of compensation. By the end of the investigative stage, the expropriating authority should know: (i) whether it requires the property for a public purpose or in the public interest and (ii) what amount of compensation is likely to be just and equitable.
   5. Fourthly, the negotiation process is repeated up to three times. During this time the property remains in private ownership (or in the ownership of an organ of state other than the expropriating authority). This protracts matters unduly.
   6. Fifthly, the amount of compensation should be agreed on or decided by a court, in general, before expropriation takes place. The CC recognised that there may be instances where expropriation ‘must’ precede compensation but affirmed that justice and equity generally favour prior determination.[[6]](#footnote-6)
3. We therefore proposed that the process for expropriation and determination of compensation be streamlined as follows:
   1. Investigation stage: 1. Ascertain suitability of property for expropriation; 2. Calculate the amount of just and equitable compensation that should be offered; 3. Take an in-principle decision to move on to the next stage.
   2. Notice of intention to expropriate: 1. Offer an amount of compensation to owner or holder; 2. Afford owner or holder an opportunity to accept or dispute the offer; 3. If disputed, then the parties must mediate or a court must determine the amount of compensation.
   3. Mediation or determination by court: 1. If mediated, expropriation may proceed once agreement has been reached on compensation; 2. If taken to court, expropriation may proceed after the court of first instance has decided the amount (a special application would be needed to suspend that decision, pending any appeals).
   4. Notice of expropriation: 1. Confirms the intention to expropriate the property on a specific date for an agreed or decided amount of compensation.
4. The clause regulating urgent expropriations does not require a prior determination of compensation, for obvious reasons. Urgent expropriations would likely fall into the category of cases where expropriation ‘must’ precede the determination of compensation.

# NON-URGENT TEMPORARY USE AS A FORM OF EXPROPRIATION

1. The Bill provides for property to be used temporarily and for a defined period. This must be communicated to the owner or holder in the notice of intention to expropriate and in the notice of expropriation (see clauses 7(2)(e) and 8(3)(e)).
2. This type of expropriation is for a defined period. The right expropriated is only the right of use, not ownership. The expropriating authority retains that right only for so long as the notice of expropriation permits it, after which it must give the right of use back to the owner or holder.
3. Non-urgent expropriations for temporary use must follow the ordinary process. Urgent expropriations may be for temporary use only. Clause 22 limits the duration to 12 months, but allows the expropriating authority to approach a court to extend the period to 18 months in the aggregate. Of course, if the owner agrees to the extension, then there would be consensus and no need for an act of further expropriation.
4. We agree with the PLA that clause 9, governing vesting and possession of expropriated property, contains a technical error insofar as it concerns temporary use.
   1. Clause 9(1)(a) provides that the effect of expropriation is that ownership vests on the date stipulated in the notice of expropriation; it does not carve out an exception for temporary use.
   2. Clause 9(1)(c), on the other hand, specifically governs temporary use, but is separated from clause 9(1)(b) by a large bloc of text. It gives the impression that it is not linked to and does not modify the scope of clause 9(1)(a). This could be clarified by inserting a phrase into clause 9(1)(a) to the effect: ‘*subject to paragraph (c)*’.
5. There is also an ambiguity in clause 9(5): it implies that the expropriating authority becomes liable for municipal property rates, taxes and similar charges only after the right to possession vests, but not before. But it does not say who will pay rates, taxes and similar charges if the property is used only temporarily.
6. It may be unfair to the expropriated owner or holder to bear those costs while it is denied the use of the property. The solution might be in ensuring that the amount of compensation factors in future costs where the expropriating authority uses the property only temporarily.
7. Lastly, there is no provision governing damage to property after the period of temporary use has come to an end and the property is returned to the owner or holder. This should be addressed to afford an owner or holder a statutory, as opposed to a common law, right to compensation.

# CLAUSE 19

1. The intention behind clause 19 was to ensure that outstanding municipal rates and taxes and similar charges are paid before the expropriating authority takes ownership. These outstanding rates, taxes and charges should have been ascertained and anticipated during the investigation phase.
2. Clause 19, however, inadvertently suggests that expropriation occurs by transfer and that, for an expropriating authority to become owner, registration in the Deeds Registry is required. But that is not so:
   1. Transfer from owner to non-owner is a consensual act. Transfer of ownership is a derivative mode of acquisition.
   2. Expropriation is an original mode of acquisition. It does not require transfer. Nor does it require registration for title to pass to the expropriating authority. The expropriating authority becomes owner on the date stipulated in the notice of expropriation, even if the expropriated owner remains the registered owner in the Deeds Registry.
   3. Updating the Deeds Registry with the expropriating authority’s information as the new owner is a purely clerical act. It serves the publicity purpose of registration, but is not necessary for acquisition by expropriation.
3. We think that clause 19 should be reworded to provide something to the following effect:

‘*The expropriating authority must pay outstanding municipal property rates, taxes and similar charges out of the compensation amount.*’

# CLAUSE 21 – NO ARBITRATION

1. This is a new section.
2. Parties to a mediated dispute resolution process endeavour to reach agreement on disputed issues. If they do not reach agreement, then the mediation fails. The focus is on reaching consensus. Mediation is appropriate for the purpose of section 25(2)(b) of the Constitution, which speaks of agreement on the amount of compensation.
3. In arbitration, unlike mediation, the parties agree to a process of dispute resolution on a particular issue and to be bound by the decision on that issue by an impartial arbitrator. They may well not agree with the outcome, but they are bound by it. And so arbitration does not fit under the words ‘*agreed to by those affected*’ in section 25(2)(b) of the Constitution.
4. Equally, arbitration does not fit under the words ‘*decided or approved*’ because the constitution vests that power in a court. Arbitration, although it must be fair and before an impartial arbiter, is not a dispute resolution method that falls under section 34 of the Constitution,[[7]](#footnote-7) and so the right of access to courts is not limited by excluding arbitration from clause 21.

# CLAUSE 25 AND EXTENSIONS OF TIME

1. This is a new section.
2. Clause 25 governs extension of time periods under the Bill applicable to an owner, holder of a right in property or other interested or affected person (which would include a mortgagee). Hon Graham-Mare (DA) questioned what would happen if the expropriating authority needed an extension.
3. Clause 29(2) addresses this in part. It provides that the failure to take steps in terms of the Bill which are needed to culminate in a decision (like a decision to expropriate) will not invalidate that decision, unless the procedural slip is material, prejudicial or procedurally unfair. So if the expropriating authority does not comply with a set time prescribed in the Bill, the failure must be immaterial, non-prejudicial and not procedurally unfair.
4. The formulation does not permit an expropriating authority to extend a timeframe applicable to it or other organ of state under the Bill. There is no such provision. There is also no provision for the expropriating authority **(i)** to agree with the owner or holder or other interested person to extend a period applicable to it or **(ii)** to approach a court for an extension.
5. This appears to be a policy choice taken by the previous Portfolio Committee. It is open to this Committee to revisit that choice. It does seem odd that the parties which are affected cannot agree to extend an applicable period.

# CONCLUSION

1. In the limited time available to us, we have not been able to respond to every query raised by the Portfolio Committee. We may elaborate on points during the Committee meeting scheduled for 19-20 April 2022 or supplement this note, as necessary.

**G M BUDLENDER SC**

**U K NAIDOO**

18 April 2022

Chambers, Cape Town

1. This happened in Canada in *Manitoba Fisheries Ltd v The Queen* [1979] 1 S.C.R. 101, where the Supreme Court found that regulatory measures deprived owners of their businesses and effectively transferred them to a Crown corporation, creating a state monopoly. [↑](#footnote-ref-1)
2. For instance, clause 7 purports to define the jurisdiction of the Land Court, but provides: ‘*Subject to the Constitution and section 42, and except where this Act provides otherwise, the Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Court.*’

   Clause 42 does not assist. It regulates the jurisdiction of the Land Court of Appeal and provides merely that it has exclusive jurisdiction to hear appeals against judgments and orders of the Land Court and may decide any question of law reserved in terms of clause 25(2)(a).

   But clause 25(2)(a) similarly lacks substantive content. It says that the Court may reserve any question of law for the Land Court of Appeal.

   Only clause 25(1)(a) *suggests* that the jurisdiction of the Court concerns land within its territorial jurisdiction. And that it has all the powers of the High Court in civil proceedings and ancillary powers necessary to perform its functions. It may also determine *any* incidental issue in terms of any other law, which is not ordinarily within its jurisdiction, if it is in the interests of justice.

   But because its jurisdiction is ‘exclusive’ section 169(1)(a)(ii) of the Constitution would strip the High Court of its own jurisdiction in respect of the same, ill-defined subject matter. Any civil claim concerning land, whether arising out of a contract, will, enrichment or delict would seemingly fall beyond the jurisdiction of the High Court. [↑](#footnote-ref-2)
3. *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC). [↑](#footnote-ref-3)
4. Id at para 59. [↑](#footnote-ref-4)
5. *Harvey v Mhlatuze Municipality and Others* 2011 (1) SA 601 (KZP), which Van der Walt and other academics criticise on this basis. In that case, land was expropriated for a public purpose on the assumption that approvals would be obtained for certain public uses. But the approvals could not be obtained, and so the expropriating authority sold the land to private developers. But the Court signalled the need for legislative reform on this issue at para 135:

   ‘Our legislature has thus far not enacted any statutory provision entitling the person to reclaim property expropriated from him if the purpose for which it was expropriated is not realised. This is so, notwithstanding the fact that the legislature has in the new constitutional era passed many laws dealing with property rights, including where persons have been dispossessed of such rights in the past. . . . The Expropriation Act 63 of 1975 itself does not make any provision for an expropriatee of property to reclaim such property if the purpose for which it was expropriated is not realised; nor does the Local Authorities (Natal) Ordinance 25 of 1974 (as amended) or the Town Planning Ordinance 27 of 1949 (Natal) which was the legislation under which the properties were expropriated, read with the provisions of the Expropriation Act.’

   Instead the Court resorted to pre-1996 law (at para 136) and, relying on *White Rocks Farm (Pty) Ltd and Others ∆*1984 (3) SA 785 (N) at 793 at 793, ultimately found that because the initial expropriation was bona fide, there was no requirement on the expropriating authority to offer the property to the expropriated owner for repurchase after the intended purpose of the expropriation could no longer be realized. [↑](#footnote-ref-5)
6. *Haffejee v eThekwini Municipality and Others* 2011 (6) SA 134 (CC) at para 43. [↑](#footnote-ref-6)
7. *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC). [↑](#footnote-ref-7)