

REPUBLIC OF SOUTH AFRICA

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# EXPROPRIATION BILL

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*(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 43798 of 9 October 2020))*  
*(The English text is the official text of the Bill)*

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(MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE)

[B 23—2020]

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# BILL

**To provide for the expropriation of property for a public purpose or in the public interest; to provide for certain instances where expropriation with nil compensation may be appropriate in the public interest; and to provide for matters connected therewith.**

## PREAMBLE

**WHEREAS** section 25 of the Constitution of the Republic of South Africa, 1996, provides as follows:

### “Property

**25.** (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

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

- (a) for a public purpose or in the public interest; and
- (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.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

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

(4) For the purposes of this section—

- (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
- (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is

entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).”; and

**WHEREAS** section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair; and

**WHEREAS** section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum; and

**WHEREAS** uniformity across the nation is required in order to deal effectively with these matters;

**AND IN ORDER TO ENABLE** expropriation in accordance with the Constitution,

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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**CHAPTER 1****DEFINITIONS AND APPLICATION OF ACT**

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**Definitions**

**1.** (1) In this Act, unless the context indicates otherwise—

“**claimant**” means a person who has lodged a claim for compensation with an expropriating authority arising from or in connection with an expropriation of property;

“**Constitution**” means the Constitution of the Republic of South Africa, 1996; 40

“**court**” means—

- (a) a High Court within whose area of jurisdiction a property is situated;
- (b) a Magistrate’s Court within whose area of jurisdiction a property is situated, having competent jurisdiction and designated as such in terms of paragraph (b)(ii) in the definition of ‘court’ in section 1, read with section 9A, of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000); or 45

- (c) in the case of intangible property, the court within whose area of jurisdiction the owner of that property is ordinarily resident or has its principal place of business within the Republic;

- “date of expropriation”** means the date mentioned in the notice of expropriation, which date must not be earlier than the date of service of such notice; 5
- “deliver”**, in relation to any document, means to deliver by hand, facsimile transmission or post as contemplated in section 24(3) and (4);
- “Department”** means the Department of Public Works and Infrastructure;
- “Director-General”** means the Director-General of the Department;
- “disputing party”** means an owner, holder of a right, expropriated owner or expropriated holder who does not accept the amount of compensation offered in terms of section 14(1) or 15(1); 10
- “expropriated holder”** means a holder of an unregistered right in property, which right has been expropriated by notice in terms of section 8(1) or in terms of section 9(1)(b);
- “expropriating authority”** means an organ of state or a person empowered by this Act or any other legislation to acquire property through expropriation; 15
- “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;
- “holder of a right”** means the holder of an unregistered right in property; 20
- “land parcel”** means land that has been surveyed and is either registered or yet to be registered in a deeds registry;
- “Master”** means the Master of the High Court;
- “Minister”** means the Minister responsible for Public Works and Infrastructure;
- “notice of expropriation”** means a notice contemplated in section 8; 25
- “organ of state”** means an organ of state as defined in section 239 of the Constitution;
- “owner”**, where the ownership of the property or right in question is registered, means the person in whose name such property or right is registered, and—
- (a) if the owner of any property or registered right in land is deceased, means the executor of his or her estate and if no executor has been appointed or his or her appointment has lapsed, the Master; 30
- (b) if the estate of the owner of any property or registered right in land has been sequestrated, means the provisional or final trustee of his or her insolvent estate, as the case may be, or if no such appointment has been made, the Master; 35
- (c) if the owner of any land or registered right in property is a company that is being wound up, means the provisional or final liquidator of that company, or if no such appointment has been made, the Master;
- (d) if any property or registered right in property is vested in a liquidator or trustee in terms of any other law, means that liquidator or trustee; 40
- (e) if the owner of any property or registered right in property is otherwise under a legal disability, means his or her representative by law;
- (f) if any land or registered right in property has been attached in terms of an order of a court, means the sheriff or deputy sheriff, as the case may be;
- (g) in the case of a public place, road or street under the control of a municipality, means that municipality; 45
- (h) for the purposes of section 5, includes a lawful occupier of the land concerned; and
- (i) includes the authorised representative of the owner, which authorised representative is ordinarily resident in the Republic; 50
- “possession”** includes the exercise of a right;
- “prescribed”** means prescribed by regulation;
- “property”** means property as contemplated in section 25 of the Constitution;
- “public interest”** includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources in order to redress the results of past racial discriminatory laws or practices; 55
- “public purpose”** includes any purposes connected with the administration of the provisions of any law by an organ of state;
- “registered”** means registered or recorded with a government office in which rights in respect of land, minerals or any other property are registered or recorded for public record in terms of any law; 60
- “regulation”** means a regulation made in terms of section 28;

- “**service**”, in relation to a notice as contemplated in section 24(1), means to serve by delivery or tender, post, publication or in accordance with the direction of a court, and “serve” has a corresponding meaning;
- “**this Act**” includes the regulations;
- “**unregistered right**” means a right in property, including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered; and
- “**valuer**”, in relation to land, means 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).
- (2) (a) A Saturday, Sunday or public holiday must not be reckoned as part of any period calculated in terms of this Act.
- (b) The period 20 December to 7 January inclusive, must not be reckoned as part of any period calculated in terms of this Act.

### **Application of Act** 15

2. (1) Despite the provisions of any law to the contrary, an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest.
- (2) Despite the provisions of any law to the contrary, an expropriating authority may not expropriate the property of a state-owned corporation or a state-owned entity without the concurrence of the executive authority responsible for that corporation or entity.
- (3) Subject to section 22, a power to expropriate property may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or holder of a right in property for the acquisition thereof on reasonable terms.
- (4) An expropriating authority may expropriate property in terms of a power conferred on such expropriating authority by or under any law of general application, provided that the exercise of such power is in accordance with sections 5 to 27 and 31.

## **CHAPTER 2**

### **POWERS OF MINISTER TO EXPROPRIATE** 30

#### **Powers of Minister to expropriate**

3. (1) Subject to the provisions of Chapter 5, the Minister may expropriate property for a public purpose or in the public interest.
- (2) If an organ of state, other than an expropriating authority, satisfies the Minister that it requires particular property for a public purpose or in the public interest, then the Minister must expropriate that property on behalf of that organ of state upon its written request, subject to and in accordance with the provisions of this Act.
- (3) The Minister’s power to expropriate property in terms of subsections (1) and (2) applies to property which is connected to the provision and management of the accommodation, land and infrastructure needs of an organ of state, in terms of the Minister’s mandate.
- (4) Where only a portion of a land parcel is expropriated, the Minister may expropriate that portion together with the remainder of the land parcel, provided that—
- (a) the owner so requests; and
- (b) the Minister is satisfied that due to the partial expropriation the use or potential use of the remainder of such land has become so impaired in consequence of the expropriation, that it would be just and equitable to the owner to expropriate it.
- (5) When the Minister expropriates property in terms of subsection (2)—
- (a) the ownership of the property vests in the relevant organ of state on the date of expropriation;
- (b) the date on which the right to possession of the property vests in the relevant organ of state must be determined in terms of section 9;
- (c) the relevant organ of state is liable for the fees, duties and other charges which would have been payable by that organ of state in terms of any law if it had purchased that property; and

- (d) all costs incurred by the Minister in the performance of his or her functions on behalf of an organ of state must be refunded by the relevant organ of state within a reasonable time.

#### **Delegation or assignment of Minister's powers and duties**

4. (1) Subject to subsection (2), the Minister may, either generally or in relation to a particular property or in relation to a particular case, delegate or assign to an official of the Department any power or duty conferred or imposed on him or her in terms of this Act. 5
- (2) The Minister may not delegate or assign the powers or duties conferred on him or her in terms of sections 3, 22(1), 23(1) and 28. 10

### **CHAPTER 3**

#### **INVESTIGATION AND VALUATION OF PROPERTY**

##### **Investigation and gathering of information for purposes of expropriation**

5. (1) When an expropriating authority is considering the expropriation of property, he or she must, amongst others, ascertain— 15
- (a) the suitability of the property for the purpose for which it is required; and
  - (b) the existence of registered and unregistered rights in such property and the impact of such rights on the intended use of the property.
- (2) Subject to subsection (3), if the property is land, an expropriating authority may, in writing— 20
- (a) for purposes of subsection (1)(a), authorise a person or persons with the necessary skills or expertise to—
    - (i) enter upon the property with the necessary workers, equipment and vehicles at all reasonable times or as may be agreed to by the owner or occupier of the property; 25
    - (ii) survey and determine the area and levels of the land;
    - (iii) dig or bore on or into the land;
    - (iv) construct and maintain a measuring weir in any river or stream;
    - (v) insofar as it may be necessary to gain access to the property, enter upon and go across another property with the necessary workers, equipment and vehicles; and 30
    - (vi) demarcate the boundaries of the property required for the said purpose; and
  - (b) authorise a valuer, for purposes of ascertaining the value of the property, to enter upon the land and any building on such land and to do the necessary inspections and investigations for that purpose. 35
- (3) The person or persons contemplated in subsection (2)(a) and (b) may not enter the property unless authorised in writing by the expropriating authority to do so, and—
- (a) the owner or occupier of the property has consented thereto in writing, after being informed; 40
  - (b) the owner of the property has consented in writing to the performance of an act contemplated in subsection (2)(a); or
  - (c) in the event of the owner or occupier refusing or failing to grant consent contemplated in paragraphs (a) or (b), is in possession of a court order authorising the expropriating authority and such person or persons to enter the land, including any building thereon, for purposes of conducting the investigations contemplated in subsection (2). 45
- (4) The valuer contemplated in subsection (2)(b) may—
- (a) require the owner or occupier of the property to give him or her access to a document in the possession or under the control of the owner or occupier that the valuer reasonably requires for the purposes of valuing the property; 50
  - (b) extract information from or make copies of a document to which he or she is given access in terms of paragraph (a);
  - (c) in writing require the owner or occupier of the property to provide him or her, either in writing or orally, with particulars regarding the property that he or she reasonably requires for the purposes of valuing the property; and 55
  - (d) despite the provisions of any law to the contrary, require the municipality in whose area the land is situated, to provide such valuer—

- (i) insight into building plans of improvements on such land;
  - (ii) a copy or copies of building plans on such land at the cost of the valuer or valuers; and
  - (iii) such information in respect of municipal property rates or other charges, land use rights including the zoning of the land, availability of engineering services to such land, or such other information with respect to the land, as is in the possession of the municipality and as may be reasonably required for the valuation of the said land by the valuer. 5
- (5) An expropriating authority must, if the information has not already been established at any time before deciding to expropriate property— 10
- (a) by written notice call upon the following persons to furnish, in writing within 20 days from delivery of the notice, subject to section 25, the names and addresses of all known persons holding unregistered rights in the property, as well as particulars of such rights:
    - (i) An owner; 15
    - (ii) a person apparently in charge of the property; and
    - (iii) any holder of unregistered rights in the property, known to the expropriating authority;
  - (b) if the property is land, consult—
    - (i) the Departments responsible for rural development and land reform, for environmental affairs, for mineral resources and for water and sanitation and any other organ of state whose functions and responsibilities will be materially affected by the intended expropriation, for the purposes of establishing the existence of and the impact of expropriation on rights therein; and 20
    - (ii) if applicable, with the municipality as contemplated in section 6. 25
- (6) (a) A person authorised in writing to perform an act contemplated in subsection (2), must—
- (i) provide the owner or occupier of the property with a copy of the said written authorisation; 30
  - (ii) at all times whilst performing any such act, be in possession of such written authority; and
  - (iii) identify himself or herself to the owner or occupier of the property by means of an official identification document.
- (b) If the person contemplated in paragraph (a) fails to comply with subparagraphs (i), (ii) or (iii) of that paragraph, the owner or occupier of the property may refuse that person entry to the property or may refuse the performance of an act contemplated in subsection (2). 35
- (7) If the property in question is damaged as a result of the performance of an act contemplated in subsection (2), the expropriating authority must repair to a reasonable standard, or compensate the affected person for that damage after delivery of a written demand by the affected person and without undue delay. 40
- (8) Any legal proceedings arising out of a claim referred to in subsection (7) must comply with the relevant provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No. 40 of 2002). 45

### **Consultation with municipality during investigation**

6. (1) When contemplating an expropriation of land, an expropriating authority must, if not already established, in writing, request the municipal manager of the municipality where the land is situated to inform the expropriating authority of the effect which the purpose for which the property is being acquired may have on municipal planning. 50
- (2) The request contemplated in subsection (1) must include—
- (a) a statement that the expropriating authority is contemplating the acquisition of land;
  - (b) a full description of the land in question;
  - (c) details of the purpose for which the land is required; and 55
  - (d) such other details as the expropriating authority may deem necessary.
- (3) The municipal manager must deliver a written response to the request contemplated in subsection (1) to the expropriating authority within 20 days of receiving the request or within a reasonable time to be agreed between the expropriating authority and municipal manager or within the period determined in terms of section 25. 60

(4) If the expropriating authority is the municipal council of the municipality where the land is situated, the request contemplated in subsection (1) is not required.

## CHAPTER 4

### INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY

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|--|----------|
| <b>Notice of intention to expropriate</b>  | <b>5</b> |
| 7. (1) If an expropriating authority intends to expropriate property, it must—   |          |
| (a) serve a notice of intention to expropriate on the owner and any known holder of a right in the property; and   |          |
| (b) publish the notice of intention to expropriate, in accordance with section 24(2).  | 10       |
| (2) A notice of intention to expropriate must include—   |          |
| (a) a statement of the intention to expropriate the property;  |          |
| (b) a full description of the property;  |          |
| (c) a short description of the purpose for which the property is required and the address at which documents setting out the purpose may be inspected and particulars of the purpose may be obtained during business hours;  | 15       |
| (d) the reason for the intended expropriation of that particular property;   |          |
| (e) the intended date of expropriation or, as the case may be, the intended date from which the property will be used temporarily and the intended period of such temporary use;   | 20       |
| (f) the intended date on which the expropriating authority will take possession of the property;   |          |
| (g) an invitation to any person who may be affected by the intended expropriation to lodge with the expropriating authority at a given address within 30 days after the publication of the said notice, subject to section 25—   | 25       |
| (i) any objections to the intended expropriation;  |          |
| (ii) any submissions relating to the intended expropriation;   |          |
| (iii) a postal address and a facsimile number, if any, to which further communications to such person may be addressed by the expropriating authority; and   | 30       |
| (iv) the choice of official language for the purposes of further written communication;  |          |
| (h) a directive to the owner and a holder of a right contemplated in subsection (1)(a) to deliver or cause to be delivered in writing, within 30 days of service, subject to section 25—   | 35       |
| (i) the names and addresses of any holders of unregistered rights and particulars of such rights, other than those furnished in accordance with section 5(5)(a) to the extent that such names, addresses and particulars are within the knowledge of the owner or the holder; and  |          |
| (ii) a written statement stipulating the amount claimed by him or her as just and equitable compensation: Provided that failure to stipulate the amount claimed will not affect the owner's right in section 7(4);   | 40       |
| (i) a statement that if a person has an unregistered right in respect of the property of which the expropriating authority had no knowledge when making an offer of compensation, the expropriating authority may adjust that offer; and   | 45       |
| (j) a statement drawing the owner or the holder's attention to the provisions of section 27.   |          |
| (3) If the property contemplated in subsection (1) is land, the expropriating authority must also deliver a copy of the notice referred to in subsection (1) to—   |          |
| (a) the Directors-General responsible for rural development and land reform, for environmental affairs, for mineral resources and for water and sanitation, and the accounting authority of any other organ of state whose functions and responsibilities will be materially affected by the intended expropriation: Provided that if the expropriating authority is the executive authority of one of the departments or organs of state concerned, delivery of such notice to the relevant Director-General or accounting authority is not required; and | 50       |
| (b) the municipal manager of the municipality where the property is situated: Provided that if the expropriating authority is the relevant municipal council of that municipality, no such delivery is required.   | 55       |

- (4) Subject to section 25, an owner or a holder of an unregistered right responding to a notice contemplated in subsection (1) must within 30 days of the service of the notice or, if the notice had not been served on him or her, within 30 days of the publication, as the case may be, deliver to the expropriating authority a written statement indicating—
- (a) the amount claimed by him or her as just and equitable compensation should his or her property be expropriated and furnishing full particulars as to how the amount is made up; 5
  - (b) if the property is land, full particulars of all improvements thereon which, in the opinion of such owner or holder of a right, affect the value of the land;
  - (c) if the property is land— 10
    - (i) which prior to the date of such notice was leased as a whole or in part by an unregistered lease, the name and address of the lessee, and accompanied by the lease or a certified copy thereof;
    - (ii) which prior to the date of such notice was sold by the owner, but transfer had not yet been effected, the name and address of the buyer, and accompanied by the contract of purchase and sale or a certified copy thereof; or 15
    - (iii) on which a building has been erected which is subject to a builder's lien by virtue of a written building contract, the name and address of the builder, and accompanied by the building contract or a certified copy thereof; and 20
  - (d) the address at which the owner or the holder of an unregistered right desires to receive further documents in connection with the expropriation.
- (5) The expropriating authority must acknowledge receipt in writing, consider and take into account all objections and submissions timeously received before proceeding with an expropriation. 25
- (6) The expropriating authority must, within 20 days of receiving the statement contemplated in subsection (4), in writing—
- (a) inform the relevant owner or relevant holder of an unregistered right whether the amount of compensation claimed in the statement is accepted; and 30
  - (b) if the amount of compensation claimed is not accepted, indicate the amount of compensation offered by the expropriating authority, furnishing full details and supporting documents in respect thereof.
- (7) (a) If no agreement on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right within 40 days of the expropriating authority receiving the statement contemplated in subsection (4), the expropriating authority must decide whether or not to proceed with the expropriation. 35
- (b) If the expropriating authority decides— 40
    - (i) to proceed to expropriate, it must serve a notice of expropriation in terms of section 8(1) within a reasonable time;
    - (ii) to continue with negotiation on compensation in accordance with section 16, it must inform the owner or the holder of a right accordingly in writing within a reasonable time; or
    - (iii) not to proceed with the expropriation of the property, it must inform the owner or the holder of a right accordingly in writing within a reasonable time and must publish a notice in the *Gazette* of his or her decision not to proceed in terms of section 24(2). 45

### Notice of expropriation

8. (1) If the expropriating authority decides to expropriate a property, the expropriating authority must cause a notice of expropriation to be served on the owner and the known holders of unregistered rights, as the case may be, whose rights in the property are to be expropriated. 50
- (2) The expropriating authority must cause a copy of the notice of expropriation to be— 55
- (a) published in accordance with section 24(2): Provided that if the notice of expropriation has taken place by publication in terms of section 24(1)(c), the publication in terms of this paragraph is not required;
  - (b) delivered to a holder of an unregistered right in the property of whom he or she is aware and whose rights are not to be expropriated; and 60

- (c) if the property is land or a right in land, delivered to—
- (i) the municipal manager of the municipality where the property is situated: Provided that if the expropriating authority is the municipal council the delivery of such notice is not required;
  - (ii) the Directors-General responsible for rural development and land reform, for environmental affairs, for mineral resources and for water and sanitation, and the accounting authority of any other organ of state whose functions and responsibilities will be materially affected by the intended expropriation: Provided that if the expropriating authority is the executive authority of one of the departments or organs of state concerned, the delivery of the notice on the relevant Director-General or accounting authority is not required;
  - (iii) a holder of a mortgage bond registered in the Deeds Office in respect of the property concerned;
  - (iv) if the property is subject to a contract contemplated in section 7(4)(c)(ii), on the buyer; and
  - (v) if the building thereon is subject to a lien contemplated in section 7(4)(c)(iii), on the builder.
- (3) The notice of expropriation served as contemplated in subsection (1) must contain—
- (a) a statement of the expropriation of the property;
  - (b) the full description of the property, including—
    - (i) in the case where the expropriation applies to a portion of a land parcel, the approximate extent of such portion in relation to the whole; or
    - (ii) in the case where the expropriation applies to a right in land, a description of the approximate position of the right in land on such land;
  - (c) a short description of the purpose for which the property is required and the address at which documents setting out that purpose may be inspected and particulars of that purpose may be obtained during business hours;
  - (d) the reason for the expropriation of that particular property;
  - (e) the date of expropriation or, as the case may be, the date from which the property will be used temporarily and also stating the period of such temporary use;
  - (f) the date on which the right to possession of the property will pass to the expropriating authority;
  - (g) except in the case of an urgent expropriation contemplated in section 22, the amount of compensation offered by the expropriating authority or agreed to by the expropriating authority and the owner and the holder of an unregistered right, as the case may be; and
  - (h) if the amount of compensation is disputed, a statement that the expropriated owner may institute proceedings in a competent court to dispute the amount of compensation, or request that the expropriating authority commence such court proceedings, within 180 days of the date of expropriation, which time period may be extended by the court on good cause shown.
- (4) The notice of expropriation served as contemplated in subsection (1) must be accompanied by documents detailing the following:
- (a) The date or dates on which the expropriating authority proposes to pay the compensation and any interest payable in respect thereof in terms of section 13;
  - (b) in the case where the expropriation applies to a portion of a land parcel, a survey diagram or sketch plan showing the approximate position of such portion in relation to the whole;
  - (c) in the case where the expropriation applies to a right in land, a survey diagram or sketch plan on which the approximate position of the right in land on such land is indicated, unless the right in land is accurately described without such survey diagram or sketch plan;
  - (d) an explanation of what the offer of compensation referred to in subsection (3)(g) comprises of, together with supporting documents detailing how the offer of compensation was determined;
  - (e) a directive calling upon the expropriated owner or expropriated holder, as the case may be, to submit, in writing, the names and addresses of all holders of unregistered rights in the property and particulars of such rights, other than those furnished in accordance with sections 5(5)(a) and 7(2)(h), if any, to the

- extent that such names, addresses and particulars are within the knowledge of the expropriated owner;
- (f) a statement that if a person has an unregistered right in respect of the property of which the expropriating authority had no knowledge when making the offer of compensation, the expropriating authority may adjust that offer; 5
  - (g) a statement informing the expropriated owner or expropriated holder, as the case may be, that he or she may request a translation of the notice of expropriation in the official language of his or her choice; and
  - (h) a statement drawing an expropriated owner, expropriated holder or any other person's attention to the provisions of section 27. 10
- (5) (a) Rights in a property may be expropriated from different owners and holders of unregistered rights in the same notice of expropriation.
- (b) A separate offer of just and equitable compensation must be stated in respect of each owner or holder mentioned in the notice of expropriation contemplated in paragraph (a). 15

### **Vesting and possession of expropriated property**

9. (1) The effect of an expropriation of property is that—
- (a) the ownership of the property described in the notice of expropriation vests in the expropriating authority or in the person on whose behalf the property was expropriated, as the case may be, on the date of expropriation; 20
  - (b) all unregistered rights in such property are simultaneously expropriated on the date of expropriation unless—
    - (i) the expropriation of those unregistered rights are specifically excluded in the notice of expropriation; or
    - (ii) those rights, including permits or permissions, were granted or exist in terms of the provisions of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002); 25
  - (c) in the case of a right to use a property temporarily, the expropriating authority or the person on whose behalf the property was expropriated may as from the date of expropriation exercise that right; and 30
  - (d) the property remains subject to all registered rights in favour of third parties, with the exception of a mortgage, with which the property was burdened prior to expropriation, unless or until such registered rights are expropriated from the holder thereof in terms of this Act.
- (2) (a) The expropriating authority, or the person on whose behalf the property was expropriated, must take possession of the expropriated property on the date stated in terms of section 8(3)(f) or such other date as may be agreed upon with the expropriated owner or expropriated holder. 35
- (b) The right to possession passes on the relevant date contemplated in paragraph (a) to the person referred to therein, as the case may be. 40
- (3) (a) The expropriated owner or expropriated holder who is in possession of the property concerned must, from the date of expropriation to the date referred to in subsection (2) or (4), take all reasonable steps to maintain the property.
- (b) If the expropriated owner or expropriated holder wilfully or negligently fails to maintain the property and as a result thereof the property depreciates in value, the expropriating authority may recover the amount of depreciation from the expropriated owner or the expropriated holder concerned. 45
- (c) The expropriating authority must compensate the expropriated owner or expropriated holder, as the case may be, for costs which were necessarily incurred after the date of expropriation in respect of such maintenance. 50
- (4) If the expropriated owner or expropriated holder, as the case may be, desires to place the expropriating authority in possession of the expropriated property prior to the date contemplated in section 8(3)(f) and the expropriating authority does not agree to a date on which the right to possession of the property will pass to it, the expropriated owner or expropriated holder, as the case may be, may give the expropriating authority notice in writing of not less than 20 days before the date on which the expropriated owner or expropriated holder wishes to transfer the right to possession of the property, in which case the right to possession of the property passes to the expropriating authority on that date. 55
- (5) The expropriated owner or expropriated holder who is in possession of the property concerned, remains entitled to the use of and the income from the expropriated 60

property, as was enjoyed immediately prior to the date of expropriation, from the date of expropriation to the date referred to in subsection (2)(b), but remains, during that period, responsible for the payment of municipal property rates, taxes and other charges, if applicable, and normal operating costs in respect of the expropriated property as if the property had not been expropriated. 5

### **Verification of unregistered rights in expropriated property**

**10.** (1) If, after the date of expropriation, a person claims to have held an unregistered right in the expropriated property for which that person has not been compensated, the expropriating authority must request that person to deliver within 30 days of receipt of the request, subject to section 25, a copy of any written instrument evidencing or giving effect to the unregistered right, if such instrument is in his or her possession or under his or her control, or any other evidence to substantiate the claim. 10

(2) If the unregistered right, claimed as contemplated in subsection (1), pertains to the use of improvements on expropriated land, the evidence required in terms of subsection (1) must include— 15

- (a) a full description of those improvements;
- (b) an affidavit or affirmation by the person concerned stating whether those improvements were erected by that person and if so, whether the materials used for erecting those improvements were owned by that person; and
- (c) the amount claimed as compensation for such unregistered right, together with details or a report, if any, on how the amount is computed. 20

(3) After receipt of the evidence requested in terms of subsection (1) and if the unregistered right claimed pertains to land, the expropriating authority may forward that evidence to the Directors-General responsible for rural development and land reform, for environmental affairs, for mineral resources and for water and sanitation, and to the accounting authority of any other organ of state, as the case may be, for assistance in the verification of such claim. 25

(4) A Director-General or accounting authority referred to in subsection (3) must submit comments within 30 days of receipt of the request contemplated therein.

(5) (a) The expropriating authority must decide on the claim contemplated in subsection (1) within 20 days of expiry of the period referred to in subsection (4) and notify the claimant in writing of the decision. 30

(b) If the expropriating authority accepts the claim contemplated in subsection (1), the expropriating authority must serve the notice contemplated in section 11(2) on such claimant. 35

(c) If the expropriating authority does not accept the claim contemplated in subsection (1), the expropriating authority must inform the claimant accordingly in writing and must provide reasons for the rejection.

(6) The expropriating authority may require the expropriated owner to compensate a person who held an unregistered right, if that person was not given notice of the expropriation as provided in this Act, and if the owner ought reasonably to have identified that person in terms of section 7(2)(h)(i) but did not do so. 40

(7) The expropriating authority may exercise the power in terms of subsection (6) only after giving the expropriated owner a reasonable opportunity to make representations in that regard. 45

### **Consequences of expropriation of unregistered rights and duties of expropriating authority**

**11.** (1) An expropriated holder of an unregistered right in a property that has been expropriated by the operation of section 9(1)(b) is, subject to section 10 and this section, entitled to compensation. 50

(2) If the expropriating authority becomes aware that an unregistered right in the expropriated property has been expropriated by the operation of section 9(1)(b) and becomes aware of the identity of the expropriated holder thereof, the expropriating authority must serve on that expropriated holder a notice that the unregistered right has been expropriated, together with a copy of the notice of expropriation served on the expropriated owner in terms of section 8(1). 55

- (3) The notice contemplated in subsection (2) must—
- (a) inform the expropriated holder of the date on which the right to possession of the expropriated property passed to the expropriating authority in terms of section 9(2) or (4);
  - (b) contain a statement contemplated in section 8(3)(f), if applicable; and 5
  - (c) except if this information was furnished in terms of section 10(1), request the expropriated holder to deliver to the expropriating authority, within 20 days of receipt of the notice, subject to section 25, a copy of any written instrument in which the unregistered right is contained, if such instrument is in his or her possession or under his or her control. 10
- (4) When a notice in terms of subsection (2) has been served on the expropriated holder concerned, this Act applies with the changes required by the context as if such notice were a notice of expropriation in terms of section 8(1) in respect of such unregistered right: Provided that if that expropriated holder is a lessee, he or she remains liable to pay rental to the expropriated owner until the right to possession passes in terms of section 9(2) or (4) and, if applicable, thereafter to the expropriating authority. 15
- (5) If the expropriated owner or expropriated holder knew of the existence of an unregistered right contemplated in subsection (2) and failed to inform the expropriating authority of the existence thereof, the expropriated owner or expropriated holder, as the case may be, is liable to the expropriating authority for any loss incurred in the event of the expropriating authority having to pay compensation for the expropriation of the unregistered right after the date of payment of compensation to the expropriated owner or expropriated holder, as the case may be. 20

## CHAPTER 5

### COMPENSATION FOR EXPROPRIATION 25

#### **Determination of compensation**

- 12.** (1) The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including— 30
- (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and 35
  - (e) the purpose of the expropriation.
- (2) In determining the amount of compensation to be paid in terms of this Act, the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take account of—
- (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder; 40
  - (b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;
  - (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful; 45
  - (d) improvements made to the property in question after the date on which the notice of expropriation was served upon the expropriated owner or expropriated holder, as the case may be, except where the improvements were agreed to in advance by the expropriating authority or where they were undertaken in pursuance of obligations entered into before the date of expropriation; 50
  - (e) anything done with the object of obtaining compensation therefor; and
  - (f) any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated. 55
- (3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—

- (a) where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
  - (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration; 5
  - (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
  - (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and 10
  - (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.
- (4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances. 15

### Interest on compensation

- 13.** Interest, at the rate determined from time to time in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), from the date the expropriating authority, or the person on whose behalf the property was expropriated, takes possession of the expropriated property, accrues on any outstanding portion of the amount of compensation payable in accordance with section 12 and becomes payable in the manner contemplated in section 17: Provided that— 20
- (a) if the expropriated owner or expropriated holder fails to comply with section 14(1) within the period referred to in that section, including any extension of such period, the amount so payable during the period of such failure and for the purposes of the payment of interest, is not regarded as an outstanding amount; 25
  - (b) until the claimant complies with the requirement of section 17(5), the amount so payable during the period of such failure and for the purposes of the payment of interest, is not regarded as an outstanding amount; 30
  - (c) interest due in terms of this subsection must be regarded as having been paid on the date on which the amount has been made available or dispatched to the expropriated owner or the expropriated holder concerned by prepaid registered post, or electronically transferred to his or her account, as the case may be; and 35
  - (d) a payment, utilisation or deposit of an amount in terms of section 17(1), 19(2) or 20(1) or (2) must be regarded as being a payment to the expropriated owner or an expropriated holder and no interest accrues on any such amount as from the date on which it has been so paid, utilised or deposited. 40

### Compensation claims

- 14.** (1) An owner or a holder of an unregistered right who receives a notice of expropriation in terms of section 8(1) must, subject to section 25, within 20 days from the date on which that notice was served on that owner or holder, deliver or cause to be delivered to the expropriating authority a written statement— 45
- (a) either confirming that the compensation as stipulated in such notice was agreed to or, if applicable, indicating whether the offer of compensation stipulated in such notice is accepted; 50
  - (b) if no compensation was offered, as in the case of an urgent expropriation in terms of section 22, or if such offer in the notice is not accepted, indicating the amount claimed by such owner or holder as just and equitable compensation;
  - (c) furnishing full particulars as to how the amount contemplated in paragraph (b) is made up, including a copy of a valuation, other professional report or other document that forms the basis of the compensation claimed, if any; 55
  - (d) if the property expropriated is land, furnishing full particulars of—
    - (i) improvements on the land that in the opinion of the owner or the holder affect the value of that land; and

- (ii) all unregistered rights that exist in respect of such land that he or she is aware of, including the name and address of the holder of such unregistered right and a copy of any written instrument evidencing or giving effect to an unregistered right, in his or her possession or under his or her control; 5
  - (e) the physical address or postal address, facsimile number and email address, if any, to or at which further documentation in connection with the expropriation must be delivered; and
  - (f) such information and annexing such documentation as may be prescribed by the Minister in order to facilitate electronic payment of compensation to the expropriated owner or expropriated holder. 10
- (2) If the property expropriated is land—
- (a) the expropriated owner must deliver or cause to be delivered to the expropriating authority, subject to section 25, within 30 days of the expropriating authority requesting the title deed to such land or, if it is not in his or her possession or under his or her control, written particulars of the name and address of the person in whose possession or under whose control the title deed is; and 15
  - (b) the person referred to in paragraph (a) in whose possession the title deed may be, must deliver or cause to be delivered the title deed in question to the expropriating authority within 20 days of the expropriating authority requesting it, subject to section 25. 20

### Offers of compensation

**15.** (1) If the expropriating authority does not accept the amount claimed by a claimant in terms of section 14(1), the expropriating authority must, within 20 days of delivery of the statement contemplated in that section, make an offer of just and equitable compensation to the claimant in writing, furnishing full particulars of how such amount is made up and calculated. 25

(2) The offer of compensation contemplated in subsection (1) must be accompanied by copies of reports detailing how the offer of compensation was determined if the amount is different from the amount offered by the expropriating authority in terms of section 8(3). 30

(3) The provisions of section 21 apply if—

- (a) an owner or holder of an unregistered right does not deliver a statement in terms of section 14(1); or 35
- (b) the claimant does not accept the offer of compensation contemplated in subsection (1), by written reply within 20 days, or within such additional time as may be permitted in terms of section 25.

### Requests for particulars and offers

**16.** (1) The expropriating authority and the claimant may, from time to time in writing, deliver a request for reasonable particulars regarding the claimant's claim for just and equitable compensation or the offer of just and equitable compensation, as the case may be, and particulars so requested must be furnished within 20 days of such request. 40

(2) If the expropriating authority or the claimant fails to comply with a request in terms of subsection (1), the requesting party may, on notice, apply to a court for an order directing the defaulting party to comply with subsection (1) and the court may make such an order. 45

(3) A claim for just and equitable compensation and an offer of just and equitable compensation remain in force until— 50

- (a) such compensation claimed or offered is revised by the claimant or expropriating authority, as the case may be;
- (b) the amount of compensation has been agreed to by the expropriating authority and the claimant; or
- (c) the compensation has been decided or approved by a court. 55

### **Payment of amount offered as compensation**

**17.** (1) Subject to sections 18, 19 and 20, an expropriated owner or expropriated holder is entitled to payment of compensation by no later than the date on which the right to possession passes to the expropriating authority in terms of section 9(2) or (4).

(2) The payment, utilisation or deposit of any amount contemplated in sections 18, 19 and 20 does not preclude the determination of an amount by agreement or by a court: Provided that where the amount so determined is less than the amount paid, the difference must be refunded to the expropriating authority together with interest at the rate contemplated in section 13 from the date on which the amount was so paid, utilised or deposited.

(3) Any delay in payment of compensation to the expropriated owner or expropriated holder by virtue of subsection (2) or any other dispute arising will not prevent the passing of the right to possession to the expropriating authority in terms of section 9(2) or (4), unless a court orders otherwise.

(4) If the expropriating authority, expropriated owner or expropriated holder has proposed a later date than the date contemplated in subsection (1) for the payment of compensation, the party proposing later payment may, in the absence of agreement, apply to court for an order for payment on such later date, and the court may make an appropriate order, having regard to all relevant circumstances.

(5) If value-added tax is leviable by a claimant in terms of section 7(1)(a) of the Value-Added Tax Act, 1991 (Act No. 89 of 1991), by virtue of section 8(21) of that Act, payment of compensation must be made by the expropriating authority only upon receipt of a tax invoice as required in terms of section 20 of that Act from the claimant, together with confirmation of the tax compliance status of the claimant by the South African Revenue Service.

(6) The Minister may prescribe the information and documentation to be delivered by a person to whom compensation or interest is payable in terms of this Act, in order to facilitate electronic payment thereof.

### **Property subject to mortgage or deed of sale**

**18.** (1) If property expropriated in terms of this Act was, immediately prior to the date of expropriation, encumbered by a registered mortgage or subject to a deed of sale, the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant has notified the expropriating authority of the agreement.

(2) The expropriated owner or expropriated holder or the bond holder or buyer, as the case may be, must notify the expropriating authority by no later than 30 days from the date contemplated in section 9(2) or (4), of their agreement and its terms contemplated in subsection (1), failing which the expropriating authority may deposit the compensation money with the Master in terms of section 20(2).

(3) In the event of a dispute arising out of subsection (1), the expropriating authority may deposit the compensation money with the Master, and any of the disputing parties may apply to a court of competent jurisdiction for an order directing the Master to pay out the compensation money in such manner and on such terms as the court may determine.

### **Payment of municipal property rates, taxes and other charges out of compensation money**

**19.** (1) For the purposes of this section, the charges referred to are municipal property rates, taxes or other charges that must be paid in order for ownership of land to be transferred by the registrar of deeds to the expropriating authority through registration in the deeds office.

(2) If land which has been expropriated is subject to the charges contemplated in subsection (1), the municipal manager must, within 30 days of receipt of a copy of the notice of expropriation in terms of section 8(2)(c)(i), inform the expropriating authority in writing of such charges, as at the date contemplated in section 9(2) or (4): Provided that if the expropriating authority is the municipal council of the municipality where the land is situated, the notice is not required.

(3) (a) The expropriating authority must, in writing, notify the expropriated owner or expropriated holder of any outstanding charges contemplated in subsection (1).

(b) If the expropriated owner or expropriated holder does not dispute the outstanding charges contemplated in paragraph (a), within 20 days of the notification, the expropriating authority may utilise as much of the compensation money in question as is necessary for the payment, on behalf of the expropriated owner or expropriated holder, of any outstanding charges contemplated in subsection (1). 5

(4) If the municipal manager fails to inform the expropriating authority of the outstanding charges contemplated in subsection (1) within the period of 30 days as contemplated in subsection (2), the expropriating authority may pay the compensation to the expropriated owner or expropriated holder without regard to the outstanding municipal property rates or other charges, and in such an event and despite the provisions of any law to the contrary— 10

(a) the Registrar of Deeds must register the transfer of the expropriated property;

(b) the expropriating authority or the person on whose behalf the property was expropriated, as the case may be, is not liable to the municipality concerned before or after such registration for the outstanding municipal property rates or other charges; and 15

(c) the expropriated owner or expropriated holder, as the case may be, continues to be liable to the municipality for the outstanding rates and charges calculated up to the date of possession, notwithstanding the registration of the expropriated property in the name of the expropriating authority or person on whose behalf the property was expropriated, as the case may be. 20

#### **Deposit of compensation money with Master**

20. (1) The expropriating authority must deposit the amount of compensation payable in terms of this Act with the Master after which the expropriating authority ceases to be liable in respect of that amount— 25

(a) if a property expropriated under this Act was left in terms of a will or testament to an undetermined beneficiary or beneficiaries;

(b) if compensation is payable in terms of this Act to a person whose address is not readily ascertainable or who, unless otherwise agreed, fails to supply the prescribed information and documentation for electronic payment within 20 days of being given written notice to do so; or 30

(c) if compensation is payable and the expropriating authority, after reasonable endeavours, is unable to determine to whom it must be paid. 35

(2) In the event of a dispute or doubt as to the person who is entitled to receive compensation payable in terms of this Act, or in the event that an interdict prevents the expropriating authority from paying compensation to that person, the expropriating authority may deposit the amount of compensation with the Master.

(3) Any money received by the Master in terms of subsection (1) or (2) must be paid into the guardian's fund referred to in section 86 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), for the benefit of the persons who are or may become entitled thereto and bear interest at the interest rate determined in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999). 40

(4) A court of competent jurisdiction may make an order which it may deem expedient in respect of money received by the Master in terms of subsection (1) or (2). 45

## **CHAPTER 6**

### **MEDIATION AND DETERMINATION BY COURT**

#### **Mediation and determination by court**

21. (1) If the expropriating authority and expropriated owner or expropriated holder do not agree on the amount of compensation, they may attempt to settle the dispute by mediation, which must be initiated and finalised without undue delay by either party. 50

(2) If the expropriating authority and disputing party do not settle the dispute by consensus or mediation, either party may, within 180 days of the date of the notice of expropriation, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation. 55

(3) The disputing party may, instead of instituting such proceedings himself or herself, within 90 days of the date of the notice of expropriation request the

expropriating authority, in writing, to institute such proceedings and the expropriating authority must institute such proceedings within 180 days of receiving such request.

(4) A court may extend the time periods in subsections (2) and (3) on good cause shown and if the interests of justice so require.

(5) The onus or burden of proof is not affected by whether it is the expropriating authority or the disputing party which institutes the proceedings referred to in this section. 5

(6) Subsection (2) does not preclude a person from approaching a court on any matter relating to the application of this Act.

(7) Where a court finds that a provision of this Act has not been complied with, it must make such order as it considers just and equitable, having regard to all relevant circumstances, including— 10

(a) the nature and extent of the interest of the person who has challenged the conduct in question;

(b) the materiality of the non-compliance; 15

(c) the stage which has been reached in the expropriation process; and

(d) the interests of other persons which may be affected by the relief which is ordered.

(8) A dispute on the amount of compensation alone does not preclude the operation of section 9. 20

## CHAPTER 7

### URGENT EXPROPRIATION

#### Urgent expropriation

**22.** (1) An expropriating authority may, if a property is required on an urgent basis, exercise a right to use property temporarily for so long as it is urgently required for a period not exceeding 12 months. 25

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

(a) In the case of a disaster as defined in the Disaster Management Act, 2002 (Act No. 57 of 2002); or 30

(b) where a court grants an order that an expropriating authority is entitled to use the provisions of this section due to—

(i) urgent and exceptional circumstances that justify action under subsection (1); 35

(ii) real and imminent danger to human life or substantial injury or damage to property; or

(iii) any other ground which in the view of the court justifies action under subsection (1).

(3) Should an expropriating authority exercise the power referred to in subsection (1), the expropriating authority will be exempted from compliance with the provisions of sections 5(1), 6(1) and 7(1). 40

(4) The owner or the holder of an unregistered right whose right in property has been taken for temporary use in terms of this section is entitled to just and equitable compensation as calculated, determined and paid in terms of this Act. 45

(5) The expropriating authority must make a written offer of compensation to the expropriated owner or expropriated holder of an unregistered right within 30 days from the date on which the notice to use the property temporarily was given, and payment must be made within a reasonable time thereafter: Provided that in the event of any dispute, the provisions of section 21 apply. 50

(6) If the property taken for temporary use in terms of this section is damaged during the use of the property, the expropriating authority must repair such damage or compensate the owner or the holder of an unregistered right concerned for the damage.

(7) (a) If an expropriating authority wishes to extend the period of temporary usage beyond 12 months and the owner or the holder of an unregistered right whose right in property has been taken does not agree thereto, the expropriating authority may approach the court for an extension of the period. 55

(b) The court may, on sufficient cause shown by the expropriating authority, extend the period of temporary usage.

(c) The period of extension may not exceed 18 months from the date the property was taken for temporary use in terms of subsection (1).

(8) If the court refuses to grant an extension as applied for in terms of subsection (7), the expropriating authority must vacate the property on the expiry of the period of temporary use or on the date agreed to by the parties or determined by the court. 5

(9) An expropriating authority may at any time during the temporary use of the property, commence with the expropriation of the property and must comply with all relevant provisions of this Act.

## CHAPTER 8

### WITHDRAWAL OF EXPROPRIATION 10

#### Withdrawal of expropriation

**23.** (1) (a) Notwithstanding anything to the contrary contained in any law, the expropriating authority may withdraw any expropriation from a date mentioned in a notice of withdrawal, if the withdrawal of that expropriation is in the public interest, or the reason for which the property was expropriated is no longer applicable. 15

(b) The notice of withdrawal contemplated in paragraph (a) must be served on every person on whom the notice of expropriation in question was served.

(2) An expropriation may not be withdrawn—

(a) after the expiration of three months from the date of expropriation, except with the written consent of the expropriated owner and all expropriated holders or, in the absence of a written consent, if a court, on application by the expropriating authority, authorises the withdrawal on the ground that it is in the public interest that the expropriation be withdrawn; 20

(b) if, where the expropriated property is land, the property has already been registered in the name of the expropriating authority in consequence of the expropriation; or 25

(c) if the expropriating authority has already paid compensation in connection with such expropriation, unless the agreement in writing of every person to whom the compensation has been paid is obtained.

(3) If an expropriation of property is withdrawn— 30

(a) ownership of the property concerned again vests, from the date contemplated in subsection (1), in the owner from whom it was expropriated, and any mortgage or other rights discharged or expropriated in connection with or as a consequence of the expropriation are fully revived;

(b) the Registrar of Deeds or the registrar of any other office at which such expropriated right was registered or recorded must, on receipt of a copy of the notice of withdrawal, cancel any endorsement made in connection with the expropriation in his or her registers and on the title deed in question; and 35

(c) the expropriating authority is liable for all reasonable costs and damages incurred or suffered by a claimant as a result of such withdrawal. 40

## CHAPTER 9

### RELATED MATTERS

#### Service and publication of documents and language used therein

**24.** (1) Whenever a notice in terms of sections 7(1), 8(1), 11(2) or 19(3)(a) or a notice of withdrawal in terms of section 23(1)(b) is required to be served in terms of this Act, the original or a certified copy thereof must— 45

(a) be delivered or tendered to the addressee personally at his or her residential address, place of work, place of business or at such address or place as the expropriating authority and the addressee may, in writing, agree upon;

(b) be posted by pre-paid registered post to the postal address of the addressee; 50

(c) be published in the manner contemplated in subsection (2)—

(i) if the whereabouts of the person concerned are unknown to the expropriating authority and is not readily ascertainable, after taking reasonable steps; or

- (ii) in the case of *fidei commissaries* in respect of a property which is subject to a *fidei commissum* and it is not known to the expropriating authority who all the *fidei commissaries* are or will be; or
  - (d) if none of the modes of service set out in paragraphs (a) to (c) is practicable under the circumstances, be served in accordance with such directions as the court, on application, may direct. 5
- (2) Whenever publication of a notice in terms of section 7(1) or (7)(b)(iii), a notice of expropriation or other document is required by this Act, publication must take place—
- (a) in English and in any other official language commonly used in the area where the property is situated, once in the *Gazette* and, simultaneously therewith or not more than one week thereafter, once in two widely circulated and accessible newspapers of different languages circulating in the area in which the property is situated; 10
  - (b) if the property is land, by the display of the notice in the languages referred to in paragraph (a), on such land in a conspicuous place, from not later than the date of publication in the *Gazette* contemplated in paragraph (a); and 15
  - (c) if the expropriating authority deems it necessary in the circumstances, by the advertising in such languages as may be appropriate on television or radio, transmitting to the area where the property is situated in the languages commonly used in that area, the contents of the advertisement to adhere as closely as is practicable to the contents of the notice or document so advertised. 20
- (3) Whenever a document must or may be delivered in terms of this Act, it must take place by delivering—
- (a) to the owner and holder of an unregistered right in a property known to the expropriating authority, at the address appointed in the notice in terms of section 7(1), the notice of expropriation, the notice in terms of section 11(2) or other document, as the case may be; and 25
  - (b) to any owner, holder of an unregistered right, person who has lodged an objection or submission contemplated in section 7(2)(g), expropriated owner and expropriated holder, at the address or facsimile number appointed by such person in terms of this Act, or in the absence thereof— 30
    - (i) at an address supplied in respect of such person in terms of this Act;
    - (ii) at the residential or postal address of such person, if known to the expropriating authority; or 35
    - (iii) if no address of such person is known to or readily ascertainable by the expropriating authority, by publication in the manner contemplated in subsection (2)(a).
- (4) The delivery contemplated in subsection (3) must take place at the address in question either by— 40
- (a) hand;
  - (b) facsimile transmission: Provided that a confirmatory copy of the document is sent by ordinary mail or by any other suitable method within one day of such transmission; or
  - (c) registered post. 45
- (5) All documents must be in English and if an addressee has prior to a communication expressed in writing a preference for another official language, also in that preferred other official language.
- (6) Every addressee who has received a written communication from the expropriating authority is entitled to request, in writing, a translation of that communication into the official language indicated in the request. 50

### Extension of time

25. Wherever a period is mentioned within which something must be done in terms of this Act, the expropriating authority may, on written request and good cause shown by the relevant owner or relevant holder of a right in property or other interested or affected person, as the case may be, from time to time extend that period for a further period or periods as may be reasonable in the circumstances. 55

**Expropriation register**

**26.** (1) The Director-General must ensure that a register of all expropriations that are intended, effected and withdrawn, and of decisions not to proceed with a contemplated expropriation by all expropriating authorities, is opened, maintained and accessible to the public. 5

(2) All expropriating authorities must deliver to the Department a copy of any notice of an intended expropriation, expropriation and withdrawal of expropriation, and of any decision not to proceed with an intended expropriation, within 20 days of the service or delivery of such notices.

**Civil offences and fines** 10

**27.** (1) A person commits a breach of this Act if that person fails to—

- (a) comply with a directive by the expropriating authority in terms of section 7(2)(h)(i);
- (b) deliver to the expropriating authority a statement contemplated in section 7(4)(c)(i), (ii) or (iii); or 15
- (c) provide the information contemplated in section 8(4)(e).

(2) A civil court may impose a fine up to a maximum prescribed amount, in favour of the National Revenue Fund, on a person referred to in subsection (1), upon application by the expropriating authority brought on notice to the affected person.

(3) The rules of the relevant court apply to the application referred to in subsection (2). 20

(4) A breach referred to in subsection (1) is not a criminal offence.

(5) A person who wilfully furnishes false or misleading information in any written instrument which he or she by virtue of this Act delivers or causes to be delivered to an expropriating authority, is guilty of an offence and liable on conviction to be punished as if he or she had been convicted of fraud. 25

**Regulations**

**28.** (1) The Minister may, by notice in the *Gazette*, make regulations regarding—

- (a) any matter that may or must be prescribed in terms of this Act;
- (b) any ancillary or incidental administrative or procedural matter that may be necessary for the proper implementation or administration of this Act; 30
- (c) any notice or document required in terms of this Act; and
- (d) any maximum fine imposed by a competent court in terms of this Act.

(2) (a) The Minister must, before making any regulations contemplated in subsection (1), publish the draft regulations for public comment. 35

(b) The period for submitting comments must be at least 20 days from the date of publication of the draft regulations.

**Regulations, legal documents and steps valid under certain circumstances**

**29.** (1) A regulation or notice, or an authorisation, document, made or issued in terms of this Act— 40

- (a) but which does not comply with any procedural requirement of this Act, is nevertheless valid if the non-compliance is not material and does not prejudice any person; and
- (b) may be amended or replaced without following a procedural requirement of this Act if— 45
  - (i) the purpose is to correct an error; and
  - (ii) the correction does not change the rights and duties of any person materially.

(2) The failure to take any steps in terms of this Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure— 50

- (a) is not material;
- (b) does not prejudice any person; and
- (c) is not procedurally unfair.

### Interpretation of other laws dealing with expropriation

**30.** (1) Subject to section 2, any law dealing with expropriation of property that was in force immediately before the date on which this Act came into operation, must be interpreted in a manner consistent with this Act, and for that purpose any reference in any such law to— 5

- (a) a functionary authorised to expropriate property, must be construed as a reference to an expropriating authority; and
- (b) compensation as provided for in sections 12 and 13 of the Expropriation Act, 1975 (Act No. 63 of 1975), must be construed as a reference to compensation contemplated in the provisions of section 25(3) of the Constitution and the provisions of this Act. 10

(2) In the event of a conflict between this Act and any other law contemplated in subsection (1) in relation to matters dealt with in this Act, this Act prevails.

### Repeal

**31.** The Expropriation Act, 1975 (Act No. 63 of 1975), is hereby repealed. 15

### Transitional arrangements and savings

**32.** (1) This Act does not apply to any expropriation initiated through delivery of a notice of expropriation prior to the date of commencement of this Act or to any consequences of any expropriation initiated prior to the date of commencement of this Act. 20

(2) Any proceedings for the determination of compensation in consequence of an expropriation contemplated in paragraph (a) must be instituted, or if already instituted must be concluded, as if this Act had not been passed: Provided that the parties concerned may agree to the application of this Act to such expropriation or proceedings in which case the relevant provisions of this Act apply to the extent agreed upon between the parties as if it were an expropriation or proceedings for the determination of compensation in terms of this Act. 25

### Short title and commencement

**33.** (1) This Act is called the Expropriation Act, 2020, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 30

(2) Different dates may be determined in respect of different provisions of this Act.

## **MEMORANDUM ON THE OBJECTS OF THE EXPROPRIATION BILL, 2020**

### **1. Background**

- 1.1 The Constitution of the Republic of South Africa, 1996 (“Constitution”), recognises expropriation as an essential mechanism for the State to acquire another’s property for a public purpose or in the public interest, subject to just and equitable compensation being paid.
- 1.2 The Expropriation Act, 1975 (Act No. 63 of 1975) (“Expropriation Act”), predates the expropriation mechanism provided for in section 25(2) of the Constitution. The Constitution is the supreme law of the Republic, legislation or conduct inconsistent with it is invalid, and the obligations it imposes must be fulfilled. The peremptory terms of section 2 of the Constitution strengthens the case for the redrafting of the Expropriation Act to ensure consistency with the spirit and provisions of the Constitution. The provisions of the Constitution alluded to are: The right to equality (section 9), property rights (section 25), access to information (section 32), and lawful, reasonable and procedurally fair administrative action (section 33).
- 1.3 Given the array of authorities within all spheres of government which have the power to expropriate property through various pieces of legislation, there is a need to ensure uniformity in the way organs of state undertake expropriation. The Expropriation Bill, 2020 (“Bill”) seeks to ensure consistency with the Constitution and uniformity of procedure of all expropriations without interfering with the powers of expropriating authorities.

### **2. Objects of Bill**

The Bill seeks to repeal the Expropriation Act and to provide a common framework in line with the Constitution to guide the processes and procedures for expropriation of property by organs of state and to provide for instances where expropriation with nil compensation may be just and equitable.

### **3. Summary of Bill**

#### **3.1 Chapter 1: Definitions and application of Act**

Clauses 1 and 2 contain definitions and deal with the application of the proposed legislation, determining that an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest. The expropriating authority is obliged to enter into negotiations with the owner of property required for such purposes and attempt to reach an agreement on the acquisition of the property before resorting to expropriation, except in circumstances where the right to use property temporarily is taken on an urgent basis (clause 22). An expropriating authority may not expropriate the property of a state-owned corporation or state-owned entity without the concurrence of the executive authority responsible for that corporation or entity. The Bill proposes that no property may be expropriated unless the prescribed procedures have been followed.

#### **3.2 Chapter 2: Powers of Minister of Public Works and Infrastructure to expropriate**

Clauses 3 and 4 grant a general power to expropriate to the Minister of Public Works and Infrastructure (“Minister”). The Minister is empowered to expropriate property for purposes connected with the execution of his or her mandate, which includes the provision and management of the accommodation, land and infrastructure needs of organs of state. The Minister may delegate or assign his or her powers and duties contained in the Bill to an official of the Department of Public Works and Infrastructure (“Department”), except for the power to—

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

### **3.3 Chapter 3: Investigation and valuation of property**

- 3.3.1 Clauses 5 and 6 deal with the pre-expropriation phase and detail various procedures to be followed by an expropriating authority prior to an expropriation. These procedures are used to ascertain the suitability of the property for the purpose for which it is required and to gather information on the existence of registered and unregistered rights in such property and the impact of such rights on the intended use thereof. It is also proposed in the Bill that the expropriating authority may authorise persons to enter the property with a view to surveying and valuating the property, amongst other things. Provision is also made for a person to claim compensation should the property concerned be damaged as a consequence of the evaluation of the property.
- 3.3.2 In gathering the information, the expropriating authority is obliged to consult with other organs of state that may be affected by the expropriation. The Departments responsible for rural development and land reform, for mineral resources and for water affairs and sanitation and the relevant municipality must be consulted to ascertain the impact of the proposed expropriation on the rights administered by those Departments and in the case of municipalities, to ascertain the effect which an expropriation will have on spatial development and engineering services.

### **3.4 Chapter 4: Intention to expropriate and expropriation of property**

- 3.4.1 Clauses 7 to 11 deal with the post-investigation phase. At this stage of an expropriation, the expropriating authority would have gathered all information, consulted with all parties affected by the expropriation and decided to expropriate. The expropriating authority must serve all the affected parties known to him or her with a notice of intention to expropriate. This notice will amongst other things include the description of the property, the purpose for which the property will be expropriated, the reason for the expropriation and a directive to the owner and holders of rights to furnish particulars of holders of unregistered rights known to them. The notice must also call upon the owner or a holder of a right to provide a written statement stipulating the amount claimed as just and equitable compensation. However, failure to stipulate the amount claimed by him or her will not affect the owner's rights contained in clause 7(4). Rights must be expropriated individually and separate notices must be given to separate right holders. All affected parties are given the opportunity to submit written objections within a stipulated period. The expropriating authority must consider all objections and submissions timeously before proceeding with an expropriation. If no agreement on the amount of compensation payable can be reached between the expropriating authority and the owner or holder of a right within a specified period, the expropriating authority must take the decision whether or not to expropriate. Provision is made for further negotiation on compensation with the owner or holder of a right.
- 3.4.2 Clause 8 deals with the notice of expropriation. If the expropriating authority decides to expropriate a property, the expropriating authority must cause a notice of expropriation to be served on the relevant owner and holder of an unregistered right and on all affected parties of whom the expropriating authority is aware. Extensive provision is made regarding the contents of the notice of expropriation. It must,

amongst others, contain a full description of the property, a description of the purpose for which the property is expropriated, the reason for the expropriation, the date of expropriation and the amount of compensation offered or agreed to. The notice must furthermore be accompanied by documents setting out the date of payment of the compensation, indicating the property by way of a survey diagram or sketch plan, an explanation of what the offer of compensation comprises of, as well as the further documentation required in terms of clause 8(4). An expropriating authority is further obliged to inform the owner of the right to approach a competent court including conditions applicable to that right.

- 3.4.3 Clause 9 states the effect expropriation will have on the property concerned, which includes that ownership of the property vests in the expropriating authority and that all unregistered rights in the property are expropriated, subject to certain exceptions. Furthermore, the expropriating authority, or the person on whose behalf the property was expropriated, must take possession of the expropriated property on the date stated in terms of clause 8(3)(f) or such other date as may be agreed upon with the expropriated owner or expropriated holder. Until the date of possession, the expropriated owner or expropriated holder who is still in possession of the property must take care of and maintain the property. The expropriated owner or expropriated holder must be compensated for costs necessarily incurred for the maintenance of the property.
- 3.4.4 Clause 10 deals with claims made in respect of unregistered rights in property, which property has already been expropriated. Provision is made for the submission of evidence to the expropriating authority and for the duties of the expropriating authority in this regard. A further obligation is imposed on the expropriated owner to compensate a person who held an unregistered right if that person was not given notice of the expropriation and the owner ought to have reasonably identified that person. The expropriated owner affected by this situation is entitled to be given a reasonable opportunity to make representations to the expropriating authority. In terms of clause 11, an expropriated holder of an unregistered right in property that has been expropriated is entitled to compensation, subject to certain provisions.

### **3.5 Chapter 5: Compensation for expropriation**

- 3.5.1 Clauses 12 to 20 deal with the determination and payment of compensation to persons whose property or rights are expropriated. Section 25(3) of the Constitution determines that the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
- (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- 3.5.2 Provision is made in clause 12 for factors which must not be taken into account when the amount of compensation is determined. These are—
- (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;
  - (b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;

- (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
  - (d) improvements made on the property after the date on which the notice of expropriation was served upon the expropriated owner and expropriated holder, except where the improvements were agreed on or were undertaken in pursuance of obligations entered into before the date of expropriation;
  - (e) anything done with the object of obtaining compensation therefor; and
  - (f) any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated.
- 3.5.3 Clause 12 further provides for situations wherein it may be just and equitable and in the public interest to pay nil compensation for land earmarked for expropriation. These instances include the following:
- (a) Where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
  - (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to need the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
  - (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned land by failing to exercise control over it;
  - (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
  - (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.
- 3.5.4 When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for no compensation to be paid having regard to all circumstances.
- 3.5.5 Clause 13 makes provision for the payment of interest on any outstanding amount of compensation once the expropriating authority has taken possession.
- 3.5.6 Clause 14 deals with certain obligations of an owner or holder of an unregistered right who receives a notice of expropriation in terms of clause 8(1). The owner must within 20 days of receiving the notice indicate whether he or she agrees to or rejects the amount of compensation payable. If the offer is rejected, the owner or holder must indicate the amount he or she claims as just and equitable compensation. Provision is made for particulars which the owner or holder must furnish. Provision is also made for the expropriating authority to extend the period of 20 days in terms of clause 25.
- 3.5.7 Clause 15 provides that if the expropriating authority rejects the amount claimed by a claimant, the executing authority must within 20 days of delivery of the statement containing the amount claimed, make an offer of just and equitable compensation and furnish full particulars of how the amount is made up and calculated.
- 3.5.8 Clause 16 provides for certain particulars the expropriating authority or claimant may request regarding claims and offers.

- 3.5.9 Clause 17 deals with the manner in which the payment of the amount offered as compensation must be made.
- 3.5.10 Clause 18 deals with instances where expropriated property is subject to a mortgage or a deed of sale and provision is made as to whom payment of the amount of compensation must be paid.
- 3.5.11 Provision is made in clause 19 for the payment, from the compensation money, of property rates, taxes and other charges relating to the property concerned by the expropriating authority. Should a municipal manager fail to inform the expropriating authority of outstanding municipal property rates, taxes or other charges, the expropriating authority may pay the compensation to the expropriated owner or expropriated holder without regard to outstanding municipal property rates, taxes or other charges.
- 3.5.12 Clause 20 makes provision for instances where the amount of compensation may be deposited with the Master of the High Court.

### **3.6 Chapter 6: Mediation and determination by court**

Clause 21 provides that in the absence of agreement on compensation, either party may institute legal proceedings in a competent court within a stipulated period. The disputing party has the option to request the expropriating authority, in writing, to institute legal proceedings. Both the request by the disputing party and the institution of the proceedings by the expropriating authority must take place within a stipulated time period.

### **3.7 Chapter 7: Urgent expropriation**

Clause 22 deals with urgent expropriations. In the case of a disaster, urgent and exceptional circumstances, real and imminent danger, or if a court so orders, an expropriating authority may exercise a right to use property temporarily for a period not exceeding 12 months. The expropriating authority is exempted from certain provisions of the envisaged Act should it exercise the right to take property temporarily on an urgent basis. The expropriating authority must within 30 days of the notice to use the property temporarily make a written offer of compensation to the owner or holder. Provision is made for compensation in the case of damage to the property concerned and for the extension of the period of 12 months by order of court.

### **3.8 Chapter 8: Withdrawal of expropriation**

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

### **3.9 Chapter 9: Related matters**

- 3.9.1 Clauses 24 to 32 deal with—
- (a) service and publication of documents;
  - (b) extension of time allowed for certain actions;
  - (c) a register of all expropriations;
  - (d) offences and other related matters;
  - (e) the power of the Minister to make regulations;

- (f) validity of regulations, legal documents and steps under certain circumstances;
  - (g) impact on existing legislation;
  - (h) repeal of the Expropriation Act;
  - (i) transitional arrangements and savings; and
  - (j) the short title and commencement of the envisaged Expropriation Act, 2020.
- 3.9.2 Provision is made for the service of documents and the publication of expropriation notices and related documentation which includes the use of radio and television under specific circumstances.
- 3.9.3 The Department will be required to establish and maintain a register of all expropriations, which register must be accessible to the public. All expropriating authorities will be obliged to provide the Department with copies of all notices of—
- (a) contemplated expropriations;
  - (b) decisions not to proceed with contemplated expropriations;
  - (c) expropriations; and
  - (d) withdrawal of expropriations.
- 3.9.4 Chapter 9 also deals with offences relating to—
- (a) failure to provide information or documentation as prescribed in the Bill; and
  - (b) wilful furnishing of false or misleading information.
- 3.9.5 As far as existing laws dealing with expropriation are concerned, clause 30 proposes that those laws continue to apply to the extent that they are consistent with the provisions of the envisaged Act. In the event of a conflict between the envisaged Act and such existing laws, the envisaged Act will prevail.
- 3.9.6 The Bill seeks to repeal the Expropriation Act.
- 3.9.7 Finally, provision is made for certain transitional arrangements and savings. The envisaged Act will not apply to expropriations initiated prior to the commencement of the Act. Proceedings instituted before the commencement of the envisaged Act for compensation resulting from expropriation must be concluded as if the envisaged Act had not been passed. However, the parties may agree that the provisions of the envisaged Act will apply.

#### **4. Bodies consulted**

In the development of the Bill, the Department sought advice from various prominent legal practitioners on specific constitutional and practical matters relating to expropriation. The Bill was initially published in the *Gazette* for comment on 21 December 2018. Wide-ranging submissions were received from organised agriculture; commerce and industry; the financial sector; the legal fraternity; the property industry; professional associations; public entities; government departments and members of the public.

#### **5. Implications for provinces**

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

#### **6. Financial implications for State**

- 6.1 Section 25(2) and (3) of the Constitution obligates the State to pay persons affected by expropriation compensation that is just and equitable, reflecting an

equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

- 6.2 The implementation of the uniform procedures for expropriation should not have a significant impact on the staff structures of expropriating authorities.
- 6.3 Implementation of the envisaged Act will have financial implications for the Department in that it will—
- (a) establish capacity to provide guidance on the uniform procedures to all expropriating authorities; and
  - (b) be responsible for the development and maintenance of the expropriation register, which will require the development of a database accessible to the public and dedicated personnel.

## 7. Parliamentary procedure

- 7.1 Sections 74 to 77 of the Constitution contain the procedures that have to be followed in respect of different types of Bills introduced in Parliament. It is important to determine which section applies— colloquially referred to as the tagging of the Bill in order to ensure that the Bill is passed in a constitutionally sound manner. Sections 74 to 77 deal with the following:
- section 74: Bills amending the Constitution;
  - section 75: Ordinary Bills not affecting provinces;
  - section 76: Ordinary Bills affecting provinces; and
  - section 77: Money Bills.
- 7.2 The State Law Advisers have considered the provisions of the Bill and are of the view that sections 74, 75 and 77 do not apply in respect of the Bill, and that the Bill must be dealt with in accordance with the procedure prescribed by section 76(3) of the Constitution since the Bill in substantial measure falls within several of the areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution.<sup>1</sup>
- 7.3 This view is based on the application of the *Tongoane* judgment<sup>2</sup> of the Constitutional Court and the views held therein regarding the tagging of Bills.
- 7.4 In the *Tongoane* judgment the Constitutional Court stated that what matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, but rather, whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4. The Court furthermore stated that the tagging test focuses on all the provisions of the Bill in order to determine the extent to which those provisions substantially affect functional areas listed in Schedule 4, and not whether or not any of the provisions are incidental to the Bill's substance.<sup>3</sup> The Court furthermore stated that the process of tagging of a Bill “. . . is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the

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

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

3. *Tongoane* at par. 59.

provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”<sup>4</sup>

- 7.5 Since the Bill seeks to serve as a uniform legislative measure which would in future be applied by any expropriating authority to expropriate land in a constitutional manner and since the Bill seeks to repeal the Expropriation Act, the envisaged Act would find application in the performance of functions relating to the majority of areas of concurrent national and provincial legislative competence listed in Schedule 4 to the Constitution.
- 7.6 The State Law Advisers are therefore of the view that, since the Bill in substantial measure falls within functional areas listed in Schedule 4, it must be dealt with in accordance with the procedure prescribed by section 76(3) of the Constitution.
- 7.7 The State Law Advisers are furthermore of the opinion that it is necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it may impact on the customs of traditional communities.

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4. *Tongoane* at par. 60.

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