THE BANKING ASSOCIATION SOUTH AFRICA

Tel +27 11 645 6700
Fax +27 11 645 6800
P O Box 61674
Marshalltown 2107
www.banking.org.za

3rd Floor Building D
Sunnyside Office Park
32 Princess of Wales Terrace
Parktown 2193

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Mr Sam Vukela
Director-General, Department of Public Works
Central Government Offices (CGO) Building
256 Madiba street
Pretoria
0002
Attention: Livhuwani Ndou / Johannes Lekala

Doc Ref: PIERREV/#25690_v1

Your ref: Pierre Venter

Direct ☎: 011 645 6717

E-✉: pierrev@banking.org.za

Per email:
Livhuwani.ndou@dpw.gov.za/Johannes.lekala@dpw.gov.za

Dear Mr Vukela

**Public Submission: DRAFT EXPROPRIATION BILL, 2019**

The Banking Association South Africa ("The Banking Association") would like to thank The Department of Public Works and the National Assembly Committee on Public Works for the opportunity to comment on the above-mentioned Bill.

## Who we are

The Banking Association South Africa (The Banking Association) is an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 33-member banks which include both South African and International banks. All licenced banks are members of The Banking Association. Our vision and role, together with our areas of focus, including a list of our members may be found on our website, www.banking.org.za

## Context

The Banking Association supports Government's initiative to address past imbalances through processes such as land reform, as envisaged and provided for by the Expropriation Bill.

The banking sector is a critical stakeholder because of the substantial sums of credit extended by banks in respect of "property". Banks have about R1.6-trillion in mortgage exposure to immoveable property, including residential, agricultural and commercial and industrial mortgages.

**Comments**

We suggest four critical themes needed for the Bill:

- Alignment to international norms and the Constitution.
- Completeness of definitions.
- Protection of the rights of owners and holders of registered and unregistered rights (notification, processes etc.) to support this.
- The "just and equitable" principle to provide underpinning support for owners and holders of rights.

Our comments will thus be made considering these four themes.

**Chapter 1 – Definitions and Application of ACT**

***Definition:*** "Expropriation" in the Bill is defined as "…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.". This definition of expropriation is limiting, as expropriation could occur outside the scope of this definition. This confers untoward power to the State, where the State is empowered to take a custodianship role for the country's resources/ property rights with no obligation for the State to pay compensation. Constitutional Court cases Agri South Africa v Minister of Minerals and Energy (2013) and Shoprite Checkers v member of the executive Council for the Eastern Cape Economic development, Environmental Affairs and tourism department (2015) refer.

This is contrary to international law that deems any seizure of legal title to constitute expropriation. The Organisation for Economic Co-operation and Development (OCED), which consists of 36-member countries including our biggest trading partners in Europe, The United States of America and Canada, amongst others, hold the view that expropriation or "wealth deprivation" could take various forms. It could be direct where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright physical seizure. In addition, the OCED states that terms such as "dispossession", "taking", "deprivation" or "privation" are all instances of expropriation. Even in instances where a property is not seized or the legal title is not affected but the State restricts use or the enjoyment of the benefits can be classified as expropriation as the measures taken by the State have a similar effect to expropriation or nationalisation and is generally termed "indirect", "creeping", or "de facto" expropriation, or measures "tantamount" to expropriation.

From a context perspective, the need to align to international definitions is critically important if South Africa wishes to attract international investment. Such investment should be seen against the context of the Protection of Personal Investment Act (2018), where the State subjected international investment to the confines of local legislation and in the process removing the right of international investors to resort to the International Arbitrating Court if they were not satisfied with the compensation for their expropriated property being fair.

Nevertheless, international law does allow States to control or regulate certain usages of properties with reason. Limitations which are vital to the functioning of the State are not deemed to be expropriation, such as:

- Taxation;
- Consumer protection;
- Environmental protection;
- Zoning rights.

It is important to note that the Constitution does not have a definition of expropriation which we submit is required within the Expropriation Bill.

***Recommendation***

The definition for "expropriation" should be aligned to international definitions and be broad enough to include all forms of expropriation as recognised internationally. In doing so the courts should have discretion to determine when State encroachment on a property or its associated rights qualifies as an expropriation.

***Definition:*** "Property" is defined as "is not limited to land and includes a right in such property".

This definition implies that the Bill relates to all property, tangible or intangible, and is subject to a legal relationship between persons, with the State enforcing possessionary interest or legal title in that thing. This mediating relationship between individual, property and State is known as property regimes. Recognized types of property include:

- Moveable and immovable property;
- Tangible and intangible property;
- Corporeal and incorporeal property.

South Africa recognises certain types of rights in property. These are:

- Real rights which refers to immovable property (land and improvements, usufructs);
- Personal rights which refers to personal security, liberty etc.;
- Immaterial property rights which refers to intellectual property;
- Limited real rights which refers to a restrictive right that a person has over another's property e.g. a servitude;
- Statutory rights, which refers to legal rights created by Government through legislation.

In looking at the State's objective in this regard, the objective of the Bill as contained in the "PREAMBLE" predominantly focuses on land reform and to allow the State to "take legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination…" The Bill therefore provides the State with a tool to achieve its commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources. It follows therefore that the Bill seeks to address land, water and related reform as opposed to other types of property and that it should be restricted accordingly.

If the Bill is intended to be broader and to include all types of property, we would not support this, as this would include:

- Intellectual property rights, which could have a large impact on international trade because such rights are governed by international law/bi-lateral treaties/covenants/agreements etc. and are subject to international investment law practices/governance frameworks;

- Personal rights, which could have a large impact on international investment into South Africa, including trade in the South African stock and bond markets.

***Recommendation***
The Bill should be aligned specifically to section 25 (4)(a) of the constitution. Therefore, the definition of "property" should be restricted to "real rights" in property only and to equitable access to all South Africa's natural resources.

***Definition:*** "Public interest" is defined in the Bill as "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.". Whilst this definition expands on the definition in the Constitution it does not offer an explanation of what is meant by the additional wording" … in order to redress the results of past racial discriminatory laws or practices…". This could be interpreted widely which could be cause for concern for local and international investors.

On the other hand, Section 25(4)(a) of the Constitution limits the definition of "public interest" to "includes the nations commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" and Section 25(4)(b) as "property is not limited to land."

We therefore submit that the definition of "public interest" is not aligned to that as contained in the Constitution as it has been broadened within the Bill to include; " other related reforms in order to redress the results of past racial discriminatory laws or practices." As mentioned above, the Bill does not clearly define what is meant by this additional wording. Therefore, this leaves the matter open to wide interpretation, which creates market uncertainty for both local and international investors, especially given the broad definition of property.

Further, we are of the view that such a definition is too broadly defined, is incomplete and that it should be redefined within the context of Section 25(2) of the Constitution as:

- "Public interest" could be interpreted to include both 'for profit' and 'not for profit' entities. Outside of land reform and reforms that bring about equitable access to South Africa's natural resources, where beneficiaries would benefit from 'for profit' initiatives, "public interest" should otherwise be restricted to consumptive and non-profit use purposes only. This would be in accordance with the principles of fairness. This would include public facilities and public welfare undertakings that do not aim for profit, but rather to serve the public, and where benefits are shared by society, e.g. roads, military installations, public facilities, government buildings etc. Any other land use should be excluded from the scope of land expropriation;
- Private and public companies as per the definitions (Chapter 1, Interpretation, Purpose and Application) of the Companies Act, that generate profits are not allowed to expropriate property and natural resources to generate profit but are allowed to acquire such property and natural resources through the normal operations of the market (buy and sell). Similarly, state-owned companies that generate profits should not be allowed to expropriate property and natural resources in order to benefit from such expropriation for profit generation purposes, but should only be allowed in the event the proposed definition of "public interest" is met;
- Third party transfers that benefit a private person (excludes land reform/equitable access to natural resources) but which does not benefit the

public in any way should not be allowed and the Minister/the courts should always ensure that this is the case in any expropriation that seems to benefit a third party. Further, expropriations that benefit a third party that provides a public utility should only be allowed as far as they satisfy the "public interest" requirement.

There are numerous international examples where failure to more accurately define "public interest" has led to third party transfers that benefit a private person but not the public. Internationally, expropriation law for "public interest" purposes is therefore strictly defined, listing those entities that may expropriate land and defining the methodologies that may be adopted by them for doing so.

This would include:

- Generalisation (defining the "public interest" need e.g. public engineering construction, State subsidy housing etc.);
- Enumeration (for setting up various social public undertakings e.g. roads, parks etc.);
- A combination of the above two focus areas e.g. setting up public undertakings such as a water conservancy, land reform, equitable access to natural resources etc.;
- Elimination (exclusions are specified).

By way of an example:

- Agricultural land totalling 400 hectare (HA) is expropriated at R 10 000 per HA to be used for State subsidy housing purposes;
- This is re-zoned to constitute a mixed-use development, which affects the market value of sites within the development as follows:
- Market value: Residential sites R 30 000 per HA
- Market value: Commercial/industrial sites R 100 000 per HA

If only 50% of the development site is used for State subsidy housing/ municipal public facilities purposes (the "public interest" element purpose), it follows that the balance of the sites should be sold to third parties at market value and not at cost (profit generating).

Further, if the expropriation of a property/portion of a property will have a negative impact on the market value of the remaining portion of a property or adjacent properties, the owner/s of such properties should have the right to request that these properties should also be expropriated e.g. a property/portion of a property is expropriated for usage as a national road. This would negatively impact on the market value of the remainder of the property/adjacent properties to the road and such an owner/s would be unfairly prejudiced were they unable to request that these properties too be expropriated.

***Recommendation***

We recommend that the definition of "property" within the Bill should be restricted to "real rights in property" only.

Either the definition of "public interest" should be aligned to section 25. (4)(a) and (b) of the Constitution, or there is a need for the definition within the Bill to be broadened to clearly define what is meant by "other related reforms in order to redress the results of past racial discriminatory laws or practices."

*New insertion into the Bill:*

"The owner/s of the remaining portion of a property/adjacent properties have the right to request that these properties be expropriated if the initial expropriation negatively impacts on the market value of their property/properties. Disputes as to whether the initial expropriation has impacted on such property values or expropriation compensation levels are to be resolved through the courts."

***Definition:***

"Public purpose" is defined as "includes any purposes connected with the administration of the provisions of any law or practices".

We submit that this definition is incomplete as there is a need for clear regulation of the "public purpose" requirement in legislation to ensure conformity with Section 25(2) of the Constitution. This would align the definition to international norms where the principle of requiring a strong indication of public necessity in applying the "public purpose" requirement is scrutinised by the courts and it places an onus on the State to provide a detailed and specific motivation as to the necessity for an expropriation to occur.

***Recommendation***
The UN (United Nations Conference on Trade and Development, 2012) states that there is no single definition to effectively capture the meaning of "public purpose". However, the UN states that the concept of public purpose is the pursuance of a legitimate welfare objective, as opposed to a purely private gain or an illicit end. This concept is widely accepted in international law and this concept should be captured in Regulations promulgated for this Bill by dictating which activities are deemed to be for "public purpose".

Moreover, there is a need for clarity to ensure conformity with Section 25(2) of the Constitution (demonstrate public necessity: Constitutional Court cases: Fnb v SARS, Bissett v Buffalo City Municipality refer.)

**Chapter 2**

***Clause 3 (2):*** The wording used in sub-clause 2 state that the Minister "must" expropriate property when requested by another organ of the state. The use of the word "must" instead of the word "may" limits the discretion of the Minister, however it does not exclude the Minister entirely as it is qualified by the words "satisfies the Minister". This would therefore imply that the minister can only refuse a request for expropriation if it is not in the "public interest" or for a "public purpose". This could be particularly problematic in instances when the Minister should be rightfully allowed to deny a request due to other legitimate reasons such as the exportation of a property is not being deemed as a priority, or if there is insufficient budget at the time to pay "just and equitable" compensation.

***Recommendation***
The word "must" to be replaced with the word "may".

***Chapter 5***

***Clause 12 (1):*** The Bill aims to align to section 25(3) of the Constitution, which determines the compensation paid by the Expropriating Authority to the owner. This may adversely affect Financial institutions who provide credit based on market value as the Banks Act and Regulations related to this Act (Regulations 23 & 24 of 2012) compel financial institutions to do so. In turn, South Africa's Banks Act and its Regulations are aligned to global international regulatory frameworks and prudential frameworks. Should the compensation paid by the Expropriating Authority be less then market value, in some cases loans would exceed the compensation amount paid and financial institutions and owners would suffer a loss. The inadequate management of credit risk can lead to systemic consequences for the economy and financial system as evidenced by the global financial crisis. A critical consequence of the Bill would therefore be a negative impact on the stability of or losses suffered by commercial banks.

This would in turn result in:

- Private sector lenders withdrawing from providing loans where property is being offered for security, thus sterilizing the market; and/or

- Banks adopting a more conservative approach to the extent of loans they would be prepared to provide as compared to property values; and/or

- Banks increasing borrowing interest rates to compensate for the additional risk in the event of expropriation.

This would promote food insecurity, job losses and financial exclusion.

In stakeholder engagements with the DRDLR (Department of Rural Development and Land Reform) – the Department recognised the need for the State to avoid such situations. Cabinet therefore approved the DRDLR policy framework document styled: "A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the of the Office of the Valuer General dated 18 October 2012." Extracts from this paper are the following:

"The market value of property be aligned with the international definition and be interpreted to exclude prices paid by Government as evidence for market value. This will have the immediate effect of aligning prices paid by Government with private lenders. "

The change to "just and equitable" which was provided for in the document would have negative implications on the collateral value of existing debt. This has a domino effect as the capital adequacy of these institutions and their ability to provide loans to the agricultural sector is negatively affected, thus having serious implications on food, security and employment.

In order to mitigate these negative implications, Government should automatically guarantee the difference between "just and equitable" compensation as contemplated in s25(3) of the Constitution and "market value" for private sector lenders.

***Recommendation***

The Bill should provide for the Cabinet approved policy framework.

***Clause 12 (2) (c):*** The Bill states that "no compensation is to be provided for in respect of unlawful property enhancements". This could unfairly prejudice rural property owners as most agricultural properties have been enhanced without the approval of building plans, as previously they were not subject to the need for approved building plans by municipalities.

***Recommendation***

The clause should exclude property improvements/enhancements used in agricultural activities or agricultural related activities.

***Clause 12 (3):*** This clause makes provision for nil compensation to be paid in certain circumstances (listed in clause (12)(3) (a-e)). However, the clause has a caveat which indicates that nil compensation is not limited to the instances listed in the Bill. This would imply that nil compensate can apply to all instances of expropriation, the implication of which would have a devastating impact on property rights and consequently local and foreign investment. The resultant dilution of property rights will result in property not being viewed as an attract asset class. This would have a profound effect on the financial sector of the country, as collateral in the form of immoveable property is the most common form of security used by lenders to support loans. In turn, this allows lenders to reduce the interest rate charged on such loans and to provide term loans at attractive interest rates. On the other hand, unsecured loans increase lender risk and they therefore attract higher interest charges. The dilution of property rights could result in lenders implementing more stringent lending requirements for all loans. In addition, due to weakened property rights, the resultant impact would be lower levels of demand for immoveable property (investment into illiquid long-term assets, e.g. property, is an expression of long-term investor confidence), which will simultaneously impact negatively on the profitability of existing property portfolios (mortgagees would be unable to reprice such loans to compensate for increased debt levels).

As a matter of principle, we are not supportive of the principle of expropriation without compensation as this constitutes a dilution of property rights. In 2018, The Banking Association made a substantive submission to the Constitutional Review Committee in this regard where we argued that based on the opinions expressed by subject matter experts, including ex Constitutional Court judges, that there is no need to change Section 25 of the Constitution, as section 25(3) already makes provision for "just and equitable" compensation to be paid , which compensation which could range from R nil to above market value. For the State to now highlight five categories (but not necessarily confine expropriation without compensation to these categories) is we believe unnecessary and problematic, as it creates unnecessary local and international investor angst. In all instances, compensation levels following expropriation should be subject to a formula-based calculation methodology for section 25(3), with the detailed methodology contained within Regulations to this Bill.
Outside of this we wish to further expand on the following issues created by the insertion of this clause:

***Clause 12 (3)(a):*** The clause indicates that nil compensation is applicable to land occupied or used by a labour tenant. The clause is vague and ambiguous as it does not specify if the claim has to be valid, nor does it specify the portion of the property that would be expropriated (where labour tenants only occupy a portion of a larger property).

***Recommendations***

The claim firstly needs to be validated before it is eligible for expropriation. Expropriation should be limited to the portion of the property which the labour tenant occupied.

***Clause 12 (3)(b):*** This clause makes provision for nil compensation to be paid in instances where land is held for purely speculative purposes. The Bill does not define "speculative purposes". Speculation could be considered as a broad range of activities from land holding to land being processes through town planning process. Such a clause also places risk on owners of properties where immediate improvements cannot be made due to financial constraints. Moreover, in certain circumstances developers purchase a peri urban property for development at a future date. Such a clause could thus stall human settlement development in peri-urban areas, should the property of a land developer be expropriated without the payment of fair compensation, this would contaminate any further land purchasers of land by developers for usage at a future date. This is particularly important given that cities continue to expand due to population growth, and this restriction could sterilize property development in new development areas.

Placing such a broad restriction on property also reflects a dilution of property rights as one of the fundamental rights of property ownership and a free market economy is the autonomy to decide how best to use one's own property.

***Recommendation***

This clause should be removed from the Bill.

***Clause 12 (3)(c):*** This clause makes provision for the land of a state-owned corporation or entity to be expropriated without compensation. However, clause 2(2) *Application of Act,* severely limits the potential for State owned land from being expropriated unless this is consented to by "the executive authority responsible for that corporation or entity." State owned land, including that owned by state owned entities constitutes 25,2 million hectares, with 2.9 million hectares being unused. It follows that a major land redistribution opportunity exists within this ambit of land. It is however highly unlikely that 'executive authorities" will consent to their land being expropriated without any compensation if they would be able to sell this in the market at market value. Whilst one can argue that the spatial plans as detailed within the Spatial Planning and Land Use Management Act (2015) (SPLUMA) should not be contradicted, this clause within the Bill should be amended to specifically provide an exclusion for spatial plans.

***Recommendation***

The Minister should be able to decide without the consent of the executive authority to expropriate state-owned land. The executive authority however should be able to review the decision.

***Clause 12 (3)(d):*** As in clause 12 (3)(b) there is no definition for abandoned land. This Bill does not consider the reasons why land could be abandoned. There are instances where owners cannot access their land or have lost control of their property due to circumstances outside of their control, such as land occupied by informal dwellers.

***Recommendation***

The formula created for section 25(3) would determine what the expropriation value of the property is. This would be nil if outstanding rates and taxes/utilities equal or exceed the value of the property.

***Clause 12 (3)(e):*** This clause makes provision for nil compensation to be paid in circumstances where the state has invested a greater or equal amount in the property than its market value. This clause is ambiguous as it does not clarify the circumstances under which this clause may apply.

***Recommendation***

This clause should be expanded on.

***Clause 13:*** The expropriated owner is to be paid interest stipulated by section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999). However, an owner may be required to pay a higher interest rate to a financial institution than that stipulated by the PFMA.

***Recommendation***

Should the expropriated owner be required to pay a higher interest rate to a financial institution as compared to that stipulated within the PFMA, the owner should be compensated for the net difference in interest that has been paid.

***Clause 17 (2):*** Only 80% of the compensation to be paid on the date of expropriation or a date agreed to by the parties. There is no mention in the Bill as to when the balance would be paid - this does not reflect a "just and equitable" position to expropriated owners or holders of registered or unregistered rights, as it is unfair for individuals to be deprived of property and further be deprived of payment by the State.

***Recommendations***

The full amount should be paid as at the date of expropriation. Where all parties agree to 80% only being paid at date of expropriation, the balance should be paid within 12 months. (a period in excess of 12 months creates a contingent liability on the State's balance sheet, which could adversely impact on the country's sovereign rating).

This should also be cross referenced to Clause 13 of the Bill.

***Clause 18:*** This clause provides for property subject to a mortgage bond or deed of sale. Clause 8 of the Bill makes it clear that if land in which unregistered rights exist is expropriated, the expropriating authority must offer compensation for both the land and the unregistered right holder. The clause is less clear in the context of mortgage bonds specifically in relation to clause 8(3)(g) as this clause does not compel the expropriating authority to offer compensation to the holder of a mortgage bond over the property in respect of the termination of his rights under the bond.

By way of example, a mortgage bond on a property is worth R4 million. The owner and the expropriating authority agree compensation in an amount of R3 million without informing the mortgage bond holder, thus resulting in no compensation being offered to the mortgage bond holder which effectively is a deprivation of property.

The Insolvency Act no. 24 of 1936 protects the holder of a mortgage bond by making such a holder a secured creditor. The Bill should not disregard the other entrenched laws and it follows that the proceeds must be paid directly to the mortgagee and not the claimant.

***Recommendation***

If the intention of s18(1) is that compensation must first be offered to the mortgagee - appropriate amendments would need to be made in the Bill in order to reflect that in any instance where property is subject to a mortgage bond, the Expropriating Authority must offer compensation not just for the property but for the mortgage bond as well. The total amount offered should be divided between the property owner and the mortgagee. This should be done in accordance to:

- factors listed in clause 12;
- the amount owing under the mortgage bond should be paid to the mortgagee first (as dictated by the Insolvency Act);
- if there is a dispute concerning compensation, this should be settled by way of the courts.

**Conclusion**

Whilst we have highlighted aspects which we believe requires address for transformation which does not dilute property rights to be achieved, we hold the view that land reform is an imperative for South Africa's sustainability. As a sector we have pledged our support to partner with the State to help it achieve its Chapter 6 National Development Plan objectives.