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**The Portfolio Committee on Public Works and Infrastructure** Doc Ref: PIERREV/#297362v1  
**256 Madiba Street**  
**Pretoria** Your ref: Pierre Venter  
**0002** Direct ☎: 011 645 6717

Per email: Ms Nola Matinise  
[expropriationbill@parliament.gov.za](mailto:expropriationbill@parliament.gov.za)

E-✉: [PierreV@banking.org.za](mailto:PierreV@banking.org.za)

Dear Ms Matinise

### Public Submission: Expropriation Bill, 2020, No. 23, of 10 December 2020

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

#### Who we are:

The Banking Association is an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 36 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](http://www.banking.org.za)

#### Context:

The Banking Association is fully supportive of the State’s initiatives to rectify past racial injustices, to correct current land ownership patterns and to alleviate poverty. We remain committed to playing a leading role in working with key stakeholders, including Government in finding all-inclusive solutions to this and other economic challenges to create a better life for all South Africans.

A sound and secure banking and regulatory framework is essential to enable faster and inclusive economic growth. Property rights and prosperity are inextricably linked, where banks place reliance on property as security for loans. Banks are also required in terms of the Banks Act (1990) and Regulations thereto to value their assets at market value. A marked decrease in the value of properties, caused by either amendments to legislation and/or market uncertainty, and/or a reduced interest in property from property buyers could destabilise the banking sector, and have a negative impact on the credit rating of the sector as well as the country. The current exposure banks have in relation to property is approximately R1.6 trillion. Many banking crises around the world have as their starting point declines in property values and the impact that this has on market confidence.

We recognize the need for the State to align the Expropriation Act (1975) to Section 25 of the Constitution of the Republic of South Africa (1996). We are also cognisant of proposed changes to this section of the Constitution (Amendment of Section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) dated 19 February 2019 refers). The process of amending Section 25 of the Constitution has however not been finalised, which may have material implications for this Bill, as the Expropriation Bill needs to give effect to the gazetted finalised amendments to this section of the Constitution. The Bill is therefore pre-supposing that Section 25 of the Constitution will be amended and that public consultation on the need for this to take place and perhaps even amended wording recommendations will be inconsequential. We are therefore of the view that the finalisation of the proposed amendment to Section 25 of the Constitution should have been finalised before this Bill was gazetted for public consultation.

We seek to highlight our comments relative to Section 12(1) and 18(1) of the Bill. In earlier submissions on the Expropriation Bill, together with the Property Valuations Act (2014) and Regulations thereto, we appealed for the Cabinet approved policy framework document termed “A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the Office of the Valuer General dated 18 October 2012” to be included within either expropriation or State property valuation legislation. Our requests have and continue to be ignored. This could have far reaching socio-economic consequences for financial institutions, property owners and land reform alike, as the Banks Act (1990), and Regulations thereto are aligned to the global Basel framework for the financial sector (South Africa as a member of the G20 is obliged to adopt this framework) require that banks value their assets at market value and that they have sufficient capital and liquidity to return depositors and investors funds, with interest and on demand. If the value of land is reduced by expropriation at below market value, this will inhibit the ability of banks to provide credit where property serves as security for a loan. Banks will also have reduced capital against which to extend credit for entrepreneurs and personal development, and they will have to adopt more conservative loan policies, which will affect all credit extension, not just property. This was recognized by the Minister of Rural Development and Land Reform, hence the inclusion of the salient extract from the above policy framework, which reads as follows:

*“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.*

*The Bill should provide for the Cabinet approved policy framework.”*

We again appeal to the Portfolio Committee on Public Works and Infrastructure to include this Cabinet approved policy framework within the Expropriation Bill.

A summary of other key concerns which we have elaborated on in our detailed submission, are as follows:

- The possibility of expropriation at below market value or without compensation has already started discouraging essential investment by farmers into their property, increasing food insecurity, as well as investment into the general economy. It must be made clear as soon as possible what land may be subject to expropriation, and which will be excluded.
- South Africa's definition of expropriation excludes the deprivation of property for the benefit of the nation and where it is not transferred into the name of the State (Constitutional Court ruling), as well as providing for compensation below market value. This conflicts with global norms, including that of the OECD. As the Protection of Investment Act (2015) subjects international investors to the prescripts of South African legislation, and as aggrieved parties are now prevented from turning to the International Arbitration Court, the Bill in its current format may discourage international investment into South Africa and result in capital flight should international investors incur losses due to expropriation at below market value. The Bill is also at variance to existing country bi-lateral Trade Agreements.
- There are key definitions which have not been clearly defined within the Bill, namely "just and equitable" compensation, "public purpose" and "public interest", which introduces policy uncertainty and opens the Bill for injudicious expropriation.

Further, the definition of property is viewed in the broadest sense within the Constitution and so the Bill is aligning to this definition. Property can therefore include intangible property (intellectual property etc.). The definition of property within the Bill should therefore be restricted to tangible property only, and this should be further confined to only include the country's natural resources.

- Under section 9, the Bill seems to exclude the rights of registered rights holders (mortgagees, cessionaries etc.) in respect of expropriation engagements, as well as not recognizing the need for such registered rights to also be expropriated. This represents a material dilution of property rights.
- The Bill conflicts with some extant legislation e.g., expropriation can occur before ownership is transferred in the deed's registry (this is at variance to the Deeds Registries Act (1937)) and undermines a property owner's rights. The Bill also provides for a property to be expropriated even if it is being disputed in the courts, which again undermines a property owner's rights.
- Section 12 of the Bill which seeks to identify 5 instances where nil compensation may be justified, is ill defined and given that the pre-amble to this section states "but is not limited to" makes this section irrelevant. Further, as a principle, we are opposed to the inclusion of this section as it represents a material dilution of property rights. If the clause remains, limitation is critical as well as clearer parameters for all such instances.
- There are numerous areas within the Bill which require ambiguity address. Unless the Bill provides policy certainty, aggrieved parties having to resort to the courts for "just and equitable" redress will exacerbate public uncertainty in an area that is both highly emotional and sensational. There is therefore a need for the Bill to be crisp and clear and to provide definitive guidance to some 255 state entities which possess expropriation rights, as this will ensure that expropriation is implemented prudently and equitably, failing which local and international investment into property (and in particular into land) will be threatened.

## **OUR SUBMISSIONS**

### **General Comments:**

1. We believe that there is a need for inclusion of definitions for a Mortgage bond, a Bond Holder, Financial Institutions and Mortgage Debt.

#### **Suggested definitions:**

- i. *Mortgage Bond*: means a bond attested by the Registrar of Deeds (appointed in terms of the Deeds Registries Act (1937) specially hypothecating immovable property;
  - ii. *Bond Holder*: means the holder of a mortgage bond who has advanced monies to the owner of the property;
  - iii. *Financial institutions*: means any person or institution referred to in the definition of “financial institutions” as set out in the Financial Sector Regulations Act (2017); and
  - iv. *Mortgage Debt*: means any monies advanced by a financial institution against security of a mortgage bond over the property.
2. We recommend that a clear obligation needs to be placed on the expropriating authority to purposefully engage with financial institutions as a registered rights holder (bond holders/cessionary) prior/simultaneously to discussions with an expropriated owner on agreed compensation for the property to be expropriated, including confirmation that compensation will ensure that at a minimum, the debt will be extinguished, and for this not to unfairly prejudice the expropriated owner and the financial institution.
  3. The Bill does not distinguish between local and foreign ownership, which may negatively impact foreign investor confidence and bilateral trade agreements with foreign countries.
  4. We suggest that an express obligation is placed on the expropriating authority to consider registered rights, such as a mortgage bond/special notarial bond.
  5. “Just and equitable” expropriation needs to be consistently applied to all, including state owned institutions.
  6. A holder of a right needs to reference both registered and unregistered rights throughout the Bill.

### **Chapter 1: Definitions**

#### **“Deliver:”**

The definition should include ‘Email’ to cater for circumstances where digital interaction is preferred.

#### ***Recommendation:***

The definition “deliver” needs to be aligned with Section 14(e), which provides for Email as a form of delivery.

The wording for “deliver” should therefore read *“deliver”, in relation to any document, means to deliver by hand, facsimile transmission, post or Email as contemplated in section 24(3) and (4)”*.

#### **“Expropriation:”**

We submit that the definition for expropriation is incomplete as it does not clearly define key aspects of Sections 25 (3) and (4) of the Constitution, namely:

- public interest;
- public purpose; and
- just and equitable compensation.

Unless the definitions for these critical areas within the Bill are clear, we can expect this legislation to result in expropriated owners having to resort to the courts, which legislation should seek to avoid. To avoid uncertainty and costly litigation, the Bill should be as unambiguous as possible so that in the event of an expropriation decision, all parties concerned understand clearly what the applicable principles are.

We also highlight that South African case law in respect of expropriation does not fully align to international norms, as the Constitutional Court interpreted deprivation as not constituting expropriation in instances where the State does not acquire the property (*Agri SA v Minister of Minerals and Energy* (2013) refers). The Organisation for Economic Co-operation and Development (OECD), 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. This could be direct or “dispossession”, “taking”, “deprivation” or “privation” as constituting expropriation. Even in instances where a property is not seized or legal title is not affected, but the state restricts use or the enjoyment of the benefits, it is classified by the OECD as expropriation, as the measures taken by the state have a similar effect to expropriation or nationalisation (termed “indirect” or “creeping” expropriation).

This could pose a threat to South Africa being able to attract international investment if it were to effect the principle of deprivation as not being tantamount to expropriation given that the Protection of Personal Investment Act (22 of 2015) subjected international investors to the prescripts of local legislation and hence removed their right of recourse to the International Arbitrating Court if they are not satisfied with the fairness of compensation levels or the need for an expropriation to occur.

### **Recommendations**

The definition of expropriation must be aligned with the requirements of Section 25 of the Constitution. In this regard, we propose that the definition be amended to read as follows:

*“Means any compulsory acquisition of property, for a public purpose or in the public interest and subject to just an equitable compensation, by an ‘expropriation authority’, and ‘expropriate’ has a corresponding meaning. In the case of expropriation of land by an ‘expropriation authority’, it may be just and equitable for nil compensation to be payable as per the provisions of this Act”.*

There is a need for the Bill to clearly define public interest, public purpose, and just and equitable compensation.

There is a need for the Bill to align the definition of expropriation to international norms as detailed above.

### **“Expropriated holder”**

We submit that the definition of an “expropriated holder” is incomplete as it is only used to reference holders of unregistered rights in property (excludes holders of registered rights in property).

### **Recommendation**

We recommend that the definition for “expropriated holder” be amended to read: *“Means a holder of a registered or 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).”*

### **“Holder of a right”**

The definition of a “holder of a right” is only used to reference holders of unregistered rights in property.

### **Recommendation**

We recommend that the definition of a “holder of a right” should read: *“Means a holder of a registered or an unregistered right in property.”*

### **“Land Parcel”**

The Bill references ‘land parcel’ and ‘land’ interchangeably while only providing a definition for “land parcel”, intimating that there is a difference between the two. We support the definition of “land parcel” and are of the view that this wording should be used consistently throughout the Bill for clarity of interpretation of all provisions.

### **Recommendation**

If the intention of the Bill is to apply an alternate interpretation when referencing “land”, then “land” should also be clearly defined.

### **“Owner”**

It is unclear whether the current definition of “owner” is intended to include a holder of registered rights in property, such as a bondholder (although it appears that it might). It is important to understand whether this is the case and for the wording to clearly define this as so, as subsequent sections in the Bill specifically reference to the rights of owners and holders of unregistered rights, and do not include reference to holders of registered rights. As an alternative to our recommendation that the definition of an “expropriated holder” and a “holder of a right” be amended to include registered rights holders, it is imperative to clarify whether “owner” includes the holders of registered rights. It is also imperative that definitions are used consistently throughout. For example, section 7 (2) (g) (i) invites “any person who may be affected by the intended expropriation” to raise any objections to the intended expropriation. However, in sections 7 (2) (h) (ii) and 7 (4) (a) (and subsequent sections relating to disputes) it appears to only allow the owner or a holder of an unregistered right to dispute the actual amount of compensation offered by the expropriating authority.

### **Recommendations**

As an alternative to our proposed wording changes for “expropriated holders” and “holders of a right” the definition of “owner” could be clarified to include registered rights holders.

### **“Property”**

“Property” is defined as “property as contemplated in section 25 of the Constitution”, which definition does not limit property to only land. While we support an interpretation that “property” should include both registered and unregistered rights in land, we do not support a broader application that could include intellectual property or personal rights.

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 apply to immovable and moveable property (land and improvements, shares in companies, usufructs etc.);
- Personal rights, for example, personal security, liberty etc.;
- Immaterial property rights, which apply to intellectual property;
- Limited real rights which refer 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 the state through legislation.

### **Recommendations**

The Bill should be aligned specifically to the references made to “Land Reform and equitable access to all South Africa’s natural resources” in Section 25 (4)(a) of the Constitution. Therefore, the definition of “property” should be restricted to only reference “*registered and unregistered rights in land parcels and equitable access to all South Africa’s natural resources*”.

The Bill should therefore provide a definition of property beyond merely referring to Section 25 of the Constitution i.e., the definition should explicitly define the classes of property that can be expropriated.

### **“Public Interest”**

“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”.

We submit that this definition 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 (2008) and Amendments thereto, that generate profits are not allowed to expropriate property and natural resources to generate profit but can acquire such property and natural resources through the normal operations of the market. 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 to expropriate property if 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 define “public interest” more accurately 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 property and defining the methodologies that must 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, or equitable access to natural resources etc.;
- Elimination (exclusions are specified).

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/properties adjacent to the road and such an owner/s would be unfairly prejudiced were they unable to request that these properties too be expropriated.

### **Recommendations**

The definition of “public interest” should be aligned to Section 25 (4)(a) and (b) of the Constitution.

We recommend that clear guidance be provided on what “public interest” entails and if there are criteria to be met for a scenario to be regarded as falling within “public interest”. Additionally, it is suggested that the term “public interest” be aligned to the provisions of Section 25 of the Constitution.

We therefore recommend the definition of “public interest” should be amended to read, *“includes the nation’s commitment to land reform, with an obligation on the state to take appropriate measures to ensure that equitable land reform is for the benefit of the recipients of expropriated land, to empower them with access to capital, skills and resources, to be successful, as further prescribed in the Regulations to the Bill, and to reforms ...”*.

### **New insertion into the Bill:**

*“The owner/s of the remaining portion of a property/adjacent property 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”*.

### **“Public Purpose”**

“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 also 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. 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 report also states that the concept of “public purpose” is the pursuance of a legitimate welfare objective, as opposed to private gain or an illicit end.

We submit that the definition of “public purpose” is too wide as it does not clearly define what “public purpose” is and it should be limited to:

1. land reform;
2. equitable access to all South Africa’s natural resources;
3. redress the results of past racial discriminatory laws or practices.

“Public purpose” must be defined in a manner to ensure conformity with section 25(2) of the Constitution (e.g. to demonstrate public necessity). Given the importance of this term, in its current form, it is very broadly defined and ambiguous, and it is therefore difficult to understand its meaning.

### **Recommendations**

The definition for “public purpose” should be aligned to Section 25(2) of the Constitution and should also include circumstances provided for in the current Expropriation Act (1975) and related land tenure & restitution of land rights legislation. Moreover, there is a need for clarity to ensure conformity with Section 25(2) of the Constitution which demonstrates public necessity. Constitutional Court cases: *Fnb v SARS* (2002), *Bissett v Buffalo City Municipality* (2003), amongst others have reference.

A provision for Regulations which detail qualifying activities for “public purpose” should be added into the Bill.

We recommend that the definition should be amended to include *“any purpose that results in an outcome of economic development for the recipient of land expropriation and the economy, connected with the administration of the provisions of any law by an organ of state”*.

In addition, we recommend that Regulations which articulate the proposed definition of “public purpose” are drafted.

### **Application of the Act**

#### **Section 2(3)**

How will it be determined if the Expropriating Authority (EA) has “without success attempted to reach an agreement with the owner...?”

This subsection is therefore ambiguous. The Bill should clearly state what process should be followed to demonstrate that no agreement could be reached with the owner or holder of an unregistered/registered right.

#### ***Recommendation***

We recommend that the phrase “without success” be deleted and the following phrase be added at the end of the clause *“and the parties have failed to reach agreement regarding the acquisition...”*

### **CHAPTER 2: POWERS OF MINISTER TO EXPROPRIATE**

#### **Section 3(2)**

The wording used in sub-clause 2 states that the Minister “must” expropriate property when requested by another organ of the state to do so. 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 permitted to deny a request due to other legitimate reasons e.g., the expropriation of a property is not deemed as a priority, or there is insufficient budget at the time to pay “just and equitable” compensation.

This provision is also too wide in that it also affords undue discretion to the Minister to deprive an owner of his/her rights in the absence of a court order. There is also no outline of what criteria will be used to satisfy the Minister.

#### ***Recommendations***

We recommend that the word “must” be replaced with the word “may” to avoid expropriation being mandatory.

A subsection should be incorporated into this section which indicates what criteria will be applied to satisfy the Minister that a particular property may be expropriated. Alternatively, this section should detail which specific provisions in the Act shall be applicable.

## **CHAPTER 3: INVESTIGATION AND VALUATION OF PROPERTY**

### **Section 3(2)**

This section implies that is mandatory for the Minister to approve **any** request for expropriation of land.

#### ***Recommendation***

The Minister should be allowed to apply discretion in first determining whether the request is reasonable and valid before approving same.

### **Section 3(5)**

This section provides that ownership of property expropriated by the Minister will vest in the State. This however poses the question as to whether the property use will be restricted to the stated purpose of the expropriation, as the intended use of the property impacts the amount of compensation that is deemed to be “just and equitable”. The Bill should therefore state that the expropriated property must be used for the purpose it was expropriated and that it cannot be used for any other purpose without the State reviewing the quantum of the compensation paid to reflect “just and equitable” compensation based on the alternative property use.

#### ***Recommendation:***

We propose that a clause be added that emphasises that the expropriated property must be used for the purpose it was expropriated and that it cannot be used for any other purpose without the State reviewing the amount of the compensation paid to reflect “just and equitable” compensation based on the alternative land parcel use.

### **Section 3(5)(a)**

This section is in contravention of the Deeds Registries Act (1937) as it provides for

1. Ownership before transfer of the property is effected;
2. It provides no process to determine if the property was suitable;
3. There is no alignment to the requirements for the valid transfer of immovable property.

Although it is acknowledged that ownership can vest by operation of the law, we believe that the current well-established system of transfer of ownership, as contained in the Deeds Registries Act, is the appropriate method of determining ownership. Additionally, the section provides for

- no process to determine if the property was suitable;
- no alignment to the requirements for the valid transfer of immovable property.

#### ***Recommendations***

***“The ownership of the property should vest in the relevant organ of state on the date **on which transfer of ownership of the property is registered by the relevant deeds registry office in terms of the Deeds Registries Act (1937);”*****

The words “of expropriation” should be deleted.

### **Section 3(5)(b)**

We recommend that possession should only be given on transfer of ownership to the relevant organ of state and not prior to that.

#### ***Recommendation***

***“Possession of the property will vest in the relevant organ of state **on the date of registration of transfer of ownership of the property to the State.**”***

### **Section 5 read together with section 8**

In terms of these sections of the Bill, the outcome of any investigation and/or gathering of information for purposes of expropriation is not made available in substantive detail to interested parties.

#### ***Recommendation***

Full details will provide interested parties with the necessary and sufficient information to be able to take an informed decision regarding whether to oppose the expropriation or the amount of compensation to be paid, we believe is essential if this section within the Bill is to meet a fairness evaluation.

### **Section 5(1)(b)**

It is not only the impact of intended use that should be considered but also the impact on the current use of the property.

#### ***Recommendation***

This clause to read as follows *“the existence of registered and unregistered rights in such property and the impact of such rights on the current and intended use of the property.”*

### **Section 5(2)**

We believe that the consent of the owner must be obtained and that in the absence thereof, a court order should be obtained.

Here and in numerous other sections, we recommend that the words “if the property is land” be removed (our previous request that the definition of “property” must be limited to land / immovable property refers).

#### ***Recommendation***

This clause to read as follows: *“Subject to subsection (3), an expropriating authority **must with the prior written consent of the owner or an applicable court order, in writing...**”*

### **Section 5.3**

An expropriation authority is not the owner of a property and it therefore requires the owner’s consent to enter the property.

#### ***Recommendation***

This clause should read as follows: *“...may not enter the property unless authorized **in writing by the owner and expropriating authority to do so...**”*

### **Section 5(4)(a)**

The documents, which the owner, tenant or occupier are required to make available to a valuer, should be limited to official documents (such as title deeds, building plans for improvements, servitudes, liens over the property, usufructs etc.), contracts relating to unregistered expropriated rights, dams and other infrastructure and any other documents which a court on application by the relevant expropriating authority may order the owner or occupier to make available.

#### ***Recommendations***

The documents need be limited to those required for the valuation to be undertaken.

The Property Valuation Act (2014) states that the valuer must write a report which must be made available to the owner. The availability of such a report to the owner, registered and unregistered rights holders should be included in the Bill.

We believe that the value of the property is affected by an intended expropriation. As soon as an expropriation notice is published, a property's market value is impacted. We therefore recommend that the valuation process should commence prior to the publication of the expropriation notice so that the value of the property is not unnecessarily negatively affected (the valuation of the property will materially guide the State in objectively determining whether it should proceed with an expropriation notice).

**Section 5(7)**

This section refers to the property being repaired to a "reasonable standard" if it has been damaged. It is not clear what a "reasonable standard" entails in this context.

**Recommendation**

We recommend that the section be re-phrased to read *"the expropriating authority must repair **and/or restore** the property to the state it was in prior to the damage taking place within the confines of the National Environmental Management Act (1998) and any other environmental legislation with similar requirements or compensate the owner to repair and/or restore the property to the state it was in prior to the damage taking place."*

**CHAPTER 4: INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY**

**Section 7**

The Bill contains no express provisions regarding a property owner/rights holder challenging the expropriation itself.

**Recommendation**

The Bill should expressly provide details concerning the process to be followed for a property owner/rights holders to challenge an expropriation.

**Section 7(1)**

In terms of this section, the notice of intention to expropriate land is not filed with the Registrar of Deeds. This will have a major impact on lenders in instances where they are seeking to take the property as security for a loan e.g. whilst the owner is aware of the intended expropriation and has reached agreement with the expropriating authority on the amount of compensation to be paid, he/she could allow the bank to take the property as security prior to the expropriating notice, provided for in section 8, being filed with the Registrar of Deeds.

**Recommendation**

Filing notices of intention to expropriate a property with the Registrar of Deeds is recommended to allow banks to timeously identify potential risk/losses.

**Section 7(1)(a)**

As previously highlighted, there is a need for the "holder of right" to include a reference to registered rights.

**Recommendation**

This clause should read as follows: *"serve a notice of intention to expropriate on the owner and any known holder of a right in the property; **and on the Registrar of Deeds.**"*

**Section 7(2)(e)**

Temporary use is not defined within the Bill and the circumstances under which property will be temporarily used is also not defined. This contradicts Section 25 of the Constitution in that it deprives the owner of the right to property without clearly defining the circumstances under which this will occur.

It is also noted that the intended date of expropriation could differ from the date the authority will take possession of the property, thus the effect on the bank and the owner could effectively be earlier – on date of possession, which would be earlier than the actual expropriation date.

**Recommendation**

We recommend that temporary use and the circumstances under which property will be temporarily used be defined.

**Section 7(2)(f)**

Is an important subsection as Section 9 indicates that the liability for the costs and municipal charges will only pass to the expropriated authority upon possession, even though ownership could have passed at an earlier date in time (date of expropriation). Ownership and the liability for costs should follow norms i.e., possession should only take place on transfer of ownership.

**Recommendation**

We recommend that the existing subsection be deleted and substituted with the following:

*“the expropriating authority will only take possession of the property after transfer of ownership has been registered in the name of the relevant organ of state.”*

**Section 7(2)(g)**

As previously highlighted, Email as a recognized form of delivery must be included.

**Recommendation**

Clause 7(2)(g)(iii) to read as follows: *“a postal address, **Email** and a facsimile number, if any, to which further...”*

**Section 8(2)(c)**

Having regard to subsection (2)(c)(iii), as read with subsection (3)(e), it is noted that no right of objection is afforded to the registered rights holder i.e., the financial institution that has provided the lending facility. The only dispute right afforded to the registered rights holder is in respect of the compensation amount. However, the process needs to be looked at in totality, and a right of objection should be provided for at this point to the financial institution, as the facility extended to the mortgagor is severely impacted by this, and the financial institution may need to review the available options, such as restructuring the facility or relinquishing the customer. The latter option will not only have adverse consequences for the customer and for credit lending practices, but it will also have adverse consequences for the economy at large. It is therefore important that the process be considered in its totality and that a right of objection be provided to the financial institution at this time.

**Recommendation**

We recommend that a right of objection be provided to the registered rights holder at this point in the proposed process.

**Section 8(2)(f)**

In our view, this cannot be a pre-selected or determined date, as possession should only be given once transfer of ownership has been registered in the relevant deed's office.

**Recommendation**

We recommend the existing subsection be deleted and substituted with the following:

*“the expropriating authority will only take possession of the property after transfer of ownership has been registered in the name of the relevant organ of state.”*

**Section 8(2)(h)**

Is impractical as a dispute that ensues only occurs after the date of expropriation, and the Expropriating Authority has become the owner of the property.

**Recommendation**

Ownership should only pass once the dispute is resolved and not on the date of expropriation.

**Section 8(5)(a)**

“Holder of rights” needs to include registered rights holders.

Notices to unregistered and registered rights holders should be separated and individualised as these notices will display the owners’ personal information (The Protection of Personal Information Act (2013) provides for confidentiality of personal information).

**Recommendation**

This clause should read as follows: *“Rights in a property may be expropriated from different owners and holders of unregistered **and registered** rights in **separate** notices of expropriation being provided to **each respective owner or holder of a registered and unregistered right.**”*

**Section 9(1)(a)**

This clause is at variance with the Deeds Registries Act (1937) as well as property ownership fundamentals in that transfer of a property needs to precede ownership. Ownership may only vest upon transfer of a property is registered in the relevant deeds office.

**Recommendation**

We propose the following wording: *“the ownership of the property ... vests **in the relevant organ of state on the date on which transfer of ownership of the property is registered by the relevant deeds office in terms of the Deeds Registries Act (1937).**”*

**Section 9(1)(c)**

Temporary use needs to be defined.

**Recommendation**

We suggest that the requirements and process for temporary use be detailed in the Regulations to the Bill.

**Section 9(2)(a)**

The expropriating authority will take possession of the property before a dispute regarding compensation is finalised. We submit that this infringes on the property owners’ constitutional rights.

**Recommendation**

We submit that possession should only be granted on transfer of ownership.

**Section 9(3)(a)**

The requirement to take “all reasonable steps to maintain” is wide and can be onerous as what would constitute “all reasonable steps...” as these would differ from party to party. In the case of properties in the possession of banks (i.e. where the bank was forced to buy a property at a sale in execution to maximise its monetary recovery via a subsequent sale (protects the bank’s and client’s interest)), the expropriated owner will be the bank itself. This is especially onerous for banks as expropriated holders as it would be unreasonable for them to maintain these properties which are often unoccupied / illegally occupied and vulnerable to possible vandalization despite their taking reasonable steps to try guard these properties.

**Recommendation**

We recommend that in relation to expropriated holders, the requirement should be limited to the steps that they currently take in cases where a property is abandoned, repossessed or for whatever other reason the property may fall into the possession of the expropriated holder. In essence the requirement should be that the steps taken must not be less than that which is ordinarily taken to safeguard the property.

### **Section 9(3)(b)**

The balance between rights and obligations is not considered here, as this section should not apply if the expropriation is for nil value. We submit that this would not be an issue if possession is only granted simultaneously with transfer of ownership in the deed's office.

#### **Recommendation**

This clause should read as follows: *"If the expropriated owner or expropriated holder willfully or negligently fails to maintain the property and as a result thereof the property depreciates in value, and **except if the compensation amount is nil**, the expropriating authority may recover the amount of depreciation from the expropriated owner or the expropriated holder, concerned."*

### **Section 10(6)**

This provision may place a burden on owners to know exactly who is exercising what rights on their farms (some farms are very large) and knowing which of these rights qualify for compensation upon expropriation. It is important that landowners know what kind of rights are included in the definition of *"unregistered rights"*. If they omit to inform an expropriating authority of a right which they thought is excluded but later appears to be included, the financial consequences for them could be harsh.

Based on the definition, *"unregistered right"* means a right in property, including a right to occupy and use land, which is recognized and protected by law, but is neither registered nor required to be registered". It is assumed, for example, that any rights which land invaders and *"unlawful occupiers"* as defined in the Prevention of Unlawful Occupation Act (1998) may have to remain on the land until they are evicted by order of a court, are not included? This section should therefore be expanded upon to provide certainty to landowners.

#### **Recommendation**

Consideration could be given to replacing the words "including a right to occupy and use land" in the definition of "unregistered right" by the words *"including a registrable real right and a non-registrable form of land tenure"*.

### **Section 11**

Unlike holders of registered rights, the holders of an unregistered right are "entitled to compensation". The rationale for the different treatment of holders of registered rights versus holders of unregistered rights is discriminatory and should be amended accordingly .

#### **Recommendation**

In terms of equality as enshrined in our Constitution as previously referenced, all holders of rights should be treated the same. We therefore recommend that this sentence should either be deleted or worded to reflect fairness and equality for all rights holders be inserted into this sentence.

## **CHAPTER 5: COMPENSATION FOR EXPROPRIATION**

### **Section 12(1)**

The Bill aims to align this section to section 25(3) of the Constitution, which determines the quantum of 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 (1990) and Regulations related to this Act (Regulations 23 & 24 of 2012) compel financial institutions to value property as an asset class at market value. In turn, the Banks Act and its Regulations are aligned to global international regulatory frameworks and prudential frameworks (Basel), which South Africa as a member of the G20 is obliged to adopt.

Should the compensation paid by the expropriating authority be less than market value, in some cases outstanding loan balances would exceed the compensation amount paid and financial institutions and owners would therefore suffer a loss. The inadequate management of credit risk can lead to systemic consequences for the economy and the financial system as evidenced by the 2007 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.

Should lenders incur losses due to expropriation compensation being below market value, this would in turn result in:

- Lenders adopting a more conservative approach to the extent of loans they would be prepared to provide as compared to property values; and/or
- Lenders increasing borrowing interest rates to compensate for the additional risk (and potential losses) in the event of expropriation;
- If losses are severe enough, private sector lenders withdrawing from providing loans where property is being offered for security, thus sterilizing the market.

In turn, this would promote food insecurity, job losses, financial exclusion and consequently result in adverse pricing for first time property owners and be especially contrary to progress being made in relation to land reform. In stakeholder engagements with the Department of Rural Development and Land Reform (DRDLR), DRDLR recognised the need for the state to avoid such a situation. 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 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.*

*The Bill should provide for the Cabinet approved policy framework."*

### **Recommendation**

A clause should be added to this section as approved by Cabinet that would allow the state to guarantee the difference between 'just and equitable' compensation and "market value" for private sector lenders, which payment is restricted to the shortfall between the level of outstanding monies and the quantum of "just and equitable" compensation.

### **Section 12(1) continued**

This clause provides for the factors to be considered when determining compensation. We highlight that s12(1)(d) refers to "the market value of the property". The term "market value" is not defined in this Bill.

**Recommendation**

We recommend that “market value” as defined in the Property Valuation Act (2014) be used and that this section of the Bill should specifically detail that the Office of the Valuer General is responsible for determining the market value of property intended for land reform as envisaged by s12(1)(a) of the Property Valuation Act. In keeping with this objective, stakeholders should be able to challenge the valuation especially if the land parcel is mortgaged.

**Section 12(3)**

The clause provides for expropriation at nil compensation, which may be regarded as “just and equitable” in certain cases.

The wording “... including but not limited to...” is problematic. Whilst several specific categories of land that can be expropriated at nil compensation is listed, it is clear from the wording of clause 12(3) that any land expropriated in the public interest can potentially be targeted for nil compensation. This includes, for example, land which is the subject of a restitution claim. The scope for expropriation at nil compensation is therefore broad and the implication is that this would have a devastating impact on property rights and land being viewed as an attractive asset class, and consequently local and foreign investment into land. We are of the view that it would be appropriate to have a definitive list of instances which can only be extended on good cause shown and if such an extension is for a “public purpose” or in the “public interest” and which is aligned with the objectives of the Bill and Section 25 of the Constitution.

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 retired 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 could range from R nil (e.g. in instances where outstanding municipal rates and taxes/utility arrears are greater than the market value of the property) to above market value. For the State to highlight five categories but not necessarily confine expropriation for nil compensation to be paid for 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 aligned to Section 25(3) of the Constitution, with the detailed methodology contained within Regulations to this Bill as well as Regulations to the Property Valuation Act (2014).

**Recommendations**

As a principle we are opposed to the insertion of this section as this represents a material dilution of property rights which we are opposed to and we recommend that this section be deleted.

Further, the current list is not limited to the circumstances listed and affords the court a discretion to, on a case-by-case basis, consider any other circumstance it deems relevant. This creates uncertainty concerning circumstances under which a court will make a determination that an amount of nil compensation is payable.

We accordingly propose that the wording “including but not limited to” be deleted and for the list of circumstances be a closed list to ensure policy certainty.

We further propose an insertion referencing the need for a methodology for the calculation of “just and equitable” compensation through Regulations to this Bill and the Regulations to the Property valuation Act (2014).

We expand further on the following issues created by the insertion of this clause:

### **Section 12(3)(a)**

This clause makes provision for nil compensation to be paid in instances where land parcels are “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”. Placing such a broad restriction on land parcels reflects a dilution of property rights, as one of the fundamental rights of property ownership and a free-market economy is one in which property owners have the autonomy to decide how best to use one’s own property. This is particularly important for the agricultural sector where the type of farming necessitates that land lies fallow for extended periods of time. It also discriminates against the lawful investment in land as an asset class to benefit from the appreciation of its market value, as opposed to other classes of assets where such investment is not penalized or outlawed.

### **Recommendation**

This clause should be removed from the Bill, or at the very least provide clear parameters for the circumstances where unused land would be included, e.g., restrict the failure to use/develop the land only to the circumstances referenced in sub-paragraphs (b) to (e).

### **Section 12(3)(b)**

This clause makes provision for the land of a state-owned corporation or entity to be expropriated at nil compensation. However, clause 2(2) *Application of Act*, severely limits the potential for state-owned land to be expropriated at nil compensation unless this is consented to by “the executive authority responsible for that corporation or entity”. State-owned land, including that of land parcels 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 highly unlikely that “executive authorities” will consent to their land being expropriated at nil compensation if they would be able to sell this in the market at market value.

### **Recommendation**

The Minister should be able to decide without the consent of the executive authority to expropriate state-owned land. The executive authority should however be able to review the decision based on municipal Spatial Development Plans which are required in terms of the Spatial Planning and Land Use Management Act (2015).

### **Section 12(3)(c)**

There is no definition for abandoned land other than to reference “failure to exercise control over it”. This Bill does not consider the reasons why land could be abandoned, or the owner is unable to exercise control over it. There are instances where owners cannot access their land or have lost control of their property due to circumstances outside of their control e.g., land occupied by informal dwellers/hijacked buildings, land invasions etc.

### **Recommendation**

Reference to “failing to exercise control” should be removed and clear parameters should be included for the circumstances under which land is considered as having been abandoned by the owner.

### **Section 12(3)(d)**

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.

Further, the clause does not differentiate between State investment into a property for “public interest” as opposed the sole benefit of the property owner e.g., the provision of a dam to provide food and water security to a district.

Moreover, the clause does not provide clarity in respect of property owners who acquired a property at market value and where previous owners had benefitted from State investment into the property.

**Recommendation**

This clause should detail what constitutes State investment into a property and circumstances where this would be applied to remove any ambiguity.

**Section 12(3)(e)**

The context and application of this section is not clear. Municipal by-laws exist that deal with the management and rectification of property that pose health and environmental risks and which allows for remediation to be taken place in such instances.

Although municipal planning and building regulations are a function and responsibility of local government and they have by-laws and regulations to enforce compliance i.e., in instances where a property may pose environmental and health risks and they might decide to afford the property owner an opportunity to remedy the situation before seeking to expropriate the property. If national/provincial government are of a different opinion and they elect rather to expropriate the property, subject to Section 151(4), a municipal by-law or its land use management is deemed in terms of this section to be invalid. The Bill in such an instance therefore seeks to render municipal by-laws and their land use management invalid. This conflicts with the ruling in the Constitutional Court case (CTT 117/13), which deemed municipalities to be solely responsible for municipal by-laws and land use management.

**Recommendations**

We recommend that this section be reworded to align with the ruling of the Constitutional Court case.

We further recommend that a clear methodology be included within municipal by-laws that informs municipal assessments in this regard.

**Section 12 (4)**

While section 12(4) of the Bill has provided for the determination of compensation in terms of Section 23 of the Land Reform (Labour Tenants) Act, 1996, we note that no similar provision has been included for when it may be just and equitable for nil compensation to be paid in terms of Section 42E of the Restitution of Land Rights Act, 22 of 1994. Section 42E(2) of the Restitution of Land Rights Act states that *“The Expropriation Act, 1975 (Act No. 63 of 1975), shall, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation”*. Section 42E(3) further states that *“Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the Court in accordance with section 25 (3) of the Constitution”*.

**Recommendation**

To ensure alignment with existing legislation, we are of the view that a section 12(5) should be added to the Bill to provide for “just and equitable” compensation in the event of expropriation under the provisions of Section 42E of the Restitution of Land Rights Act (1994). This provision should mirror that provided in section 12(4) for compensation payable under the provisions of section 23 of the Land Reform (Labour Tenants) Act (1996).”

### **Section 14(1)**

Holder of rights needs to include registered rights too. This section provides for an owner or a holder of an unregistered right to, inter alia, claim compensation. It does not reference registered rights holders. To exclude these types of relationships from the objective of Section 14, would result in banks ultimately suffering material losses on these transactions, especially where a lesser compensation amount is claimed by the owner. This would in turn result in banks limiting their credit lending due to the significant risk involved; and where credit is provided, it would be at an increased interest rate due to the elevated risk involved (see also comments in respect of Section 12(1) above).

#### ***Recommendations***

We recommend that these relationships be specifically accommodated for in section 14, resulting in registered rights holders also being entitled to claim compensation, because its security is being expropriated. Moreover, as registered rights represent a real right, we submit that the Expropriating Authority is compelled to also expropriate the mortgage bond/cessionary agreement.

Alternatively, we recommend that the mortgagee/cessionary be entitled to produce a certificate of balance on the outstanding debt amount, including any related costs, and that, at minimum, compensation be paid to the mortgagee/cessionary on such amount. This clause should read as follows: *“An owner or a holder of registered and unregistered right who receives a notice of expropriation in terms of section 8(1) must, subject to section 25, must 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...”*

### **Section 14(2)(b)**

Where the property has been mortgaged, the title deed would be held as its security by the mortgagee. It is untenable for a mortgagee to be required to release the title deed prior to receiving any payment or the process as stipulated in Section 18(1) having been completed, as this will prejudice their security (mortgage bonds). Title deeds form part of the security documents retained by financial institutions during the term of financing.

Further, no responsibility is placed on the Expropriating Authority to return the title deeds to the financial institution as the mortgagee if the property is ultimately not expropriated.

#### ***Recommendations***

The words *“subject to S18(1)”* should be inserted at the beginning of section 14(2)(b).

A clause should be inserted which makes provision for the return of title deeds if expropriation does not proceed.

### **Section 17(3)**

The right to possession must take place simultaneously with payment of compensation or at least on receipt of sufficient undertakings securing payment of compensation.

The Constitutional Court has held that compensation is not a pre-requisite to expropriation. The Constitutional has also held that eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision. In order to protect the rights of all parties, we propose that the right to possession must take place on receipt of sufficient undertakings securing payment of compensation. This will still meet the Constitutional Court’s findings of not unduly burdening the State but also provide a level of protection to the expropriate holder or the holders of registered rights that that compensation will be paid.

#### ***Recommendation***

This clause should be deleted or modified to indicate that if payment has not been agreed to or paid prior to the passing of possession, then the right to possession can only take place on receipt of sufficient undertakings securing payment of compensation.

### **Section 18 (1)**

Our comments in Section 12(1) are relevant and we respectfully request that the Cabinet approved policy framework document termed “A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the Office of the Valuer General dated 18 October 2012” be inserted into this section.

South African banks are legally obliged to use market value as the basis on which real security for loans are measured. As a result, financial institutions calculate loans on the assumption that the land can be sold to repay the entire debt if the lender defaults, hence secured loans seldom exceed the market value of the land. Where compensation paid upon expropriation is less than the market value, there may be a shortfall between the total compensation provided and the amount lent to the landowner. In South African law, the owner as well as the mortgagee have real rights over the land, namely ownership and the registered real right (mortgage/registered cession). Whilst an expropriation dissolves all real rights in the land (subject to each party receiving “just and equitable” compensation for their right), it does not automatically dissolve the contractual right between the lender and the borrower. This means that the borrower will still be liable to pay the financial institution the full extent of the loan, albeit on an unsecured loan basis following the expropriation.

Particularly in the agricultural sector, land is often the farmer’s single greatest capital asset as well as his or her only source of income. If the compensation received for land falls significantly short of the amount owing on the loan (which was calculated according to the market value of the farm), it can result in the landowner finding himself/herself being insolvent, with more debt than assets and no form of income to repay the balance of the loan. The credit extended by the financial institution would not be regarded as reckless, nor was the farmer over-indebted before the expropriation. Yet, as a direct result of the expropriation, the farmer may face insolvency. In this scenario, we strongly believe that compensation below market value would not be “just and equitable, reflecting an equitable balance between the public interest and the interests of those affected’.

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 to the unregistered right holder. The clause is less clear in the context of registered rights owners (mortgagees) 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 such rights under the bond. This effectively is a dilution of the real rights of registered rights holders. The Insolvency Act (1936) protects the holder of a mortgage bond by making such a holder a secured creditor. The Bill should not disregard other entrenched legislation and it follows that the proceeds must be paid directly to the mortgagee and not to the claimant.

Additionally, the clause does not set out what will happen to the settlement of a mortgage if nil compensation is payable. It should also not be a pre-requisite that the bondholder and the owner reach agreement prior to the payment of compensation. The bondholder should automatically be entitled to receipt of its outstanding balance on presentation of a statement of the outstanding account. Should a mortgage not be settled, the bondholder may have to write off the debt shortfall in the event that the compensation amount is less than the outstanding debt. The effect of this approach could have wide-ranging consequences, for example it would lead to an increase in the cost of credit due to increased credit losses, deteriorating credit or payment behaviour of clients due to the threat of expropriation, and impaired credit profiles of individuals whose properties have been expropriated (see also comments in Section 12(1) above).

The expropriation of the property should not be finalised until agreement has been reached with the bondholder/registered cessionary regarding the settlement of the mortgage bond/registered cession. Bondholders/registered cessionaries need to consent to the cancellation of the registered real right and will only do so if the exposure is settled in full. If there is a dispute/compensation is below the level of the debt and the bondholder/registered cessionary refuses to consent to the cancellation of the mortgage bond, does the decision of the expropriating authority to expropriate the property override the mortgage bond/cession registered over the property or will the expropriating authority have to seek a court order to cancel all mortgage bonds/cessions registered over the property?

In the event of a dispute, the bondholder/registered cessionary should not have to bring an application to court to gain access to the funds deposited with the master's office. The expropriation should therefore not be finalised unless agreement has been reached.

### **Recommendations**

If the intention of S18(1) is that compensation must first be offered to the mortgagee/registered cessionary, appropriate amendments would need to be made in the Bill to reflect that in any instance where property is subject to a mortgage bond/registered cession, the expropriating authority must offer compensation, not just for the property but for the mortgage bond/registered cession as well. The total amount offered should be divided between the property owner and the mortgagee/cessionary (premised upon the secured debt being expunged). This should be done in accordance to:

- factors listed in Section 12 (clauses 1 and 2);
- the amount owing in terms of the mortgage bond should be paid to the mortgagee first (as required by the Insolvency Act (1936));
- if there is a dispute concerning compensation, this should be settled by way of the courts.

For the stable functionality of the property mortgage market, it is imperative that there are clear provisions in the Bill indicating that registered rights holders will be compensated in full in relation to the outstanding amount owed and as set out in a statement of outstanding balance, regardless of the amount of compensation to be paid to the owner of the property and without the need to conclude an agreement between the registered rights holder and the expropriated owner.

It is also proposed that if the amount of compensation offered to the owner, who is not a bondholder/registered cessionary or buyer, is lower than the outstanding amount owed to the mortgagee/registered cessionary or buyer, the Expropriating Authority ought to make good the difference. This will ensure that mortgagees/registered cessionaries are not placed in a position whereby they need to factor in the possibility of expropriation when extending credit to customers.

### **Section 18(2)**

What happens to the expropriated owner if the debt is not settled in full?

This section provides that if notification is not provided to the authority within 30 days, then the authority may deposit the monies with the Master. As the mortgagor of the property, the mortgagor is entitled to agree with the mortgagee that compensation may be received from the authority. However, no provision has been made for the mortgagee/registered cessionary, as the financial institution who has extended the lending facility, to object and/or to have any recourse against the process.

### **Recommendation**

We recommend that this process be looked at in its totality and that all the relevant stakeholders be considered, including the impact of expropriation on all such stakeholders. The mortgagee/registered cessionary, as the financial institution extending the lending facility, should be provided with a right of recourse if it is not in agreement with the quantum of compensation being offered.

**Section 18(3)(i)**

The recourse provided here, relates to an instance where the compensation amount is being disputed. However, no recourse has been provided for instances where registered rights holder (the mortgagee/registered cessionary), is not in agreement with the expropriation and where it wishes to dispute such an expropriation. No clear recourse has been provided to such rights holders. Also, the impact of such expropriation, where the mortgagee/registered cessionary is not in agreement with either the expropriation and/or the amount of compensation offered may result in the mortgagee/cessionary restructuring the facility and/or relinquishing the customer. As indicated in our comment above, the latter option will have adverse consequences as it may impact the mortgageor, credit lending and the economy at large.

**Recommendation**

We recommend that appropriate recourse be made available to the registered rights holder, in the event that such a holder is not in agreement with the expropriation action.

**Section 19(1)**

This section references “rates, taxes and other charges that must be paid for ownership to be transferred in the deeds office”, but it does not specify that this amount must be limited to the amounts payable in terms of Section 118 of the Municipal Systems Act of 2000, where Section 118(1) restricts the collection of municipal services to a period of two years and Section 118(3) includes the collection of all amounts without restriction or prescription (rates and taxes), but which in practice is restricted to 30 years in terms of the Income Tax Act (1962) and Amendments thereto.

**Recommendation**

By referencing Section 118(1) and (3) of the Municipal Systems Act (2000) in this section, it will protect all stakeholders in the expropriation process and align the registration of transfer of ownership process for expropriation to that applied in the voluntary transfer of ownership transactions.

**Section 19(3)(b)**

This clause allows the expropriating authority to utilise as much of the compensation amount to settle the outstanding rates and charges as necessary. We enquire what would happen if the compensation amount is less than the compensation amount? Further, the Bill refers to the compensation amount payable to the owner as being inclusive of the amount payable to a bondholder. If the compensation amount is reduced by the outstanding rates and taxes, then the bondholder receives a lesser amount or perhaps even R Nil.

**Recommendation**

The bondholder’s right to compensation should not be impacted by amounts to be paid to the municipality or any other person.

**Section 19(4)**

The expropriated owner continues to be liable to the municipality for outstanding rates and taxes up to the date of possession notwithstanding transfer of ownership.

**Recommendation**

It is suggested that this clause be re-considered to align with the prescripts of Section 118 of the Municipal Systems Act (2000) if it is to be “just and equitable”.

**Section 19(4)(a)**

This clause is in contravention of the Deeds Registries Act (1937) as there is no mention of the need to obtain a clearance certificate. The expropriated owner will therefore be unfairly prejudiced if there is failure on the part of the municipality to accurately calculate this amount.

**Recommendation**

We submit that a clearance certificate should be obtained.

**Section 19(4)(b)**

This contradicts subsection (c) as it states the owner will only be liable up to date of possession, and this section states that the owner will be liable up to registration/transfer.

**Recommendation**

We submit that the use of language be consistent to avoid confusion and misinterpretation.

**Section 19(4)(c)**

Possession is currently used as the date for determining the amount of outstanding rates and utility charges to the municipality.

**Recommendation**

We recommend that the Bill also uses the date of registration to determine the amount of outstanding rates and utility charges to the municipality.

**CHAPTER 6: MEDIATION AND DETERMINATION BY COURT**

**Section 21(1)**

What happens if the “public interest” is *mala fide*? The Bill does not allow for an owner/rights holder to contest the merits of an expropriation. Rather it seeks to confine a contestation to only compensation for nil consideration. Does the court then deal with this within its inherent jurisdiction?

**Recommendation**

Section 21(1) needs to provide guidance in instances where “public interest” is *mala fide*.

**Section 21(8)**

A dispute concerning compensation does not affect the operation of clause 9.

**Recommendation**

Section 21(1) needs to be amended accordingly.

**CHAPTER 7: URGENT EXPROPRIATION**

**Section 22(1)**

This section reflects the deprivation of a constitutional right. Further, this Section does not provide criteria to determine whether the expropriation on an urgent basis is justified.

**Recommendation**

The criteria for determining what constitutes the need for an urgent expropriation needs to be clearly set out within this section of the Bill.

**CHAPTER 9: WITHDRAWAL OF EXPROPRIATION**

**Section 23**

Regulates the rights of the Expropriating Authority to issue notices of withdrawal of expropriation but the Chapter does not afford the expropriated owner/rights holders any rights or recourse in circumstances where the Expropriation Authority fails to proceed with or does not use the expropriated property for the purpose for which expropriation was earmarked. While recourse to the courts is always an option, this is a costly process and is thus not equally available to all South Africans.

**Recommendation**

This Chapter of the Bill should include provisions to regulate timeframes (not exceeding 12 months), within which the Expropriating Authority should proceed with and/or finalize the use of the expropriated property for the purpose for which expropriation was earmarked. In addition to this timeframe, this Chapter should also include rights afforded to an expropriated owner/rights holder to reclaim ownership of the property where the Expropriation Authority has failed to meet its obligations with regard to the use of the expropriated property for the purpose for which expropriation was earmarked, within the timeframes provided.

**Section 29**

Who decides whether a breach is material or immaterial?

The onus should be on the party that did not follow the correct procedure to seek condonation. If the owner thinks something is a material aspect and the authority disagrees, then the matter should go to court and the party who did not comply must initiate the court process.

**Recommendation**

If the parties are unable to reach agreement, the matter should be determined by a court, with the onus being on the non-compliant party to initiate the court process.

**Conclusion**

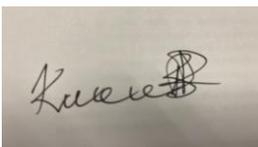
We reiterate that the envisaged expropriation interventions should not dilute property rights or be applied injudiciously, failing which local and international investor confidence in property as an attractive asset class will be undermined and which in turn could destabilise the financial system, detract from benefiting intended beneficiaries and ultimately threaten the greater economy of the country.

The Expropriation Bill is an extremely important key piece of legislation where a uniform approach to expropriation, prudence and objectivity in its implementation is essential. The Bill therefore needs to provide crisp and clear policy guidance to some 255 state entities who are empowered through legislation to expropriate property, together with property owners and rights holders alike. As we have demonstrated in our comments, the Bill is ambiguous and silent in a number of key areas and in parts it conflicts with extant legislation. We therefore urge the Department to comprehensively review the Bill to remove any policy uncertainty, as the need for aggrieved expropriated owners/rights holders to resort to the courts for guidance will exacerbate what is already a sensitive and emotional matter.

Additionally, we are of the view that it is also important for the Bill to also take into account envisaged legislative land reform processes, including among others, the Land Court Bill, the Preservation and Development of Agricultural Land Bill and the Land Donations Policy.

The Banking Association respectively requests that it be permitted to make an oral submission on the Bill at the envisaged Parliamentary hearings.

Kind regards



**Bongzi Kunene**  
**MANAGING DIRECTOR**