



## Explanatory memorandum on the draft Expropriation Bill, 2013

### 1. Background

Prior to the present constitutional dispensation, the system of government in South Africa was founded on the principle of parliamentary supremacy. It was common practice for the executive to be granted unbridled legislative powers to govern. The Expropriation Act, 1975 is an example of such legislation. An evaluation of the Expropriation Act reveals various shortcomings that do not accord with the principle of constitutional supremacy as embodied in section 2 of the Constitution, 1996 -

*“The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.”*

The review of the Expropriation Act therefore became necessary to ensure consistency with the spirit and provisions of the Constitution, in particular -

- (a) the equality clause (section 9);
- (b) the property clause (section 25);
- (c) just administrative action (section 33); as well as
- (d) extension of the purpose for expropriation to include *public interest*.

Given the array of authorities within the national, provincial and municipal spheres of government who have the power to expropriate property, there is a need to ensure uniformity in the way organs of state undertake expropriation.

### 2. Objectives of the draft Expropriation Bill

The Draft Bill seeks to align the Expropriation Act with the Constitution and to provide a common framework to guide the processes and procedures for expropriation of property by organs of state, by providing for -

- (a) the express inclusion of public interest as one of the purposes for which property may be expropriated. Expropriation in the public interest, for instance, provides government 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;
- (b) all affected parties to be notified of a contemplated expropriation, to afford such parties an opportunity to raise objections and make representations to the expropriating authority, before a decision to expropriate is taken. The expropriating authority must give consideration to all submissions and attempt to reach agreement with persons whose rights and interests may be adversely affected before deciding to expropriate;
- (c) urgent temporary expropriation to facilitate disaster management or comply with a court order authorising such expropriation;

- (d) the expansion of the scope of protected rights to provide for compensation for both registered and unregistered rights. In terms of the Expropriation Act, only the holders of registered rights and certain specified unregistered rights are eligible for compensation upon expropriation. Section 25 of the Constitution, however, does not distinguish between registered and unregistered rights. It could thus be perceived as unconstitutional to terminate unregistered rights without compensation;
- (e) the payment of just and equitable compensation to persons affected by expropriations, with such compensation reflecting an equitable balance between the public interest and the interests of those affected. Whilst the market value of expropriated property is a predominant factor in the Expropriation Act, the Constitution does not give undue weight to any single factor over others, but requires consideration of all relevant factors, including -
- the current use of the property;
  - the history of the acquisition and use of the property;
  - the market value of the property;
  - the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - the purpose of the expropriation;
- (f) expropriating authorities and affected persons to exchange technical reports and other relevant information, in endeavouring to reach agreement on compensation. In the absence of the parties to an expropriation reaching agreement on compensation, any such party may approach a court to decide or approve the amount of compensation or the time or manner of payment of such compensation;
- (g) all disputes emanating from expropriations to be dealt with by the Court having competent jurisdiction.
- (h) the establishment and maintenance of a register of all expropriations by the Department of Public Works. All expropriating authorities will therefore be obliged to provide the Department with copies of all notices of contemplated expropriation, expropriation and withdrawal of expropriation, as well as decisions not to proceed with contemplated expropriations;
- (i) the withdrawal of an expropriation of property if the expropriating authority is of the opinion that it is in the public interest or otherwise expedient to do so;
- (j) all existing laws dealing with expropriation to continue to apply, to the extent that they are consistent with the provisions of the Draft Bill and the Constitution. The Draft Bill proposes that no property may be expropriated unless the procedures prescribed in the Draft Bill have been followed; and
- (k) the repeal of the Expropriation Act, 1975.

**Department of Public Works**

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