

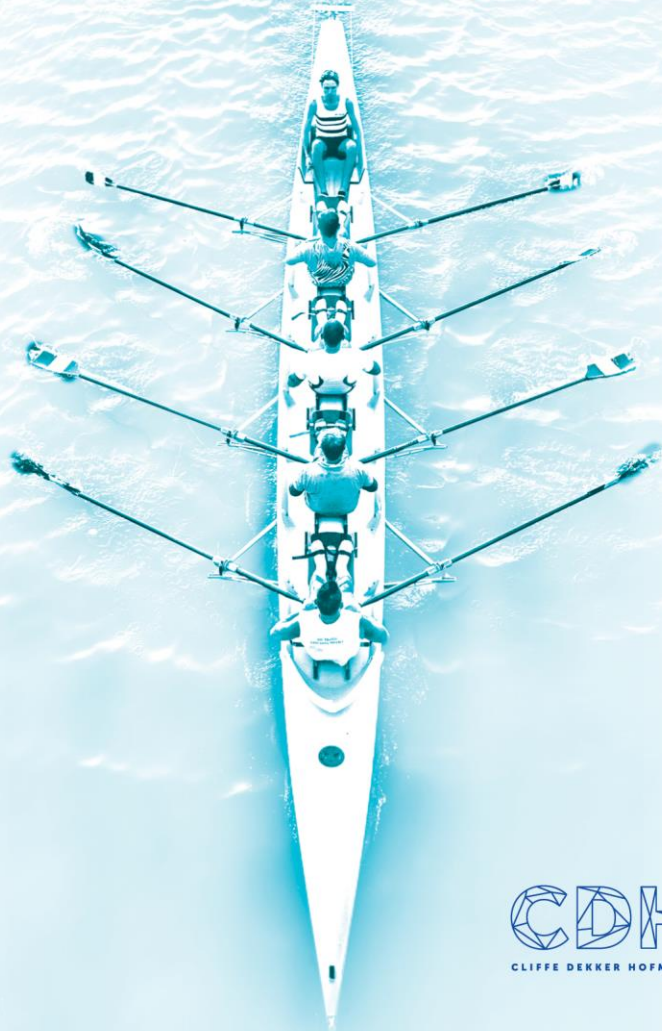
# FOCUS

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## EXPROPRIATION BILL

Bill 23 of 2020



# LANDOWNERS AND DEVELOPERS

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# INTRODUCTION

The Bill is not as invasive of landowner rights as everyone thought.

The fear that land would be expropriated without compensation and without any protection for landowners, leaving landowners without any remedies is unfounded if regard is had to the Bill.

The starting point is Section 25 of the Constitution which guarantee's the right to property and which will challenge any legislation that is contrary to the principles and law set out in the Constitution.

- No one may be deprived of property and certainly not arbitrarily;
- Property may be expropriated, but for a public purpose and in the public interest;
- Property may be expropriated, but subject to compensation which is to be agreed or determined by the courts; and
- The amount of compensation must be just and equitable taking into account the public interest and the interests of those affected by the expropriation.

The Bill is to a large extent in line with the constitution and the principles set out therein, save for the fact that the Constitution does not allow for expropriation without compensation. The argument will be that the section implies that at times compensation for nil value would be just and equitable.

The Constitution (section 36) does however also provide for the limitation of these rights and this would be a secondary argument.

EXPROPRIATION BILL

# WHAT IS PUBLIC INTEREST?

The Constitution and the Bill give us an idea:



The nation's commitment to land reform.



Reforms to bring about equitable access to South Africa's natural resources



Redress the results of past racial discriminatory laws or practices.

EXPROPRIATION BILL

# DEFINITIONS



“Date of Expropriation” - the date of the notice of expropriation



“Expropriated Holder” - unregistered right in property



“Holder of a right” - the holder of an unregistered right in property



“Owner” - where ownership of the property or right in question is registered



“Registered” - registered with a government office



“Unregistered” - a right in property recognized and protected by law

EXPROPRIATION BILL

# GENERAL PREMISE

## Section 2(3)

*“a power to expropriate property may not be exercised unless the exectuting authority has without success attempted to reach an agreement with the owner or holder of a right in property for the acquisition thereof on reasonable terms.”*

Accordingly the deprivation of property is not arbitrary, however, there are provisions in the Bill that disregard established property law and established property law principles.

EXPROPRIATION BILL

# LET'S CUT TO THE CHASE

## Section 12(3)

**When is nil compensation just and equitable? The Bill provides for limited grounds.**

It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, **including but not limited to:**

- where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
- where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
- notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
- where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
- when the nature or condition of the property poses a health, safety or physical risk to persons or other property.



There is no limit to the grounds



Investment properties for on-sale at risk

EXPROPRIATION BILL



# THE SCARY SECTIONS!!

## Section 3(5)(a) read with Section 9(1)(a)

- ✓ the ownership of the property vests in the relevant organ of state on the date of expropriation (see Section 8(1)).
- ✓ the effect of the expropriation is that the ownership of the property described in the notice of expropriation vests in the expropriating authority or in the person on whose behalf the property was expropriated, as the case may be, on the date of expropriation.

## Section 3(5)(c) read with Section 9(5)

- ✓ the relevant organ of state is liable for the fees, duties and other charges which would have been payable by that organ of state in terms of any law if it had purchased that property.
- ✓ the expropriated owner or expropriated holder who is in possession of the property concerned, remains entitled to the use of and the income from the expropriated property, as was enjoyed immediately prior to the date of expropriation, from the date of expropriation to the date referred to in subsection (2)(b), but remains, during that period, responsible for the payment of municipal property rates, taxes and other charges, if applicable, and normal operating costs in respect of the expropriated property as if the property had not been expropriated (See section 8(3)(f)).

EXPROPRIATION BILL



# THE SCARY SECTIONS!!

## Section 8(3)(h)

- ✓ If the amount of compensation is disputed, a statement that the expropriated owner may institute proceedings in a competent court to dispute the amount of compensation, or request that the expropriating authority commence such court proceedings, within 180 days of the date of expropriation, which time period may be extended by the court on good cause shown.
- ✓ There is accordingly every possibility that there will be disputes in regard to compensation, whilst the expropriating authority is the owner and potentially in possession or entitled to possession.
- ✓ That said, at least the values determined are not to be arbitrary and full details and supporting documents are required (see section 7(6)).

## Section 9(1)(d)

- Property remains subject to registered rights, BUT.... **Claudette will address this aspect in detail**

EXPROPRIATION BILL

# THE SCARY SECTIONS!!

## Section 11(5)

- ✓ If the expropriated owner or expropriated holder knew of the existence of an unregistered right contemplated in subsection (2) and failed to inform the expropriating authority of the existence thereof, the expropriated owner or expropriated holder, as the case may be, is liable to the expropriating authority for any loss incurred in the event of the expropriating authority having to pay compensation for the expropriation of the unregistered right after the date of payment of compensation to the expropriated owner or expropriated holder, as the case may be.
- Accordingly exposure of owner in the event of non-disclosure to expropriating authority, so make a full disclosure.

## Section 14(2)(a)

If the property expropriated is land:

- ✓ the expropriated owner must deliver or cause to be delivered to the expropriating authority, subject to section 25, within 30 days of the expropriating authority requesting the title deed to such land or, if it is not in his or her possession or under his or her control, written particulars of the name and address of the person in whose possession or under whose control the title deed is.

Accordingly the expropriating authority is entitled to request the title deed before the expropriation value is determined by agreement or a court of law.

EXPROPRIATION BILL

# THE SCARY SECTIONS!!

## Section 21

- ✓ Court determination if no consensus or mediation fails.
- ✓ Ultimately the court will decide the amount. But what if the public purpose or public interest is mala fide and thus the land should not be expropriated? Does the court rely on its inherent jurisdiction to address this aspect of the matter?

## Section 21(8)

- ✓ A dispute on the amount of compensation does not affect the operation of clause 9.
- ✓ Vesting vs registration.
- ✓ What of the Alienation of land Act and registration of properties.

## Section 19(4)

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

## Section 22(1)

- ✓ Potentially a constitutional challenge

EXPROPRIATION BILL

# BANKS AND OTHER FINANCIAL INSTITUTIONS

The affects and concerns

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## OVERVIEW

HOW ARE FINANCIAL INSTITUTIONS  
ADDRESSED IN THE BILL?



CURRENT PROVISIONS AFFECTING  
FINANCIAL INSTITUTIONS



PROVISIONS WHICH ARE CAUSE FOR  
CONCERN



WHAT IS LACKING IN THE BILL FOR  
FINANCIAL INSTITUTIONS

# HOW ARE FINANCIAL INSTITUTIONS ADDRESSED IN THE BILL?



## Financial Institutions are not specifically defined in the Bill

- where does this leave financial institutions as bond holders over the property to be expropriated?



## Can a financial institution be regarded as an unregistered right holder?

- Expropriated holder: “*means a holder of an unregistered right in property...*”
- Holder of a right: “*means the holder of an unregistered right in property*”
- Therefore a financial institution is not a “holder of a right” as defined in the Bill

Unregistered rights holders are offered vast protection in accordance with the Bill

- tenancy
- fideicommissum
- usufructs

# HOW ARE FINANCIAL INSTITUTIONS ADDRESSED IN THE BILL?



## “Owner”

- Being defined as “*where the ownership of the property or right in question is registered, means the person in whose name such property or right is registered...*”
- Can a financial institution be regarded as an owner as defined?



## “Registered”

- Being defined as “*registered or recorded with a government office in which rights in respect of land, minerals or any other property are registered or recorded for public record in terms of law*”
- This is not taken any further to include any specific registered rights, like a mortgage, to the property to be expropriated

## Unregistered rights

holders are offered vast protection in accordance with the Bill

- tenancy
- fideicommissum
- usufructs



# CURRENT PROVISIONS AFFECTING FINANCIAL INSTITUTIONS

Investigation  
& valuation

Notice of  
expropriation

Vesting and  
possession

- **Section (5)1:** “When an executing authority is considering the expropriation, he or she must amongst others, ascertain –
  - (a) The suitability of the property ....; and
  - (b) The existence of registered and unregistered rights and the impact of such rights on the intended use of the property” [own underling]
- **Section 8(1):** in the event the expropriation authority decides to expropriate a property, a copy of such notice is to be delivered to “a holder of a mortgage bond registered in the Deeds Office in respect of the property concerned”
- **Section 9(1)(d):** “the property remains subject to all registered rights in favour of third parties, with the exception of a mortgage, with which the property was burdened prior to expropriation, unless or until such registered rights are expropriated from the holder thereof in terms of the Act” [own underling]

## OWNERSHIP

- Vests in expropriating authority / person on whose behalf property was expropriated
- On date of expropriation
- As recorded on notice of expropriation
- Prior to transfer

➔ Alienation of land Act?  
Deeds Registries Act?

# CURRENT PROVISIONS AFFECTING FINANCIAL INSTITUTIONS (continued)

- **Section 14 (2):** if the property expropriated is land:
  - (a) the owner must deliver the title deed within 30 days of request from the expropriation authority or written particulars of the person in whose particulars the title deed is in possession; and
  - (b) the person referred to in (a) must deliver the title deed to the expropriating authority within 20 days of request
- **Section 18 (1):** if the property is immediately encumbered by a registered mortgage or subject to a deed of sale *“the expropriating authority may not pay out any ... compensation money except to such person and on such terms as may be agreed upon between the expropriated owner ... and the mortgagee, after the claimant has notified the expropriating authority of the agreement”*

Title deed

Mortgage/  
Deed of sale

## OWNERSHIP

- Vests in expropriating authority / person on whose behalf property was expropriated
- On date of expropriation
- As recorded on notice of expropriation
- Prior to transfer

# CURRENT PROVISIONS AFFECTING FINANCIAL INSTITUTIONS (continued)

Obligation on  
bond holder

- **Section 18 (2):** provides an obligation on the owner and on the bond holder to provide the underlying agreement to the expropriating authority within 30 days after possession has been taken of the property, *“failing which the expropriating authority may deposit the compensation money with the Master”*

Dispute

- **Section 18 (3):** should there be a dispute regarding the bond agreement, the executing authority may make payment of the compensation amount to the Master and the parties may apply to Court *“for an order directing the Master to pay out the compensation money”*

## OWNERSHIP

- Vests in expropriating authority / person on whose behalf property was expropriated
- On date of expropriation
- As recorded on notice of expropriation
- Prior to transfer



PROCESS OF DUE DILLIGENCE BY AUTHORITY  
(OR LACK THEREOF)

- Lack of clear a definition of financial institutions as right holders
- Lack of obligation on expropriating authority to communicate with financial institutions
- Lack of protection of bond holders over the property to be expropriated



HOW IS AN EXISTING BOND TAKEN INTO  
ACCOUNT IN VALUING THE PROPERTY?

- No express obligation on the expropriating authority to consider existing bond over the property for purposes of a valuation
- Lack of consultation with financial institutions in respect thereof



WHAT HAPPENS TO THE BOND WHEN  
PROPERTY HAS BEEN EXPROPRIATED?

- Currently ownership vests on date of expropriation (prior to transfer)
- No protection of a bond holder other than provided for in section 18 of the bill (which is sparse)
- Section 14 provides for the hand over of the title deed prior to transfer and registration
- Should property be transferred without debt having been extinguished, bond holder has no security for the debt

# WHAT IS LACKING IN THE BILL FOR FINANCIAL INSTITUTIONS

What would we like  
to see in the bill?



A clear definition of a financial institution as a right holder;



A clear obligation on the expropriating authority to purposely engage with financial institutions as bond holders prior to discussions of agreed compensation for the property to be expropriated; and



Protection for bond holders: a defined process on how the property is to be registered after expropriation and how and when a bond is to be cancelled, including:

- conditions for the bond cancellation
- should the compensation not cover the debt, how this debt is to be dealt with

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