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To: **Parliamentary Portfolio Committee on Public Works and Infrastructure**
For attention: Ms Nola Matinise (Committee Secretary)
Per e-mail: expropriationbill@parliament.gov.za; mnmatinise@parliament.gov.za

Re: **Expropriation Bill [B23 - 2020] – FOR SA Submission**

From: **Adv Nadene L. Badenhorst**
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Date: 10 February 2021 (**Extended deadline for comment: 28 February 2021**)

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INTRODUCTION:

Dear Ms Matinise,

1. We refer to the invitation by the **Portfolio Committee on Public Works and Infrastructure** (“the Committee”) for comments on the [Expropriation Bill \[B23 - 2020\]](#) (“the Bill”).
2. We make the following submissions to the Committee with regard to the Bill. We would further appreciate an **opportunity to make verbal submissions** at the appropriate time.

EXECUTIVE SUMMARY OF SUBMISSIONS:

3. We hereby submit our concerns relating to Clauses 1, 12 and 22 of the Bill.

4. In a nutshell, our submissions are as follows:
 - 4.1. The definition of “*property*”¹ is not limited to land. Neither do exceptions for certain types of land, specifically land used for religious purposes, exist. Without this limitation, property will mean anything from land, to the clothes on a person’s back, or even their intellectual property.

 - 4.2. The Constitution protects the fundamental right to religious freedom,² which includes the right to practise one’s faith in a community – a right one may not be denied.³ Furthermore, the State is bound by these rights⁴ and is constitutionally mandated to respect, protect, promote and fulfil these rights.⁵

 - 4.3. While we applaud the criteria included for consideration before expropriation without compensation (“EWC”) can occur,⁶ we object to the list not being a closed list and/or that no exceptions to property that cannot be expropriated, are provided for.

 - 4.4. Although well-intended, the broad definition of “*property*”, the open list for EWC and the absence of any exceptions will have unintended and potentially disastrous consequences, including the potential expropriation of church land / land used for religious purposes.

5. In the circumstances, we propose that:
 - 5.1. The definition of “*property*” in Clause 1 be limited to land only;

 - 5.2. The definition of “*public purpose*” in Clause 1 should include that the property should be expropriated for public use, i.e. to meet the public need for land reform and redistribution;

 - 5.3. A Clause relating to “*public purpose*” be inserted that includes a list factors that should be met in order for expropriation to be for a “*public purpose*”;

¹ Clause 1 of the Bill.

² Section 15 of the Constitution of the Republic of South Africa, 1996.

³ Section 31(1) The Constitution of the Republic of South Africa, 1996.

⁴ Section 8(1) The Constitution of the Republic of South Africa, 1996.

⁵ Section 7(2) The Constitution of the Republic of South Africa, 1996.

⁶ Clause 12(3) of the Bill.

- 5.4. That Clause 12(3) be removed, alternatively, that the criteria for EWC in Clause 12(3) be a closed list;
 - 5.5. That Clause 12(4) be removed, alternatively, that “*all the relevant circumstances*” be defined and/or linked to the list in Clause 12(3);
 - 5.6. That a clause containing land which is exempt from EWC, be inserted. Here we specifically propose: “***Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of sections 12(3) and 12(4)***”;
 - 5.7. Clause 22(2)(a) be removed, alternatively, that express provision be made for judicial oversight in the exercise of Clause 22(2)(a).
6. We also urge the Committee to approach the Constitutional Court for a declaratory order regarding whether the “*nil compensation*” (i.e. EWC) in terms of the Bill’s proposed Clauses 12(3) and 12(4) would qualify as “*just and equitable*”⁷ payment. This will achieve clarity regarding whether EWC is constitutional⁸ under section 25(8)⁹ of the Constitution as it currently stands.
 7. We request an opportunity to make verbal submissions in this regard during any (further) consultations that may be held in relation to the Bill.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

8. *Freedom of Religion SA NPC (2014/099286/08)* (“FOR SA”) is a legal advocacy organisation working to protect and promote the constitutional right to religious freedom in South Africa.
9. FOR SA currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches, and faith groups.
10. As such, and because the constitutional rights to freedom of conscience, religion, thought, belief and opinion (section 15 of the Constitution) and to practise one’s faith in a community (section 31 of the Constitution) are directly affected by any law that could potentially affect the ability of the

⁷ Section 25(3) of the Constitution.

⁸ It has been the traditional view of legal scholars that the Constitution does not allow for EWC – see *Currie and de Waal’s The Bill of Rights Handbook* 5ed (2005) page 536.

⁹ Section 25(8) states that any departure from the provisions of section 25 must be in accordance with section 36.

millions of believers in South Africa (across different denominations, churches and faith groups) to meet together in buildings located on land in the exercise of their constitutional rights, our constituency has a direct interest in this matter.

11. The State has a duty to respect and protect the religious convictions and beliefs of those believers who choose to meet together to practise their faith (sections 7(2) and 8(1) of the Constitution).

PROCEDURAL CONCERNS:

12. A distinct, but parallel process by the [Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of Constitution](#) regarding the amending of the Constitution itself to allow for EWC, is still underway. *FOR SA*, therefore, urges the Committee to approach the Constitutional Court for a declaratory order regarding whether the “*nil compensation to be paid*” (i.e. EWC) in terms of the Bill’s proposed Clauses 12(3) and 12(4) would qualify as “*just and equitable*”¹⁰ payment and thus, whether EWC is constitutional¹¹ under section 25(8)¹² of the Constitution as it currently stands.
13. Given that any measures taken by the State in relation to socio-economic rights must pass the constitutional standard of reasonableness,¹³ *FOR SA* is concerned that the first port of call, when Parliament is about to craft and promulgate a new legislative measure, which will have such a wide-reaching effect on the nation and which has so hotly been disputed, should be to ascertain from the Constitutional Court whether EWC is constitutional or not. To do otherwise would be putting the cart in front of the horse and risk falling short of said standard of reasonableness.

¹⁰ Section 25(3) of the Constitution.

¹¹ It has been the traditional view of legal scholars that the Constitution does not allow for EWC – see *Currie and de Waal’s The Bill of Rights Handbook* 5ed (2005) page 536.

¹² Section 25(8) states that any departure from the provisions of section 25 must be in accordance with section 36.

¹³ *Rahube v Rahube and Others* 2019 (2) SA 54 (CC) at para 50: “*It is a well-established principle of this court that when evaluating the measures taken by the state in relation to socio-economic rights, those measures must pass the constitutional standard of reasonableness.*” See also *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at paras 138 and 161; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at paras 67 to 68; and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paras 41 to 44.

THE LEGAL FRAMEWORK:

INTERNATIONAL LAW:

14. In terms of section 39(1)(b) of the Constitution, a court “*must consider international law*” when interpreting the Bill of Rights. It would thus be prudent for Parliament to do so when drafting legislation that affects these rights.

TREATIES AND DECLARATIONS:

15. South Africa has signed the following international and regional treaties and declarations protecting religious freedom:

- 15.1. The International Covenant on Civil and Political Rights (ICCPR);¹⁴
- 15.2. The African Charter on Human and People’s Rights (Banjul Charter);¹⁵
- 15.3. Universal Declaration of Human Rights;¹⁶
- 15.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;¹⁷ and
- 15.5. Durban Declaration and Programme for Action which promotes an inclusive society where all participate on the basis of equality.¹⁸

¹⁴ Article 18 of the ICCPR provides that everyone has the right to religious freedom and that **this includes the freedom to meet in community with others** to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

¹⁵ Article 8 guarantees that freedom of conscience, the profession and **free practice of religion** shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. Article 14 further states that the **right to property shall be guaranteed**. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

¹⁶Article 17 states that everyone **has the right to not be arbitrarily deprived** of his property. Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or **in community with** others and in public or private, **to manifest his religion** or belief in teaching, practice, worship and observance.

¹⁷Article 1 states that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or **in community with others and in public or private, to manifest his religion** or belief in worship, observance, practice and teaching.

¹⁸Article 14 *Urges* States to recognize the particularly severe problems of religious prejudice and intolerance that many people of African descent experience and to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief, which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination; and Article 79 *Calls upon* States to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981, in order to obviate religious discrimination which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination.

THE LEGAL POSITION IN SA:

THE CONSTITUTION:

16. The right to freedom of conscience, religion, thought, belief and opinion (section 15) and rights of religious communities (section 31):

- 16.1. Every week, millions of believers (across different denominations, churches and faith groups) believe that the Scriptures command¹⁹ their meeting together and doing so is an integral part of practising and living out their beliefs.
- 16.2. In this regard, the Constitutional Court has repeatedly held that religious freedom includes not only “*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination”.²⁰ [Own emphasis.]*
- 16.3. Thus, the places where such meetings happen are of central and indeed, critical importance to the living out of believers’ section 15 and section 31 constitutional rights.
- 16.4. Having regard to the same definition (and guarantee), and as a matter of principle, every believer should be free to believe, and practise (within the bounds of the law), what they believe the religious texts to command and to live out their faith in community with others, meeting together to worship, take the holy sacraments, receive teaching, fellowship etc.

17. EWC and the section 36 “limitation analysis”:

- 17.1. The question that falls to be determined, likewise, is whether it would be a reasonable and justifiable limitation, in terms of section 25(8) and section 36 of the Constitution, on the rights of believers to have faith-based institutions’ property expropriated without compensation.

¹⁹ In the Christian faith see example Hebrews 10:25 in the Bible.

²⁰ **Christian Education SA v Minister of Education** 2000 (4) SA 757 (CC)., para 36 citing **S v Lawrence**; **S v Negal**; **S v Solberg** 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).

- 17.2. The [Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change](#) (“the HLP Report”) found that with regard to land reform:
- 17.2.1. “[P]olicy has shifted away from **Constitutional imperatives** such as equitable access to land, **towards state ownership, which echoes apartheid-style notions of custodianship**” [own emphasis];²¹
- 17.2.2. That “land reform policy has drifted from its initial pro-poor focus to one marked by signs of **elite capture. Implementation has also been dysfunctional**” [own emphasis];²² and
- 17.2.3. That “**the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform**” [own emphasis].²³
- 17.3. As is clear from the above extracts from the HLP Report, the lack of funding is not the cause for the slow and failed pace of land reform. Rather, the causes of the bottleneck are a lack of political will, corruption and a reverting back by the State to an Apartheid-style State-stewardship and elite capture.
- 17.4. Given the identified causes, EWC is the wrong remedy for the problem – and a remedy that bears with it the likely (indeed inevitable) consequences of degrading the South African economy (which is in dire straits already) even further in the eyes of international investors - *FOR SA* strongly emphasises that EWC is unlikely to meet the section 36 requirements, because it fails to meet the necessity of a relationship between the remedy and its purpose (section 36(1)(d)).
- 17.5. On this ground alone, we respectfully submit that it is not a reasonable and justifiable limitation, and will not provide a solution to the problem it is seeking to resolve.

²¹ Page 34 of the HLP Report.

²² Page 37 of the HLP Report.

²³ Page 51 of the HLP Report.

- 17.6. The Bill should aim to be a coherent framework law for land reform that roots out the maladministration and corruption that has happened to date. To achieve this, surely the Bill should first and foremost be addressing what has been identified as the actual problems to land reform.

COMMENTS RELATING TO THE SUBSTANCE OF THE BILL:

CLAUSE 1 OF THE BILL:

18. Clause 1 – Definition of “property”:

18.1. “Property” is defined as “*property contemplated in section 25 of the Constitution*”.

18.2. Section 25(4)(b) of the Constitution states that “*property is not limited to land*”. Legal theorists have suggested that it means **property rights** – i.e. the legal relationship to a thing (e.g. ownership, mortgage, lease, mineral rights, liens or servitude).²⁴

19. As a result, all property – from immovable to trademarks – becomes encompassed by the Bill and subject to possible State expropriation.

20. FOR SA is of the view that this definition should be specifically limited in the Expropriation Bill as the Bill clearly intends to deal with, and relate to, immovable property - not intellectual property or shares.

21. Clause 1 – Definition of “public purpose”:

21.1. Currently the Bill defines “*public purpose*” merely as “*includ[ing] any purposes connected with the administration of provisions of any law by an organ of state*”.

21.2. Surely public purpose should also mean that the property should be expropriated for public use, i.e. to meet the public need for land reform and redistribution? FOR SA submits that this should be clearly included in the definition.

²⁴ Currie and de Waal pages 537-8.

21.3. FOR SA also advocates that the definition of “*public purpose*” should include a list factors that should be met to show it is for a “*public purpose*” and that due process has been followed.

22. We submit that, absent clear definitions in respect of the foregoing terms, the Bill is in danger of being open to abuse by a future political dispensation.

CLAUSE 12 OF THE BILL:

23. Clause 12(3) – EWC:

23.1. This clause currently only relates to land and provides that where land is expropriated in the public interest, it:

“may be just and equitable for nil compensation to be paid... having regard to all relevant circumstances, including but not limited to – (a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value; (b) where an organ of state holds lands 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; (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it; (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and (e) when the nature or condition of the property poses a health, safety or physical risk to person or other property” [own emphasis].

23.2. FOR SA strongly objects to the list not being a closed list and/or that no exceptions to property that cannot be expropriated, are provided for.

23.3. Furthermore, given that the question of whether EWC is even permissible (i.e. constitutional) under the current Constitution has not yet been answered, it is highly doubtful that Clause 12(3) will be seen as being reasonable due to the Bill legislating a constitutionally doubtful provision into law without attempting to obtain clarity regarding its constitutionality from the Constitutional Court first. Considering that any measures taken by the State in relation to socio-economic rights must first pass the constitutional

standard of reasonableness as per paragraph 13 above, Clause 12(3) is fundamentally flawed.

- 23.4. Finally, given that EWC will affect not only property rights (section 25), but also religious freedom rights (sections 15 and 31), and that it fails to pass the section 36 analysis set out in paragraph 17 above, it is clearly an unconstitutional limitation of the aforementioned rights.

24. Clause 12(4) – EWC as an order by a court or arbitrator:

- 24.1. In light of paragraph 22, Clause 12(4), which provides that it is competent for a court or arbitrator to determine nil compensation be paid “*having regard to all the relevant circumstances*” (which are undefined and not linked to the list in Clause 12(3)), it is highly unlikely that this Clause will pass constitutional muster.

CLAUSE 22 OF THE BILL:

25. Clause 22(2) – Urgent Expropriation:

- 25.1. Clause 22 allows for an expropriating authority to temporarily use property it urgently requires for up to 18 months (Clause 22(1) read with Clause 22(7)(c)), subject to just and equitable compensation being paid to the owner (Clause 22(4)) - which we know may be nil where land is concerned (Clause 12(3)).
- 25.2. Clause 22(2) set outs the circumstances this can be done it, and states that such urgent expropriation can be done:

“(a) [i]n the case of a disaster²⁵ as defined in the Disaster Management Act, 2002 (Act No. 57 of 2002); or (b) where a court grants an order... due to (i) urgent and exceptional circumstances that justify [urgent expropriation]; (ii) real and imminent danger to human life or substantial injury or damage to property; or (iii) any other ground which in the view of the court justifies [urgent expropriation]”.

²⁵ A disaster is defined in the Disaster Management Act as “a progressive or sudden, widespread or localised, natural or human caused occurrence which (a) causes or threatens to cause (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) significant disruption of the life of a community; and (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources”.

- 25.3. In light of the COVID-19 pandemic which has resulted in South Africa being in a continual state of disaster since [15 March 2020](#), FOR SA strongly objects to Clause 22(2)(a) that allows for the expropriation of property without any judicial oversight. Where a matter is of utter urgency, an urgent court order can be obtained.

RECOMMENDATIONS:

26. In the circumstances, we propose that:

- 26.1. The definition of “*property*” in Clause 1 be limited to land only;
- 26.2. The definition of “*public purpose*” in Clause 1 should include that the property should be expropriated for public use, i.e. to meet the public need for land reform and redistribution;
- 26.3. A Clause relating to “*public purpose*” be inserted that includes a list factors that should be met in order for expropriation to be for a “*public purpose*”;
- 26.4. That Clause 12(3) be removed, alternatively, that the criteria for EWC in Clause 12(3) be a closed list;
- 26.5. That Clause 12(4) be removed, alternatively, that “*all the relevant circumstances*” be defined and/or linked to the list in Clause 12(3);
- 26.6. That a clause containing land which is exempt from EWC be inserted. Here we specifically propose: “***Land that is owned and used in connection with the exercise of the constitutional right to religious freedom and the rights of religious communities, is hereby exempted from the applicability of sections 12(3) and 12(4)***”;
- 26.7. Clause 22(2)(a) be removed, alternatively, that express provision be made for judicial oversight in the exercise of Clause 22(2)(a).

27. We also urge the Committee to approach the Constitutional Court for a declaratory order regarding whether the “*nil compensation*” (i.e. EWC) in terms of the Bill’s proposed Clauses 12(3) and 12(4)

would qualify as “*just and equitable*”²⁶ payment. This will achieve clarity regarding whether EWC is constitutional²⁷ under section 25(8)²⁸ of the Constitution as it currently stands.

Kind regards,

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&

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THE END.

²⁶ Section 25(3) of the Constitution.

²⁷ It has been the traditional view of legal scholars that the Constitution does not allow for EWC – see *Currie and de Waal's The Bill of Rights Handbook* 5ed (2005) page 536.

²⁸ Section 25(8) states that any departure from the provisions of section 25 must be in accordance with section 36.