

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-156411

In the application of:

AFRIFORUM NPC	First Applicant
INSTITUTE FOR RACE RELATIONS NPC	Second Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE	Second Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Third Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fourth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fifth Respondent
ECONOMIC FREEDOM FIGHTERS.	Sixth Respondent
and	
THE ASSOCIATION FOR RURAL ADVANCEMENT	<i>Amicus curiae</i>
THE RULE OF LAW PROJECT	<i>Amicus curiae</i>
THE SOCIETY FOR THE PROTECTION OF THE OF OUR CONSTITUTION	<i>Amicus curiae</i>

ASSOCIATION FOR RURAL ADVANCEMENT’S WRITTEN SUBMISSIONS

I INTRODUCTION

- 1 In *Daniels v Scribante*, Cameron J reminded us “*that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice.*”¹
- 2 One of the past’s claims to justice is for the redistribution and restitution of land. Section 25 of the Constitution requires that expressly. One way to achieve that constitutional demand is by expropriating property and redistributing it to those who were dispossessed by colonialism and apartheid.
- 3 The primary question in this case is whether, in some circumstances, to meet the past’s claims to justice, it may be just and equitable to pay an owner nil compensation when the state expropriates its property.
- 4 It arises because the Applicant has challenged the constitutionality of various provisions of the Expropriation Act 13 of 2024 (**Expropriation Act**). Most particularly it challenges ss 12(3) and (4) which identify certain circumstances where it “may be just and equitable for nil compensation to be paid”. Afriforum argues this is unconstitutional.
- 5 The Association for Rural Advancement (**AFRA**) agrees with the state respondents that the provisions are entirely consistent with the Constitution. Section 25 itself does not only protect negative property rights. It imposes positive obligations to redress the wrongs of the past. That is why s 25(3) lists the “purpose of the expropriation” as one of the factors to consider when determining what compensation is just and equitable.

¹ 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 154 (Cameron J, concurring).

- 6 The cost of expropriating property is one of the contributing factors to the slow pace of land reform. What ss 12(3) and 12(4) achieve will make a small contribution to expediting land reform. They will do so without limiting landowners' rights because each and every expropriation will be determined on its own facts. Even if the situations listed in ss 12(3) and (4) are met, that does not mandate that nil compensation must be paid. It only provides guidance to the decision-maker that it "*may*" be just and equitable to pay nil compensation.
- 7 At the time of AFRA making its application for admission as amicus curiae, the state respondents in the Afriforum application had not yet filed their answering affidavits. Having seen the state respondents' answering affidavits, AFRA will – in these submissions – curtail those of its arguments which appear to have been raised by the state respondents.
- 8 Accordingly, in these submissions, AFRA will address the following:
 - 8.1 Section 25 of the Constitution requires restitutionary equality;
 - 8.2 Reduced or nil compensation is not a solution but is critical;
 - 8.3 Section 25 of the Constitution permits compensation to be calculated differently when the purpose of expropriation is to fulfil the aims in section 25(5) to (9);
 - 8.4 Sections 12(3) and (4) of the Expropriation Act have a limited impact that is wholly consistent with the scheme of section 25 of the Constitution;
 - 8.5 Section 12(4) of the Expropriation Act is not only constitutionally permissible, but also desirable;

- 8.6 International and foreign authorities recognise that reduced or nil compensation for expropriation is permissible in certain circumstances;
- 8.7 Some of Afriforum's procedural challenges to the Expropriation Act; and
- 8.8 Conclusion.

II SECTION 25 REQUIRES RESTITUTIONARY EQUALITY

- 9 Section 25 of the Constitution contains a constitutional imperative for restitutionary equality.²
 - 9.1 The tension that existed at the time of transition from apartheid to democracy is apparent in section 25 which recognises the right to property and, at the same time, creates a duty to redress the wrongs of the past, particularly in the way they deprived Black people of land and resources.
 - 9.2 Section 25 provides protection for existing property rights whilst, at the same time, mandating the restitution and redistribution of property – it thus stands at the heart of an inevitable tension between the interests of the haves and the have nots.
 - 9.3 The apartheid-era Expropriation Act privileged market value as the formula for determining compensation due to a person whose land was expropriated by the state. This approach is rejected by our Constitution which creates a justice and equity standard – the approach followed in the Expropriation Act.

² AFRA's FA at paras 30 to 33, 011-21 to 22.

- 9.4 An understanding of section 25 must be based in its history and context, striking a balance between the respect for property rights and the enabling of redistribution, restitution and security of tenure.
- 10 The Constitutional Court has regularly emphasised the historical context of s 25, and its restitutionary purpose.
- 10.1 In *Shoprite Checkers*³ Froneman J recognised that the “*question of property is fiercely contested in South African society*”.⁴ It is contested because our history is “*a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines.*”⁵ That historical reality “*explains the concerns both the previously-advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.*”⁶
- 10.2 In *Daniels v Scribante*⁷ the Court again emphasised our shared history of dispossession and exploitation: “*Dispossession of land was central to colonialism and apartheid.*”⁸ And the purpose of the dispossession “*was, first, the obvious one of making more land available to white farmers. The second ‘was to impoverish black people through dispossession and prohibition of*

³ *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

⁴ Ibid at para 4.

⁵ Ibid at para 34.

⁶ Ibid.

⁷ 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

⁸ Ibid at para 14.

*forms of farming arrangements that permitted some self-sufficiency. ...*⁹ By making it impossible for Black people to farm and support themselves, the colonial and apartheid governments created “*a pool of cheap labour for the white farms and the mines.*”¹⁰

10.3 In *Agri SA*¹¹ Mogoeng CJ held that section 25 of the Constitution must be interpreted with due regard to the gross inequality in relation to wealth and land distribution in this country;¹² and that section 25 imposes an obligation not to over-emphasise private property rights at the expense of the state’s social responsibilities.¹³ In his words, s 25 “*sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.*”¹⁴

11 Section 25 has nine subsections that must all be read together. They are mutually supportive and should not be read to create internal conflict within the section. They must, instead, be read as a cohesive whole that reflects how the constitutional drafters sought to redress our history without disregarding existing property rights.

12 Sections 25(1), (2) and (3) contain negative property rights. That is, the rights not to be arbitrarily deprived of property, the right for property not to be expropriated without just

⁹ Ibid at para 16, quoting Rugege ‘Land Reform in South Africa: An Overview’ (2004) 32 *International Journal Legal Information* 283 at 284-5.

¹⁰ Ibid.

¹¹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).

¹² Id at para 61.

¹³ Id at para 62.

¹⁴ Ibid at 60.

and equitable compensation and the right for such compensation to be determined by agreement or approved by a court.

- 13 Sections 25(4) to (9) contain positive property rights. They include express and repeated commitments to “land reform” and to “equitable access” to land and natural resources. They also create express rights to secure tenure, to redistribution, and to restitution for dispossession after 1913.

13.1 As Ackermann J put it in FNB, these provisions: *“all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa”*.¹⁵ They necessarily entail that *“the protection of property as an individual right is not absolute but subject to societal considerations.”*¹⁶

13.2 That is why the proper approach to interpreting s 25 *“with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfillment of our country’s nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans.”*¹⁷

III REDUCED OR NIL COMPENSATION IS NOT A SILVER BULLET

¹⁵ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 49. See also *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) at paras 30-1.

¹⁶ *Ibid.*

¹⁷ *Agri SA* at para 60.

- 14 Afriforum's primary attack on the Expropriation Act is that it permits expropriation with reduced or zero compensation. That mechanism is constitutional, for the reasons that follow.
- 15 But reduced or nil compensation is not *a panacea* to land reform.¹⁸
- 15.1 The scale of compensation is not the primary reason for the glacial pace of land reform. The biggest reasons include insufficient budgets, lack of state capacity, lack of political will and confused policies.
- 15.2 That compensation may be below market value or, in some cases, nil compensation can be paid, will not resolve any of those problems – they will be fixed by greater budget allocations, properly capacitated departments and the rapid adoption and implementation of clear and transparent policies.
- 16 The existence of all of the above impediments does not mean that the calculation and determination of compensation is not, itself, an impediment. And the existence of other impediments to land reform does not mean that government cannot address one of them. The state is constitutionally required to do more than change the scale of compensation for expropriation. But those additional obligations do not mean that this one small step is not a step in the right direction towards realising the promise of s 25.

IV CALCULATING COMPENSATION DIFFERENTLY IS CONSTITUTIONAL

¹⁸ AFRA's affidavit paras 26-9, pp 011-20 to 21.

- 17 Afriforum argues that compensation should be calculated in the same way, regardless of the purpose of expropriation, and that the amount of compensation should not be reduced simply because the expropriation is for land reform.¹⁹
- 18 Afriforum's premise is flawed.
- 18.1 Section 25(2) allows for expropriation for a public purpose or in the public interest.
- 18.2 Section 25(3) expressly includes the "*purpose of the expropriation*" as a relevant factor in determining just and equitable compensation.
- 18.3 Section 25(4)(a) provides that "public interest" includes "*the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*". Thus, expropriation in the public interest could be for purposes of land reform.
- 18.4 Therefore, the fact that land can be expropriated for land reform is a relevant factor in determining the just and equitable compensation due to an owner.
- 19 It would be flawed to conclude that the purpose of expropriation, such as land reform, should not affect the calculation of just and equitable compensation:
- 19.1 To do so would be to ignore section 25(4)(a) of the Constitution.
- 19.2 Such a conclusion would undermine the purpose of section 25 as a whole as it would limit the state's ability to achieve the reforms required in section 25(5) to (8) which include enabling "*citizens to gain access to land on an equitable*

¹⁹ Afriforum's heads of argument, para 72, 018-34.

basis"; persons' entitlement to secure tenure; restitution of property and land reform.

- 19.3 The conclusion is not justified given that, even without sections 12(3) and (4) of the Expropriation Act, nil compensation would be permissible under section 25(3) where such compensation is just and equitable. And so, sections 12(3) and (4) of the Expropriation Act simply identify circumstances where nil compensation may be just and equitable.

V SECTIONS 12(3) AND (4) HAVE A LIMITED IMPACT AND ARE CONSTITUTIONAL

- 20 Properly construed, sections 12(3) and (4) of the Expropriation Act do no more than to identify circumstances in which nil compensation may be just and equitable.

- 20.1 Sections 12(3) and (4) do not mandate nil compensation, they simply assist in providing clarity and guidance on how and when it "may" be just and equitable to decide that nil compensation is warranted.

- 20.2 Sections 12(3) and (4) do not limit the relevant circumstances to be taken into account when just and equitable compensation is considered.

- 20.2.1 They both require "*all relevant circumstances*" to be considered.

- 20.2.2 Section 12(3) lists some circumstances to be taken into account and specifically introduces them by saying "*including but not limited to*". Thus, other relevant factors – including any of those in section 25(3) – are not excluded.

- 21 Importantly, the decision to award nil compensation in certain circumstances will only occur following an individualised assessment of each proposed expropriation and the guiding considerations – which include the taking into account of all relevant circumstances will still apply.
- 22 That is exactly what s 25(3) already envisages – an individualised assessment considering all factors to determine what is just and equitable.

VI SECTION 12(4) IS BOTH CONSTITUTIONALLY PERMISSIBLE AND DESIRABLE

- 23 Afriforum, takes issue with section 12(4) of the Expropriation Act on the basis that the Expropriation Act concerns “administrative” expropriations which regulates “coercive” acquisition by the state, whereas the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) deals with “judicial expropriation” by the court.²⁰
- 24 Nowhere in the Expropriation Act is it stated that it only applies to “administrative” or “coercive” expropriations. In fact, the long title to the Expropriation Act provides:

“To provide for the expropriation of property for a public purpose or in the public interest; to regulate the procedure for the expropriation of property for a public purpose or in the public interest, including payment of compensation; to identify certain instances where the provision of nil compensation may be just and equitable for expropriation in the public interest; to repeal the Expropriation Act, 1975 (Act 63 of 1975); and to provide for matters connected therewith.” (Emphasis added.)

- 25 The preamble goes further to recognise that “*uniformity across the nation is required in order to deal effectively with*” expropriation, and states expressly that a purpose of the Expropriation Act is “*TO ENABLE expropriation in accordance with the Constitution*”.

²⁰ Afriforum’s Heads of Argument, especially paras 108-110, 018-50 to 51.

26 From the long title and the preamble, the following is clear:

26.1 The Expropriation Act seeks to address expropriation for a public purpose or in the public interest and, as we know from section 25(4) of the Constitution, public interest includes land reform.

26.2 The Act seeks to regulate compensation as it relates to expropriation for a public purpose or in the public interest.

26.3 The Act does not limit itself to “administrative” expropriation; the Act states clearly that “*uniformity across the nation is required*” to deal effectively with “these matters”, which – as a matter of interpretation, would include issues of compensation in expropriations for a public purpose or in the public interest and the rights of the interested or affected parties to a hearing before a court or an arbitrator.

27 Thus, simply at the level of the preamble to the Expropriation Act, there is no basis to conclude that it could never apply to the LTA on the core bases advanced by Afriforum. In any event, as the name of the LTA suggests, it is the “*Land Reform*” Labour Tenants Act.

28 Critically, section 2(3) of the Expropriation Act provides:

“(3) This Act applies, with the necessary changes, to the compulsory acquisition of property directly or indirectly by a third-party beneficiary through an expropriating authority in the public interest, including for the purposes contemplated in section 25(4) to (8) of the Constitution.”

29 Section 12(4) of the Expropriation Act provides:

“(4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), it may be

just and equitable for nil compensation to be paid, having regard to all relevant circumstances.” (Emphasis added.)

30 Importantly, section 2(1) of the LTA states that “[t]he rights conferred by this Act shall be subject to the provisions of any law providing for the expropriation of land or rights in land.”

31 Thus, simply on a textual basis, there is no reason why the Expropriation Act cannot apply to the LTA or why the LTA would not be subject to the Expropriation Act.

32 Insofar as Afriforum argues that section 23(1) of the LTA provides for just and equitable compensation as prescribed by section 25(3) of the Constitution, we agree. The point of disagreement is what follows in Afriforum’s argument, which is that section 12(4) of the Expropriation Act “overrides” section 23(1) of the LTA by introducing the possibility of nil compensation.²¹ We make the following submissions:

32.1 Nil compensation is possible even under section 25(3), so that section 12(4) simply provides guidance as to when it “may” be appropriate. Thus, section 12(4), in our argument, simply clarifies the position in section 25(3) of the Constitution and 23(1) of the LTA, it does not change it. At worst, s 12(4) is superfluous; but that does not make it unconstitutional.

32.2 In Afriforum’s argument, which suggests that section 23(1) does not include the possibility of nil compensation, we submit that the necessity for section 12(4) of the Expropriation Act is heightened as it would be bringing the LTA in line with section 25(3) of the Constitution.

²¹ Afriforum Heads at para 113, p 018-52.

- 33 Section 12(4) can only be unconstitutional if s 25(3) never permits nil compensation. But then it would be unconstitutional for that reason, not because of any supposed conflict between the Expropriation Act and the LTA.
- 34 The recognition that nil compensation may be just and equitable in some situations governed by the LTA is substantively justifiable:²²
- 34.1 Compensation is only paid to landowners under section 23 of the LTA for land over which labour tenants are awarded rights after an application under the LTA;
- 34.2 Section 12(4) is likely to apply only when the expropriation is in respect of the land that the labour tenant is currently occupying, rather than when an alternatively property is expropriated for the labour tenant to occupy;
- 34.3 The labour tenants would have lived on the land for decades or generations and it will often be a relatively small portion of the total land that will be expropriated for the labour tenant;
- 34.4 Labour tenants are, by definition, people who worked for landowners (who were mostly white) without being paid money for the value of their labour. Instead, they were compensated by residing on the farm (which they and their ancestors often occupied before the landowner). Landowners who have benefited from that uncompensated labour for decades and generations should not also benefit from state compensation.

²² AFRA's affidavit paras 45-6, pp 011-26 to 27.

34.5 The above factors may not always be present in every labour tenant case, but there might be cases where they are present and may warrant nil compensation.

35 Importantly, under the LTA the primary obligation to pay compensation is on the labour tenant, not on the state.²³ While there are provisions for the state to pay that compensation, it is not obliged to do so.²⁴ It is not, therefore, a traditional form of expropriation because the land is not transferred to the state, and the state is not responsible for paying the compensation.²⁵ That is why s 23(1) of the LTA needs to make s 25(3) of the Constitution applicable, and why s 12(4) of the Expropriation Act rightly identifies that this is a situation where nil compensation may be just and equitable.

36 Afriforum also advances a “contractual reality” argument. The argument is deeply unfortunate.

36.1 Afriforum’s contends that it would be unfair to grant land occupied by labour tenants without compensating the landowner because the labour the labour tenants provided “*was not uncompensated. It was rendered in exchange for occupation and use rights. That is the contractual bargain*”.²⁶ (Emphasis added.)

36.2 As a matter of law, contract requires consensus. Afriforum in its own heads of argument says labour tenancy arose when “*black people often had no option but to submit to labour tenancy*” to gain access to land “*in areas set*

²³ LTA s 22(4)(d) and 25(1).

²⁴ LTA ss 26-27.

²⁵ *Agri SA* at para 58.

²⁶ Afriforum Heads at para 118, p 018-54.

aside for white occupation under previously racially discriminatory legislation".²⁷

36.3 Afriforum argues that depriving the owner of compensation reverses the contractual "bargain" that was struck between the white land owners and the black people who, Afriforum admits, had no option but to submit to labour tenancy.

37 The fallacy in Afriforum's argument is self-evident. If the labour tenants had no choice but to provide labour in return only for rights of occupation, then there can be no "*contractual bargain*". The reason labour tenancy was exploitative, and the reason the LTA exists, is because the relationship white landowners and Black labour tenants was not consensual; it systematically exploited Black people to benefit white people.

38 Afriforum's suggestion that the right of occupation and use would always have constituted adequate compensation ignores several key factors, namely:

38.1 The extra benefit afforded to landowners of having their labour force in close proximity to the farm, able to be called upon at a moment's notice;

38.2 The low costs associated occasioned by a landowner in allowing labour tenants to occupy small parts of often vast tracks of land; and

38.3 The fact that the labour provided by labour tenants often assisted landowners in generating wealth, while the compensation provided to labour tenants could never afford labour tenants a similar opportunity. It also made it harder for labour tenants to leave the employ of landowners, with no wages to save to sustain themselves if they ever did.

²⁷ Afriforum Heads at para 115, p 018-53.

- 39 The apartheid system, its laws and how they were enforced, including as regards how black people would end up having “no option but to submit to labour tenancy” would not even survive the ordinary test for contractual duress:²⁸

It is trite that a contract entered into under duress may be voided by the innocent party. The party relying on duress must prove: (i) a threat of considerable evil to the person concerned; (ii) that the fear was reasonable; (iii) that the threat was of an imminent or inevitable evil and induced fear; (iv) that the threat or intimidation was unlawful or contra bonos mores; and (v) that the contract was concluded as a result of the duress.”.

- 40 Madlanga J explained the position in *Daniels v Scribante*:

Other African people found themselves working as labour tenants on land now in the hands of whites. That dispensation subjected them to untold cruelty and suffering. Sol Plaatje cites an example:

“The baas exacted from him the services of himself, his wife and his oxen, for wages of 30 shilling a month, whereas Kgobadi had been making £100 a year, besides retaining the services of his wife and of his cattle for himself. When he refused the extortionate terms, the baas retaliated [by requiring] him to betake himself from the farm . . . by sunset of the same day, failing which his stock would be seized and impounded, and himself handed over to the authorities for trespassing on the farm.”²⁹

- 41 Even if, in some unusual case, the relationship between the landowner and the labour tenant was not exploitative and non-consensual, that could be considered when the court or arbitrator determined compensation. Neither s 12(4) nor s 23(1) nor s 25(3) exclude that; to the contrary they all require an individualised assessment.
- 42 Afriforum also argues that granting ownership of a portion of land without compensation to a landowner removes the only ongoing economic relationship that made the arrangement of reciprocal labour and occupation obligations viable for both parties. Thus, awarding land to a labour tenant when it is not viable or sustainable will, in most

²⁸ *Jansen Van Vuuren v Van Der Walt* 2022 JDR 2688 (GP) at para 6 (our emphasis).

²⁹ *Daniels v Scribante* at para 18.

cases, doom the successful claimant to poverty rather than to a sustainable livelihood, and that this is what those who advocate for section 12(4) of the Expropriation Act do not grapple with.³⁰ This argument is flawed:

- 42.1 It ignores that section 12(4) does not mean in every claim by a labour tenant, the result will be an automatic award of nil compensation. Considerations of justice and equity would still apply.
- 42.2 The definition of labour tenant under the LTA makes it clear that labour tenants who may apply for rights in land under the LTA have resided there for generations. They are not casual workers residing on the land for three-to-six-month periods as asserted by Afriforum.
- 42.3 There is no reason to suggest that the extinguishing of reciprocal obligations of labour and occupation would see labour tenants unable to establish themselves on a farm in a viable or sustainable way. If compensation for the landowner is warranted, compensation would be provided through the application of section 23(3) of the LTA read with the Expropriation Act.
- 42.4 Importantly, to suggest that labour tenants in such a situation would struggle to establish themselves in a viable or sustainable manner, as section 22(5)(a) of the LTA focuses on, is both insulting and demeaning and ignores the decades labour tenants would have already spent cultivating the very same land they reside on.
- 42.5 Even if it were true in a particular case, the question of whether labour tenants are awarded land to satisfy their LTA application is separate from what compensation the landowner is paid for the loss of its land. Section 22(4)(f)

³⁰ Afriforum Heads at para 117, p 018-54.

allows a court or arbitrator to make an award of compensation in lieu of the award of land.

- 43 In sum, in many labour tenant cases the circumstances will warrant awarding nil compensation. The reference in section 12(4) of the Expropriation Act to compensation awarded under the LTA, whilst not strictly necessary, is constitutionally permissible and justifiable.

VII INTERNATIONAL AND FOREIGN AUTHORITIES

- 44 International and foreign law both play an integral role in interpreting the Expropriation Act. Section 39(1)(b) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights. Moreover, section 233 of the Constitution provides that when interpreting legislation, courts must give preference to any reasonable interpretation of that legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. International law can include binding treaties, “soft law” such as comments or declarations by international bodies, other non-binding instruments, and academic opinion.³¹ In addition, s 39(1)(c) of the Constitution provides that courts may consider foreign law when interpreting the Bill of Rights.

International law

³¹ See, for example, *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at para 35; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 26; *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 178, fn 28.

- 45 Under international law, South Africa is afforded significant discretion to determine its own laws, including those on expropriation and compensation. Several international authorities establish and emphasise countries' discretion in how it manages its resources, including land.
- 46 There is, generally, no prohibition in international law on how states compensate their own citizens for expropriating their property. International law is primarily concerned with states' obligations with regard to *other* states and their nationals.
- 47 The United Nations General Assembly has issued a resolution that emphasises states' ability to expropriate land on its own terms as an important exercise of state sovereignty.³² It provides:
- expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.
- 48 While the Resolution makes mention of awarding compensation, it subjects it to three conditions:
- 48.1 Any award of compensation must be appropriate;
- 48.2 Compensation must be determined and awarded in accordance with a state's own domestic laws; and
- 48.3 The laws regulating the determination and awarding of compensation must comply with international law.

³² Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962.

- 49 It does not exclude the possibility that the “appropriate compensation” may be nil in some circumstances.
- 50 The Food and Agricultural Organisation has issued guidelines specific to the content of states’ laws regulating expropriation.³³ The Guidelines explicitly link expropriation to states’ redistributive and restitutionary obligations. Section 15 recognises the importance of redistributive reforms.³⁴ Section 1 requires only that the state provide “just compensation in accordance with national law” and a fair valuation ... in accordance with national law.”³⁵
- 51 The Guidelines make clear that—
- 51.1 compensation must be fair, just and appropriate;
 - 51.2 states are afforded significant discretion to establish their own system for the determination and calculation of compensation within their national laws; and
 - 51.3 expropriation and the determination of compensation take place within a broader context of reform, which must remain alive to the restitutionary role both play.

³³ Revised Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2002), available at <https://openknowledge.fao.org/bitstreams/4e08d38d-b1f5-4c74-8478-7cbd61a1e90a/download>.

³⁴ Section 15.1 reads: “Redistributive reforms can facilitate broad and equitable access to land and inclusive rural development. In this regard, where appropriate under national contexts, States may consider allocation of public land, voluntary and market based mechanisms as well as expropriation of private land, fisheries or forests for a public purpose.” (Emphasis added.)

³⁵ Section 18.1 provides more detail on the concept of fair valuation, stating that: “States should ensure that appropriate systems are used for the fair and timely valuation of tenure rights for specific purposes, such as operation of markets, security for loans, transactions in tenure rights as a result of investments, expropriation and taxation. Such systems should promote broader social, economic, environmental and sustainable development objectives.”

52 Sections 12(3) and (4) of the Expropriation Act are not prescriptive. They do not say nil compensation is to be awarded in every instance. Instead, they require a consideration of all relevant factors which “may” result in it being “just and equitable” for nil compensation to be awarded. Accordingly, they form part of a broader statutory scheme seeking to ensure a just and equitable compensation amount. Nil compensation can only be awarded if it is justified on specific facts. Afriforum is, therefore, wrong to contend that ss 12(3) and (4) constitute an “open-ended normalisation of uncompensated takings”.³⁶

53 The African Charter on Human and Peoples’ Rights (the African Charter) deals with property and expropriation in article 14. It provides:

“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”

54 The Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) has elaborated on article 14 of the Charter as including a requirement for “*adequate compensation for public acquisition, nationalisation or expropriation*”, and “*equitable redistribution of land through due process of law to redress historical and gender injustices*”. Those requirements – like the provisions of s 25 of the Constitution – must be read together. That is why there is no requirement for “full compensation”, or “market value compensation”, but only for “*adequate compensation*”.

55 The African Commission on Human and Peoples’ Rights (African Commission) has had occasion to consider article 14 of the African Charter. In *Endorois*,³⁷ the African Commission dealt with article 14 of the Charter:

³⁶ Afriforum Heads at para 162, p 018-70.

³⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Application 276 / 2003.

55.1 It held that an encroachment on article 14 of the Charter does not constitute a violation thereof “*as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted – ‘in the interest of public need or in the general interest of the community’ and ‘in accordance with appropriate laws’*”.³⁸

55.2 It stated that the limitations to the right in article 14 of the Charter must be determined in the prism of proportionality, so that they must be proportional to the legitimate need and should represent the least restrictive measure.³⁹

56 Thus, under the African Charter, what is required from a state is *adequate* compensation. Given that the Pretoria Declaration expressly addresses equitable redistribution for historical injustices, we submit that “adequate” compensation under the African Charter does not preclude nil compensation where that is provided for in law, and is adequate (just and equitable) in all the circumstances.

57 In our submission, what constitutes “just and equitable” or “appropriate” or “adequate” compensation under the Constitution, the UN resolution and Guidelines as well as the African Charter does not exclude reduced or nil compensation.

Foreign law

58 As regards the United Kingdom, in the case of *Lithgow and Others v The United Kingdom*,⁴⁰ the European Court of Human Rights (“**European Court**”) was concerned

³⁸ Id at para 211.

³⁹ Id at paras 213-4.

⁴⁰ (1986) 8 EHRR 329.

with a case concerning the United Kingdom having nationalised certain companies in terms of its Aircraft and Shipbuilding Industries Act 1977 ("**the 1977 Act**").⁴¹

58.1 Importantly, the 1977 Act provided for compensation be paid to the former holders of securities of the acquired companies, for the safeguarding of the assets of the nationalised undertakings, for the appointment of stockholders' representatives and for the establishment of an Arbitration Tribunal.⁴²

58.2 Alleging that the compensation that they had received was inadequate, the applicants alleged that the United Kingdom had violated article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Protocol") which provides that:⁴³

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

58.3 When discussing the entitlement to compensation, the European Court observed that:

"[120] ... Article 1 [...] in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State."

58.4 However, the European Court went on to observe that:

⁴¹ Id at para 9.

⁴² Id at para 18.

⁴³ Id at para 105.

“Under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances.”⁴⁴

59 Thus, while not the general standard, the European Court has recognised the potential for expropriation without the payment of compensation in exceptional circumstances. We submit that, in the historical context of section 25, especially as regards expropriation for land reform, exceptional circumstances warranting nil compensation may be justified. Thus, the answer is not to strike down sections 12(3) and (4) of the Expropriation Act, but to address – on a case by case basis – whether or not nil compensation, where it is awarded and if it is challenged, is justified.

60 In Germany, expropriation without compensation is considered constitutionally permissible:

60.1 Article 14 of the Basic Law for the Federal Republic of Germany⁴⁵ protects property and in inheritance. Its framing is similar to sections 25(2) and (3) of the Constitution.

60.2 Translated, it provides: “*Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected.*”

⁴⁴ Id at para 120.

⁴⁵ Das Grundgesetz für die Bundesrepublik Deutschland.

61 In *Jahn and Others v. Germany*⁴⁶ the European Court was dealing with a complaint that the German government had, among other things, breached Article 1 of the Protocol.⁴⁷

61.1 In 1992 Germany passed the second Property Rights Amendment Act⁴⁸ (**Amendment Act**) which provided that land acquired under the land reform will, in theory, pass to the registered owner's heirs unless there are persons or institutions having “superior title” (bessere Berechtigung) to it, and such persons or institutions with superior title can request that the land be assigned to them without compensation

61.2 The European Court concluded that while the Amendment Act does interfere with individuals’ property rights, this interference was justifiable and no violation had occurred.⁴⁹ When considering if the deprivation pursued a legitimate aim, the Court held that managing the changes caused by German reunification was a public interest justifying expropriation. It recognised that “the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues.”⁵⁰

61.3 When discussing whether the failure to pay compensation met the requirement of proportionality, the European Court highlighted that the Amendment Act sought to “*correct the flaws in the Modrow Law for reasons of social justice*”⁵¹ within a particular historical context. The European Court concluded that: *in the unique context of German reunification, the lack of any*

⁴⁶ Application nos. 46720/99, 72203/01, and 72552/01, ECHR 2005-VI.

⁴⁷ Id at para 66-7.

⁴⁸ Id at para 23.

⁴⁹ Id at para 117.

⁵⁰ Id at para 91.

⁵¹ Para 110

*compensation does not upset the “fair balance” that has to be struck between the protection of property and the requirements of the general interest.”*⁵²

62 The European Court found that the unique context of German reunification could, in effect, constitute the “exceptional circumstances” where compensation is not required. We submit that land reform in the context of South Africa’s history would also constitute exceptional circumstances.

63 German Law thus provides an example of another jurisdiction where it is permissible to award nil compensation in order to further broader social objectives. The decision from the European Court endorsing the German position further highlights the importance of giving due regard and consideration to the historical context of individual states when assessing the validity of their expropriation laws.

64 Canada provides an example of a foreign jurisdiction that contemplates awarding nil compensation. While property rights are not entrenched in the Canadian Charter of Rights and Freedoms enacted as part of the Constitution Act 1982, Canadian common law incorporates a general presumption against expropriation without compensation.⁵³ However, expropriation without compensation is permissible if explicitly allowed for in legislation. The position is aptly set out in *Annapolis Group Inc v Halifax Regional Municipality*⁵⁴ where the Supreme Court of Canada held as follows:

“[21] At common law, taking of property by the state must be authorized by law, and triggers a presumptive right to compensation which can be displaced only by clear statutory language showing a contrary intention — that is, an intention not to compensate...

⁵² Para 117.

⁵³ *Canadian Pacific Railway Company v City of Vancouver* [2006] 1 S.C.R. 227, 2006 SCC 5 paras 27 – 30;

⁵⁴ 2022 SCC 36, [2022] 2 S.C.R. 772.

[22] It is important to stress that the rule contemplates that governments have the power to immunize themselves from liability to pay compensation for a taking. While, as we explain, we do not “expand” that liability but merely affirm it, the point is that governments may effect takings without paying compensation, so long as the enabling statute clearly expresses that intention...”

65 Accordingly, Canada’s legal position is that expropriation without compensation is allowed where expressly stated in legislation.

VIII PROCEDURAL CHALLENGES

66 As stated above, the state respondents have addressed the challenges raised by Afriforum in respect of various sections of the Expropriation Act. We will thus not repeat arguments that are the same as theirs, save to make the following submissions.

67 First, the reference to a “*notice to expropriate*” in section 19(2) and (3) is plainly an error. It has been admitted by the President. It should refer to a notice of intention to expropriate. There are two ways to resolve the problem:

67.1 Apply the ordinary principle that “*judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*”⁵⁵ Applying this principle, the provisions can be read, as was plainly intended, to refer to a notice of intention to expropriate.

⁵⁵ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) at para 23.

67.1.1 This reading-down will avoid unconstitutionality, and would have exactly the same substantive result. It would also avoid the need for confirmation of the order by the Constitutional Court.

67.1.2 It is a reasonable interpretation. Interpreted in the context of the Expropriation Act as a whole, that is the purpose of the provision. It does not unduly stretch the language, but gives effect to the structure and purpose of the provision and the legislative scheme.

67.2 Alternatively, if this Court concludes it is impossible to interpret ss 19(2) and (3) to refer to a notice of intention to expropriate, it should declare the provision unconstitutional and invalid. The just and equitable remedy would be to replace the words “notice of expropriation” with “notice of intention to expropriate”. That is precisely what would be achieved by the mandatory technique of reading-down the legislation.

68 Second, the challenge to s 19(7) is fundamentally misconceived. Afriforum contends that it is unconstitutional because it does not repeat the requirement in s 172(1)(a) of the Constitution that a court must declare conduct that is inconsistent with the Constitution invalid.⁵⁶

68.1 It is not necessary for it to do so. Section 19(7) does not purport to exclude that obligation. As we already noted, legislation must be interpreted consistently with the Constitution, not to create artificial conflicts.

68.2 It is obviously possible to read s 19(7) together with s 172(1)(a). Where non-compliance with the Expropriation Act does not constitute a violation of the Constitution, there is no obligation to declare conduct invalid. Where it

⁵⁶ Afriforum Heads at paras 155-8, pp 018-67-9.

does, the s 172(1)(a) obligation is triggered, together with the power to make further just and equitable orders.

68.3 That is what the Constitution itself envisages. Section 172(1)(b) of the Constitution gives courts the power to make just and equitable orders. Section 19(7) merely mirrors s 172(1)(b) in the context of non-compliance with the Expropriation Act.

69 Third, the challenge to s 19(8) is stillborn. There is no constitutional provision requiring that court orders must be suspended pending appeals. The position is managed by statute. The position in most civil litigation is regulated by s 18 of the Superior Courts Act.⁵⁷ It provides that High Court orders that are final in effect must be suspended on appeal unless an application is made for them to operate pending the appeal. Parliament has a choice and is entitled to make a different choice – such as in the Expropriation Act – as long as there is a possibility to depart from the default position chosen by Parliament where justice and equity requires it. Section 19(8) provides for this, and so there is no constitutional violation.

70 Afriforum alleges three constitutional violations:

70.1 It argues that in terms of s 171, courts function in terms of national legislation. That legislation is the Superior Courts Act, and not the Expropriation Act.⁵⁸ But s 171 does not require a single piece of legislation. There are numerous statutes, in addition to the Superior Courts Act, that regulate how courts operate in different ways. Section 19(8) is just another piece of legislation that regulates how courts function.

⁵⁷ 10 of 2013.

⁵⁸ Afriforum Heads at para 143, p 018-63.

70.2 It argues that s 19(8) is inconsistent with s 173 of the Constitution which allows courts to regulate their own process in the interests of justice.⁵⁹ But s 19(8) establishes a default position, not an absolute rule. It permits a departure where there are compelling prospects of success in the appeal. That is comparable to the strong language in s 18 of the Superior Courts Act requiring a showing of exceptional circumstances, irreparable harm on one side, and the absence of irreparable harm on the other.

70.3 It argues that s 19(8) limits the rights in ss 25(2)(b) and (3). But it is not clear why this is so. The compensation is still determined by a court, and the landowner retains all its appeal rights. Where an appeal on the amount of compensation is successful, the landowner will receive the additional compensation, whether or not the state has exercised its right to implement the expropriation before the appeal is decided. In any event, in *Haffejee*, the Constitutional Court held: “*The provisions of section 25(2)(b) do not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation under section 25(2)*”.⁶⁰

IX CONCLUSION

71 Afriforum’s challenge to the Expropriation Act must fail. The Constitution permits nil compensation in circumstances where it is just and equitable. The Expropriation Act does nothing more than identify some circumstances where it may be just and equitable

⁵⁹ Afriforum Heads at para 149, p 018-65.

⁶⁰ *Haffejee* at para 43(a).

to do so, after a consideration of all the relevant facts. That is not only constitutionally permissible, it is a small step that will advance the underlying purpose of s 25 of the Constitution – advancing the equitable distribution of land, while still providing fair protection to existing landowners.

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