THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 2025-156411

In the application of:

AFRIFORUM NPC First Applicant

IRR LEGAL NPC Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

AND FIVE OTHER RESPONDENTS

FIRST APPLICANT'S (AFRIFORUM'S) INDEX TO HEADS OF ARGUMENT

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In the application of:

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and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE 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**

FIRST APPLICANT'S (AFRIFORUM'S) HEADS OF ARGUMENT

A. INTRODUCTION:

1. **AfriForum NPC** (**"AfriForum"**) challenges the constitutionality of certain provisions of the Expropriation Act 13 of 2024 (the **"Act"**) under the above case number (the **"AfriForum application"**). In view of some of

the significant concessions made in the affidavits by the President and the Speaker regarding the expropriation process, and in particular that save in urgent expropriations, the State may not expropriate until such time as the compensation payable has either been agreed upon, or determined by a court, AfriForum does not persist in the relief in paragraph 2 of the Notice of Motion, namely that the whole of the Expropriation Act be declared unconstitutional and invalid.

2. AfriForum's main challenges to the Act are:

2.1 to have sections 12(3) and 12(4) and 19(8) of the Act declared unconstitutional and severed from the Act;

2.2 to seek appropriate relief in respect of the admitted drafting error in sections 19(2) and 19(3) of the Act;

2.3 To seek appropriate relief in respect of the late publication of the Act by the President.

3. Both the President and the Speaker have accepted, in substance, that the Act is intended to require compensation to be agreed between the parties or determined by a court before the State may expropriate property, except in urgent cases. Urgent expropriation is separately dealt with in section 20. AfriForum agrees that this should be the position.

4. AfriForum's primary position is that sections 19(2) and 19(3) of the Act should be referred back to Parliament for proper redrafting. Pending that amendment, AfriForum is prepared to accept an interim reading-in order along the lines proposed by the President, so that the Act, if it is put in operation before Parliament's redrafting, may operate on the basis that compensation must be agreed or determined by a court before expropriation may take place, save for urgent expropriations under section 20 of the Act.

5. IRR Legal NPC was joined as the second applicant by order of this Court on 2 March 2026. The Court ordered that the second applicant's founding affidavit in its intervention application[1] shall stand as the second applicant's founding affidavit in the main application. IRR Legal mainly challenges sections 12(2)(e), 12(3)(a) to (d) and 12(4) of the Act, providing its own basis for submitting that these sections of the Act are unconstitutional. AfriForum leaves it to IRR Legal to deal with those issues in IRR Legal's heads of argument.

6. The AfriForum application is to be heard simultaneously with the Democratic Alliance application (Case No 2025-916183) and the Vaderland Stigting application (Case No 2025-971785).

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[1] See Item 12.2, case lines 012-38 and further. See also paragraph 4 of the order granted on 2 March 2026.

7. The AfriForum application is opposed by the President (the first respondent in AfriForum's application),[2] the third and fourth respondents (the Speaker and Chairperson of the National Council of Provinces), the fifth respondent (Minister of Rural Development and Land Reform), who was joined as a respondent in all three applications on 2 March 2026, and the EFF, which was joined by the Court as the sixth respondent on 12 May 2026. The fifth and sixth respondents were granted leave to file answering affidavits within 15 days after the dates of the respective orders. They have, as at the date of these heads of argument, not filed any answering affidavits and are out of time.

8. The second respondent (Minister of Public Works) abides the Court's decision but has filed an explanatory affidavit. Several *amici curiae* have been admitted, some in support of the application and some in support of the Act.

9. The respondents' and *amici*'s heads are due later. These heads address AfriForum's grounds of challenge and, where necessary, anticipate opposing arguments as they appear in the answering affidavits and the *amici* applications. Any new arguments raised in the respondents' and *amici*'s heads will be addressed at the hearing, or if need be, in supplementary heads of argument.

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2 President's answering affidavit in the AfriForum/Vaderland matter ("Pres-AF") at 004-1 to 004-61; AfriForum's replying affidavit ("Reply") at 008-1 to 008-25.

a. Scope of the challenge:

10. AfriForum's main challenge is directed firstly at the constitutionality of sections 12(3), 12(4) and 19(8) of the Act and secondly at the sequencing provisions of section 19 read with sections 7(6)(a) and 8(3)(g) of the Act.

11. The challenges to sections 7(6)(a) and 8(3)(g) of the Act are maintained to the extent that they are rendered unconstitutional by their irreconcilable conflict with sections 19(2) and 19(3) of the Act, as discussed in Part F below.[3]

12. AfriForum persists with the relief in paragraph 1 of the Notice of Motion.

13. The challenge to section 2(2) of the Act is not pursued, subject to the reservation that the Court accepts the President's interpretation of the section. (See the President's answering affidavit in the AfriForum application at paras 46–47, p 004-18 to 004-19).

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[3] Subject to later submissions, AfriForum does not persist in its challenges to ss 2(2) and 7(6) of the Expropriation Act. The s 2(2) challenge falls away if this Court accepts the President's interpretation at Pres-AF paras 46–47 at p. 004 -18.

B. SECTION 25 CONSTITUTIONAL FRAMEWORK:

14. Section 25(2) of the Constitution permits expropriation only in terms of a law of general application —

> *"(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."*

15. Section 25(3) requires that both the amount of compensation and the time and manner of payment must be *"just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances"*, including –

 15.1 The current use of the property;

 15.2 The history of acquisition and use;

 15.3 The market value;

 15.4 The extent of direct state investment and subsidy; and (e) the purpose of the expropriation.

16. The Expropriation Act, 63 of 1975 (the **"1975 Expropriation Act"**) authorised and continues to authorise expropriations for public

purposes only. It requires either amendment or replacement to bring South African expropriation law into alignment with section 25 of the Constitution. AfriForum accepts that the Act goes some distance toward that goal. However, sections 12(3), 12(4), and 19 read with sections 7(6)(a) and 8(3)(g) of the Act, as well as section 19(8) of the Act, fail constitutional scrutiny, as set out below.

17. In *Du Toit v Minister of Transport*[4], the Constitutional Court discussed the practicalities of the application of section 25(3):

> "*Section 25(3) does not make it peremptory that all factors listed be applied. The list is open-ended. Factors listed there will apply only insofar as they are relevant or applicable. Factors other than those listed may also be taken into account if they are relevant or applicable. The outcome reached must, however, be just and equitable, and it must reflect an equitable balance between the interests of the public and of those affected by the expropriation.*"

And further[5]:

> "*While s 12(1) of the Act*[6] *bases compensation on market value or financial loss, none of the relevant circumstances listed in s*

[4] 2006 (1) SA 297 (CC) 314, para [33]
[5] 315C-E, para [34] in the context of a comparison between s 12(1) of the Expropriation Act and s 25(3) of the Constitution
[6] The 1975 Expropriation Act

25(3) of the Constitution, which include market value and possibly actual financial loss, are given any particular prominence. The Constitution, therefore, does not foreshadow which of the circumstances provided in the open-ended list will be relevant, will actually apply or will be more significant. If, after having regard to all relevant factors, the compensation awarded is just and equitable and it reflects an equitable balance between the public and the private interests, the constitutional standards as envisaged in s 25(3) would have been met."

18. As to the role of market value in the determination of just and equitable compensation, the Constitutional Court said the following in the majority judgment at par [37]:

"*Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces. The approach of beginning with the consideration of market value (or actual financial loss for that matter) and thereafter deciding whether the amounts are just and equitable is not novel. It was adopted by Gildenhuys J in Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs. The Court in that matter did not deal with the interpretation and application of s 12(1) of the Act but rather with* *s 2 of the Restitution of Land Rights Act in the context of monetary compensation for dispossession of land. Nevertheless, the Judge pointed out that the market value of the expropriated property could become the starting point in the application of s 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an amount may be added or subtracted as the relevant circumstances in s 25(3) may require. Actual loss may play a similar role depending on the circumstances of the case.*"

19. The Constitutional Court then did the same and, subject to the caveat that it may not be suitable in all cases, described it as the most practical one in the circumstances.

20. This practical approach for quantification of just and equitable compensation is criticised in the minority judgment in *Du Toit v Minister of Transport*[7]. It is pointed out that the precise formulation of the property clause in the Constitution was a matter of great sensitivity at the constitutional negotiations, for the reason that three and a half centuries of colonial deprivation and Apartheid together resulted in a deeply racist pattern of landownership in our country, which our Constitution seeks to alter. The provisions of the property clause were carefully formulated to ensure that while protecting

[7] *supra*, judgment of LANGA ACJ as he then was at p. 321 -330.

property on the one hand, the constitutional protection of property, important as it is, should not impede the important social and political purpose of land reform. It is, according to the Court, therefore not surprising that the Constitution provides not only for the purpose for which expropriation may be effected, but also for the calculation of compensation payable. These provisions are peremptory, and it is mandatory that the compensation be just and equitable[8]. The approach of first determining market value and/or actual financial loss, then deciding whether that would be just and equitable in terms of section 25(3) is, according to LANGA ACJ, not permitted by the Constitution:

> *"It seems to me that our Constitution expressly avoided the approach to the calculation of compensation set out in the Expropriation Act, which has been the approach in South Africa for many years. In my view, the Constitution expressly insists upon a different approach – one which makes justice and equity paramount, not as a second-level 'review' test but as the test for the calculation of compensation. In my view, the approach advocated by Mokgoro J would continue to privilege market value at the expense of other considerations relevant to justice and equity which are expressly advocated by the Constitution.*

8 At p. 328, par [83].

Moreover, it would be unwieldy to apply."[9]

21. The approach advocated by LANGA ACJ has also been adopted by some academic commentators. As is the case in the minority judgment of LANGA ACJ, much rhetoric has been afforded to the basic philosophy of justice and equity, and none to the practical quantification of compensation. One must not lose sight of the purpose of sections 25(2) and 25(3) of the Constitution, namely, that compensation must be paid to the expropriatee.

22. The point of departure in applying section 25(3) must therefore be the purpose of compensation, *i.e.* to recompense the expropriatee for what has been taken from them through expropriation.

23. In *Baphiring Community v Uys and Others* 2007 (5) SA 585 (LCC), the court said the following in paragraph [12]: "*Compensation, to be fair, must recompense.*[10] *Lord Morris stated in the Appeal Court of England:*[11] *'The word compensation would be a mockery if what was paid was something that did not compensate.... The purpose of giving fair compensation for the loss of land taken from a person or a community is to put that person or community, insofar as money can*

[9] *Supra*, 329A-C, para [84]

[10] Relying on *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1993 (2) SA 12 (Nm)

[11] *Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated)* [1970] AC 874.

do it, in the same position as if the land had not been taken".[12] We submit that this exposition of the requirement for compensation is correct and in line with the Constitution, whereas the impugned sections 12(3) and (4) of the Act, which allow for nil compensation, offend section 25 of the Constitution.

24. In *Haakdoornbult Boerdery CC and others v Mphela* 2007 (5) SA 596 (SCA) Harms ADP stated at paragraph [36] that in determining whether the dispossessed community received just and equitable compensation for the loss of their rights, the expropriation principles set out in section 25(3) of the Constitution had to be applied and added: *"Compensation is by virtue of the provisions of s 25(3) and (3) a constitutional issue which means that the compensation award has to fulfil the requirements of the Bill of Rights."* Since market value was in the context of that case, the only factor listed in section 25(3) capable of quantification, the Court started by considering the market value first, and thereafter the other factors.

25. Justice and equity cannot be determined without assessing, in monetary terms, firstly what was lost by the expropriatee and then asking whether the public, rather than the expropriatee, should carry the burden of that loss. Where land is expropriated, the primary loss of the expropriatee lies in the market value of that land.

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[12] See the reliance by the court in fn 6 of the judgment on the Australian work of Douglas Brown Land Acquisition (Butterworths, 1996) at 81

26. What is required by section 25(3) of the Constitution is that in determining compensation, a balance should be struck between the interests of the expropriated person on the one hand and of the public on the other.[13] The logical point of departure should be that the market value has to be assessed in order to balance the interests of the owner with the interests of the public. Should that balance require that the equitable amount of compensation be less than market value, so be it. However, what would be totally unconstitutional is to assess compensation in an irrational and arbitrary way and without quantifying the market value of the expropriated land in order to affect the balance. Such an approach would offend against the express provisions of section 25(3) of the Constitution.

27. In practice, it is therefore imperative to commence with the determination of just and equitable compensation by a determination of the market value of the expropriated land as at the date of expropriation.

28. It is important to note the inter-relationship between sections 25(3)(c) and 25(3)(e) of the Constitution. In determining just and equitable compensation, section 25(3)(c) requires the market value of the expropriated property to be taken into account, while section 25(3)(e) mentions the purpose of the expropriation to be taken into account.

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[13] *Du Toit supra*, 311J, 314H; 315G-H – 316A

Does that mean that the purpose of the expropriation must be allowed to influence the market value of the expropriated land, either by an enhancement or by depreciation in the value thereof?

29. We submit that the correct application of section 25(3)(e) of the Constitution is that the purpose of the expropriation should be taken into account in determining compensation, firstly in order to assess whether the market value of the expropriated property is influenced by it. Secondly, if so, such influence must be disregarded in order to arrive at equitable compensation. We further submit that to hold otherwise would disturb the equitable balance between the interests of the expropriatee and the interests of the public or State.

30. If the expropriation scheme increases or decreases the value of the expropriated property, the appreciation or depreciation must be ignored in order not to burden the expropriatee disproportionately in comparison with other members of the public. This is in line with the so-called *Pointe Gourde* principle, a well-established principle in international customary law that has been accepted into South African law and has been applied in determining compensation in terms of section 25(3) of the Constitution.[14]

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[14] See for example *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) at paras [25] –[28]; *Ex parte Former Highlands Residents; In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) 40g - 41d; *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) para [26] per Meer J; *Uys v Msiza* 2018 (3) SA 440 (SCA) par [17]. See also *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T) 523A - 524D where Van Dijkhorst J discusses the origin and the extent of the rule. LAWSA Vol 10 Part 3 (2nd Ed) par 133 on the purpose of expropriation;

31. The rule is expressed in these terms: "*Any enhancement or depreciation, before or after the date of the notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used... shall not be taken into account in determining the amount of compensation*". [15]

32. Market value is the price which a willing buyer would have paid to a willing seller in the open market for the expropriated property at the date of the expropriation.[16] The willing buyer and willing seller, however, are not the expropriator and the expropriatee, but hypothetical persons who negotiate with each other at arm's length and who are fully informed of existing facts which may influence the value of the property.[17] It is a popular misconception, which lies at the heart of many of the arguments raised by, for example, the Minister of Rural Development and Land Reform, that the concept of willing seller/ willing buyer is the price at which an otherwise unwilling property owner would be prepared to sell his/her property to the State (which would often be at an inflated price).

33. Market value as contemplated in section 25(3)(c) of the Constitution is an <u>objective</u> concept. It does not represent the value to the owner

[15] See *City of Cape Town v Helderberg* (above) at par [25]
[16] See *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 264A; *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 (3) SA 618 (T) at 626H.
[17] See for example *Bestuursraad van Sebokeng v M & K Trust en Finansiele Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 384H.

or the value to the expropriator. In constructing the hypothesis of objective market value, various legal rules have evolved, including that a property has only one market value, which does not differ according to the identity of the specific owner. It is also not the knowledge, expertise, competence, financial means or success of the owner which has to be valued, but the objective attributes of the property.

34. These principles are also ignored by the State in the regulations made under the Property Valuations Act, in terms of which the competence and expertise, or lack thereof, of the owner of the property is "valued", instead of the property. We discuss this in more detail below when considering the question of whether it would be just and equitable to pay a lower amount or even nil compensation to an owner whose property is to be expropriated for land reform purposes.

a. The staged section 25 inquiry:

35. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, SARS* 2002 (4) SA 768 (CC) ("***FNB***"), the Constitutional Court established a staged analytical framework. The Court must ask, in sequence:

(i) Is there a "deprivation" of property? If so, is it arbitrary under section 25(1)?[18]

[18] *FNB v Commissioner, SARS* 2002 (4) SA 768 (CC) ("*FNB*") at para [47].

(ii) If the deprivation is also an expropriation, does section 25(2) of the Constitution permit it, for a public purpose or in the public interest, and subject to the constitutional compensation regime?[19]

(iii) Is any limitation of rights in section 25 justifiable under section 36 of the Constitution?

36. A deprivation is arbitrary if it *"does not provide sufficient reason for the particular deprivation or is procedurally unfair."*[20] Procedural arbitrariness is independently sufficient for invalidity.[21]

37. Importantly, in *FNB*, the Constitutional Court rejected the submission made that the constitutional concept of property is dependent on the use made of the property by the rights holder. [22]

38. In *FNB,* the Court also held that neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership can determine the characterisation of the right. "*A speculator has no less a right of ownership in goods purchased for resale merely because she has no subjective interest in them but sees them only as objects that will produce money on resale*".[23]

[19] FNB (above) at paras [49]–[51].
[20] *FNB* par [100]
[21] *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC) at para [27] and para [29].
[22] *FNB* (above) at paras [53] – [54].
[23] *FNB* (above) par [56].

39. The relevance of these *dicta* in *FNB* becomes relevant when the challenge to the constitutionality of section 12(3) of the Act is considered. In section 12(3), certain categories of land are targeted for expropriation at nil or substantially lower compensation than other property.

b. An expropriation has to be subject to compensation: section 25(2)(b) of the Constitution

40. We submit that the word "*subject to*" in section 25(2)(b) of the Constitution means "*conditional upon*."

41. The meaning of the words "*subject to*" in legislation depends on the context within which it is used. It is often used to establish dominance or subservience between provisions[24], or to introduce a condition precedent, or a qualification, limitation or essential requirement, or to describe the manner and fashion in which certain powers and duties may, or must be exercised[25].

42. When considering the words "subject to compensation" in section 25(2)(b) of the Constitution, we submit that the intention is to make

[24] See for example *S v Marwane* 1982 (3) SA 717 (A) at 747H – 748B.
[25] See *Hickman v The Attorney-General* 1980 (2) SA 583 (R) at 585 E-F and the comprehensive discussion in *Commissioner for Inland Revenue, Transkei v JALC Holdings (SA)* 1991 (4) SA 646 (TkGD) at 648I – 650A.

compensation an essential element or precondition without which expropriation of property may not take place. We therefore submit that if section 25(2) is read with section 25(3) of the Constitution, the payment of just and equitable compensation is a prerequisite or essential condition for any expropriation to be constitutional. [26]

43. AfriForum therefore submits that any attempt to expropriate at nil compensation, which we have already submitted, is the same as no compensation, would be unconstitutional. On this basis alone, sections 12(3) and 12(4) of the Act, which specifically allow for nil compensation, are unconstitutional and should be declared unconstitutional and severed from the Act. We deal more fully with these sections under the relevant rubric below.

44. We further submit that, save in exceptional cases where a property is required on an urgent basis for public purposes or in the public interest, it would be unconstitutional to allow an expropriation to take effect unless the compensation has first been agreed or determined by a court.

45. This very question was discussed by the Constitutional Court in the matter of *Haffejee N.O. v eThekwini Municipality* 2011 (6) SA 134 (CC) at paras [33] to [43]. In that matter, the applicants challenged an

[26] See: Antonie Gildenhuys: *The Debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa* EPLJ 2019 8(2): 136 – 160 at pp. 137 – 138.

expropriation under the 1975 Expropriation Act on the basis that section 25(2)(b) of the Constitution is to be interpreted to mean that the determination either by agreement or an order of the court of the amount of compensation should precede the expropriation. In paragraph [35] of the Constitutional Court's judgment, it held that the text of section 25 does not exclude an interpretation that compensation must precede expropriation, but that an opposite interpretation is equally plausible.

46. Of importance is that the Constitutional Court held in paragraph [43] that <u>generally</u>, the determination of compensation in accordance with the provisions of section 25(3) <u>before</u> expropriation will be just and equitable. The court however, correctly so, pointed out that there may be situations where some of the circumstances required by section 25(3) to be taken into account, would make it difficult if not impossible to determine just and equitable compensation before expropriation, to reach the conclusion in paragraph [43] (a) that the "*provisions of s 25(2)(b) do not require that the amount of compensation and the time and manner of payment <u>must always be determined by agreement or by the court before expropriation under s 25(2)</u>" (our emphasis).* In paragraph 43(c), the court held that in matters where compensation must be determined after expropriation, this must be done as soon as reasonably possible.

47. We submit that the legislature took this judgment and the reasoning therein into account in drafting the final version of sections 7(6)(a), read with section 8(3)(g) of the Act, which make it clear that, save in the event of an urgent expropriation under section 20 of the Act, the amount of compensation must either be agreed upon or approved or decided by a court prior to the expropriation.[27]

48. In paragraph 32 of the President's answering affidavit in the DA application, the President acknowledged that the process proposed by the Department for expropriation and the determination of compensation included that, if the amount offered as compensation was disputed, the compensation must be agreed upon or mediated, or a court must determine the amount of compensation prior to expropriation.[28], save in the event of urgent expropriations which do not require a prior determination of compensation.[29]

49. We also refer to the statement made by the President in paragraph 88 of his answering affidavit in the DA application at page 005-33, namely that Parliament indeed intended at the time when the Bill was drafted that expropriation would only take place, save in urgent expropriations, <u>after</u> the compensation had been determined either by

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[27] This seems to be confirmed by the Speaker. See third respondent's answering affidavit par 28.3 at 006-14 to par 28.5 p 006-15

[28] See DA application item 5, paragraph 31.2 at p 005-40.

[29] President's answering affidavit in the DA application, para 31.4.2. p 005-14. See also para 36.3 and 36.4 at p 005-16, para 86 at p 005-32.

agreement or by the court.[30] We submit that this would render the Act in line with section 25(2) of the Constitution and therefore constitutional.

50. In paragraph 98 of the President's answering affidavit in the DA application[31] the President confirmed the principle that property may not be expropriated before an agreement has been reached on compensation or before the court has determined the amount of compensation (subject of course to section 20 of the Act) by stating the following: "*The context, purpose, scheme and text of the Expropriation Act demonstrate that the decision to expropriate <u>may only be taken</u> after compensation has been agreed, determined by a court or settled by mediation if disputed (section 7(6)(a), and that the expropriating authority can only issue or publish a Notice of Expropriation once it has made a decision to expropriate (8)(1) <u>and once compensation is agreed, determined by a court or settled by mediation</u>*".

51. We submit that this concession by the President was correctly made and is central to the sequencing challenge in Part F. In view of these concessions by the first, third and fourth respondents, we submit that the question whether an expropriation can take place before compensation has been agreed or determined, save in respect of

[30] See also para 90 of the President's answering affidavit in the DA application at page 005-33 to 005-34.
[31] See page 005-36.

urgent applications, is no longer an issue to be determined by this Honourable Court in any of the three applications before it.

c. Section 25(3) of the Constitution

52. Section 25(3) imposes a mandatory, open-ended standard. All listed factors, current use, history, market value, state investment, and purpose, must be considered to the extent they are relevant to a specific expropriation. A statutory provision that excludes or pre-empts any of these factors, or that directs a predetermined outcome before the balancing exercise is completed, would in our submission deviate from and would be inconsistent with section 25(3) of the Constitution.[32] This submission forms one of the main bases on which AfriForum challenges the constitutionality of section 12(3) of the Act.

C. <u>PUBLIC PURPOSE, PUBLIC INTEREST, AND THE LIMITS OF EXPROPRIATION:</u>

53. Expropriation is a coercive acquisition of private property by the State. Laws conferring expropriation power must be strictly interpreted.[33] Under the common law, courts maintained a strong presumption against legislative interference with vested property rights, particularly

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[32] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras [28] and [31]..

[33] Southwood <u>The Compulsory Acquisition of Rights</u> (1st ed) p 18; *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) at 396–397; *Fourie v Minister van Lande* 1970 (4) SA 165 (O); *White Rock Farm v Minister of Community Development* 1984 (3) SA 685 (NPD) at 693E–I.

where fundamental rights were at stake. That presumption, we submit, endures in the constitutional era.

54. "*Public purposes*" means *"purposes which pertain to and benefit the public in contradistinction to individuals."* The Act defines it as *"any purpose connected to the administration of any law by an organ of state, in terms of which the property concerned will be used by or for the benefit of the public".*[34] This is somewhat wider than the 1975 Act definition.

55. Section 25(4) of the Constitution defines "*public interest*" for section 25 purposes to include the nation's commitment to land reform and equitable access to natural resources. This enables expropriation of property from one person by the state in order to transfer that property to another person in the land reform context. That is not in dispute.

56. In *FNB* at para [4] the Constitutional Court observed that sections 25(4) to (9) *"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."* The court equally noted that property protection under the Constitution *"is not absolute but subject to societal considerations."*

[34] LAWSA, Expropriation para 13, relying on *Fourie v Minister van Lande* (above) at 165G.

57. We wish to state clearly, at the outset, that AfriForum does not challenge land reform, restitution, tenure reform, or the need for a constitutionally compliant expropriation statute. Land reform is a constitutional imperative to correct imbalances of the past.

58. AfriForum's challenge is directed at provisions in the Expropriation Act that depart from the compensation scheme in section 25 of the Constitution, that create open-ended nil-compensation categories, or undermine appellate protection in compensation disputes.

59. The permissibility of the expropriation of property for the purpose of land reform is, however, a distinct inquiry from the question whether it would be constitutional to expropriate property at lower or nil compensation if that expropriation is for the purposes of the public interest, instead of for public purposes. Sections 25(2)(b) and 25(3) impose the same just and equitable compensation standard upon every expropriation, regardless of its purpose.

60. We submit that the proponents of the view that in respect of expropriations in the public interest another method of calculation of compensation is permitted under the Constitution, particularly that it would be just and equitable to pay less compensation for the taking of a property if the purpose of the expropriation is in land reform, as opposed to the expropriation of the same property for public purposes such as the building of a hospital, conflates the two enquiries.

61. We submit that the permissibility of land reform expropriation does not carry with it the permissibility of nil compensation, or a different method of determining compensation for such expropriation, resulting in lower or nil compensation, merely because the expropriation is in the public interest. Part D develops this argument.

62. The Association for Rural Advancement ("AFRA") is one of those proponents and submitted in its admission application that the Constitution permits compensation to be calculated differently where the purpose is to fulfil the rights in sections 25(5) to (9). That submission is in our submission wrong. Section 25(3) establishes a single, uniform standard. It creates no hierarchy of expropriation purposes and no inferior compensation floor for land reform. AfriForum supports the remarks in this regard made by the Land Claims Court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform* LCC 156/2009 [2012] ZALCC 7 at para [73], discussed below,[35] and in *Uys v Msiza* *2018 (3) SA 440 (SCA).*

D. CHALLENGE TO SECTION 12(3) OF THE ACT: NIL COMPENSATION:

a. The provision:

63. Section 12(3) of the Act reads:

[35] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* LCC 156/2009 [2012] ZALCC 7 at para [73].

"(3) 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 —

(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 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;

(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937, where an owner has abandoned the land by failing to exercise control over it despite being reasonably capable of doing so;

(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."

b. Nil compensation is unconstitutional: conflict with section 25(2)(b) of the Constitution:

64. The provisions of section 12(3) of the Act form the basis of AfriForum's primary challenge to the Act.[36] AfriForum submits that "nil" means "zero". In our submission, expropriation for nil compensation is the equivalent of expropriation *without* compensation.

65. Section 25(2)(b) of the Constitution makes compensation a constitutional *condition* of expropriation, as motivated above. Property "*may be expropriated <u>only</u> ... subject to compensation....*" Making provision for nil compensation (no compensation) to be paid as section 12(3) of the Act does, extinguishes the condition and renders both the subsection and any expropriation in terms of it, unconstitutional.

66. Expropriation without compensation will not be imputed in the absence of clear and unambiguous statutory authority.[37] Section 12(3) of the Act avoids the expression "without compensation", but we submit that nil compensation is identical in substance. Courts look to substance, not form.

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[36] Founding affidavit ("FA") para 12.1, p. 001 – 35.

[37] *Arun Property Development (Pty) Ltd v Cape Town* 2015 (3) BCLR 243 (CC) / [2014] ZACC 37 at paras [39] and [40] and in particular at par [59].

c. The "including but not limited to" rider: unconstitutional vagueness and unfettered discretion:

67. The circumstances in section 12(3) of the Act in which nil compensation may allegedly be just and equitable where land is expropriated in the public interest, are expressed as "*including but not limited to*" the listed examples. This open-ended formulation confers on expropriating authorities, including under-capacitated and often corrupt local authorities, the discretion to determine that nil compensation is just and equitable across an unlimited, unspecified range of circumstances. The provision is, in our submission, unconstitutionally vague.[38]

68. Legislation affecting constitutional property rights must indicate with reasonable certainty what is required of those bound by it. The principle of legal certainty is a cornerstone of the rule of law. In *Affordable Medicines Trust and Others v Minister of Health and Another*[39] the Constitutional Court emphasised that laws must be written in a clear and accessible manner and must indicate with reasonable certainty to those bound by them, what is required. Wide, unfettered discretion over constitutional rights requires clearly defined standards.[40]

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[38] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paras [108] - [109].
[39] (above) at par [108]
[40] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para [47].

69. Section 12(3) provides neither. Not every owner has the means to challenge an arbitrary nil-compensation determination in court. The provision thereby enables the very arbitrariness that section 25(1) of the Constitution prohibits.

d. Compensation in respect of expropriations for land reform purposes

70. We submit that one of the main issues that arises in this application is whether it can be regarded as just and equitable, and therefore constitutional, to pay an expropriatee lower or even nil compensation if the expropriation is for land reform purposes, instead of an expropriation for purely public purposes.

71. Section 12(3) of the Act restricts the nil compensation dispensation to land expropriated *"in the public interest"*, which includes, under section 25(4)(a) of the Constitution, the nation's commitment to land reform and reforms aimed at bringing about equitable access to all of South Africa's natural resources.

72. Section 12(3) does not apply to expropriations for a public purpose, yet sections 25(2) and (3) of the Constitution draw no such distinction: the just-and-equitable standard applies uniformly to *all* expropriations. We submit that creating a lower compensation floor and specifically providing for nil compensation in expropriations for land reform is constitutionally impermissible.

73. We submit that the Land Claims Court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform* LCC 156/2009 [2012] ZALCC 7 (19 April 2012) at para [73] correctly set out the legal position:

> *"I can see no logical reason why a land owner whose property is expropriated for purposes of land reform should receive less compensation than a land owner whose property is expropriated for a more mundane purpose, such as a storage dam, a school or a hospital ... Land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated, and the determination of compensation in cases of land reform must not be different."*

74. Having regard to the arguments raised by those who defend sections 12(3) and (4) of the Act, this is precisely what they see as the purpose of the two impugned sections of the Act. They argue that these sections are essential for land reform and that this will pave the way for accelerated land reform. The Minister of Rural Development and Land Reform openly blames the slow pace of land reform on the absence of provisions allowing the State to expropriate property at lower or nil compensation for land reform.

75. The real reason for the slow pace of land reform is, however, well known and reported in judgments such as *Mwelase and Others v*

Director-General for the Department of Rural Development and Land Reform 2019 (11) BCLR 1258 (CC) at par [41] and in many judgments of the Land Claims Court (now the Land Court). The lack of diligence, competence, capacity, administrative skills and the persistent failure of the Commission on Restitution of Land Rights, the Department of Rural Development and Land Reform and the Ministry itself to comply with court orders and directives, and the slow pace at which they give effect to the need for land reform, are recurring themes in that court.

76. In his paper on the Debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa, Gildenhuys (who is also a retired judge of the Land Claims Court) refers to the 2017 report of the panel that was appointed by the Speaker's Forum and chaired by former President Motlanthe to, amongst others, review land reform legislation passed since 1994. This report correctly, in our submission, identified the real problems with the slow pace of land reform, which included "*increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training capacity.*" As reflected in this paper, the panel recommended that the problems that "*bedevil*" land reform must be acknowledged and addressed, thereby demonstrating that land reform will redress poverty and inequality and justify an increase in its budget.

77. The Minister and the Department paid no heed to this report, and the many judgments, directives and orders, including costs orders against them, and the slow pace of land reform continues. Expropriations under the 1975 Act, which prescribes an uncomplicated process, have been available to the Minister, but, with one or two (mostly unsuccessful) exceptions, never utilised.

78. Gildenhuys also refers to the judgment on the Land Claims Court in *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) in which the court had to determine the amount of compensation payable to the owner of a property after the court made an award of land to a labour tenant in terms of the provisions of the Labour Tenants Act, 3 of 1996. After determining the market value of the property, the Land Claims Court made a downward adjustment based, amongst others, on the fact that the award of land was for land reform. On appeal to the SCA, that court reversed the decision on the basis that there was no justification for the deduction and that the Land Claims Court arbitrarily decided on this amount with no rational foundation. See *Uys v Msiza* 2018 (3) SA 440 (SCA) at par [27].

79. The proposition that the intention to make the purpose of an expropriation one of the factors to be taken into account in determining the amount of compensation (section 25(3)(e)) is to provide for a lower compensation has been widely debated. See in

this regard, for example, the discussion in LAWSA Vol 10 Part 3 paragraph 133 in which reference is made to Budlender, who stated that the purpose of expropriation is "*open-ended to the point of being indeterminate*"[41]and to Zimmerman, who sees this factor "*as a portal to the consideration of the greater good; it is the primary opening through which the socio-economic thrust of the Constitution as a whole, and the specific commitments to agrarian restructuring contained in section 25(4) to (9), are threaded into the compensation analysis*". [42]

80. We respectfully agree with the view expressed in LAWSA, relying on the judgment in *Mhlanganisweni*, that "*land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated. The assessment of compensation in land reform cases should not be different from other cases, notwithstanding that land reform is an urgent constitutional imperative. It is accepted worldwide that land reform in the public interest is part of the state's duties. It does not rank superior to any other legitimate purpose for which property may be expropriated. Van der Walt*[43] *points out that 'since the purpose of the expropriation (for example, land reform) is already taken into account in justifying*

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41 Budlender Juta's New Land Law 1-66
42 As quoted in LAWSA par 133 and referring to Zimmerman 2005 SALJ 378 at 410.
43 Van der Walt Constitutional Property Law (3rd Ed) 507

the expropriation, it should not be enough to override other factors in determining the amount of compensation"

81. We submit that there are cogent reasons, which have already been advanced by many opponents of the idea of "nil" compensation in public debates and platforms, as well as in academic publications, why subsections 12(3) and 12(4) of the Act, which paves the way for expropriation of property for land reform purposes for nil compensation or at lower levels of compensation, should be found to be unconstitutional. These include the following:

81.1 Parliament failed to pass the *Constitution Eighteenth Amendment Bill*, which sought to explicitly alter Section 25 to allow for "nil compensation". The state cannot now use ordinary, secondary legislation (like the Expropriation Act) to sneak the mechanism in through the back door. Ordinary legislation cannot alter or redefine constitutional concepts.

81.2 The concept of "nil" is an absence of value, making it a legal fiction designed to mask a confiscation without compensation. If no value changes hands, it is an uncompensated deprivation, which violates section 25 of the Constitution.

81.3 The determination of "just and equitable" compensation is a strictly judicial function reserved for the courts. By directly encoding specific categories (not even a closed list) in which compensation "may be nil" into statutory law, the legislature predetermines the outcome. This dictates a zero-rand outcome to a judge, usurping the judiciary's discretionary power to weigh all the relevant factors freely on a case-by-case basis.

81.4 Motivating lower or nil compensation in expropriation for land reform based on the <u>purpose</u> of the expropriation, emphasises <u>one</u> of the factors to the exclusion of the others.

81.5 Determining compensation for an expropriation for land reform purposes at nil or a lower level of compensation is unjust and inequitable in the extreme towards the owner of that property.

81.6 Land reform is a national obligation, the costs of which should be borne by the public, and not by the individual whose property is chosen to be expropriated for the greater good (the nation’s commitment to land reform). Forcing an individual to accept below-market or nil compensation simply because their land is needed for the public good amounts to an arbitrary, disproportionate financial penalty.

81.7 Determining compensation payable to the owner of property chosen to be expropriated for land reform purposes, instead of some other purpose, at nil or lower compensation, would also violate other constitutional rights, such as the right to equality. There is no justification for paying the same owner, under the same circumstances, lower compensation when their property is taken for land reform purposes, than the same owner would have been paid had the same property been expropriated for a "*more mundane purpose.*"[44]

82. Sight must further not be lost, when considering the purpose and constitutionality of sections 12(3) and 12(4) of the Act, of the context within which they were included in the Act, and the background[45] leading to the enactment of these provisions, as set out in AfriForum's founding affidavit.[46] There was first an intention and attempt to amend section 25 of the Constitution to make provision to expropriate property without compensation. It was also reported that the President said in so many words that *"it has become patently clear that our people want the Constitution be more explicit about expropriating land without compensation…"*[47] The President did not, in his answering affidavit, deny that this is what he said.

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[44] Compare *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (above)

[45] *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) paras [64] – [66]. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par [18]; *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA) par [12] and *Aurecon v Cape Town City* 2016 (2) SA 199 (SCA) at 217C – D.

[46] FA, paras 6.2 – 6.9, p.001 – 16 to 001 – 18.

[47] FA par 6.3, p. 001 -16.

83. When the intended constitutional amendment failed, the ANC, being the ruling party at the time, used its simple majority to adopt the Expropriation Bill on 27 March 2024.[48] It can also not be denied that the former Minister of Justice, Mr Lamola, said in 2021: " *We will now use our simple majority to pass laws that will allow for expropriation without compensation.*"[49]

84. The arguments of those who support the idea that an owner whose property is to be expropriated for land reform purposes should be paid nil or lower compensation are largely based on political rhetoric and not on legal argument. Public statements by politicians such as the President and Minister of Rural Development and Land Reform leave one with the almost inescapable conclusion that the true intention behind the inclusion of sections 12(3) and (4) of the Act is to legalise a Zimbabwean-style grabbing of land.[50]

85. This intention already became clear from the Property Valuation Act, 17 of 2014 (the "*PVA*") and the regulations promulgated under the said Act. One of the stated objects of the Act is to "*give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of*

[48] FA par 6.9. p. 001 -18.
[49] FA par 6.8. p. 001 -18.
[50] That at least, is how investors, including international investors, perceive these provisions in the Expropriation Act, as is evident from the well-reported negative economic fallout that resulted from the President's signing of the Act.

property".[51] Section 12(1)(a) of the *PVA* provides that the Office of Valuer-General (the "OVG") must value all property that has been identified for purposes of land reform, having regard to the "prescribed criteria, procedures and guidelines". When a property is to be acquired or disposed of by a state department for a purpose other than land reform, the OVG must determine the market value of such property. (section 12(1)(b)), with the result that properties to be acquired or expropriated for land reform purposes are "valued" differently than property acquired or expropriated by the state for any other purpose.

86. The real intent to pay less compensation for properties earmarked for land reform purposes becomes clear from the Regulations under the PVA, which prescribe that the "value" of property for land reform purposes must be determined by adding the market value of the property to the so-called "current use value", and then dividing the figure by two. [52]

87. As Gildenhuys points out in his 2019 paper (above) at p 150, in practise the valuation of a property identified for land reform is significantly lower than the market value thereof (which we submit is

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51 See section 2(a) of the PVA

52 The current use value is defined to mean "the net present value, as at the date of valuation, of cash inflows, or other benefits and costs that the subject property generates for the specific owner in perpetuity or, in the case of a lease, to lease expiry, under lawful use, and without regard to its highest and best use, or the monetary amount that might be realized upon its sale".

clearly the whole purpose of the Act and the regulations). Gildenhuys also points out that this method of determining value is not reliable, dependent on too many variables and in addition, is dependent on the abilities and resources of the farmer who works it.

88. The result is that the OVG values the performance of the particular owner, and not the property. The owner is also punished for uncontrollable events, such as the economic slump that occurred as a result of the lockdowns during the Covid epidemic. The OVG takes into account the lower income during that period in determining the so-called "use value". It should be noted that "use value" is not one of the factors in section 25: "current use" of the property is.

89. The constitutionality of the PVA and the Regulations has not yet been tested. The Land Court, however, held in *Emakhasaseni Community and Others v Minister of Rural Development and Land Reform* 2019 (4) SA 286 (LCC) that the court cannot be bound to accept such a value as determined by the OVG on the basis of the wording of section 25(2)(b) of the Constitution.

90. The practical effect of this legislation is however that farmers who would have been prepared to make their land available for land reform, now choose to rather sell it on the open market, with all the negative outfall that this has for land reform that would otherwise have been promoted had the state been prepared to offer just and

equitable compensation to owners who are prepared to give up their properties for land reform purposes.

91. We therefore submit that the clear attempt of the Legislature to motivate nil or lower compensation for expropriations for land reform purposes, in itself, renders sections 12(3) and 12(4) of the Act unconstitutional. We deal with the specific subsections further below.

e. Section 12(3)(a): capital investors:

92. Section 12(3)(a) of the Act targets owners whose main purpose is not development or income generation, but capital appreciation. This sub-section is constitutionally unsound on four independent grounds.

93. First, section 25 of the Constitution creates no hierarchy of legitimate ownership purposes. An investor holding land for capital growth is a constitutional owner no less than a developer, any other private owner, or farmer. The Constitution does not condition property rights on the productive use intentions of the owner. Section 25 recognises both the material and non-material value of property to owners. See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at par 89 and our submissions above in respect of the Constitutional Court judgment in *FNB*

94. Secondly, section 12(3)(a) of the Act completely disregards the amount that an investor has paid for such land as an investment and forces any investor in the land to either use it by developing it, or to generate income from it, failing which the owner stands to lose it without compensation, as is pointed out in AfriForum's founding affidavit.[53] This imposes a punitive consequence on passive ownership with no constitutional foundation.

95. Thirdly, section 12(3)(a) predetermines nil compensation notwithstanding and irrespective of the market value of the property. This pre-empts the market-value factor under section 25(3)(c) and the current-use factor under section 25(3)(a) — both of which the just-and-equitable balancing exercise is obliged to consider.

96. Fourthly, the sub-section unfairly discriminates against owners who hold land for capital investment purposes.

f. Section 12(3)(c): "abandonment" — vagueness and conflict with *res derelictae:*

97. Section 12(3)(c) permits nil compensation where "*an owner has abandoned the land by failing to exercise control over it despite being reasonably capable of doing so*." Three distinct defects render this sub-section unconstitutional.

[53] FA, par 12.7, p. 001 – 37.

98. First, abandonment at common law (*res derelictae*) requires *animus dereliquendi* — a positive intention to relinquish ownership. Failure to exercise physical control, absent that mental element, is not abandonment in law.[54] Section 12(3)(c) conflates physical dispossession with legal abandonment, creating an irrationally overbroad category.

99. Secondly, an owner may have lost physical control through unlawful occupation. Such an owner — unable to evict due to restrictive legislation or want of financial means — is placed on the same footing as a genuine abandoner. That is manifestly unjust.

100. Thirdly, this category, like sections 12(3)(a) and (d) of the Act, directs nil compensation irrespective of the market value of the land and other factors to be considered in terms of section 25(3). The override of the balancing exercise in section 25(3) of the Constitution is a constitutional defect common to all four sub-categories.

g. Section 12(3)(d): direct state investment or subsidies

101. Section 12(3)(d) of the Act triggers nil compensation where the market value does not exceed the present value of direct state investment or

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54 FA paras 12.12–12.13, p. 001 – 38.

subsidy. It refers *only* to market value, to the exclusion of the other factors in section 25(3) of the Constitution.[55]

102. A provision that directs nil compensation on a single metric, namely market value versus state investment, overrides the comprehensive section 25(3) balancing exercise and is inconsistent with the Constitution.

h. Answering the President's arguments on section 12(3):

103. The President contends that section 12(3) does not mandate nil compensation but merely requires a decision-maker to "give consideration" to the listed factors without those factors being exhaustive, and that section 25(3) of the Constitution does not itself prohibit nil compensation where circumstances warrant it.[56][57][58] AfriForum's response is threefold.

104. First, nil compensation *is* "without compensation." Even if section 25(3) of the Constitution could theoretically, and in exceptional circumstances, yield nil compensation after an exhaustive quantum balancing exercise in extraordinary circumstances, which AfriForum does not concede, section 12(3) of the Expropriation Act singles out

55 FA para 12.14; at p. 001 – 38, see also Reply para 13.2 at p. 008 -12.
56 Pres-AF paras 54–57, p. 004 -22.
57 Pres-AF para 52, p. 004 – 21.
58 Pres-AF paras 63–65, p. 004 -24.

and impermissibly characterises[59] specified categories of land and steers both decision-makers and courts toward a predetermined nil outcome. The mere fact that it lists and singles out certain instances and circumstances *limits the discretion, including that of a court,* to determine just and equitable compensation and deviates from section 25(3) read with section 25(2) of the Constitution. It empowers the expropriating authority, from the outset, based on the characterisation of the property, to offer nil compensation based on the use or non-use of the property.

105. Secondly, the President's justification based on section 36 of the Constitution fails. The constitutional compensation requirement in section 25(2)(b) of the Constitution is not a peripheral element capable of limitation; it is the condition upon which expropriation is constitutionally permissible. Section 36 of the Constitution cannot justify the elimination of that condition. A limitation that destroys the essential content of a constitutional right does not pass scrutiny under section 36 of the Constitution.[60]

106. Thirdly, section 12(1) of the Act omits any reference to the time and manner of payment of compensation. Section 25(3) expressly requires that *both* the amount *and the time and manner of payment*

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59 Considering the dicta in *FNB* (supra).

60 *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at paras [85]–[86].

be just and equitable. The omission is an independent constitutional defect.

E. <u>CHALLENGE TO SECTION 12(4): THE LABOUR TENANTS ACT PROVISION:</u>

a. The provision:

107. Section 12(4) reads:

> *"(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 No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances."*

b. Section 12(4) has no place in an Expropriation Act:

108. Section 12(4) is misplaced in the Act and has no place in a statute that deals with administrative expropriations.[61] The Act is an administrative expropriation statute which regulates coercive acquisition by the State through the Minister of Public Works and Infrastructure.

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[61] FA para 12.15 at p. 001 – 39, Reply para 13.3 at p. 008 -12.

109. When other statutes authorise the administrative expropriation of property by other expropriators, including organs of state, the statutes make the provisions of the Expropriation Act applicable, *mutatis mutandis*. See, for example, section 55 of the Mineral and Petroleum Resources Development Act, 28 of 2002; various Provincial Land Administration Acts, such as section 2(1) of the *Free State Land Administration Act*, 1 of 1998; sections 2B to 2E of the *Gauteng Land Administration Act*, 11 of 1996. Where municipalities are given the power to expropriate property for local public purposes, this is always subject to the Expropriation Act.

110. Section 23 of the *Land Reform (Labour Tenants) Act* 3 of 1996 (the **"LTA"**), however, provides for a <u>judicial expropriation</u>, *i.e.* an expropriation by the Court. See in this respect LAWSA Vol 10 Part 3 par 3 for a discussion of the three methods of expropriation. The authors mention that this method of expropriation is currently used in only two instances, namely the expropriation of a servitude in terms of the *National Water Act*, 36 of 1998, and an expropriation by the court following the award of land to a labour tenant.

111. The determination of compensation by the Land Court (or an arbitrator) follows a successful award to a labour tenant claimant under Chapter III of the LTA. This is not an administrative expropriation. Neither the Minister of Public Works, nor the Minister of Land Reform and Rural Development (the responsible minister as

defined in the LTA), are granted any powers of expropriation under the LTA to expropriate such land. That it is indeed an expropriation by the Land Court, is confirmed by section 38(1) of the LTA which provides that all references in the Deeds Registries Act, 1937 to "*notice of expropriation*" shall, in respect of the transfer of land awarded to a labour tenant, be read as a reference to the relevant order of the Court containing the award.

112. The Minister of Rural Development and Land Reform has no authority under the LTA to expropriate land administratively. Nor does the LTA authorise the Land Court to order the Minister to do so, contrary to the position taken by the said Minister in his joinder application. (FA para 12.1, pp. 12–123.)

113. Section 23(1) of the LTA already confers on the affected owner the right to *"just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land."* Section 23(2) of the LTA provides for the determination of such compensation by the arbitrator or the Land Court. The LTA, therefore, already incorporates the constitutional standard. Section 12(4) of the Expropriation Act does not supplement it; it overrides it by introducing the possibility of nil compensation into a statutory compensation framework that expressly tracks section 25(3) of the Constitution.

114. The arguments raised by the supporters of section 12(4) of the Act in any event lose sight of the legal nature of labour tenancy agreements and the contractual reality, as discussed below.

c. **Labour tenancy: the contractual reality**:

115. Labour tenancy arose when white landowners lacked the means to pay wages, and black people often had no option but to submit to labour tenancy to obtain access to agricultural land in areas set aside for white occupation under previously racially discriminatory legislation. In its classic form, the labour tenant provided free labour to the owner of the land for three to six months in return for the right to occupy and use a portion of the land.

116. In *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) at paras [45]–[46] the Constitutional Court characterised the labour tenant agreement as "*an individualised transaction that requires specific performance from the contracting parties*."[62] In return for labour, the owner surrendered a portion of land for the tenant's use and occupation. Divesting the owner of that land without compensation, at a minimum for the labour the owner received as consideration for the right of occupation, cannot be characterised as just or equitable.

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[62] *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) at paras [45]–[46].

117. Section 22(5)(a) of the LTA requires the Land Court, when crafting its order, to have regard to *"the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis."* Granting ownership of a portion of land without any compensation to the landowner removes the only ongoing economic relationship that made the arrangement viable for both parties, namely the reciprocal obligations of labour and occupation. Awarding such land to a labour tenant when it is not viable or sustainable will, in most cases, doom the successful claimant to poverty rather than to a sustainable livelihood. Advocates of section 12(4) of the Act do not grapple with this reality.

118. AFRA's argument that owners who benefited from "*uncompensated labour for decades and generations should not also benefit from state compensation*"[63] mischaracterises the legal position. The labour was not uncompensated. It was rendered in exchange for occupation and use rights. That is the contractual bargain. To deprive the owner of the land without compensation reverses the bargain entirely and in a manner that section 25 of the Constitution does not sanction.

119. We therefore submit that section 12(4) of the Expropriation Act and its reference to (judicial) expropriations under the LTA has no place in the Act. It is not the "answer" to speed up land reform and cannot

64. See AFRA's founding affidavit par 45.5 p 011-27

cater for the needs of labour tenants, as is submitted by some of the *amici curiae* and some of the respondents.

120. Section 12(4) of the Act should accordingly be declared unconstitutional and invalid. It has no place in a statute regulating administrative expropriations by the State, particularly where the LTA itself already provides that the owner is entitled to just and equitable compensation as prescribed by the Constitution.

F. <u>CHALLENGE TO THE SEQUENCING PROVISIONS: ss 7(6)(a), 8(3)(g), 19(2) AND 19(3) OF THE EXPROPRIATION ACT;</u>

a. The internal contradiction:

121. The Act contains an irresolvable internal contradiction that renders its sequencing architecture unconstitutional. Four provisions must be read together.

122. Section 7(4)(a) of the Act entitles a person who has received a notice of intention to expropriate to dispute the compensation amount *"in terms of section 19"* of the Act. Section 8(3)(g) requires that the notice of expropriation must contain *"the amount of compensation agreed upon or approved or decided by a court under section 19."* Section 8(3)(g), therefore, presupposes that compensation has been determined *before* the notice of expropriation is served.

123. Section 7(6)(a) of the Act empowers an expropriating authority to decide to expropriate the property **after** the compensation, the amount of which and the time and manner of payment of which have been agreed with the owner or approved or decided by a court. Section 8(3)(g) in turn provides that the notice of expropriation must contain the amount of compensation agreed upon or approved or decided by a court under section 19.

124. Section 19(2) of the Act, however, provides that if no settlement is reached, either party may, within "180 days of the date of the notice of expropriation", institute court proceedings for compensation to be determined. Section 19(3) similarly gives a disputing party 90 days *"of the date of the notice of expropriation"* to request the expropriating authority to institute such proceedings. Both sub-sections, therefore, envisage that the notice of expropriation has been served *before* compensation is determined.

125. These two readings cannot coexist. Either:

(a) Section 8(3)(g) requires compensation to be determined before the notice, rendering sections 19(2) and (3) incoherent and incapable of application; or

(b) Sections 19(2) and (3) permit the notice to precede compensation determination, rendering section 8(3)(g) impossible to comply with before the notice is served.

126. The President has conceded this contradiction in his answering affidavits. In his answering affidavit in the DA application (incorporated by reference at Pres-AF para 42):[64]

> *"I accept that the provisions of section 19(2), (3) and (4), when read with those of sections 7(6)(b)(i) and 8(3)(g) of the Expropriation Act create a circular process. I am advised that this may render the provisions void for vagueness."*

127. He further conceded that *"in error, section 19(2) and (3) makes the commencement of the running of the 180-day and 90-day time periods subject to receipt of a notice of expropriation.'*[65] This is not a contested point of interpretation. It is a concession by the first respondent that the legislature made a drafting error in provisions that go to the heart of the expropriation process.

128. The third and fourth respondents make the same concession. The Speaker says the Act was amended to shift compensation determination from after expropriation to before expropriation, but

[64] President's answering affidavit in the DA Application ("Pres-DA") para 8, incorporated in Pres-AF by reference at para 42.
[65] Pres-DA para 10.

that a consequential amendment was not made, resulting in sections 19(2) and 19(3) of the Act "*incorrectly*" referring to proceedings after the notice of expropriation. The Speaker goes as far as to state that the Act makes it impossible for an expropriating authority to expropriate property before agreement on compensation has been reached or compensation has been approved or determined by a court (except for urgent expropriations), and that a decision to expropriate in terms of section 7(6)(a) of the Act is only taken after that stage. The affidavit further accepts that, read with section 8(3)(g) of the Act, the wording "*may render sections 19(2) and 19(3) ambiguous and vague.*"

129. The Speaker seeks to minimise it as a "minor technical issue," and makes it out as abstract or technical, but this concession is a direct answer to the pleaded internal-conflict case made out by AfriForum. We, however, submit that a drafting error acknowledged by the lawmaker cannot be dismissed as harmless where it concerns the constitutional precondition to expropriation and the timing of judicial determination. This is not a "technicality," but a conceded statutory contradiction affecting a constitutional precondition.

130. We make submissions in the last section below on the appropriate relief to be granted to deal with the admitted drafting error in the Act and the inherent contradictions between section 8(3) and 19(2) and (3) of the Act.

b. Constitutional invalidity: section 25(2)(b) of the Constitution:

131. To the extent that sections 19(2) and (3), read with section 7(6)(a) and (b) of the Act, permit a notice of expropriation to be served before compensation is agreed or court-determined, save under circumstances where it would not be just and equitable to do so (referring to urgent expropriations), they conflict directly with section 25(2)(b) of the Constitution.

132. Upon service of the notice, ownership of the property vests in the expropriating authority on the date of expropriation (s 9(1)(a)) of the Act and possession passes on the date stated in the notice (s 9(2)(a)). An owner thereby loses both ownership and possession before the constitutional prerequisite of expropriation is satisfied.

133. The practical consequences are severe. A productive landowner can be expropriated, stripped of ownership and possession, before just and equitable compensation is finally determined. This may deprive the owner of the very income needed to sustain litigation and can effectively coerce acceptance of an inadequate offer. (FA para 8.5.)

c. Vagueness:

134. To the extent that section 8(3)(g) and sections 19(2)/(3) of the Act might be read as alternatives, their irreconcilable conflict renders both

provisions void for vagueness. Legislation must indicate with reasonable certainty what is required of those bound by it. The same Act cannot in section 8(3)(g) require the notice to contain compensation "approved or decided by a court" while in sections 19(2)/(3) permitting the court to decide compensation 180 or 90 days *after* the notice. This is a direct contradiction, not a textual ambiguity.

d. The President's proposed remedy: reading-in:

135. The President does not defend sections 19(2) and (3) of the Act on the merits. He proposes instead that this Court delete the words *"of the notice of expropriation"* in both sections and "read in" new triggering language to align the 180-day and 90-day periods with the conclusion of mediation or the receipt of a dispute notice under section 7(4)(a)(iii).[66]

136. AfriForum welcomes the President's candid acknowledgement "that the provisions of section 19(2), (3) and (4) as they now read, render the Expropriation Act unconstitutional" (Reply para 6.1). But the proposed correction "*requires extensive rewriting ... in order to render these subsections constitutional*,"[67] going "beyond an interpretation of the Expropriation Act to render it constitutional" and

[66] Pres-DA para 13 (exact proposed reading-in language). The President incorrectly refers in the affidavit to section 7(4)(a)(ii) of the Act, but it is clear that he intended to refer to a notice under section 7(4)(a)(iii) disputing the amount of compensation offered.

[67] Reply para 6.5 at p. 008 -6.

amounting to "a rewriting of sub-sections 19(2) and (3) ... which is the task of parliament."[68]

137. Reading-in is an exceptional remedy of constitutional remediation appropriate for urgent, operational contexts — not a mechanism for curing legislative drafting errors.[69] It should be used sparingly.[70]The Act has not been proclaimed into force. There is no operational emergency. Reading-in is doubly inappropriate: *"not in a matter such as this where the Act has not yet been put in operation."*[71]

e. Preferred remedy: declaration of invalidity and reading in;

138. Sections 19(2) and (3) and section 19(4) [in as far as it relies on the present reading of sections 19(2) and (3)], read with sections 7(6)(a) and 8(3)(g) of the Act, should be declared unconstitutional and invalid to the extent of their inconsistency with the Constitution. We deal elsewhere in these heads with the proposed reading in as an interim measure.

[68] Reply paras 6.6, 6.9. at p. 008 -6 to 008 -7.

[69] *Bhe v Magistrate, Khyayelitsha* 2005 (1) SA 580 (CC) par [115]; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) par [131].

[70] *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) at par [82].

[71] Reply para 6.10 at p. 008 -7.

G. <u>CHALLENGE TO SECTION 19(8): OVERRIDE OF SECTIONS 173 AND 34 OF THE CONSTITUTION</u>

139. Section 19(8) of the Act reads:

> *"Despite section 18 of the Superior Courts Act, 2013 (Act No. 10 of 2013), any appeal against the decision of a court on the amount of compensation will not prevent the expropriating authority from expropriating for the amount approved or decided, unless a court grants an interim interdict based on compelling prospects of success of the appeal."*

140. Section 18(1) of the Superior Courts Act codifies the courts' inherent power, itself protected under section 173 of the Constitution to regulate execution pending appeal. The default position is suspension of execution pending appeal. Section 19(8) displaces that default in the expropriation-compensation context, permitting the expropriating authority to proceed notwithstanding a pending appeal.

141. Courts' discretion under section 18(1) of the Superior Courts Act is part and parcel of the Courts' inherent jurisdiction to regulate their own process in terms of section 173 of the Constitution. See, for example, *Ekurhuleni Metropolitan Municipality v Business Connexion (Pty) Ltd and Others* 2024 (4) SA 571 (GJ) paras [19] to [22] and [37] to [39]. Section 19(8) infringes that constitutionally entrenched power.

(FA para 11.10; Reply para 17.) Parliament may amend the Superior Courts Act by ordinary legislation, but it cannot do so in a manner that impermissibly trenches on constitutionally protected inherent court powers.

142. The Speaker avers that section 19(8) of the Act is consistent with section 18 of the Superior Courts Act, whereas the President admitted that section 19(8) of the Act changed the legal position in section 18(1) of the Superior Courts Act and that Parliament was entitled to enact section 19(8) of the Act to provide an exception or departure from section 18(1). (See President's affidavit paragraph 77 p 004-28).

143. In terms of section 171 of the Constitution, all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. The Superior Courts Act, 10 of 2013, is the national legislation enacted considering inter alia the provisions of section 171 of the Constitution. The Act is not such legislation, and the legislature could not, in our submission, legislate in section 19(8) of the Act differently from what has been legislated in section 18 of the Superior Courts Act.

144. Section 19(8) Act seeks to override the common law position, which was given effect to in section 18 of the Superior Courts Act, namely that a judgment is automatically suspended pending an appeal. [72]

145. And in common terms, in section 18(1) and 18(3) of the Superior Courts Act, it is only a court which granted the order that has the power to allow its own judgment to be carried into effect pending the decision on appeal. In terms of section 18(2) read with section 18(3) of the Superior Courts Act, a party who wishes a judgment and order to be effective pending an appeal has to establish exceptional circumstances and irreparable harm.

146. The State clearly seeks to avoid such an onus through the enactment of section 19(8) in the Act, which is irrational over and above being in conflict with the constitutionally entrenched inherent powers of the courts to regulate their own process and to determine whether there should, in a specific case, be a deviation from the normal position that a judgment and order is suspended pending an appeal.

147. We submit that the "*compelling prospects of success*" threshold in section 19(8) of the Act and the onus it places on an expropriatee is arbitrary and irrational and is materially higher than the balance-of-probabilities standard in section 18(3) of the Superior Courts Act. We

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[72] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at par [38]. . See also *University of the Free State v AfriForum* [2017] 1 ALL SA 79 (SCA) at paras [9] – [10].

submit that section 19(8) changes the ordinary appellate suspension position in a constitutionally sensitive context and places the burden on the owner to obtain interim relief on a "compelling prospects" threshold. The issue is not whether an appeal remains possible; it is whether expropriation may proceed before appellate finality on compensation.

148. By raising this threshold, section 19(8) of the Act removes a substantive constitutional protection from property owners who seek to preserve their position pending appeal. This constitutes a limitation of the right of access to court under section 34 of the Constitution. The President argues (see paragraph 79 of his affidavit at p 004-29) that such a limitation is justifiable under section 36 of the Constitution. We respectfully disagree.

149. We submit that section 19(8) of the Act adversely affects the inherent powers of the courts in terms of section 173 of the Constitution, and is, for that reason, unconstitutional. Section 36 is not applicable and cannot be used as a justification.

150. Section 36 can only be resorted to where there is a limitation of a right in the Bill of Rights, such as the right to access to court in terms of section 34 of the Constitution. The limitation in section 19(8) of the Act is not justifiable under section 36 of the Constitution. The President argues that section 19(8) prevents undue delay in

implementing expropriation, and that the right to appeal is preserved.[73] That is insufficient. Appeal processes can be expedited. The rules of the Supreme Court of Appeal and the Constitutional Court cater for urgency and expedited hearings. The courts are themselves the guards at the gate as to whether an appeal would have reasonable prospects of success or whether it would in the interests of justice that an appeal be heard.

151. The right in terms of section 25(2)(b) of the Constitution to have compensation determined by a court is a crucially important right. The determination of just and equitable compensation in a specific case is in itself a constitutional issue. Such determination can be notoriously difficult, involving expert evidence and counsel experienced in the field. There are several examples in our case law where a court of appeal came to a different conclusion on appeal as to appropriate compensation.

152. Where an owner wins an appeal after having been dispossessed at an incorrect compensation figure, the harm may be practically irreversible. Not only was such an owner's source of income taken away from them, but the dispossession of productive land cannot also always be remedied by money alone. The means adopted are not

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73 Pres-AF para 78 at p. 004 -29.

proportionate to the legislative objective and do not represent the least restrictive alternative.[74]

153. A related point concerns the definition of "court" in the Act, which is restricted to divisions of the High Court. This potentially excludes the Constitutional Court and the Supreme Court of Appeal from the compensation jurisdiction. Questions of just and equitable compensation under sections 25(2)(b) and (3) are constitutional matters; restricting appellate access to those courts may be impermissible.[75]

154. AfriForum persists in its challenge to section 19(8) of the Act and submits that it is unconstitutional and constitutes a limitation of a fundamental right, which cannot be justified under section 36 of the Constitution.

H. <u>SECTION 19(7): CONFLICT WITH SECTION 172(1)(a) OF THE CONSTITUTION:</u>

155. Section 19(7) of the Expropriation Act reads:

> *"Where a court finds that a provision of this Act has not been complied with, it may make such order as it considers just and*

74 Pres-AF paras 79.1–79.5 at p. 004 -29.
75 FA paras 11.5–11.6 at p. 001 -33.

equitable, having regard to all relevant circumstances, including …"

156. Section 172(1)(a) of the Constitution *obliges* a court, when deciding a constitutional matter within its power, to declare that any law or conduct inconsistent with the Constitution is invalid to the extent of its inconsistency. Non-compliance with the Act, where it raises a constitutional matter under PAJA or the direct operation of the Constitution, triggers this mandatory obligation.[76]

157. The "*may make such order as it considers just and equitable*" language in section 19(7) of the Expropriation Act potentially displaces the *mandatory* declaration required by section 172(1)(a). To the extent that section 19(7) of the Act purports to confer a discretion to make "just and equitable" orders in substitution for the mandatory invalidity declaration, we submit it is constitutionally invalid.

158. The President contends that section 19(7) of the Act is "capable of a constitutional interpretation" — that where non-compliance constitutes a constitutional breach, section 172(1)(a) applies regardless; where it does not, section 19(7) provides flexible remedies without displacing section 172(1)(a).[77] AfriForum submits that the risk

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[76] FA paras 11.3–11.4, p 001-33. See for example *Dawood, Shlabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par [59] to [60]; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at par 198

of impermissible displacement is real and is not cured by that reading. The provision should be declared invalid to the extent of its inconsistency.

I. INTERNATIONAL LAW:

159. Section 39(1)(b) of the Constitution requires this Court, when interpreting the Bill of Rights and therefore also s 25, to consider international law. That obligation is reinforced by s 232 of the Constitution, which provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament, and by s 233 of the Constitution, which requires every court, when interpreting legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. International law is accordingly not an optional aid; under s 39(1)(b) of the Constitution its consideration is mandatory. [78]

160. AfriForum does not contend that international law prescribes market value as an irreducible minimum, or that it dictates any single rigid formula for compensation. In foreign case law and in international law[79] it is generally accepted that there is a duty on the state to pay compensation for expropriations. [80]

[78] *Haffejee* (supra) at par [29], FNB (supra) at par [64].
[79] Lubbe & Du Plessis , *Constitutional Court Review 2021,* Vol 11, 79 – 112 at B 2 p. 102.
[80] Lubbe & Du Plessis (supra) at B4, p. 104.

161. Customary International Law, however, does not countenance expropriation without compensation, *i.e*. confiscation of property. The question is whether the Constitution or an act of parliament can be adopted or amended to provide for expropriation without compensation, whilst still conforming to International Law. We submit not.

162. AfriForum's case is narrower and is anchored in the text of s 25 of the Constitution, namely that the compensation payable on expropriation must be just and equitable. International law is relied upon not to displace that domestic standard, but to confirm that compensation is an ordinary incident of lawful expropriation, and that the genuine international debate concerns the standard or quantum of compensation, not the open-ended normalisation of uncompensated takings as sections 12(3) and (4) of the Act seek to do.

163. The traditional measure of compensation, which was accepted as Customary International Law until about 1974, was adequate or effective compensation, which was equated to full compensation, or at least the market value of the expropriated property. Full compensation means an amount that, insofar as money can do so, will restore the expropriatee to the same financial position in which he/she was before the expropriation. As Gildenhuys records,[81]

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[81] Antonie Gildenhuys The debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa published on 7 December 2019. (https://doi.org/10.1515/2eplj-2019-0007)

"*adequate compensation"* has much the same meaning. The High Court of Botswana held that the expropriate should "*as far as money can do it, be put back in the same position as he would have been, had the land not been expropriated"* [82] This is still the measure insisted upon in International Law by certain countries such as the United States, Britain and most of the European countries in Bilateral Investment Treaties ("BIT's"). Since the acceptance of the Charter of Economic Rights and Duties of States by General Assembly Resolution 3281 (XX1X) on 12 December 1974, there has been a marked deviation from this measure of compensation. In the Charter, which is not binding International Law, because a General Assembly Resolution is not binding on member states, the measure of compensation was watered down in Article 2(2)(c) to "*appropriate compensation,*" taking into account the particular state's relevant laws and regulations and also contentions that the state considers pertinent. A mere subjective norm for assessing appropriate compensation is, however, still unacceptable in international law.

164. Various countries have deviated from the traditional full compensation concept and require in their constitutions just or fair compensation. Fair compensation is an amount that will redress the imbalance caused by the expropriation between the public interest

[82] *Attorney General v Western Trust (Pty) Ltd* 2006 (2) BLR 1 (HC)

and the interest of the expropriated land owner. Fair compensation can be equal to full compensation, but it may also be less.

165. The only constitution that we could find that specifically provides for no compensation is that of Zimbabwe.[83] The majority of international constitutions[84] require either just compensation[85], fair compensation[86], full compensation[87] or adequate compensation[88].

166. United Nations General Assembly Resolution 1803 (XVII) of 1962, on Permanent Sovereignty over Natural Resources, is of particular assistance precisely because it is sovereignty- and development-friendly. The respondents invoke it in support of South Africa's sovereign right to regulate and to expropriate property in the public interest, and that much is not in dispute. The Resolution provides, however, that "nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest" and that, in such cases, "the owner shall be paid appropriate compensation" in accordance with the rules in force in

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[83] Zimbabwe, could also not rely on its Constitution to avoid the international law obligation to pay compensation. See: Lubbe & Du Plessis (supra) at B 4, p. 104.

[84] See Gildenhuys *The Debate about Full, Partial or Nil Compensation* paper (above) at p 138 footnotes 7 to 10 relying on AJ van der Walt *Constitutional Property Clauses* (1999) as source.

[85] See for example the constitutions of Central African Republic, The Constitution of the Republic of Congo; The Constitution of the Arab Republic of Egypt, 1971; The Constitution of the People's Republic of Mozambique, 1990; The Constitution of the Republic of Namibia, Act 1 of 1990.

[86] See for example the Constitution of the Republic of Madagascar, 1992; the Constitution of the Republic of Rwanda, the Constitution of the United Republic of Tanzania, 1977, Constitution of Kenya, 2010, section 40.

[87] See Constitution of the Kingdom of Denmark Act 1953; The Constitution of Lesotho, 1993; the Constitution of the Kingdom of Norway, 1814

[88] The Constitution of the Republic of Botswana, The Constitution of Malta, 1964; The Constitution of the Republic of Uganda, 1955,

the State taking such measures and in accordance with international law. Even on the most sovereignty-protective international instrument, therefore, compensation is treated as an incident of lawful expropriation, rather than as something that may be dispensed with by general legislative design.[89]

167. The principal international materials are to the same effect. UNCTAD's study *Taking of Property* records that, under customary international law and the broad body of investment agreements, a lawful taking of property generally requires a public purpose, non-discrimination, the payment of compensation and an emerging requirement of due process; it also records that, while the obligation to compensate is well established, States and commentators continue to disagree about the applicable standard or formula of compensation.[90] UNCTAD's later study, *Expropriation: A Sequel,* is to like effect: a lawful expropriation generally requires a public purpose, non-discrimination, due process and the payment of compensation, while bona fide, non-discriminatory regulation in the exercise of a State's police powers may fall outside the category of compensable expropriation altogether. This confirms the distinction that lies at the heart of AfriForum's case, between, on the one hand, the standard or

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[89] United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources, para 4, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/general-assembly-resolution-1803-xvii-14-december-1962-permanent.

[90] UNCTAD, *Taking of Property* (UNCTAD Series on Issues in International Investment Agreements), available at https://unctad.org/system/files/official-document/psiteiitd15.en.pdf.

quantum of just and equitable compensation, which is properly debated, and, on the other, the wholesale legislative authorisation of uncompensated takings, which international law does not support.[91]

168. International investment law, mainly consists of bilateral investment treaties (BITs). Most BITs provide that the amount of compensation should be equivalent to "fair market value" immediately before the expropriation took place. Most guarantees contained in BITs are based on general state practice and can be regarded as part of the general principles of investment law and have relevance beyond any individual treaty. [92]

169. These international materials bear directly on both limbs of AfriForum's case. As to the challenge to ss 12(3) and 12(4), where the Act cannot reasonably be read so as to conform to the international-law norm that compensation is an incident of lawful expropriation, because those provisions purport to authorise expropriation for nil compensation as a general administrative category. Section 233 of the Constitution cannot save them, and a declaration of invalidity, with severance, we submit, is the appropriate course.

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91 UNCTAD, *Expropriation: A Sequel* (UNCTAD Series on Issues in International Investment Agreements II), available at https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

92 Lubbe & Du Plessis (supra) at pp. 105 – 106.

170. As to the remedy in respect of ss 19(2) and (3) of the Act, the position is different: those provisions can reasonably be read consistently with international law, and s 233 of the Constitution therefore requires the interpretation, or the corrective relief, under which compensation must ordinarily be agreed or determined by a court before expropriation takes effect, save in the urgent cases provided for in s 20. We submit that the Court should be guided primarily by the text, structure and purpose of s 25, interpreted in the light of these international norms.[93]

J. <u>REMEDY AND RELIEF:</u>

a. Primary relief: declaration of invalidity

171. As foreshadowed at the outset of these heads, AfriForum no longer seeks an order declaring the whole of the Act unconstitutional and invalid. It accepts that, save for the impugned provisions and the limited corrective relief set out below, the Act should remain in force once it has been constitutionally corrected. The relief now sought is targeted.

172. As motivated in Chapter 8 of *Constitutional Litigation* at p 109, a litigant, such as AfriForum, should not be limited to the specific relief first expressed in its notice of motion, relying on *Modderfontein*

[93] *S v Makwanyane* 1995 (3) SA 391 (CC) at para [39].

Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) at par 18 and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at par 52 in which it was confirmed that the Court is mandated to grant appropriate relief and that a "*claimant in such circumstances should not necessarily be bound by the formulation of the relief originally sought...*".

173. The available constitutional remedies are well established.[94] Under section 172(1)(a) of the Constitution, a court has no discretion in taking declarations of invalidity and must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

174. The Court, however, has a wide discretion to make any order that is just and equitable. Such remedies include severance (excision of the offending part of the legislation); notional severance, reading in or reading down.

175. In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at par 88, the Court stated that "... *legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to*

[94] A useful discussion is to be found in the Juta publication by Du Plessis, Penfold and Brickhill *Constitutional Litigation* Chapter 7 ("*Constitutional Litigation*")

exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made."

176. AfriForum's primary relief is an order under section 172(1)(a) of the Constitution declaring sections 12(3), 12(4) and 19(8) of the Act inconsistent with the Constitution and invalid, and severing them from the Act. Those provisions can be excised without impairing the operation of the remainder of the Act.[95]

177. As to sections 19(2) and 19(3) of the Act, AfriForum's primary position is that these provisions should be referred back to Parliament for proper redrafting, because the admitted drafting error concerns the statutory sequencing mechanism by which the Act is intended to ensure that compensation is settled before a notice of expropriation is acted upon. That is a legislative task.

178. Because, however, the defect is admitted on all sides, and because the Act should be capable of operating constitutionally in the interim, AfriForum does not oppose, and accepts, an interim reading-in of

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[95] On severance, see *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) paras [16]–[17].

section 19(2) and (3) or an order along the lines proposed by the President, to the effect that, save for urgent expropriation under section 20, expropriation may not occur until the compensation payable has been agreed, determined by a court, or otherwise settled through the processes of the Act before the notice of expropriation is acted upon.

179. It is submitted that this would provide a just and equitable, and appropriate remedy in respect of the admitted defects in sections 19(2) and (3) of the Act without intruding into the domain of the Legislature. See, for example, *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at paras [67] to [70]. Such an interim reading would take care of AfriForum's initial opposition to the extensive reading -in suggested by the President. As was stated in *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) in paras [82] to [85], with "*interim reading-in there is recognition of the legislature's ultimate responsibility for amending Acts of Parliament: reading-in is temporary precisely because the court recognises that there may be other legislative solutions. And those are best left to Parliament to contend with*".

180. To the extent that section 8(3)(g) of the Act is implicated by the internal conflict with sections 19(2) and (3), the necessary corrective relief should extend to it, but no further.

181. We finally need to say something about the relief sought in paragraph 1 of the Notice of Motion. It is common cause that the President signed the bill on 20 December 2024, but only published it on 24 January 2025 without informing the public that he had already signed the Bill more than a month earlier.

182. AfriForum, in this respect, referred in the founding affidavit to section 80 of the Constitution and contended that the failure by the President to make his decision known deprived Members of the National Assembly of their right under section 80 of the Constitution to apply to the Constitutional Court for an order declaring all or part of the Act unconstitutional.

183. The President does not deny that he failed to inform the public that he signed and assented to the Act for more than a month after he did so on 20 December 2024. He admits in his answering affidavit (see paragraph 97 at 004-35) that he only announced that he assented to and signed the Bill into law in a press statement released by him on 23 January 2025.

184. His justification for this "*limited delay,*" namely that it was "*occasioned by public holidays and the usual shutdown during December 2024 and January 2025",*[96] was on the objective facts

[96] See first respondent's answering affidavit par 98 p 004-35. He also relies on a confirmatory affidavit by a Mr Mphaphuli. The affidavit is meaningless and does not support the President's allegations in the answering affidavit in this regard. See replying affidavit par 18.11 p 008-17

shown to be untruthful as discussed in AfriForum's replying affidavit. We refer in this regard to paragraphs 18.14 to 18.18 of the replying affidavit at pp 008-18 to 008-20 in which AfriForum pointed out that the President also signed into law at least 8 other Acts on the same date as the Expropriation Act, namely on 20 December 2024, of which notices were published in the Government Gazette on 24 December 2024, as well as two Proclamations which were published in the Government Gazette on 27 December 2024, all within the period when the Government Gazette's offices were allegedly closed. Several other Government Gazettes were also published in the period between 3 January 2025 and 24 January 2025.

185. We submit that this conduct of the President was inconsistent with the Constitution and should be so declared under section 172(1)(a) of the Constitution, even if only to remind holders of office that they have to comply with their duties under the Constitution. We can do no better than to quote from a judgment of Goosen J (as he then was) in *Borbet SA v Nelson Mandela Bay Municipality* 2014 (5) SA 286 (ECP) at par [110]: *"Lest the declaratory order that I shall issue be considered to be of little effect, it must be emphasised that such declaratory order carries with it the clearest indication that the respondent has conducted itself in breach of its constitutional obligation to protect and promote the political rights of the community it serves. It is an indictment which should not be seen*

lightly. The order serves to vindicate the rights of citizens and, it is to be hoped, will serve as a timely reminder that local participatory democracy as enshrined in the Constitution is a critically important feature of our constitutional democracy.".

186. AfriForum therefore persists in the relief sought in paragraph 1 of the Notice of Motion.

b. Effective date of the order:

187. Because the Act has not yet been brought into operation, the question of retrospectivity does not arise. The important point is rather that the targeted declarations of invalidity, and the corrective relief, should be framed so as to take effect from the commencement of the Act, or, as appropriate, from the date of this Court's order, or of presidential assent, so that the impugned provisions in their constitutionally defective form never operate against any property owner. See *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) at par [20]; *Minister v Oudtshoorn Municipal Council* 2016 (6) SA 115 (CC) at paras [31] and [32].

188. The defects were, moreover, apparent before assent: AfriForum had written to the President on 15 April 2024 raising these precise concerns, and the Reply describes, at para 23, "patent errors in the

Bill, including those in sections 19(2) and (3)". Framing the order to operate from the date on which the President assented to the Act, therefore, reflects the fact that these provisions ought never to have entered into force in their present form, and is corrective rather than penal in character.

c. Targeted correction: severance and a period to cure ss 19(2) and (3) of the Act:

189. Sections 12(3), 12(4) and 19(8) of the Act can be severed without impairing the Act, and no suspension is required in respect of them.

190. If the Court accepts that sections 19(2) and (3) of the Act should be remitted, Parliament should be afforded a defined period within which to cure those provisions, failing which the interim order referred to above will continue to operate.[97] The Act has not been proclaimed into force. The President should be precluded from bringing the impugned provisions into operation in a constitutionally defective form, pending the confirmation of this Court's order by the Constitutional Court.

[97] FA para 13/8.2; Board Resolution para 1.4.

d. Reading-in: a narrow and limited role:

191. AfriForum does not oppose reading-in as an interim remedy to cure the admitted drafting error in sections 19(2) and (3) of the Act. The defect is narrow and admitted, and a limited interim reading-in or order, pending parliamentary correction, is appropriate to enable the Act to operate constitutionally in the meantime. AfriForum accepts such relief on that confined basis as motivated above with reference to the relevant case law.

e. Confirmation of the order of invalidity and reserved right:

192. The targeted declarations of invalidity in respect of sections 12(3), 12(4) and 19(8) of the Act, and any corrective order made in respect of sections 19(2) and (3) of the Act, must be referred to the Constitutional Court for confirmation under section 15(1)(a) of the Superior Courts Act. Paragraph 7 of the Notice of Motion expressly seeks such relief. AfriForum further reserves the right to seek further relief should the Act be proclaimed into operation before the outcome of this litigation is finally determined.

DATED AT PRETORIA on this the 15th day of **JUNE 2026.**

HS HAVENGA SC

AT LAMEY

Counsel for the first applicant (AfriForum NPC)

CIRCLE CHAMBERS, BROOKLYN, PRETORIA.

FIRST APPLICANT'S (AFRIFORUM'S) LIST OF AUTHORITIES

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3. *Arun Property Development (Pty) Ltd v Cape Town* 2015 (3) BCLR 243 (CC) / [2014] ZACC 37
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12. Property Valuation Act 17 of 2014 (and the regulations promulgated under it)
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