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**SUBMISSION IN RESPECT OF THE DRAFT EXPROPRIATION BILL, 2019**

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## A. INTRODUCTION AND EE AND THE EELC'S INTEREST IN THE DRAFT EXPROPRIATION BILL

1. This a joint submission made by Equal Education ("**EE**") and the Equal Education Law Centre ("**EELC**") in response to the call for comments by the Department of Public Works on the draft Expropriation Bill, 2019 (the "**Draft Bill**").

2. EE is a membership-based, democratic movement of learners, parents, teachers and community members, with the core objective of working and campaigning for quality and equality in education in South Africa. The EELC is a public interest law centre specialising in education law and working closely with EE in pursuit of an equal education system and quality education for all.

3. Our submission is focused specifically on some of the definitions contained in the Draft Bill, section 3 of the Draft Bill, relating to the powers of the Minister of Public Works (the "**Minister**") to expropriate, and on section 12, and more particularly, section 12(3) of the Draft Bill, which outlines circumstances under which expropriation for *"nil compensation"* may be just and equitable.

4. In June 2018, EE and the EELC made a submission to the Constitutional Review Committee ("**CRC**"), who was tasked with considering whether, in its current form, section 25 of the Constitution is an impediment to land reform and requires amendment to facilitate expropriation without compensation ("**CRC Submission**").

5. In that submission, EE and the EELC acknowledged that circumstances may well exist which necessitate expropriation without compensation; particularly, to address the ineffective pace of land reform. We submitted however, that section 25 in its current form need not be amended, and already provided for this possibility, but that appropriate legislative measures be taken to clarify the circumstances under which expropriation without compensation may take place.[1] Specifically, we recommended the immediate finalisation of an Expropriation Bill which outlines these circumstances.

6. Importantly, as organisations committed to achieving equal and quality education, our specific interest in making the CRC Submission as well as the submissions contained herein, also arises from the important, but often unacknowledged link between the right

[1] In light of sections 25(5) and 25(8) of the Constitution.

to education and the right of secure access to schools (and the land on which schools are located).

7. In 2012, the EELC represented EE in the matter of *Jacobus Du Plessis Botha NO and Others v Member of the Executive Council for Education, Western Cape and Others* ("**Grootkraal**"),[2] where EE was admitted as *amicus curiae* (friend of the court). The matter involved a quintile 1 public school operating on privately-owned rural land in Oudtshoorn, subject to a lease agreement entered into between the landowner and the Western Cape Education Department (WCED). In May 2011, following a change in ownership of the property, and the failure of the parties to negotiate an extended lease, the school was threatened with closure and the relocation of 160 learners to "mobile units" at a small farm school nearly 20 kilometres away.

8. In *Grookraal*, EE argued that the matter must be considered in the light of the important nexus between the right of access to education and access to schools, particularly having regard to past injustices and the effect of historical tenure insecurity.

9. Our CRC Submission therefore brought to light the interconnectedness between education and access to land and secure tenure in the school context. Furthermore, our CRC Submission noted that whilst mechanisms for tenure reform in the school context exist, such as those provided for in section 14 and section 58 of the South African Schools Act ("**SASA**"),[3] there appears to be a consistent failure to utilise these mechanisms in the absence of political will and sufficient legislative clarity on when the expropriation mechanism can and should be utilised. Again, we recommended that the duties and powers of the Minister (or relevant authority) to expropriate be legislatively strengthened.

10. Notwithstanding the decision of the CRC to continue with what we believe is an ultimately unnecessary amendment to section 25 of the Constitution to provide for expropriation without compensation, we are pleased that the Draft Bill goes further to outline some specific circumstances under which this may take place. Further, we are pleased that the Draft Bill provides guidance on the requirements to carry out expropriation, including notice requirements, etc. This submission contains recommendations to clarify certain

[2] Case No. 24611/11, Western Cape High Court.
[3] Act 84 of 1996.

provisions of the Draft Bill so that it facilitates, rather than impedes expropriation in the education context.

11. In order to contextualise our comments and recommendations relating to sections 3 and 12 of the Draft Bill, we provide a brief overview of our CRC submissions below; in particular as relates to the link between education and land justice.

## B. BRIEF OVERVIEW OF CRC SUBMISSION

12. In our submission to the CRC, we outlined the importance of the link between the current debates around land expropriation, and learners' right to basic education, particularly in the context of learners who attend public schools on privately-owned (often rural) land. In this context, we argued, expropriation as a standalone tool has been unsuccessful at achieving land reform in the absence of sufficient legislative guidance and implementation.

13. In the matter of *Juma Musjid Primary School and Others v Essay NO and Others*,[4] which involved a private property owner seeking to evict a public school operating on its property, the Constitutional Court was required to consider circumstances in which learners' rights to basic education were tested against the rights of the private landowner. Nkabinde J, who penned the judgment on behalf of a unanimous court, noted that the right to basic education, which unlike other socio-economic rights, is immediately realisable, is critical to the advancement of transformation and addressing socio-economic injustices prevailing in South Africa.[5] Nkabinde J identified *"access to school [as] an important component of the right to basic education…[and] a necessary condition for the achievement of this right"*.[6]

14. The *Juma Musjid* case identifies unobstructed access to schools and school grounds as an important component of the right to education and highlights the issues which often arise in South Africa when public schools are located on privately-owned land. The ability of the schools to operate on private land is often dependent on the decision of land owners and may potentially stand in tension with the rights of private landowners to use their property as they choose. To this extent, access to these schools, and in particular,

[4] 2011 (8) BCLR 761 (CC).
[5] Ibid at para 42.
[6] Ibid at para 43.

schools which have a legacy of tenure insecurity and insufficient resources, may be threatened, leaving learners vulnerable to the decisions of land owners.

15. Rural education expert, Dr Adele Gordon, noted in her expert affidavit for EE in the *Grootkraal* matter, that this vulnerability is even more acute in the context of rural schools,[7] such as Grootkraal UCC Primary School, which face a number significant and unique challenges relating to, amongst other things, transport, safety and the supply of necessary learning materials and school infrastructure. These are all factors which entrench already deep inequalities in our educational system that are a legacy of our apartheid history.

16. The tenure reform mechanisms provided in SASA, are to be considered keeping this historical context in mind.

**Duty to consider expropriation for education purposes – existing legislative mechanisms in SASA**

17. Section 14 of SASA regulates the existence and management of public schools on private land by way of a lease agreement, whilst section 58 relates to the expropriation of land for educational purposes. For purposes of this submission, we will focus our analysis on section 58 of SASA.

18. Section 58(1) of SASA provides that *"the Member of the Executive Council may, if it is in the public interest to do so, expropriate land or a real right in or over land for any purpose relating to school education in a province.* [Emphasis added]

19. Section 58 therefore provides education MECs with the discretion to expropriate land in the public interest for any purpose related to education.

20. It is important to be clear about the duties of MECs in terms of section 58. Read with the duty of the State to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*, including the right to basic education, in terms of section 7(2) of the Constitution, it is our view that while the decision to expropriate is discretionary, there exists a statutory duty on the part of MECs not only to consider the option of expropriation, but to properly apply their minds to whether or not to exercise the statutory power and discretion conferred by

[7] Expert Affidavit of Dr A. Gordon, at paras 56-66.

section 58. In *Ulde v Minister of Home Affairs and Another*,[8] Cachalla JA explained that it is not enough for an administrative official to merely state that he/she considered the issue, and that it is only where *"the decision-maker has demonstrated that the discretion has been properly exercised"* that a court will not interfere.[9]

21. Despite this clear duty, according to the expert view of Dr Gordon, section 58 is "underutilised". Further, the fact that no procedures have been legislated in respect of expropriation may frustrate attempts to expropriate.[10] Dr Gordon also notes the emergence of various reports in or around the year 2000, which recommended that national government develop guidelines according to which land is to be expropriated.[11]

22. Rather than expropriate, Dr Gordon notes that MECs mostly elect to allow the *status quo* to continue, to merge or close a school in circumstances not contemplated by section 33 of SASA, which regulates mergers and closures, or in the case of the Western Cape Education Department in the *Grootkraal* matter, to conclude short-term leases (as opposed to long-term leases that secure tenure, as contemplated in section 14 of SASA).[12]

23. The failure of the MEC to properly consider the expropriation option in SASA in the *Grootkraal* matter therefore, as was argued in that matter, constituted a failure of the MEC to meet its obligation to secure school tenure and to facilitate the immediate realisation of the right to basic education.

24. Apart from a lack of awareness and understanding of section 58 and a lack of political will and capacity to embark on an expropriation process, what also emerges from the *Grootkraal* matter as a reason for the failure to consider the expropriation mechanism, is the absence of clear expropriation implementation guidelines, including in relation to when expropriation without compensation may be considered.

**Key recommendations to the CRC**

25. The EE and the EELC made the following recommendations to the CRC:

[8] 2009 (4) SA 522 (SCA) at para 7.
[9] *Ibid* at paras 7 and 8.
[10] Expert affidavit of Dr A. Gordon, at para 38.
[11] Human Rights Watch Report, 2004, at pages 3 and 52.
[12] Expert affidavit of Dr A. Gordon, at para 43.

25.1 EE and EELC support expropriation without compensation. We recognise that the requirement to pay compensation may be one of the many impediments facing land reform in South Africa, but that this impediment is not perpetuated by the current wording of section 25 of the Constitution. In fact, section 25 can already be read to allow for expropriation without compensation where it is just and equitable, balancing the public interest with interests of the affected parties, and having regard to all relevant factors. Moreover, sections 25(5), 25(8) and 25(9) envisage Parliament taking legislative measures to achieve land reform, including tenure security.

25.2 We recognise the link between the right to education and secure access to schools, as well as the failure to engage the mechanisms provided for in the SASA in section 58 (and section 14) due to amongst other things, the lack of sufficient guidance on the practical steps for implementing expropriation and the seeming lack of clarity around when land could be expropriated for nil compensation.

25.3 **Accordingly, we recommended that Parliament enact laws and publish regulations, including, but not limited to the Expropriation Bill, which must:**

25.3.1 **clarify and reinforce existing legislative expropriation mechanisms (such as is contained in SASA) or generally provide necessary guidance for the implementation of existing legislative mechanisms for expropriation, particularly for the purpose of education;**

25.3.2 **clarify under what circumstances expropriation can take place without compensation.**

26. We therefore recognised the Draft Bill as a crucial opportunity to reinforce the expropriation mechanism as a tool to achieve secure access to land for education purposes. Our comments and recommendations on the Draft Bill are made with this background in mind.

## C. SUBMISSIONS IN RESPECT OF THE DRAFT BILL

### Broad and potentially problematic definitions

27. Section 25(2) of the Constitution provides that *"property may be expropriated only in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation…."* [Emphasis added]. The Draft Bill provides for expropriation by an "expropriating authority"[13] (which includes an "organ of state") or by the Minister[14] on the same grounds as are prescribed in the Constitution; namely that it must be for a "public purpose" or in the "public interest".[15]

28. The Constitution provides little direction, however, in respect of how 'public purpose' or 'public interest' should be defined, other than providing some interpretative guidance in relation to 'public interest' in section 25(4), which states that *"the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources"*. The Draft Bill simply expands on this guidance by adding the words *"…in order to redress the results of past racial discriminatory laws or practices"*.

29. Of course, this interpretative guidance simply explains what the public interest could include, but not what the public interest is. While the term is generally understood to have a wide meaning, such as for public benefit or public advantage, the Draft Expropriation Bill perhaps presents an opportunity for this term to be expressly clarified.

30. More importantly, however, the Constitution provides no guidance at all in respect of what is meant by "public purpose". The Draft Bill attempts to provide clarity in this regard and defines "public purpose" to include *"any purposes connected with the administration of the provisions of any law by an organ of state"*. The wording of this definition, which was retained from the Expropriation Act of 1975, is overly broad and potentially problematic, particularly in light of the equally broad definition of an "organ of state", defined in terms of section 239 of the Constitution to include:

> *"(a) any department of state or administration in the national, provincial or local sphere of government; or*
> *(b) any functionary or institution –*

[13] Section 2(1) of the Draft Bill.
[14] Section 3(1) of the Draft Bill.
[15] Section 2(1) and section 3(1) of the Draft Bill.

*(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;*

*(ii) Exercising a power or performing a public function in terms of any legislation, but does not include a court or a judicial officer…"*

31. Accordingly, an organ of state could include private entities performing wide public functions or exercising wide public powers related to managing or taking the responsibility for the provision of *any* law.

32. A problematic manifestation of these broadly defined terms can be seen in section 3 of the Draft Bill relating to the powers of the Minister to expropriate. Section 3 of the Draft Bill provides that:

*"**3. Powers of the Minister to Expropriate***

*(1) Subject to the provisions of Chapter 5, the Minister may expropriate property for a public purpose or in the public interest.*

*(2) If an organ of state, other than an expropriating authority, satisfies the Minister that it requires particular property for a public purpose or in the public interest, then the Minister must expropriate that property on behalf of that organ of state upon its written request, subject to and in accordance with the provisions of this Act.*

*(3) The Minister's power to expropriate property in terms of subsections (1) and (2) applies to property which is connected to the provision and management of the accommodation, land and infrastructure needs of an organ of state, in terms of his or her mandate.*

*[Emphasis added]*

*…. "*

33. Where an organ of state satisfies the Minister that it requires the property for a public purpose or in the public interest (both broadly defined), the Minister *must*; that is, he is obliged to expropriate the property on behalf of such organ of state. While a qualification is contained in section 3(3) that the Minister's power is limited to property which relates to the provision and management of the accommodation, land and infrastructure needs of the organ of state, those needs can be far-reaching in light of the wide definition of organ of state. Moreover, it is unclear and even concerning that these are needs determined in relation to the "mandate" of the organ of state. Questions arise as to how such mandate is determined.

34. In the education context, the concerns raised above may materialise in the relation to public-private partnerships, and where private entities that are afforded a significant stake in public schools, are able to expropriate land.

35. **It is our recommendation that:**

35.1 **the definitions of "public purpose" and "organ of state" be clarified and sufficiently narrowed so as to account for the danger that private entities performing public function or exercising public powers are able to expropriate land; and**

35.2 **the purpose of the Minister's power to expropriate as conferred by section 3 be clarified.**

**Section 12 – Determination of compensation**

36. Section 12 (3) of the Expropriation Bill provides as follows:

*"**12 Determination of compensation***

*(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 occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);*
*(b) Where the land is held for purely speculative purposes;*
*(c) Where the land is owned by a state-owned corporation or other state-owned entity;*
*(d) Where the owner of the land has abandoned the land;*
*(e) 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."*

37. While 'property' is defined very broadly in section 1 of the Draft Bill in line with section 25 of the Constitution, it must be noted that section 12 of the Draft Bill, which outlines circumstances where compensation for expropriation may be nil, refers to the expropriation of "land" and not property. Despite the list of circumstances listed not being exhaustive, the use of the "land" and not "property" perhaps has the unwitting effect of

limiting the application of this provision. Further, there has been extensive development of the definition of 'property' by the Constitutional Court. The Court has held that 'property' does not only include corporeal movables and immovable objects, but also rights such as ownership and limited real rights *et al*.[16]

38. **Accordingly, we recommend that section 12(3) be amended to refer to "property" and not "land". This will also align the provision with the terminology used in the Constitution and referred to in jurisprudence.**

39. **We also recommend that the following listed circumstance be added to section 12(3): *"where property is required for purposes of ensuring secure access to and tenure in respect of schools, as provided for in the South African Schools Act, 84 of 1996"***.

**Guidance in relation to other legislation providing for expropriation**

40. As previously mentioned, there appear to be a multiplicity of reasons for the failure to utilise available legislative expropriation mechanisms, particularly in the school context. Based on EE's experience in the Grootkraal matter, the absence of expropriation implementation guidelines in SASA is the biggest likely contributor to the under-utilisation of the provisions of SASA aimed at tenure security. While section 58 of SASA provides some details regarding notification of expropriation and the public participation process, it does not provide any further practical guidelines on how expropriation should be carried out, including when expropriation without compensation may be considered. The Draft Bill does well to address some of these shortcomings, but does not deal comprehensively with how to ensure that legislative mechanisms for expropriation are always considered and used where available. Such details must be provided for in the finalised Expropriation Bill.

41. **We therefore recommend that the drafters of the Draft Bill consider providing clearer, more specific guidance on the implementation of other legislation enabling expropriation or providing a list of criteria such other legislation must comply with in order to ensure effective utilisation of the expropriation mechanism. For example, providing that legislation must clarify the**

[16] First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

**circumstances under which the expropriating authority is under a duty to consider expropriation.**

**Consideration of recent legal developments**

42. In a recent judgment handed down by the Supreme Court of Appeal ("**SCA**") in respect of the Grootkraal community, the Court confirmed that the community had a public right to use a portion of the farm, including part of the farm on which the school is located.[17] The case was decided with reference to the doctrine of *vetustas*, where the right was acquired in circumstances which go beyond proof, and has existed for a very long time, or for "time immemorial", and where there is no certain knowledge or information of a different condition or practice having existed.[18]

43. The SCA, in deciding the matter in favour of the community, considered the history of the community. The Court remarked that the community is not a formal body, nor is it capable of exact definition. It is said to consist of those individuals who have historic and family ties in the area, where they and their forebears have lived and worked for many generations. The community contended that as a result of missionary activity, a church was established on the property in the early part of the nineteenth century. Since then and up until the present day, they and their forebears have, as of right, used the property. [19]

44. In light of the above, the Court concluded that there was no legal bar to the community's contention that it be entitled to the registration of a public servitude by invoking the presumption of lawful creation of the right afforded by the doctrine of *vetustas* (as opposed to being able to demonstrate legal entitlement to use the property).

45. **We recommend that when finalising the Draft Bill drafters keep in mind all legal developments which may assist communities who have used and occupied land for various purposes, but whose rights have not formally been secured by title deed or any other registrable right.**

[17] *Community of Grootkraal v Botha NO and Others* (1219/2017) SCA 158.
[18] Ibid at page 8.
[19] *Ibid* at para 4-5.

## D. SUMMARY OF RECOMMENDATIONS IN RESPECT OF THE DRAFT BILL

46. Our recommendations outlined above are made in the context of the link between education and access to schools and are aimed at ensuring that the Draft Bill does not impede, but in fact provides sufficient guidance and clarity to encourage use of the expropriation mechanisms already provided for in SASA or any other applicable legislation. The recommendations can be summarised as follows:

46.1 The definitions of "public purpose" and "organ of state" should be clarified and sufficiently narrowed so as to account for the danger that private entities performing public function or exercising public powers are able to expropriate land.

46.2 The purpose of the Minister's power to expropriate as conferred by section 3 should be clarified.

46.3 Section 12(3) should be amended to refer to "property" and not "land".

46.4 The following listed circumstance should be added to section 12(3): *"property is required for purposes of ensuring secure access to and tenure in respect of schools, as provided for in the South African Schools Act, 84 of 1996"*.

46.5 Drafters should consider providing clearer, more specific guidance on the implementation of other legislation enabling expropriation, or providing a list of criteria such other legislation must comply with in order to ensure effective utilisation of the expropriation mechanism.

46.6 We recommend that when finalising the Draft Bill drafters keep in mind all legal developments which may assist communities who have used and occupied land for various purposes, but whose rights have not formally been secured by title deed or a registrable right.