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

Case No: 2025-072494

In the application by:

IRR LEGAL NPC Intervening Party

In the application between:

AFRIFORUM NPC Applicant

And

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Third Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Fourth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned

GABRIEL DAVID CROUSE

do hereby make oath and state that:

1. I am an adult male and an executive director of IRR Legal NPC (hereinafter referred to as "**IRR Legal**"), a nonprofit company with registration number 2023/905120/08 incorporated in terms of the company laws of the Republic of South Africa, having its principal place of business and registered office at 222

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Smit Street, Braamfontein, Johannesburg, Gauteng, 2000. A copy of its memorandum of incorporation is annexed hereto marked "**IRR1**".

2. The facts contained herein are within my personal knowledge, save where the contrary appears from the context, and are, to the best of my knowledge and belief, true and correct.

3. I am duly authorised to bring this application on behalf of IRR Legal. I attach hereto the resolution of IRR Legal's board of directors, evidencing my authority as annexure "**IRR2**".

NATURE OF APPLICATION

4. IRR Legal seeks to intervene in the application instituted by the applicant ("***AfriForum***"), which seeks to challenge the constitutionality of the Expropriation Act, 13 of 2024 ("***the Expropriation Act***"). Among other things, it challenges provisions in section 12 of the Expropriation Act and the prospect of expropriation for nil compensation envisaged in the Act.

5. While IRR Legal does not agree with all of the submissions made by AfriForum, it submits that sections 12(2)(e), 12(3)(a) to (d) and 12(4) of the Expropriation Act are unconstitutional when considered against the backdrop of our constitutional jurisprudence, as will be explained below. IRR Legal therefore intends to expand upon the constitutional challenge raised by AfriForum. It also seeks an order specifically declaring sub-sections 12(2) (e) and (3)(b) to be

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unconstitutional and invalid to the extent that they are non-compliant with section 25 of the Constitution, as read with the limitations clause set out in section 36 of the Constitution.

GROUNDS FOR INTERVENTION AND *LOCUS STANDI*

6. The main purpose and objectives of IRR Legal, as set out in its Memorandum of Incorporation, are, *inter alia,* to defend and uphold fundamental constitutional values and norms through litigation and in the public square. Additionally, IRR Legal seeks to promote the transformation of the Republic of South Africa from being the state with one of the world's highest rates of unemployment to one of the lowest, through litigation as well as through research and communication with key stakeholders.

7. IRR Legal follows and participates in the development of Bills in Parliament, as well as engaging in several other legislative and regulatory processes. It made submissions on, among others, the Public Procurement Act 28 of 2024, the Fiscal Framework (2025), the Division of Revenue Bill [B100-2025], and the Appropriations Bill [B16-2025]. It has also participated in formal processes in relation to the National Minimum Wage Committee, and the Joint Constitutional Review Committee, among others.

8. The sole member of IRR Legal is The South African Institute of Race Relations ("***the Institute***"), a non-profit company duly incorporated with registration

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number 1937/010068/08. A history and purpose of the Institute is attached hereto as "**IRR3**".

9. Because IRR Legal aims to vindicate and protect the property rights of the public and to uphold the constitutional norms surrounding expropriation that have been established in our jurisprudence, it is submitted that IRR Legal has a direct and substantial interest in the application brought by AfriForum.

10. In terms of section 38 of the Constitution, any person may approach a court for appropriate relief where a right in the Bill of Rights has been infringed or is threatened. Section 38 provides for a broad standing for anyone acting in their own interest, an association acting in the interest of its members and anyone acting in the public interest.

11. IRR Legal brings this application under section 38(b) and (d) of the Constitution in the furtherance of its main purpose and objectives as contained in its Memorandum of Incorporation. IRR Legal as a non-profit with a goal of defending and upholding constitutional values and norms has a direct and substantial interest in securing legislative compliance with the Constitution.

12. As is explained below, the wide-ranging nature of the impugned legislation has an effect on a broad spectrum of property owners in the Republic, including persons, groups or communities that have little or no means either to challenge the Expropriation Act or its application in Court themselves.

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13. IRR Legal's application is brought to protect the public from the unconstitutionality of the Expropriation Act, that, as will be demonstrated below, unlawfully infringes on the right to property as set out in the Constitution.

PARTIES

14. The intervening party is IRR Legal as fully described above.

15. The applicant is **AFRIFORUM NPC**, a non-profit company registered under registration number 2005/042861/08 in terms of the company laws of the Republic of South Africa and is also registered as a non-governmental organisation (NGO) under registration number 054-590, having its principal place of business at AfriForum Building, corner. D.F. Malan and Union Streets, Kloofsig, Centurion, Gauteng.

16. The first respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** and Head of the National Executive with offices at Union Buildings, Government Street, Pretoria and care of the State Attorney, Pretoria, situated at SALU Building, 316 Thabo Sehume Street, Pretoria.

17. The second respondent is the **MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE**. The national office of the Department of Public Works and Infrastructure is situated at 256 Madiba Street, Pretoria Central, Pretoria, 0001 and care of the State Attorney, Pretoria, situated at SALU Building, 316 Thabo Sehume Street, Pretoria.

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18. The third respondent is the **SPEAKER OF THE NATIONAL ASSEMBLY** who represents the interests of the National Assembly with offices at Parliament Building, Room S38, Parliament Street, Cape Town and care of the State Attorney, Cape Town, situated at 22 Long Street, Cape Town, 8001.

19. The fourth respondent is the **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES** with offices at Parliament Building, Parliament Street, Room S11, Cape Town and care of the State Attorney, Cape Town, situated at 22 Long Street, Cape Town, 8001.

20. These parties are cited herein for the offices they hold and for reasons already set out in AfriForum's application.

BACKGROUND TO ACT AND CONTEXT

21. The Union of South Africa in 1910 had significant potential due to its people and resources. However, its justice system as well as its property and ownership system were immediately undermined and profoundly corrupted by racial discrimination, which resulted in egregious violations of human rights, including property rights, and severely oppressed black South Africans and prevented them from accessing and owning land, and dispossessed them from the land they owned.

22. Our current Constitution includes the imperative to recognise the past and redress past injustices, specifically related to past violations of human rights,

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especially including property rights. Section 25 of the Bill of Rights protects the property rights of all owners that fall under the Constitution and also seeks to redress the dispossession of land in our history.

23. The foundational legal framework for expropriation in South Africa is section 25 of the Constitution. As the supreme law, any legislation or conduct inconsistent with it is invalid. Section 25 of the Constitution protects property rights but also empowers the state to expropriate property under specific conditions. Crucially, section 25(2)(a) mandates that expropriation must be for a public purpose or in the public interest. Section 25(2)(b) provides that expropriation must be subject to compensation.

24. Historically, the Expropriation Act 63 of 1975 (the "**1975 Act**") governed the process of expropriation. The adoption of the Constitution, specifically section 25(2) and (3), fundamentally altered the legal landscape for expropriation and the attendant compensation. While the 1975 Act remained operative until the enactment of the new Expropriation Act, the provisions of the former legislation had to be interpreted and applied through the lens of the Constitution, which required a more holistic and context sensitive assessment of the 1975 Act than was previously required.

25. The Institute, amongst other individuals and organisations, was vocal in opposing the Expropriation Bill [B23 2020] and made submissions regarding the wording and constitutionality of such Bill. After various amendments and despite the comments made by the Institute and other participants in the public participation

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process, some of the impugned provisions made their way into the Expropriation Act.

PURPOSE OF COMPENSATION

26. An owner whose property is expropriated has a right to just and equitable compensation in terms of section 25(3) of the Constitution. Our courts have through various judgements given meaning to 'just and equitable compensation' as provided for in section 25 of the Constitution. In determining what constitutes 'just and equitable compensation', the courts have determined that a fundamental consideration in finding what is just and equitable is the purpose of compensation, as set out below.

27. The purpose of compensation under section 25(3) of the Constitution is to place the dispossessed into the same or similar position as they would have been in but for the dispossession by way of expropriation having taken place. Compensation therefore seeks to ensure that the dispossessed is not in a worse position as a result of the expropriation. The aim is, as far as is possible in financial terms, to provide a kind of restitution to the owner in a value equivalent to the property lost.

28. IRR Legal accepts that in certain exceptional circumstances, where either the value of the property lost is "nil", or else where such grievous misconduct is attributable to the owner that the purpose of compensation has been rendered inapplicable, such compensation can be "nil". However, it is only in those

exceptional circumstances where the purpose of compensation is achieved through the payment of "nil" compensation that it may be said that that compensation is just and equitable for the purposes of section 25(3) of the Constitution.

29. The duty to compensate under the Constitution entails that the owner of the expropriated property should not be left in a worse position as a result of the act of expropriation. The *status quo ante* must be restored by means of a money award and the equivalent in value must be given to take the place of the property lost. That is why our courts have consistently held that the value of a property is its value in the owner's hands and not in the hands of the expropriator.

EQUITABILITY IN COMPENSATION

30. In determining what is just and equitable, regard must be had to all interested parties which includes *inter alia* the state, the interests of society and the party who is being deprived of his property. According to section 25(3) the balance between these interests must specifically be an "equitable" one. An "equitable balance" is not the same as determinations of the balance of interests that Parliament is empowered to undertake in the face of budgetary scarcity or resource constraints. Rather, the term "equitable" is meaningful because it places limits upon Parliament that are not centred on its own preferred way of managing its resource constraints, but rather on achieving an equitable balance with the affected owner who is deprived of property.

31. It is submitted that on a proper interpretation of section 25(2) and section 25(3) the term "equitable" does not contemplate a discretion on the part of the state to withhold compensation under section 25(3), unless it is just and equitable in the circumstances as circumscribed above at paragraph 28.

32. Furthermore, it is generally accepted in our jurisprudence that section 25 of the Constitution must be read holistically, which should include recognizing that the term "equitable" appears three times in section 25 as a qualification of payment for dispossession, twice in section 25(3), and once in 25(7). The former refers to compensation for just expropriations, whereas the latter refers to redress for past unjust land dispossessions that occurred as a result of racially discriminatory laws or practices. In each instance the term "equitable" places impartial limits on Parliament's discretion to determine the amount of payment.

33. As detailed more fully below, however, the Expropriation Act as presently worded does not give effect to the purpose of compensation as envisaged by section 25(3) of the Constitution. Furthermore, it fails to meet the safeguard of just and equitable compensation set out in the Constitution.

34. I now turn to the challenges IRR Legal has against the Expropriation Act.

UNCONSTITUTIONALITY OF THE ACT

35. Section 25(2)(b) and (3) of the Constitution places an obligation on the legislature to provide just and equitable compensation for expropriated property. There can

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be no doubt that section 12 of the Expropriation Act places an unreasonable and unjustifiable limitation on the right to property as contemplated by section 25 read with section 36 of the Bill of Rights.

36. As set out above, IRR Legal impugns sections 12(2)(e), 12(3) and 12(4) of the Expropriation Act, which contemplate particular enumerated circumstances where land may be expropriated for nil compensation.

37. Having regard to the purpose of compensation and that of section 25 of the Constitution, which looks to serve a balance between private property rights and the interest of the public, IRR Legal demonstrates below why certain provisions of the Expropriation Act are unconstitutional.

FIRST CHALLENGE – IRRATIONALITY IN SECTION 12(2)

38. IRR Legal's first challenge to the constitutionality of the provisions of the Expropriation Act relates to section 12(2)(e) of the Expropriation Act which stipulates:

> "(2) In determining the amount of compensation to be paid in terms of this Act, the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take account of—...
>
> ....
>
> *(e) anything done with the object of obtaining compensation therefor; and"*

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39. This aforementioned sub-section is in contradiction with subsection 12(2)(d) of the Expropriation Act which provides:

"(2) ...

(d) improvements made to the property in question after the date on which the notice of expropriation was served upon the expropriated owner or expropriated holder, as the case may be, except where the improvements were agreed to in advance by the expropriating authority or where they were undertaken in pursuance of obligations entered into before the date of expropriation;"

40. Section 12(2)(e) of the Expropriation Act prevents "anything done with the object of obtaining compensation therefor" from being taken account of in determining compensation. That contradicts the proviso of 12(2)(d), which allows improvements made and agreed to in advance with the expropriating authority, and improvements made pursuant to antecedent obligations, to be taken into account when determining compensation.

41. The conflict between these two sub-sections renders them vague, irrational and unconstitutional.

42. The effect of the conflicting provisions is that it is unclear how to determine when an owner may be compensated for improvements made where they were agreed to in advance with the expropriating authority or where they were undertaken pursuant to an obligation agreed to with the expropriating authority due to the contradictory provision disallowing anything done with the purpose of gaining

compensation from being taken into account when determining compensation. This leaves the expropriated owner in a position where the expropriating authority has the discretion to choose which sub-section to rely on in each case, as in whether to allow or disallow compensation for such improvements. The manner in which this discretion is applied is not guided by anything and opens the door to abuse by the expropriating authority for an arbitrary decision to be made on whether to compensate or not.

43. The inherent conflict between the two sub-sections renders the sub-sections vague and therefore unconstitutional.

SECOND CHALLENGE – SECTION 12(3)

44. The Constitution clearly distinguishes between expropriations "for a public purpose" and those "in the public interest", but that distinction does not negate the right to just and equitable compensation, which applies equally in both instances.

45. Section 12(3) of the Expropriation Act allows for expropriation without compensation in the public interest, which is defined as including the nation's commitment to land reform and other reforms to bring about equitable access to the country's natural resources to redress past racial discriminatory laws. This sub-section effectively excludes situations where land may be expropriated without compensation for a public purpose, which is defined as any purpose connected to the administration of law where the property will be used by or for

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the benefit of the public. An example of such public purpose could be the building of an airport, public school or a public park.

46. The distinction drawn by the Expropriation Act is significant. In rendering section 12(3) only applicable to land expropriated in the public interest, but not to land expropriated for a public purpose, the Legislature clearly accepted that it would not be just and equitable to furnish nil compensation where land was expropriated for a public purpose. This is because that land clearly has a value greater than nil, otherwise there would be no interest in expropriating it for a public purpose. This understanding must be applied to the remainder of section 12(3) of the Act.

47. Furthermore, AfriForum correctly challenges the words "including but not limited to" contained in section 12(3) of the Expropriation Act as being vague, irrational and unconstitutional and opening the door to arbitrary expropriation without compensation. Section 25(2)(b) is clear on the requirement of compensation, and the circumstances in which this is departed from must be clearly delineated.

48. The explicit statutory notion of nil compensation (even if in specific contexts) and the legislative signal that faultless owners of valuable property can be financially disadvantaged by expropriation poses grave risks. It could embolden expropriating authorities to offer significantly low compensation more readily under the threat of expropriation for no compensation at all, shifting the burden onto owners to challenge the expropriation in court. Unfortunately, the realities of

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South Africa make this shifting of the onus highly unreasonable due to the lack of access to courts and funding therefor, as is already identified by AfriForum.

49. Whilst IRR Legal accepts that it may in some circumstances be just and equitable to pay nil compensation, this can only be in specific circumstances where the purpose of compensation is achieved by paying nil compensation as set out above. Those circumstances ought to be clearly delineated by the Legislature and not left open for an administrator to interpret as they wish, to the prejudice of a property owner that may not have the means to bring the necessary legal challenge against that decision. IRR Legal submits that those circumstances are limited to instances where either the property is worthless to the owner, or where the owner's misconduct is so grievous as to render "nil" compensation "just and equitable" in the circumstances.

THIRD CHALLENGE – SECTION 12(3)(a)

50. Section 12(3)(a) of the Expropriation Act provides:

> "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…"

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51. Although the focus of this provision appears to be on an investor that has purchased land with an intent to speculate upon the market value, the net cast by section 12(3)(a) would snare any land owner that holds land that is not being developed or used to generate income. By way of example, if a person has inherited land but does not have the resources to either develop the land or to lease it, that person's land would be susceptible to expropriation for nil compensation.

52. IRR Legal agrees with the position set out by AfriForum. Over and above what has been raised by AfriForum, IRR Legal submits that this sub-section and the sub-sections that follow are irrational and unconstitutional for want of compliance with section 25(2)(b) read purposively with section 25 as a whole and with section 36 of the Constitution.

53. Section 25(2)(b) of the Constitution provides that an owner of property may only be expropriated of their property "subject to compensation", which is then determined in accordance with section 25(3) of the Constitution. Contrary to this right contained in section 25(2)(b) of the Constitution, section 12(3)(a) of the Expropriation Act provides that an owner may receive nil compensation simply because they own land and do not intend to develop that land or use that land to generate income.

54. At best, the provision is vague and irrational and does not lend itself to any sensible application. How does one understand what an owner's "main purpose" is for the use of the land? Any owner faced with expropriation would easily be

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able to come up with a different "main purpose" for the land that would fall outside the scope of this provision, rendering the provision nugatory. The only way that the state would be able to avoid this outcome is if it simply assumed that any land not being developed or generating an income is being held for the "main purpose", which defeats the proviso set out in section 12(3)(a).

55. The effect of the provision is to punish an owner for not developing land or using it for the generation of an income – either because their intention is to benefit from the appreciation of market value, or, as shown above, for any other reason. This conflicts with the primacy of agreement in compensation and impacts on the rights of an owner to use their property as they see fit, subject only to reasonable constraints under the law. Our Courts have held that such an owner has no less rights simply because they acquire or hold property for speculative gain.

56. The payment of nil compensation to an owner in terms of section 12(3)(a) of the Expropriation Act is in conflict with the purpose of compensation, which is to place the expropriated owner in the same or similar position as they would have been in, had they not been expropriated. Land would constitute an asset in an owner's estate even if it were not being developed or used to generate an income, and an owner ordinarily has the right to hold land without developing it or using it, and has the right to sell it or not to sell it at the price of their choosing. These aspects of the rights of ownership are infringed by section 12(3)(a).

57. By paying nil compensation, an owner is deprived of elements of the right to ownership and faces financial loss, relating not only to the anticipated gain on

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the property, but also in respect of the payment or investment made into the property.

58. There is no rational basis upon which an owner can be punished for holding land to benefit from the appreciation therefrom. A person is entitled to do with their property as they wish, as long as it is consistent with the Constitution and law. This further implicates a privacy right under section 14 of the Constitution. IRR Legal sees no need to assert the privacy right further in this matter only on the understanding that a direct limitation of the right to compensation already triggers a section 36(1) analysis.

59. Nil compensation is an intrusive and drastic limitation of the right to compensation as contained in section 25(2)(b) of the Constitution. It is submitted that this is a serious infringement of constitutional rights and that section 12(3)(a) of the Act is invalid.

FOURTH CHALLENGE – SECTION 12(3)(b)

60. This provision implies fault on organs of state in failing to use land "for its core functions", thereby triggering financial harm to that organ of state in the form of "nil" compensation.

61. While there is a serious problem with unused state-owned land, non-core-function use alone should not imply misconduct or fault.

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62. The purpose of compensation is frustrated by this provision of the Act. Despite the organ of state having received the land for no consideration, the asset book of the organ of state deprived of the land by the expropriation shall reflect the loss of the value of that asset. As the purpose of compensation is to place a party in the same or similar position where they were before the expropriation took place, by paying nil compensation to an organ of state for the expropriation of its land, it's asset book shall still be negatively affected and the affected organ of state shall suffer loss in the amount of the value of the land.

63. It is submitted that the right of an organ of state to be compensated for an expropriation of its land in terms of section 25(2)(b) is not different to that of a private person.

64. It would appear that the purpose of paying nil compensation under section 12(3)(b) is to punish an organ of state for not using land for its core functions, at least in respect of land purchased for no consideration.

65. The restriction in section 12(3)(b) to land not being used for core functions of the organ of state is vague in that it is not clear what constitutes "core functions". It opens the door for the expropriating authority to choose what constitutes a core function.

66. If the organ of state objects to nil compensation being paid for such land as the expropriating authority decides it is not used for core functions, they will have to

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challenge the decision in court, at taxpayers' expense. This has a disproportionate and unjustifiable effect on the public.

67. Whilst it is important for an organ of state to make full use of its resources, they also have a duty to use their land for the betterment of the public. An organ of state should not be punished simply because they do not use land for a core function, despite the land being used for the benefit of the public or itself.

68. If land owned by an organ of state is expropriated for nil compensation, the asset (i.e. the land owned by the organ of state) is removed from the asset book of the organ of state, which may have various detrimental effects. For example, the organ of state will lose the value of the land which enabled it to potentially procure finance up to that value. Additionally, the organ of state could lose any associated income generated from such land, which was not used for its core functions, but which nonetheless generated income for the organ of state, which the organ of state was dependent upon to give effect to its core functions.

69. A clear example of where this provision would lead to results that are neither just nor equitable is public universities. These are organs of state that hold land, which, for various reasons, may be left unutilised. This provision of the Expropriation Act could be abused to punish a university for political or other reasons. In doing so, the provision may be used to impact on academic freedom.

70. This provision also fails to strike an "equitable balance" as required by section 25(3) of the Constitution. Rather than treating an organ of state and an expropriating authority in an impartial manner, the latter is empowered to take

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something for nothing while the former is exposed to the risk of losing an important asset without recompense, to its clear detriment, even if it has acted lawfully in the public interest.

71. Thus, this sub-section is unconstitutional as it unreasonably and unjustifiably limits an organ of state's right to be compensated for property expropriated.

FIFTH CHALLENGE – SECTION 12(3)(c)

72. Section 12(3)(c) of the Expropriation Act provides that nil compensation can be paid "where an owner has abandoned the land by failing to exercise control over it despite being reasonably capable of doing so".

73. As AfriForum has correctly argued, this subsection is impermissibly vague and can result in "arbitrary decisions as to the meaning of exercising control".

74. The rationale for paying nil compensation in section 12(3)(c) circumstances is ostensibly to punish owners to whom gross misconduct is attributable as they have abandoned their land or failed to exercise sufficient control over their land, by depriving them of that property for no compensation. This rationale is on the face of it in line with the purpose of compensation and therefore with s25(2)(b) of the Constitution.

75. Despite a valid rationale, the subsection's construction opens the door to unreasonable and arbitrary expropriation with nil compensation as it lacks

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sufficient guidance to an administrator as to when the provision is applicable. The failure to exercise control despite being reasonably able to do so is impermissibly vague and leaves the administrator with massive powers to expropriate without compensation any property where it appears that the owner has failed to exercise control. This may include anything from hijacked buildings where an owner is trying, unsuccessfully, to remove unlawful occupiers, to a vacant plot where an owner has erected a fence but has not been in physical attendance for any reason whatsoever.

SIXTH CHALLENGE – SECTION 12(3)(d)

76. Section 12(3)(d) provides for a situation where nil compensation can be paid "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."

77. IRR Legal notes the challenge raised by AfriForum to section 12(3)(d) of the Expropriation Act. It however submits that the section is unconstitutional for a different reason.

78. The right to compensation as provided in section 25(2)(b) is limited in this instance to punish those owners who have not improved the market value of the land beyond the value of state investment or subsidy.

79. Many of those owners who could fall into the ambit of this section are beneficiaries of land reform programmes. Such groups of persons shall be

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disproportionately affected and punished for not potentially having the means to improve the market value of the land beyond the value of the state's investment or subsidies.

80. The provision further does not account for the fact that the market value of property is volatile and may change for a variety of reasons. It is unclear from this provision whether the value of state investment into the land will likewise be adjusted in accordance with the market value of the land. This could again lead to the unjustifiable deprivation of land in circumstances beyond the owner's control.

81. This section fails to have regard to situations where the owner was granted the land through a land reform programme and has not had the means to upkeep the land or through no fault of their own, the market value of the land has since fallen below the value of the state's investment or subsidy. It is not equitable to deprive such owners of compensation in the event of an expropriation.

82. Furthermore, this section violates the principles of the rule of law with respect to state payments. Subsidies are defined in National Treasury's 2009 Guidelines for Implementing the Economic Reporting Format as "unrequited payments", meaning something is paid without the state getting back anything directly in return. The total "Transfers and Subsidies" in Schedule 1 of the most recent Appropriation Bill allocates over R800 billion to both these unrequited payments. The exact amount allocated to subsidies alone is not known, but is clearly a very high amount. In the case of the payment of each and very rand, out of hundreds

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of billions, every year, the unshakable expectation is that so long as the recipient's conduct is lawful, and so long as there is no explicit contractual provision to the contrary *ex ante*, the payment of every subsidy is final and does not admit of later clawback if the state is to retrospectively change its position on how profitable ventures out to be. This assurance, and with it a pillar of the rule of law, would be annihilated by section 12(3)(d)'s retrospective transformation of subsidies into arbitrarily withdrawable loans.

83. The construction of the section is vague and can lead to unreasonable and unjustifiable expropriations without compensation. It can have a disproportionate effect on faultless beneficiaries of land reform programmes. Additionally, most of those affected will not have the means to challenge any dispute in the calculation of compensation in court and therefore right of access to courts in section 34 of the Constitution will similarly be limited without reason or justification.

SEVENTH CHALLENGE – SECTION 12(4)

84. AfriForum submits that section 12(4) of the Expropriation Act offends the concept of just and equitable compensation as contained in section 25(3) of the Constitution. It objects to the unfair and unconstitutional discrimination of owners whose property is expropriated for land reform for nil compensation.

85. Owners in terms of section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 have a right to compensation as provided in the Constitution, being section 25(2)(b). Section 12(4) of the Expropriation Act limits this right to compensation

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by providing for nil compensation to be paid. However, there are no guiding provisions on when such nil compensation would be just and equitable, leaving it all in the hands of the arbitrator or court. There are no policy considerations included in this section.

86. The vagueness of the section can lead to various unreasonable and unjustifiable expropriations without compensation which makes this subsection unconstitutional.

THE PROVISIONS CANNOT BE RESCUED UNDER SECTION 36(1) OF THE CONSTITUTION

87. IRR Legal submits that the provisions of section 25(2)(b) and section 25(3) of the Constitution brook no doubt: compensation must be afforded where property is expropriated, and that compensation must be just and equitable. Save in very exceptional circumstances as contemplated under our jurisprudence, the Constitution does not make provision for Parliament to direct that no compensation is payable.

88. At this stage IRR Legal does not know what defence will be put up to the unconstitutionality of these provisions. It may be anticipated that reliance will be placed by the State on section 36(1) of the Constitution. IRR Legal reserves its right to reply to the allegations made by the State in this regard.

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89. There are however a number of preliminary remarks that may be made on section 36 of the Constitution, and its applicability in this matter.

90. First, it is submitted that the right to compensation is an important right that is necessary for the protection of the interests of persons (and certain organs of state) from the significant power afforded to the state under the Act to expropriate property and in doing so deprive that person of any benefit of that property or any recompense therefor. Expropriation has a serious impact on the right to property and, if not kept under proper check, affords the state very serious overreach into private property. The basis on which this right is limited, its importance and its purpose, must be unprecedentedly significant, and the nature and extent of the limitation must be narrowly tailored to the strictest degree, to balance such a serious infringement.

91. It is submitted that this balance is not met simply because of an interest in preventing owners from holding land without developing it or using it to derive an income; or because an owner is unable to exercise reasonable control over that property; or because an organ of state is not using that land to serve its core function; or because the present value of direct state investment or subsidy in the property is in excess of the market value of the land. As shown above, the public interest in these aims is not so compelling as to deprive an owner of compensation.

92. It may be that the State may argue that it is necessary to limit the substantive right to compensation due to resource constraints. In this regard it must be

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remembered that, unlike the explicit and substantive rights set out in sections 26(1) and 27(1) of the Constitution, the explicit and substantive right to compensation under section 25(2) and (3) is not subject to progressive realisation. The State must raise very compelling budgetary reasons to limit any such right. Furthermore, the compensation right provided by section 25(2) and (3) is not only essential to protecting property rights, but also to maintaining the rule of law.

93. IRR Legal recognises the importance of land reform and the need for the State to be able to expropriate land for this, and other important public purposes. It recognises that there are instances where the State may legitimately offer nil compensation in the expropriation of land.

94. In this matter, however, it is submitted that the Expropriation Act is drafted in terms that are overbroad, which confer excessive powers on the state in carrying out an expropriation, and which unduly punish property owners. The provisions of the Expropriation Act therefore need to be tailored to ensure that they are in line with the Constitution.

CONDONATION

95. An Order was granted by the Honourable Justice Erasmus on 30 July 2025 ("the Order"), directing, amongst other things, that all intervention applications be filed by 30 July 2025. IRR Legal has acted post haste to finalise this application, but owing to the complexity of the issues involved as well as the significant public

importance it could not bring the application within the time frame set out in the Order handed down by the Honourable Justice Erasmus.

96. The order further only appears to direct when interventions as respondents must be filed. IRR Legal however accepts that the Order facilitates the effective prosecution of the matter.

97. The filing of this application was to an extent delayed by the availability of counsel who had to apply a considerable amount of time to the issues that had to be placed before this Honourable Court. IRR legal is regrettably late in bringing this application, which, having regard to the importance, the complexity and the serious implications of the matter, is not excessive.

98. It must be borne in mind that it would be in the interests of justice that IRR Legal be allowed to place its case before this Honourable Court, especially considering the public importance of the matter, which deals directly with Constitutional issues that will affect millions of South Africans Property and other ancillary rights.

99. IRR Legal at this juncture does not anticipate any prejudice to be borne by the respondents, as it seeks to intervene as an applicant. Further, by joining as an applicant and making common cause with several of the issues raised by the AfriForum, IRR Legal does not anticipate opposition by AfriForum and therefore no time prejudice to file answering affidavits will be occasioned by the parties involved to resist the intervention application that is to be heard on 15 and/or 16 October 2025.

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100. Conversely should IRR Legal's condonation be refused, to the extent that such condonation is required, this Honourable Court will be deprived of IRR Legal's affidavit and case, that has been brought in the interest of the public and to assist the Honourable Court to ultimately reach the right conclusion on the merits.

REMEDY

101. In the circumstances and on the grounds mentioned above, IRR Legal hereby requests this Honourable Court to declare sections 12(2)(e), 12(3)(a) to (d) and 12(4) of the Expropriation Act unconstitutional and invalid.

102. It is submitted that there is no lacuna in the law, or any pressing public need, for the provisions of the Expropriation Act to be saved in the interim. Parliament is entitled to re-enact the legislation within the constitutional confines as advised by this Court. No further order preserving any part of the impugned provisions is therefore necessary.

103. The Honourable Court is hereby requested to refer the requested Order of constitutional invalidity referred to above to the Constitutional Court for confirmation in terms of section 15(1)(a) of the Superior Courts Act 10 of 2013 and further to direct the Registrar of this Honourable Court to lodge a copy of the Order granted by this Honourable Court to the Registrar of the Constitutional Court within 15 days of the granting of the Order.

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Wherefore the intervening party seeks an order in terms of its notice of motion to which this affidavit is annexed.

DEPONENT

The Deponent having acknowledged that he knows and understands the contents of this affidavit and that he has no objection to taking the prescribed Oath which he considers to be binding on his conscience, this affidavit was signed and sworn to before me remotely via Microsoft Teams on the 25th day of August 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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Ex Officio Commissioner of Oath
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