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

Case No: 2025-072494

AFRIFORUM NPC	First Applicant
IRR LEGAL NPC	Second Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF PUBLIC WORKS & 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

SECOND APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

A. INTRODUCTION

1. The Second Applicant ("**IRR Legal**") challenges the Constitutional validity of sections 12(2)(e), 12(3), and 12(4) of the Expropriation Act 13 of 2024 ("**the Act**"), which all curtail compensation payable to property owners following:

   1.1. An "*expropriation*", which the Act defines to mean "*the compulsory acquisition of property for a public purpose or in the public interest*"[1] by either: **(a)** "*an expropriating authority*", which is defined to mean an organ of state[2] empowered to expropriate property by the Act or other legislation;[3] or **(b)** "*an organ of state upon request to an expropriating authority*".[4]

   1.2. The "*compulsory acquisition of property directly or indirectly by a third-party beneficiary through an expropriating authority in the public interest …*", pursuant to section 2(3) of the Act ("**third-party acquisitions**").[5]

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[1] In *Harksen v Lane* 1998 (1) SA 300 (CC) at para 33, the Court noted that a substantially similar definition of an expropriation "*has long been recognised in our law.*"

[2] An "*organ of state*" is, in turn, defined with reference to section 239 of the Constitution, which includes
"*(a) any department of state or administration in the national, provincial or local sphere of government; or*
(b) any other functionary or institution-
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".

[3] The Act does not define this term, but it would most likely include:
(a) "*National legislation*" as defined in section 239 of the Constitution, and legislation made by Parliament exercising its national legislative authority in section 44 of the Constitution.
(b) "*Provincial legislation*" as defined in section 239 of the Constitution, and legislation by any provincial legislature exercising its provincial legislative authority in section 104 of the Constitution. This would include "*old order*" provincial ordinances that remain in force under item 2 of schedule 6 to the Constitution, and which contain expropriation powers for municipalities and roads authorities – such as section 123 of the Municipal Ordinance 20 of 1974, and section 27(1)(a) of the Roads Ordinance 19 of 1976.
(c) By-laws made by municipalities pursuant to their original legislative powers under sections 151(2) and 156(2) of the Constitution.

[4] This includes the power of the Second Respondent, under section 3(2) of the Act, to expropriate property on behalf of an organ of state that is not itself empowered to expropriate property in terms of the Act or other legislation

[5] The reason for the differentiation in the Act follows the approach in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) at para 64, that –
" *… courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state.*"

2. In particular, IRR Legal contends that the impugned provisions in the Act are fundamentally incompatible with, and unjustifiably violate the framework in sections 25(2)(b) and 25(3) of the Constitution for the determination of "*just and equitable*" compensation.

3. This incompatibility arises because the impugned provisions subvert the purpose of just and equitable compensation by failing to preserve an "*equitable balance*" (as envisaged in section 25(3) of the Constitution) between:

    3.1. The "*public interest*" in an expropriation, and the purposes for which the expropriated property will be used; and

    3.2. The interests of the property owner (and others who hold real or personal rights in respect of the property) in the expropriated property.

4. Instead, the impugned provisions shoe-horn officials tasked with determining an offer of compensation into a process in which:

    4.1. **<u>First</u>**, the heft of the State's interest is raised in a wide range of cases where the purpose of the expropriation is a project or result that serves a "*public interest*" (under sections 12(3) and (4) of the Act).

    4.2. **<u>Second</u>**, the interests of those affected by the expropriation are diminished based on pre-determined assumptions. Under section 12(2)(e) of the Act, the property owner's interests must exclude "*anything done with the object of obtaining compensation therefor*"; and in the scenarios set out in sections 12(3)(a) to (d), and 12(4) of the Act (or in other scenarios that the expropriating authority thinks are similar), the Legislature indicates that the

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See too: *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) interests of those affected by the expropriation should be considered so weak as to negate the need for compensation.

5. The result of this imbalance is that it inevitably leads to *under compensation*. This fails to meet the Constitutional standard, in which the right to fair and equitable compensation is one that serves the affected person (as a protection against under compensation from the State), while at the same time ensuring that the State does not over-pay.

6. Even in cases in which a property owner has the wherewithal to dispute an expropriating authority's offer, and to approach a Court (under section 20 of the Act), this under compensation will not be remedied. A Court cannot disregard the impugned provisions, or interpret them in a manner that makes them nothing more than surplusage. But as soon as the impugned provisions are imbued with any meaning any meaning or effect, it is because they represent a 'finger on the scale' in favour of the State's interest in reducing compensation. In other words, they are designed to justify an imbalance, in which the affected person's right to fair and equitable compensation is sacrificed

7. Thus, the impugned provisions are inconsistent with the imperative of ensuring, by law of general application, that an affected property owner is just and equitable compensation – because it entrenches a statutorily-induced imbalance in the compensation determination.

B. ABSTRACT CHALLENGE

8. The Third Respondent ("**the Speaker**"), quite correctly, does not challenge IRR Legal's standing to challenge the impugned provisions of the Act.[6]

9. As such, this Court's powers under section 172(1) of the Constitution (read with section 2(2) of the Superior Courts Act 10 of 2013) mean that it "*must*" declare the impugned provisions of the Act to be invalid to the extent that IRR Legal establishes that these provisions are inconsistent with the provisions of section 25(2)(b) and (3) of the Constitution.

10. This peremptory[7] power may be avoided when it is not necessary to decide a constitutional issue to resolve the dispute in a case;[8] or where an "*abstract challenge*" to legislation requires a court to "*peer into the future*" to determine academic or hypothetical issues,[9] and to speculatively consider factual situations that may or may not arise.[10]

11. These concerns do not arise in the current case.

12. It is submitted that an abstract challenge to the impugned provisions is appropriate – taking account of the considerations collated by the Constitutional Court in the *Solidarity v Minister of Health*.[11] In particular:

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[6] Speaker AA, para 135. In this regard, in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 168, Chaskalson P (in the majority judgement) noted that once it is accepted that constitutionality is tested objectively, "*there is no valid reason for denying persons in the position of the Applicants standing to secure a ruling on the validity of a law that directly affects their interests.*" This did not require an Applicant to show that its rights were threatened (which relates only to 'own interest' standing), but only that it had a sufficient interest in the subject matter.

[7] *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC) at para 74

[8] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para 59; *Harksen v Lane*, para 26

[9] *Savoi v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at para 13

[10] *Esau v Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) at para 4

[11] *Solidarity Trade Union and Others v Minister of Health and Others* (CCT 240/24) [2026] ZACC 19 (18 May 2026) at para 46:

12.1. The case involves a consideration of section 25 of the Constitution. In *Du Toit*,[12] the Court held that the –

> "*constitutional protection of private property is an important right [and] the ability to expropriate property is a crucial constitutional power of the state. Firstly, it enables the state to perform several of its important functions without private ownership becoming an undue impediment. Secondly, in view of the history of the unequal and unjust distribution of property in our society, land in particular, the Constitution enjoins the state to effect redistribution equitably*."[13]

12.2. The Act is constitutional legislation. It is the "*law of general application*" envisaged in section 25(2) of the Constitution, and the preamble to the Act records that its purpose is to "*enable expropriation in accordance with the Constitution.*"

12.3. The challenge made by IRR Legal to the impugned provisions of the Act links directly to its structural incompatibility with the requirements for compensation dictated by sections 25(2)(b) and (3) of the Constitution; and the interpretation of the impugned provisions of the Act. Interpretation is a "*matter of law and not of fact*".[14] Furthermore, the objective approach

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"*It follows that determining the appropriateness of hearing an abstract challenge requires regard to be had to a number of factors, none of which is individually decisive of the issue. These include—*

(a) the nature of the right said to be infringed;

(b) whether a genuine dispute exists which is not premature, hypothetical in nature or based on speculation, with the basis of the challenge apparent from a clear factual matrix;

(c) whether there is another reasonable and effective manner in which the challenge can be brought;

(d) the consequences of the infringement of the right and whether the manner in which the impugned provisions will operate in practice is capable of identification;

(e) the range of persons or groups who may be directly or indirectly affected by any order made by the court, including the degree of vulnerability of the people affected, and the opportunity that those persons or groups have had to present evidence and argument to the court; and

(f) the nature of the relief sought, the extent to which any relief granted will have a direct, practical effect of general and prospective application and not amount to a symbolic or advisory opinion on the issues."

[12] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 25

[13] See also, for example, *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) at para 1, in which the Court noted that the "*painful, emotive subject of colonial and apartheid era land dispossession … continues to plague South Africa's politico-legal landscape.*"

[14] *KPMG Chartered Accountants (SA) v Securefin Limited* 2009 (4) SA 399 (SCA) at para 39

adopted by the Constitutional Court in *Ferreira v Levin*[15] means that the impugned provisions are "*objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution*". In these circumstances, there is "*a pressing public interest that the decision be given as soon as possible.*"[16]

12.4. The Act is of a 'framework' nature, setting out requirements for all expropriations. The identification of expropriating authorities, and the purposes for which they are permitted to expropriate property, will appear in other legislation. It will be in that legislation that policy-based considerations will be reflected, regarding issues such as what programmes are required to ensure "land reform", and how these programmes are funded. These are not issues that serve before this Court.

12.5. The issues raised are neither hypothetical, speculative, or of academic interest only; and do not require any enhanced skills of prognostication. Once the Act commences, every expropriating authority in every case will have to consider whether section 12(2)(e) of the Act is triggered (as a matter of fact); and in every case in which this occurs, the provision demands an exclusion. IRR Legal submits that this will generally amount to under-compensation. Similarly, in every case in which an expropriation is made on a public interest basis, the expropriating authority will have to determine whether any sub-section in 12(3) of the Act is triggered; and if

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[15] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 27 (per Ackermann J) and 167-168 (per Chaskalson P for the majority)
[16] *Ferreira v Levin*, at para 164.

so, consider how much under-compensation may be paid. The same holds in respect to section 12(4) of the Act.

12.6. The fact that the Act has not as yet come into operation, does not affect this Court's jurisdictional powers to hear the current case. In the case of a challenge to a Bill, section 167(4)(b) of the Constitution grants the Constitutional Court exclusive jurisdiction. An Act, however, has a Constitutional status once passed – even if it is not as yet operational. In any event, it would avoid prejudice to many people if the constitutionality of the Act could be determined before the Act came into operation.

C. COMMON GROUND BETWEEN IRR LEGAL AND THE RESPONDENTS

13. IRR Legal's challenge is confined to the specific impugned provisions. In the circumstances, it is evident that:

13.1. Sections 2(1) and 3(1) of the Act accord with section 25(2)(a) of the Constitution, in that the Act is confined to expropriations for a "*public purpose*" or "*in the public interest*". As dealt with below, the definitional ambit of these concepts under the Act must inform a proper interpretation of the impugned provisions.

13.2. The general requirements for compensation in section 12(1) of the Act are beyond contestation, as they substantially restate the wording in section 25(3) of the Constitution in a statutory form.[17]

13.3. The Act properly identifies other relevant circumstances (i.e. in addition to those identified in section 25(3)(a) to (e) of the Constitution) which must be

[17] The only substantive difference is that section 12(1) expands on "*the interests of those affected*", and makes it clear that this includes: an owner of property; a holder of other rights in property; and a mortgagee. This is eminently sensible.

considered in a compensation inquiry. For instance, the expropriating authority must ascertain and consider, *inter alia*, "*the existence of registered and unregistered rights in the property*" (section 5(1)(b));[18] and the interests of the mortgagee (section 12(1)).[19]

13.4. IRR Legal does not challenge the exclusions from compensation mandated in sections 12(2)(a) to (d) and (f) of the Act.

14. Furthermore, IRR Legal notes that it is common cause that:

14.1. The Constitution's implicit protection of property rights[20] does not operate to make such rights "*absolute*".[21]

14.2. The requirement in section 25(1) of the Constitution that no-one may be arbitrarily deprived[22] of property is properly reflected in section 2(1) of the Act. [23]

14.3. The Expropriation Act 63 of 1975 ("**the 1975 Act**") is "*old order legislation*" (as defined in schedule 6 to the Constitution); and given this provenance, it

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[18] This is important because:
- Unregistered rights do not survive expropriation (section 9(1)(b)(i)), but the holder of such a right is entitled to compensation for the loss of their unregistered rights (section 11(1)).
- Registered rights (other than mortgages) survive expropriation (section 9(1)(d)), and must be separately expropriated if so required.
- Section 12(1) provides that consideration must be given to the interests of the mortgagee (i.e. a registered financial institution that has forwarded a loan to the property owner, which is secured by a registered mortgage bond over the property). A mortgage bond does not survive expropriation (section 9(1)(d)), but the compensation for the expropriation must settle the underlying debt (section 16).

[19] A mortgage bond does not survive expropriation (section 9(1)(d)), but any compensation paid must be applied to settle the underlying debt (section 16).

[20] Section 25 of the Constitution does not explicitly protect property rights to acquire and hold property. However, this is implicit - see *Haffejee NO and others v Ethekwini Municipality and others* 2011 (6) SA 134 (CC) at para 30

[21] *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) at para 49; and *Hafferjee*, at para 30

[22] The vexed question of what constitutes a "*deprivation*" is not an issue that arises in this case, as all expropriations are a sub-species of deprivations – *Agri SA*, at para 48 and 67

[23] In *FNB*, at para 100, the Constitutional Court held that arbitrariness in this sense arises when an empowering law "*does not provide sufficient reason for the particular deprivation in question*". This is not an issue that arises in the current case.

comes as no surprise that the approach under the 1975 Act does not accord in all respects with section 25 of the Constitution.[24]

14.4. In these circumstances, the Constitutional Court has pointed out that "*pre-constitutional expropriation law must be approached circumspectly*.".[25]

D. THE INTERPRETATION OF SECTION 25 OF THE CONSTITUTION

i. The constitutional compensatory norm

15. Section 25(2)(b) of the Constitution provides that all expropriations must take place in accordance with a law of general application –

> "*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*."

16. Following from this requirement, section 25(3) of the Constitution sets a "*constitutional compensatory norm*" that "*determines the amount of compensation*" that must be paid.[26]

17. In so doing, section 25(3) of the Constitution sets out three cascading principles:

17.1. In the **<u>first</u>** place, the lodestar for the inquiry is that the compensation paid by an expropriating authority to any person affected by an expropriation must be "*just and equitable*".

17.2. In the **<u>second</u>** place, what constitutes "*just and equitable*" compensation is given substance, in that it must reflect an "*equitable balance between the*

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[24] As noted in *NAD Property Income Fund (Pty) Ltd v South African National Roads Agency SOC Limited* (710/2024) [2026] ZASCA 42 (1 April 2026), at para 10, this is because "*the market standard reflects the pedigree of the Expropriation Act*"

[25] *Hafferjee*, at para 29

[26] In *NAD* at para 10

> *"[t]he amount of compensation and the time and manner of payment must be just and equitable. What is just and equitable must reflect an equitable balance between the public interest and the interests of those effected, having regard to all relevant circumstances, which includes an enumerated list.*"

public interest and the interests of those affected".

17.3. In the **third** place, the "*equitable balance*" between competing interests is, in turn, determined by having regard to "*all relevant circumstances*" – including, but not limited to, five pre-determined circumstances in section 25(3)(a) to (e) of the Constitution.

18. While consideration of the circumstances identified in section 25(2)(a) to (e) of the Constitution is mandatory, it is evident that these sub-sections raise broad factors at a sufficiently high level of generality that they may not always be relevant, and that other unlisted factors may be relevant.[27] In other words, none of these has a uniform impact on a compensation determination.

19. At the same time, the 'open texture' of the relevant circumstances set out in section 25(2)(a) to (e) of the Constitution does not mean that the resulting compensation determination is a free-floating one.

20. In this regard, in the SCA's recent judgment in *NAD*[28] is noteworthy. It highlights that section 25(3) of the Constitution is "*not cast as a regime of discretion*". Rather, section 25(3) of the Constitution specifies that:

20.1. In the first place, compensation must be just and equitable; and

20.2. In the second place, justice and equity is reflected in an equitable balance of competing interests, based on all relevant circumstances, including the five enumerated circumstances in sub-sections (a) to (e).

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[27] In *Du Toit*, at para 33, the Court held that –

"*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*."

[28] *NAD*, at para 16

21. The circumstances in section 25(3)(a) to (e) of the Constitution are thus "*not discretionary considerations*". They are determined as a "*matter of fact*".

22. In *NAD*, the SCA noted further that once these facts are at hand, there may be differences regarding the weight that is attributed to each fact; the assessment of the findings that the facts support; how these findings are considered in an equitable balance; and how this balance translates into a precise determination of the Rand-value for the compensation that must be paid.

23. But, the Court continued,[29] just because there is room for difference does not mean that the compensation inquiry in section 25(3) of the Constitution involves a true discretion.

24. This is so because the determination remains an "*objective enquiry*" in which the consideration of the collected facts establishes the interests of persons affected and the countervailing interests of the State; and these interests are weighed against each other to establish just and equitable compensation. The determination of compensation "*must meet this constitutional standard*", and the "*compensation either meets the standard or it does not. Conformity with the standard is not a matter of variable satisfaction.*"[30]

25. Similarly, in *Du Toit*[31] the Court held that the compensation inquiry under section 35(3) of the Constitution "*must adhere to the standards of justice and equity. It must also reflect an equitable balance between the interests of the public and of those affected by the expropriation. These standards, provided for in section*

[29] *NAD*, at para 16-18
[30] *NAD*, at para 19
[31] *Du Toit*, at para 26

25(3) of the Constitution, are peremptory and every amount of compensation agreed to or decided upon by a court of law must comply with them."

26. The recognition that the compensation determination remains an objective one is crucial. This has important consequences. Most notably, an official determining an offer of compensation on behalf of the expropriating authority, or a Court deciding a dispute regarding the adequacy of the compensation offered, cannot adopt *a priori* assumptions about the materiality and weight of any fact or any of the factors enumerated in section 25(3) of the Constitution.

27. Rather, the materiality and significance of the facts that are collected (in respect of the issues in sections 25(3)(a) to (e), and other relevant issues that may arise) remains tethered to the determination of just and equitable compensation.

28. The *levelling up* purpose of section 25 is also clearly settled. A unanimous Constitutional Court undertook an interpretation of the purpose of section 25 and noted that: "*The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons*.[32]"

29. Finally, the constitutional purpose of ensuring that the state, which is the most powerful and resource-rich entity in the country and so most capable of facilitating rapid land reform, pays for land reform is clear.

    29.1.1. There can be no dispute that the "state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis", as stated in section 25(5) of the Constitution.

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[32] *Port Elizabeth Municipality v Various Occupiers* CCT 53/03

29.1.2. Furthermore, the state is obliged to provide for "tenure which is legally or to comparable redress" and "restitution…or to equitable redress" in terms of those persons or communities identified in sections 25(6) and 25(7) of the Constitution respectively.

29.1.3. Finally, "land reform" as referred to in section 25(4)(a) of the Constitution is included in "the public interest", which in turn is referred to as applicable to expropriations in which compensation "must" be paid by the state in terms of sections 25(2)(b) and 25(3) of the Constitution.

30. The impugned provisions of the Act frustrate all three purposes of compensation, since they provide for under-compensation that does not restore the value in the owner's hands that has been lost; they provide for the state to shirk its duties; and they level down the property rights of all owners, thereby frustrating the exact object of land reform for all land reform beneficiaries who are, or will be, owners.

ii. The process followed thus far

31. In terms of section 25(3) of the Constitution, the consideration of an "*equitable balance*" must determine and weigh an <u>affected person's interests</u> in the expropriated property, and the <u>public interest</u>, with regard to the purpose for which the State seeks to expropriate the property.

32. Flowing from this, the compensation inquiry demanded under section 25(3) of the Constitution is very different from that envisaged in section 12 of the 1975 Act – which focuses on market-value of a person's rights in the affected property.

33. The Speaker attempts to reframe IRR Legal's position as a defence of market-

value compensation.[33] This is incorrect.[34] Since the *First Certification* judgment,[35] it has been clear that section 25(3) of the (then draft) Constitution set "*market value*" as one of several factors for consideration.[36] Indeed, this was also evident in the wording of the property rights in section 28(3) of the Interim Constitution.[37] This is again highlighted in *Du Toit*[38]

34. In order to ensure that the factors in section 25(3) of the Constitution were factored into a compensation determination under the 1975 Act, in *Du Toit*[39] the Constitutional Court set out a "*two-stage approach*".

34.1. In the **<u>first</u>** stage, consideration must be given to compensation calculated in accordance with the 1975 Act. As noted in *NAD*,[40] this approach has the effect that in the first stage, "*market value sets the presumptive standard against which consistency with justice and equity must then be determined In the second stage*".

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[33] Speaker AA, para 22: The Speaker counters allegation in IRR Legal's founding papers by stating that –

> "*the purpose of section 25(3) of the Constitution is not to constitutionalise market-related compensation, nor to guarantee that every expropriated owner is placed in the <u>same financial position</u> as before the expropriation*" (emphasis added).

[34] IRR Legal FA, para 27: IRR Legal's position is that compensation had to "*place the dispossessed into the <u>same or similar position</u> as they would have been but for the dispossession by way of expropriation …*". This is not limited to a financial position.

[35] *Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) at para 73

[36] In the *First Certification* case, some parties contended that a market-related price determination was required to respect Principle II in the Interim Constitution, which required that the final Constitution had to accord with "*universally accepted principles*". This argument was rejected. The Court held that "*[a]n examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists*".

[37] Section 28(3) of the Interim Constitution provided that compensation had to be –

> "*… just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.*"

[38] *Du Toit*, at para 28: the Constitutional Court again highlighted that section 25(3) of the Constitution did not render a consideration of the market value irrelevant. Rather, when determining just and equitable compensation, "*section 25(3) provides an open-ended list of relevant circumstances to be taken into account, including the market value of the property.*"

[39] *Du Toit,* at para 34

[40] *NAD*, at para 13

34.2. In the **second** stage, it must be considered whether "*that amount is just and equitable under s25(3) of the Constitution*".

35. This remains relevant: This is so because the Land Claims Court[41] and the SCA[42] have adopted substantially the same approach to determine compensation under statutory provisions that mirror section 25(3) of the Constitution – including sections 2 and 22 of the Restitution of Land Rights Act 22 of 1994 ("**the Restitution Act**"), and section 23 of the Labour Tenants Act.

36. This was based on an understanding that –

> "*the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require ….*"

37. Furthermore, in *Uys v Msiza*,[43] the SCA pointed out that many of the other relevant factors referred to in section 25(3) of the Constitution will already have been factored into a consideration of the market price of the property – such as the fact that it has not been used, has not developed, or has been neglected.

38. However, we submit that the Act (which carries the framework under section 25(3) of the Constitution into section 12(1) of the Act) requires: **(a)** a determination of all of the interests of an affected person in the property; and **(b)** a determination whether the public interest and the purposes served by the act of expropriation serve as a counterweight to reduce the valuation of the affected person.

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[41] *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 LCC para 35; *Khumalo v Potgieter* [2000] 2 All SA 456 (LCC) par 23; *Mphela v Engelbrecht* [2005] 2 All SA 135 (LCC) at 153; *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012)

[42] *Uys N.O v Msiza* 2018 (3) SA 440 (SCA)

[43] *Uys v Msiza*, at para 23

iii. Determining and valuing the interests of the affected person

39. Based on the SCA's findings in *NAD*, we submit that the consideration of the affected person's interests would accord with the following principles:

39.1. **First**, an affected person's interests must be distinguished the rights that these affected people have in the property (including real rights and personal rights in the case of land). The nature of the affected person's rights in the property, and their market value, is an important consideration. However, a consideration based on their interests goes further.

39.2. **Second**, to determine these interests, one must consider the circumstances in section 25(3)(a) to (e) of the Constitution (as repeated in section 12(1) of the Act), and other relevant circumstances.

39.3. **Third**, it must be kept in mind that while these circumstances are relevant, none of them has any pre-determined weight, consequences, or inherent significance in itself. Rather, the circumstances in section 25(3)(a) to (e) of the Constitution are important because they facilitate and structure the collection of all relevant facts for a particular case.

39.4. **Fourth**, based on the factual material that is collected, the actual interests that affected people have in a target property are discernible. This is also a matter of fact.

39.5. **Fifth**, in considering the value of these interests, it must be kept in mind that various considerations may overlap. Thus, for instance, the fact that a property has not been maintained very well, will already be factored into its valuation.

39.6. **Sixth**, the affected person's interests may translate into compensation with a Rand-value that is lower than the market value of the property. But, by the same logic, it may be higher. This depends on the facts. As the SCA held in *Helderberg 1*[44] -

> "*the duty to compensate implies that the owner of the expropriated property may not be in a better or 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.*"

40. Cases in which the interests of those affected will outstrip the value of their rights in the property are easy to conceive. For instance:

40.1. A landowner may knowingly 'over-capitalise', based on the intention to live on, or to retain use of, a property for a long time.

40.2. The property may have a special significance for an owner, and its loss may be keenly felt by the landowners and their family. Under section 12 of the 1975 Act, a *solatium* could be added as compensation (over and above the market value of the property) to compensate for injured feelings or emotional pain and suffering. This is not expressly retained in the Act, but would fall under the general rubric of the property owner's interests in the property.

40.3. A well-established business operating from the property may be known by its location, and the disturbance of its business will have financial costs.

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[44] *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) at para 21

These disturbance interests are recognised in Australia,[45] Canada,[46] and the United Kingdom.[47]

40.4. Registered or unregistered real rights in the expropriated property will often have no market value, but will be very important to the interests of the right-holder. For instance, a farmer may have servitutal rights to build an access road over a neighbouring property. If the neighbouring farm is expropriated, this servitutal right of access would have no market value (because the access road only leads to the farmer's property). But the farmer's interests in the old access road would have been considerable, because he would now be required to build a new access road.

40.5. A mortgagee's interest is for the full amount secured under the mortgage. If the compensation does not cover this amount, the property owner will remain indebted to the mortgagee,[48] and the mortgagee will be left with an unsecured debt.

iv. Does the public interest or purpose serve as a counterweight?

41. The interests of the people affected by an expropriation are not alone dispositive.[49] Section 25(3) of the Constitution clearly indicates that regard must also be had to:

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[45] Under the Land Acquisition Act 1989, which gives effect to the requirement in section 51(xxxi) of the Australian Constitution – which requires that compulsory acquisitions must take place on "*just terms*".

[46] See *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.,* [1997] 1. S.C.R. 32, in which the Supreme Court of Canada dealt with the requirement that compensation had to be "*fair and adequate*". This meant that expropriation legislation "*should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.*" This includes a distinct interest of the property owner for business disturbance See *M.C.A. Land Development Corp. v. British Columbia (Transportation and Infrastructure)*, 2014 BCCA 435 (CanLII)

[47] Under section 37 of the Land Compensation Act of 1973

[48] *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* 2010 (6) SA 439 (SCA)

[49] IRR Law RA, para 54-55

41.1. The "*public interest*" that is served by an expropriation; and

41.2. The "*purpose*" for which the land is being expropriated.

42. We submit that the following principles are significant:

42.1. **<u>First</u>**, the public interests served, and the purposes of the expropriation are, as before, resolved as matters of fact.

42.2. **<u>Second</u>**, section 25(3) of the Constitution does <u>not</u> dictate any particular outcome based on the "*public interest*" or the "*purpose*" of the expropriation; and how this is weighed against the interests of those affected by the expropriation. There thus cannot be any *a priori* assumption that because an expropriation is being pursued to serve a commendable public interest or purpose, the compensation claimants must accept that they have a duty to 'take the knock' in an assessment of their compensation (so that the State can achieve a commendable public interest or purpose at a lower cost to the fiscus).

42.3. **<u>Third</u>**, the weight attributed to a public interest or a commendable purpose, must be tied to considerations of justice and the equities arising in that case. What this means is that there must be something about the public interest or the purpose of an expropriation in the factual context of a particular case that makes it a relevant factor to off-set part of all of the State's duty to compensate those affected for the loss of their interests in the expropriated property.

43. So, what will follow is that in many (most) other cases, the factual determination of the public purpose of the envisaged project, or the public interest in the project, will not serve as a counterweight to reduce the payment to an expropriated

property to compensate the loss of their actual interests in a property.

44. This is not an indication that the public interests in land reform and land restitution (as dealt with in sections 23(4)(a) and (5) to (9) of the Constitution) are belittled, degraded, or ignored. All that it means is that these are based on the "*nation's commitment*" and the State's duties. It cannot be assumed that even the most noble intention must, by itself, mean that the State's duties can be shuffled horizontally onto a specific private property owner, who happens by sheer misfortune to own a property that would suit this noble project. This private property owner then takes a double hit: First, they must alienate their land and pass it to the State, whether they like it or not. Secondly, they are deprived of compensation, even when compared to that which would have been received if the same property had been expropriated for a mundane, unglamorous, or more prosaic reason.

45. In *PE Occupiers*,[50] the Court noted that

> *"[t]he blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.*"

E. THE IMPUGNED PROVISIONS, PROPERLY UNDERSTOOD

i. The Respondents do not properly construe the impugned provisions

46. The Speaker suggests that the impugned provisions must be understood on the bases that:

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[50] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 15

46.1. The provisions are "*framed in deliberately non-automatic language*", and raise factors which "*may*" be used – but are "*not a closed list*".[51]

46.2. The factors in section 12(3)(a) to (d) of the Act are just "*examples*",[52] and that these point to the possibility of nil compensation as a possible outcome that is permissible under the Constitution.[53]

47. The **first** problem with the Speaker's preferred interpretation of the impugned provisions is that they are left "*inoperative and meaningless*". This is not an interpretation that any court should favour.[54]

48. The **second** problem with the Speaker's preferred interpretation is that it is unsustainable. As noted above, the Speaker starts by suggesting that section 12(3) of the Act merely sets out "*examples*".

48.1. But she is compelled to shift this position, and later states that by introducing section 12(3), Parliament indicates examples to show that *"special attention may be required in the land reform context*".[55]

48.2. She then again shifts: The purpose of listing "*examples*" in sections 12(3)(a) to (e) is now presented as an attempt to highlight (for the benefit of officials and courts) that "*special consideration should be given to those factors.*"

48.3. We submit that neither the Speaker nor the EFF (with respect) ever present a clear indication of what the any of the impugned provisions (except section 12(3)(d)) do.

[51] Speaker AA, para 21
[52] Speaker AA, para 15
[53] Speaker AA, para 52 and 57
[54] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 41; *Scalabrini Centre,* at para 99-101
[55] Speaker AA, para 69

49. The **<u>third</u>** problem with the Speaker's favoured interpretation is that it does not seek to properly construe the text of impugned provisions within a contextual and purposive understanding of the iterative process detailed above.

50. The **<u>fourth</u>** problem with the interpretation of the Speaker and the EFF, is that it is premised on the idea that an administrator determining an offer of compensation has a discretionary power.

51. This is false as a general proposition (because, as held in *NAD*, the compensation inquiry does not raise a true discretion); and because a proper interpretation of the provisions does not establish any such discretionary power.

52. The **<u>fifth</u>** problem is that even if an administrator could pick-and-choose when to invoke the impugned provisions, it is immediately evident that the provisions themselves give no inkling of a principled basis on which an administrator could discern between cases when the provisions must or should be applied, and when they are inappropriate.

53. In order to properly understand the impugned provisions, we deal with:

    53.1. The provisions within the context of the Act as a whole; and

    53.2. Thereafter, the impugned provisions themselves – which we submit are foundationally incompatible with the framework for a compensation inquiry in section 25(3) of the Constitution.

ii. The impugned provisions within the context of the Act

54. Both the Speaker and the EFF suggest that because the compensation inquiry is resolved in proceedings before the High Court (under section 20), the

impugned provisions can be 'read down', or the Court can be expected to interpret and apply the Act in a manner that is Constitutionally-compliant.

55. We submit that this approach fails to consider the Act in accordance with its text, context, and purpose.[56] What the Speaker and the EFF blithely skip over is that the Act envisages an iterative process, in which judicial proceedings come at the very end (and only in those cases in which efforts to reach an agreement have deadlocked).

56. Under the Act:

56.1. The process begins with the requirement that expropriating authority considering a possible expropriation, must undertake an investigation in which information is collected from the property owner; and if the property is land, notice must be given various national departments and the municipality in the area (sections 5(5) and 6 of the Act).

56.2. Thereafter, the expropriating authority must serve a notice of intention to expropriate on the property owner, a mortgagee, and a holder of any other right in the property (under section 7(1)). This notice must include (*inter alia*): "*an offer of compensation which the expropriating authority considers just and equitable and an explanation of how the amount was arrived at with reference to supporting information*" (section 7(2)(k)).

56.3. If the expropriating authority then decides to proceed, it must issue notice of expropriation (section 8(1) - "**the section 8 notices**") to the property owner and others affected by the expropriation. These section 8 notices

[56] As required in accordance with the interpretative approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 17-18

must include, *inter alia*, **(a)** "*an explanation of how the amount of compensation was arrived at, together with supporting documents*" (sections 8(1) and 8(4)(d)); and **(b)** an indication when the offered compensation and any interest thereon will be paid (sections 8(4)(a) and 13). These section 8 notices must also include compensation to a holder of unregistered rights over the property (section 11(1)): make arrangements to ensure that any compensation is first made available to settle any debt secured by a mortgage bond over the property (section 12(1)); and ensure that deductions from the compensation tare paid to settle outstanding municipal rates and levies(section 17(1)).

57. These steps are significant. In *Kohler Bricks*,[57] this Court dealt with a notice of an intention to expropriate under the 1975 Act, and found that this constituted an administrative act subject to the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA**").

58. It is submitted that the same is true of notice of intention to expropriate under the Act. The section 7 notice has direct, external, legal effects in the sense set out in *Greys Marine*,[58] in that it "*has the capacity to affect legal rights*". In particular, the recipients are then imposed with the duty to –

> "*deliver to the expropriating authority a written statement –*
> *(i)* *stating whether he or she accepts the offer of compensation;*
> *(ii)* *requesting further particulars under section 14; or*
> (iii) *disputing, in terms of section 19, the amount of compensation offered.*"

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[57] *Kohler Bricks (Pty) Ltd v City of Cape Town and Another* (21362/2017) [2019] ZAWCHC 6 (15 February 2019) at para 18-21

[58] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23

59. The issuing of a section 8 notice also amounts to an administrative act, regulated under PAJA.

59.1. In *Erf 16 Bryntirion*,[59] the SCA held that a decision to expropriate taken by the Minister under the 1975 Act amounted to administrative action under PAJA. [60]

59.2. The same applies under the Act, in that the section 8 notices (of expropriation) have significant and material effects for those affected by the expropriation.

60. In this regard, we note that the effects of the section 8 notices include:

60.1. Determining the "*date of expropriation*" (section 8(3)(e)). This is significant as on this date ownership in the property vests in the expropriating authority (section 9(1)(a)); and if the property is land, unregistered rights over the land and any mortgage against the land cease to exist (sections 9(1)(b)(i)) and 9(1)(d)). Similarly, any mortgage bonds cease to exist.

60.2. Determining the "*future date on which the right to possession of the property will pass to the expropriating authority*" (sections 8(1)(f) and 9(2)(b)). This has immediate legal consequences as:

60.2.1. In this period, the former owner of the property retains the right to use the property (section 9(5)(a)), but also remains responsible to maintain the property (section 9(3)(a)), and to pay "*the municipal property rates, taxes, levies and other charges, and*

[59] *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (914/10) [2011] ZASCA 246 (1 December 2011)
[60] Similarly, in *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* 2026 (2) SA 227 (CC) at para 71, assessments by SARS were treated as administrative acts subject to PAJA.

normal operating costs in respect of the expropriated property" (section 9(5)(b)).

60.2.2. The expropriating authority may claim further amounts from the former property owner if they do not maintain the property (section 9(3)(b)).

60.2.3. The burden falls onto the former property owner to issue a notice requiring the expropriating authority to take immediate possession of the property if they are unwilling to maintain the property (section 9(4)).

60.3. Triggering the obligation for a compensation claimant to dispute the compensation offered by the expropriating authority as unjust and inequitable. If compensation remains in dispute:

60.3.1. The expropriating authority may deposit the offered amount with the Master (sections 18(2) and (3)).

60.3.2. The parties may enter into mediation, which must be initiated "*without undue delay*" (section 19(1)).

60.3.3. If deadlocked, the compensation claimants must request the expropriating authority to institute court proceedings within 90 days of the expropriation order (section 19(3)); or launch proceedings themselves within 180 days of the expropriation order (section 19(2)). Failing compliance with these periods, the compensation claimant will only be able to bring proceedings to settle the compensation "*on good cause shown and if the* *interests of justice*" require an extension of the time periods (section 19(4)).

61. Based on the above, we submit that the following broad principles arise:

61.1. **First**, the offer of compensation contained in the section 6 and section 8 notices must accord with the overarching requirements for just and equitable compensation, reflecting an equitable balance between the public interest and the interests of those affected by the expropriation; and

61.2. **Second**, the offer of compensation contained in the section 6 and section 8 notices must also accord with other applicable laws. Most notably, the compensation must take account of the valuation conducted by a valuer under the Property Valuation Act 17 of 2014 ("**the Valuation Act**"). The Valuation Act has the object (in section 2(1)(a)) 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 property*". [61] In terms of the definitions in the Valuation Act, the "*value*" of land is determined in accordance with the test set out in section 25(3) of the Constitution.[62] Furthermore, the meaning and effect of each of the circumstances in

[61] To this end, the Valuation Act applies (under section 12(1)(a))

"*[w]henever a property has been identified for—*

(a) purposes of land reform that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines …"

[62] Section 1 provides that:

"*''value'', for purposes of section 12(1)(a), means the value of property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including the— (a) current use of the property; (b) history of the acquisition and the use of the property; (c) market value of the property; (d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) purpose of the acquisition.*"

sections 25(3)(a) to (e) of the Constitution are set out in Regulations under the Valuation Act.[63]

61.3. **<u>Third</u>**, an affected person is entitled to lawful and fair treatment at every stage of the process.[64] This is not displaced by the fact that defects may be cured later in the process, or before a Court.

61.4. **<u>Fourth</u>**, the determination of the compensation offer in the section 6 and section 8 notices is one made by an administrative functionary, exercising administrative powers under the Act (including the impugned provisions). This means that these functionaries are left to make sense of the impugned provisions themselves. This becomes significant, because:

61.4.1. The impugned provisions lead an administrator tasked with determining an offer of compensation into a process that is foundationally inconsistent with section 25(3) of the Constitution.

61.4.2. The Legislature's attempt to provide guidance, fails; and these administrators are left with marshmallow-words, which are vague and overbroad.

iii. <u>Fifth</u>, the judicial process (in section 20) involves High Court litigation in which extensive factual evidence will have to be led, including expert evidence relating to issues that have proven vexing – such as how a "*current use value*" is properly determined;[65] how the "*highest and best use*" value of the property;[66] and how a Judge

[63] The Valuation Regulations, published under R1322 in Government Gazette 42064of 30 November 2018

[64] *Slagment (Pty) Ltd v Building Construction and Allied Workers's Union & others* 1995 (1) SA 742 (A) at 756; and *Basson v Hugo and Others* 2018 (3) SA 46 (SCA) at para 20

[65] The is dealt with in *Moloto Community v Minister of Rural Development and Land Reform and Others* (LCC 204/2010) [2022] ZALCC 4 (11 February 2022)

[66] This concept is now recognised as a decisional referent in Regulation 5(5) of the Valuation Regulations. The difficulties with this concept were dealt with in *NAD*, at para 22ff

can act as a "*super valuer*" to ascertain a fictional value for a fictional sale of the affected land.[67] We submit that the reality must be recognised that this sort of court process is not one that will be affordable or viable for a great many affected property owners.The impugned provisions are inconsistent with the Constitution

62. When we turn to the impugned provisions, we submit that it becomes clear that they upend the hierarchy of principles in section 25(3) of the Constitution.

63. This is so because an official tasked with determining an offer of compensation on behalf of an expropriating authority is shoe-horned into a process in which they enter into a compensation inquiry from the wrong end – in that specific factual situations are automatically treated as being imbued with a particular relevance to the compensation inquiry, namely that they permit the payment of under-compensation up to and including the extreme of "nil" compensation.

64. **<u>First</u>**, <u>all expropriations made in the public interest</u>, an official considering an offer of just and equitable compensation <u>must:</u>

    64.1. Make a <u>factual finding</u> whether the affected property owner did "*anything*" (without any temporal limit) "*with the object of obtaining compensation therefor*" (section 12(2)(e)).

    64.2. If this factual finding is made, the value of the identified 'things' that were done with this object, <u>must</u> be excluded from the calculation of compensation.

    64.3. The only exception arises if a property owner can prove the existence of "*special circumstances*", and convince the official that it would be just and

[67] The term "*super valuer*" is referred to in *Davey v Minister of Agriculture* <u>1979 (1) SA 466</u> (N). The practical difficulties in this regard are dealt with in *Moloto*, at para 29ff.

equitable to pay a claim for a thing done with the object of obtaining compensation.

65. IRR Legal contends that this exclusion is inconsistent with section 25 of the Constitution. A factual conclusion that the situation in section 12(2)(e) has arisen, is treated as an end in itself. This effectively amounts to a deeming provision – which assumes that the exclusion under section 12(2)(e) of the Act is required to ensure that just and equitable compensation is paid, and not more. Conversely, the provision assumes that it would be unjust and inequitable to allow compensation.

66. We deal with other challenges to section 12(2)(e) below. However, the provision is, we submit, doomed from the start.

67. **<u>Second</u>**, in <u>all expropriations made in the public interest</u>, the official <u>must:</u>

67.1. Make a factual determination to establish if the particular facts of the case match with the scenarios set out in sections 12(3)(a) to (d) of the Act; and

67.2. Make a factual determination if other relevant factors exist, similar to those in section 12(3)(a) to (d), which could justify substantially reducing the compensation payable to those affected by the expropriation.

68. As with section 25(3) of the Constitution, section 12(3) of the Act does not create a discretionary regime. These factual circumstances must be assessed.

69. **<u>Third</u>**, the consideration of facts becomes very different from that which usually follows under the Constitutional regime. As seen in *NAD*, these facts are not assumed to be material, and are attributed any pre-ordained weight. But under section 12(3) of the Act, an official tasked with determining a compensation offer on behalf of an organ of state <u>must</u> have regard to the clear legislative view set

out in section 12(3) of the Act that the compensation inquiry tilts towards a significant reduction in compensation payable by an organ of state whenever:

69.1. The public interest being served by the expropriation is commendable, and the specific project being pursued is a good one; and

69.2. The facts in the particular case match one (or more) of the scenarios in sections 12(3)(a) to (d), or something akin to those.

70. Once again, section 12(3) of the Act is fundamentally incompatible with framework for a compensation inquiry under section 25(3) of the Constitution. Section 12(3) of the Act enters into the inquiry from the wrong end. It assumes that specific factual circumstances (that are chosen because they all point in favour of the State paying less in compensation) are relevant and material; and other considerations wane by comparison. This fundamentally unsettles any just and equitable balance.

71. **Fourth**, in all cases in which an expropriation is made in respect to compensation claimed by a property owner under section 23 of the Land Reform (Labour Tenants) Act 3 of 1996 (“**the Labour Tenants Act**”), the assumption is again made that because this Labour Tenants Act serves a commendable public interest, this is in itself a reason to consider greatly reduced or nil compensation.

72. Sections 12(3) and (4) of the Act are thus quite clearly based on the dual assumptions that when an expropriation is made in the public interest, and relates to a commendable interest or project, then:

72.1. It can be assumed this commendable public interest goal is a material factor that can and must be factored in to reduce the compensation that must be paid by the State; and

72.2. It can be assumed that the property owner's interests become less compelling, and that this must be factored in reduce the compensation claimable by those affected.

73. We submit that these assumptions are not consistent with the fact-based, purposive determination envisaged under section 25(3) of the Constitution.

74. The inappropriateness of sections 12(3) and (4) of the Act become clearer if it is recognised that:

74.1. The Act does not determine the identity of any expropriation authority, or empower that expropriation authority with any powers to expropriate in specific cases.

74.2. Sections 25(5) to (7) of the Constitution refer to the State's obligations to undertake "*legislative and other means*" to achieve land reform and restitution measures.

74.3. The legislative means that serve public interest / land reform expropriations will thus be found in other Acts that specifically empower the State to pursue land reform and restitution measures.

74.4. The "*other means*" would include funding and administering land reform and restitution programmes under these other Acts.

74.5. As such, in the context of a particular expropriation, any determination regarding the significance of the public interest being served would have to start with a consideration of the other Act that is involved; the measures undertaken by the State to administer projects under that other Act; the funding that is available for those projects; and the State's ability or inability to fund land acquisitions from the available funding. This is not reflected in the impugned provisions.

iv. Lack of guidance

75. The impugned provisions are all hopelessly vague, and operate overbroadly without any guidance to the hypothetical administrator tasked with determining an offer of compensation on behalf of an expropriating authority.

76. In *Dawood*,[68] the Constitutional Court held as follows –

> "*a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights.*"

77. In these circumstances, it is –

> "*not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights.*"[69]

78. So too in Janse Van Rensburg,[70] the Constitutional Court held that:

> *"Every conferment by the Legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such powers. However, as this Court has already held (in the context of a limitations analysis), the constitutional obligation on the Legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised."*

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[68] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 46
[69] *Dawood*, at para 54
[70] *Janse Van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC) at para 25

79. In a similar vein, the Constitutional Court has held on several occasions that provisions that establish a crime, and which operate in a manner that includes acts protected under the Bill of Right, cannot be saved because the police and prosecutors have a discretion to use their arrest and prosecutorial powers lawfully.[71] This was applied in *EFF v Minister of Justice,*[72] which concerned an overbroad provision in the Riotous Assemblies Act 17 of 1956 (which applied the law to "*incitement*" to commit "*any offence*"). The Court noted that it could not abdicate the responsibility "*to curb unnecessary yet vast invasions*" of rights (in that case, the free expression) to police and the prosecuting authority, based on the hope that they would exercise their discretion to only prosecute appropriate cases. Nor was overbreadth avoided because courts would make ultimate determinations under the general requirements of making just and equitable orders.

80. In that case, the criminalisation of "*incitement*" of "any offence" had such far reach "*that it would be difficult to know beforehand what is really prohibited*".[73]

81. The principles above were recently confirmed by the Court in *Scalabrini v Minister of Home Affairs*,[74] in which legislative provisions operated in a manner that was "*circular, non-exhaustive and provides no principled framework for decision-making.*" It is submitted that the impugned provisions are of the same sort – in that the task of an administrator determining an offer of compensation is only made harder by the impugned provisions.

[71] *S v Mbatha, S v Prinsloo* 1996 (2) SA 464 (CC) at para 23; applied in EFF
[72] *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 (2) SA 1 (CC) at para 59
[73] At para 61
[74] *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* (CCT126/25) [2026] ZACC 30 (7 July 2026) at para 59

F. THE CHALLENGE TO SECTION 12(2)(e)

i. The contradiction between sections 12(2)(d) and 12(2)(e)

82. IRR Legal points to the inconsistency between sections 12(2)(d), specifically the proviso therein, and 12(2)(e) of the Act. Both the Speaker and the EFF contend that section 12(2)(e) does not contradict 12(2)(d), because:

82.1. Section 12(2)(d) concerns the timing of improvements, and applies only to improvements made "*after the date on which the notice of expropriation was served*";[75] and

82.2. Section 12(2)(e) concerns the "*purposes or object*" of improvements, and prevents abusive conduct by a claimant who invokes "*acts that were done, not for genuine property-related reasons, but to manufacture or inflate a claim*".[76]

83. But this is a distinction without a difference, in that:

83.1. Section 12(2)(d) of the Act relates to both the purpose for which improvements are made, and their timing: The provision applies to all improvements by a property owner in the specific period after the section 8 notice is served. In this period, compensation for improvements is generally excluded, regardless of whether the compensation claimant's purpose are good, bad, or indifferent.

83.2. However, there is a proviso in section 12(2)(d), according to which the only cases in which the exclusion of compensation is lifted is when the

[75] Speaker AA, para 29; EFF AA, para 30
[76] Speaker AA, para 35; EFF AA, para 36

improvements fall within the narrow confines of the exceptions in that provision.

84. Section 12 (2)(d) of the Act, including its proviso, is sensible. This is so in that:

84.1. The provision has a strict temporal limit: It only applies in the period after a section 8 notice of expropriation has been served.

84.2. In this period, ownership of the expropriated property has passed to the expropriating authority.

84.3. The expropriated property owner only remains as a possessor, and compensation only remains in issue if it is disputed.

84.4. In this setting, the proviso's exceptions to section 12(1)(d) of the Act are appropriate: The expropriated property owner only remains as a <u>possessor</u> if they have the expropriating authority's agreement. Furthermore, as a practical matter, the expropriated property owner would require the co-operation of the expropriating authority to undertake material improvements after the section 8 notice has been served.[77]

85. But the contradiction then arises in that section 12(2)(e) also comes into play as a separate basis on which the expropriating authority must exclude compensation for "*anything*" that is done with the object of obtaining compensation. This expansive provision:

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[77] This is so in that:
- Under section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977, building plans are required for any structure. Under section 4(3)(a), an application for such building plans must indicate the owner of the property.
- Similarly, under municipal planning by-laws, an application for any municipal land use approvals required for a development must be made by the owner.

85.1. Excludes compensation for improvements undertaken in the same period as that covered under section 12(2)(d) – i.e. in the period after the section 8 notice of expropriation has been served; and

85.2. Excludes compensation for improvements even if that work falls within the bounds of the narrow exceptions in section 12(2)(d) of the Act, if the expropriating authority can point to facts to support the conclusion that the expropriated property owner's object in performing this work was to obtain compensation.

86. The problem with this additional test is that

86.1. Section 12(2)(e) does not require that the object of obtaining compensation must be the only, or even the main, object that motivates an expropriated property owner to undertake improvements in the period after the section 8 notice has been served.

86.2. Even when an expropriated property owner makes improvements that fall within the narrow exceptions in 12(2)(d) of the Act, it will almost invariably be the case that one of the motivations that this work will be undertaken is that additional compensation can be claimed.

86.3. Section 12(2)(e) excludes compensation even though the expropriating authority has agreed to the improvements being made; and even though the improvements are useful to, or even desirable for, the expropriating authority.[78]

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[78] Any other lawful possessor in such a position would at least have the possibility of an enrichment claim against a landlord for improvements. Section 12(2)(e) would strip the compensation claimant of this right.

87. This incongruency between sections 12(2)(d) and (e) of the Act is not ameliorated by the fact that these provisions can be moderated when the property owner can show "*special circumstances*" that indicate that compensation should be allowed because it is just and equitable.

88. The provisions cannot be understood to mean that it will always amount to a "*special circumstances*" that the section 12(2)(e) exclusion does not operate in respect of improvements that fall within the narrow confines of the exceptions in section 12(2)(d) of the Act.

    88.1. If this is so, then the application of section 12(2)(d) of the Act in the period after a section 8 notice has been served is inherently overbroad.

    88.2. But, if this is not so, there are no indications of how a principled distinction could be made between those cases in which section 12(2)(e) applies, and those in which it does not.

ii. Section 12(2)(e) is overbroad and irrational

89. Quite apart from the above, section 12(2)(e) is startlingly overbroad. It has no temporal limitation, and applies to "*anything*" done with the object of compensation.

90. Section 12(2)(e) would thus even apply to any work undertaken by a property owner <u>before</u> the expropriating authority had served a notice of intention to expropriate under section 7 of the Act.

91. Section 12(2)(e) would, in fact, apply whenever the property owner has knowledge that there was a non-negligible chance that the property may be

targeted for expropriation. This situation arose in cases such as *Reflect-All*[79] and *Offit Enterprises.*[80] In those cases, the Court held that a possible future expropriation does not amount to "*administrative action*" under PAJA that can be challenged, and this threat of expropriation does not amount to a deprivation of property.

92. But section 12(2)(e) of the Act inveigles itself into this antecedent phase, in which an expropriation is a clear <u>possibility</u>, but <u>not</u> a certainty.

93. This places the property owner in an impossible position. In the ordinary course, a property owner who considers the possibility that they may wish to alienate that property in the near future, will often undertake work to spruce up the property and buildings / structures on the property. The object of this work will be to increase the property's market value and attractiveness to a buyer. In other words, the work would be undertaken with the object of obtaining a benefit when the property is sold.

94. But a property owner facing possible future expropriation does <u>not</u> have this option. Even though this property owner may not wish to sell the property at all, the threat of expropriation hangs over them like a sword of Damocles.

95. In this period, a sensible property owner could still consider undertaking improvement works, or costly maintenance work, because:

    95.1. They wish to prevent the property from falling into a poor state, which would reduce its value if/when the expropriating authority eventually decides to move forward; <u>or</u>

[79] *Reflect-All, supra*
[80] *Offit Enterprises v Coega, supra*.

95.2. They want the benefit of an improvement or costly maintenance work, and pursue this work even though an expropriation <u>may</u> follow at some point in the future. If the expropriation does not follow, the property owner has the benefit of the improvement or maintenance work. But, if the expropriation does follow, a responsible property owner would factor in the consideration that the cost of the work would still not be wasted: The cost would be covered, whether in whole or in part, by an increased compensation payment.

96. But in both of these situations, section 12(2)(e) of the Act would exclude any consideration of compensation that results from this work – all because the property owner undertook the working thinking (as a matter of fact) that, even if the threated expropriation came to fruition, the expense of the work would not be wasted, because it would be represented in the property having a higher value than it would have had if the work had not been undertaken.

97. The EFF contends that section 12(2)(e) is unobjectionable as it "*could be*" interpreted to deal with "*abusive conduct*", such as work undertaken "*to manufacture or inflate*" compensation.[81]. The Speaker similarly states that the provision:

97.1. Targets "*artificial acts, sham arrangements, unnecessary improvements, or contrived value-creating steps*", and those "*undertaken with no genuine property-related reasons*";[82] and

[81] EFF AA, para 31
[82] Speaker AA, para 33

97.2. Does not apply to “*bona fide improvements*” such as those undertaken in situations envisaged in the exceptions in section 12(2)(d).[83]

98. But this is a baseless assertion. If these statements reflect the legitimate legislative purpose that section 12(2)(e) of the Act seeks to serve, why does it not say so? Furthermore, why is it that section 12(2)(e) is still presented in such untrammelled terms?

99. In *Prince,*[84] the Constitutional Court set out that a challenge based on overbreadth was “*in essence a challenge based on the contention that the legitimate government purpose served by the legislation could be achieved by less restrictive means*”.

100. So too in *Case*,[85] this Court noted that a court must determine overbreadth of an impugned provision by considering its “*legitimate underlying objectives*” against the means chosen in the provision itself.

101. In so doing, the Court continued that when rights in the Bill of Rights were implicated (in that matter, the right to free speech as it related to sexually explicit material), “*[i]t is incumbent upon the Legislature to devise precise guidelines*”.[86]

G. THE CHALLENGES TO SECTION 12(3): CROSS-CUTTING ISSUES

i. Public interest and public purpose

102. As dealt with above, section 25(2) of the Constitution limits the State’s expropriation power to those that are made “*for a public purpose or in the public*

[83] Speaker AA, para 31
[84] *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) at para 114.
[85] *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 49
[86] *Case*, at para 63

interest". This is reflected in sections 2(1) and 3(1) of the Act.

103. However, section 12(3) of the Act applies "*where land is expropriated <u>in the public interest</u>*".

104. In its founding papers, IRR Legal pointed out that:[87]

104.1. Based on the definitions in section 1 of the Act, it follows that section 12(3) of the Act does <u>not</u> apply to expropriations made for a "*public purpose*"; and

104.2. The result is two separate compensation regimes. If an expropriation is pursued for a "*public purpose*", the Act respects that the value of the expropriated property must be factored into the compensation inquiry. However, if an expropriation in respect of the same property is pursued in the "*public interest*", the expropriating authority must consider the Legislature's strong indication that the compensation should be substantially lower.

105. The Speaker adopts a contradictory approach to the application of section 12(3) of the Act:

105.1. <u>**First**</u>, she states that IRR Legal incorrectly "*draws a hard dichotomy between 'public purposes' and 'public interest'*"; and that "*leading authorities accept that the public interest, as a broader category, may include the narrower category of public interest. Even in expropriation that benefits a third party may be valid if it is undertaken in the public interest.*"[88]

[87] IRR Legal FA, para 45-47
[88] Speaker AA, para 61

This suggests that section 12(3) of the Act applies to all expropriations and third-party acquisitions permitted under the Act.

105.2. **Second**, she accepts that "*the circumstances listed in section 12(3) of the Act identify examples where Parliament considered that special attention may be given in the land reform context.*"[89]

106. The power to expropriate for "*public purposes*" has a long history and included actions taken for the benefit of the public or a particular community, and to those that serve "*government purposes*" (i.e. uses which served the State).[90]

107. This was reflected in the 1975 Act, which permitted expropriations for "*public purposes*", and defined this term broadly to include "*any purpose connected with the administration of the provisions of any law by an organ of State*".

108. In *Van Streepen*,[91] the AD dealt with an expropriation under a provincial Roads Ordinance, which allowed an expropriation for road construction or maintenance, or "*any purpose*" in connection therewith. A provincial authority was undertaking road-widening work, which required it to use land alongside an existing road that was being used for a private railroad track (owned by a private company). To do so, the authority sought to expropriate other land, which it intended to then make available to the private company to re-route its railroad track.

109. In considering whether an authority could exercise an expropriation power to acquire land for the benefit of another, the Court held:

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[89] Speaker AA. para 69
[90] *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271. The Expropriation Act 55 of 1965 adopted the term, but did so without definition
[91] *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*. 1990 (4) SA 644 (A)

"*Expropriation, generally speaking, must take place for public purposes or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. Non constat that it cannot be in the public interest.*"[92]

110. In that case, the Court found that the power to pursue "*any purpose*" connected to road construction, amounted to a power to expropriate land for the benefit of a third party because this served "*public interest*".

111. Curiously, section 28 of the Interim Constitution limited the expropriation power to those made for "*public purposes*". Du Plessis and Corder[93] indicate that this phrase was preferred because it was understood to be wider than "*in the public interest*", and would include land reform programmes for the benefit of third parties. This is plainly wrong, and "*was severely criticised as being a stumbling block in the way of effective land reform*"[94] – which had to wait until section 25(2)(a) of the Constitution came into effect (which allowed expropriations in the public interest).

112. The provenance of these terms is carried into the definitions in section 1 of the Act is evident:

112.1. A "*public purpose*" includes "*any purposes connected to the administration of any law by an organ of state, in terms of which the property concerned <u>will be used by or for the benefit of the public</u>*". This does not include the power to acquire land for the benefit of third person.

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[92] At 661D
[93] Du Plessis and Corder <u>Understanding South Africa's Transitional Bill of Rights</u> (Juta, 1994) at p 183 (para 22 2 1)
[94] Badenhorst *at al* <u>Silberberg and Schoeman's The Law of Property</u> (Butterworths, 4ed, 2003) at p 183

112.2. The term "*public interest*" is defined to include "*the nation's commitment to land reform, and the reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices*".

113. These definitions are accompanied by section 2(3) of the Act, which extends the Act to include "*the compulsory acquisition of property directly or indirectly by a third-party beneficiary through an expropriating authority in the public interest, including for the purposes contemplated in section 25(4) to (8) of the Constitution.*"

114. The distinguishing feature of expropriations made "*in the public interest*", is plainly that the expropriated property is <u>not</u> earmarked for use by <u>the public</u>, or for benefit of <u>the public</u>. Expropriations made in pursuance of land reform projects (under a separate empowering Act) are one example of such "*public interest*" expropriations.

ii. Definitional overbreadth

115. As dealt with in paragraph 105.2 above, the Speaker tells us that the legitimate governmental purpose that is served in section 12(3) of the Act is that it relates to expropriations made "*in <u>the land reform context</u>*".

116. However, this is not reflected in section 12(3) of the Act, which refers to cases "*where land is expropriated <u>in the public interest</u>*" generally.

117. This is problematic as section 12(3) of the Act would apply beyond land reform cases. The power to expropriate property in the public interest is not confined to land reform case. For instance:

117.1. In *Offit Enterprises*,[95] the Court considered a situation in which private land was earmarked for possible expropriation at the behest of the Coega Development Corporation (Pty) Ltd ("**the CDC**") – which was designated as the operator of the Coega Industrial Development Zone (established under the Manufacturing Development Act 187 of 1993). The Court noted that the CDC was registered as a private company, but was wholly State-owned. It was thus "*in reality a public entity acting in the public interest*".

117.2. An organ of state may legitimately use its power to expropriate property in the public interest to acquire that property for a third party, in order to serve wider commercial interests. Such situations arose in *Van Streeten* (dealt with above) and *African Farms*[96] (in which land was expropriated so that it could be bundled with other municipally-owned land, to be sold off as part of the development of the Cape Town foreshore).

118. This extended operation of section 12(3) of the Act is not justified in any way.

119. Section 12(3) of the Act is also not limited only to those cases in which the facts fall within the ambit of the individual considerations in sections 12(3)(a) to (d). It also applies whenever another circumstance is deemed "*relevant*". What this means is that section 12(3) must be considered in all cases in which an expropriation is made in the "*public interest*", and a determination must be made if another consideration is so "*relevant*" that section 12(3) is triggered.

120. There is, however, no principled manner in which an expropriating authority could establish what would make another consideration "*relevant*" in this way.

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[95] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC)

[96] *African Farms and Townships Ltd v Cape Town Municipality* 1961 3 SA 392 (C)

iii. Section 12(3) is not limited to establishing the possibility of nil compensation

121. The Speaker contends that IRR Law misconstrues section 12(3) of the Act, in that it is "*not an instruction always to offer or award nil compensation*" if the circumstances in sub-sections (a) to (d) are present in a particular case.

122. However, as noted in IRR Legal's founding papers, the real threat of section 12(3) of the Act is that it emboldens expropriating authorities "*to offer significantly low compensation more readily.*"[97] This is so because:

    122.1. It is a well-established principle that the "*greater includes the lesser*".[98]

    122.2. Section 12(3) is thus <u>not</u> confined to cases in which an expropriating authority will be emboldened to offer nil compensation. It invites expropriating authorities to peg their offers of compensation at substantially reduced amounts.

123. IRR Legal accepts that cases may arise in which compensation for an expropriation or a third-party acquisition may be nil.[99] That is not in issue. What is problematic is that section 12(3) of the Act will operate more insidiously to substantially reduce compensation (even when compared to what the affected person would have received if the same property had been expropriated for a public purpose).

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[97] IRR Legal FA, para 48

[98] See, for instance, *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans* 2010 (6) SA 439 (SCA) at para 56

[99] These include cases where the value of the property in the hands of the owner is "nil", as was the case of the gravel in *Du Toit*, or where grievous misconduct renders the purpose of compensation inapplicable, or where the owner's direct benefit more than compensates for the loss, such as is indicated (though not regarding the applicant's case) in *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC)

iv. The "*public interest*" and purpose as a counterweight

124. As noted above, the interests of the public and the purposes of an expropriation may be a counterweight to reduce the compensation in appropriate cases, based on the facts. This applies whether the expropriation is made in respect of a project undertaken "*for a public purpose*" or "*in the public interest*".

125. However, we submit that section 12(3) is based on the mistaken assumption that when an expropriation serves a worthy purpose, this fact (in itself) reduces the State's burden to compensate the former owner of that land.

126. We again emphasise that this position does <u>not</u> suggest that the "*public interest*" in land reform and land restitution is disregarded, devalued, or disrespected. On the contrary, IRR Legal notes that:

    126.1. The State has made significant developments to the economy, and to reduce poverty levels through positive interventions.[100]

    126.2. A StatsSA report for 2022-2023 indicates that 23.2 million people still lived below the "*lower-bound poverty line*" (set at R1300 per person per month in 2023 prices); and 10.8 million people lived in extreme poverty (below the food poverty line in poverty of R777 per person per month in 2023 prices). Black African people made up 93.6% of all poor people in 2023.[101] This indicates the need for further action.

127. We submit that the starting point must be the recognition that the primary duty to pursue the land reform and land restitution imperatives in sections 25(4)(a) and (5) to (9) of the Constitution falls to the State. Most notably:

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[100] IRR Legal RA, para 26 and 27
[101] IRR Legal RA, para 27

127.1. Section 25(4)(a) of the Constitution refers to the "*public interest*" with reference to the "*<u>the nation's</u> commitment to land reform, and the reforms to bring about equitable access to all South Africa's natural resources.*"

127.2. Sections 25(5) and (8) of the Constitution refer to the <u>State's duty</u> "*to take reasonable legislative and other means, within its available resources*" to achieve land reform goals.

127.3. Sections 25(6) and (7) of the Constitution refer to an entitlement to restitution in accordance with an Act of Parliament (when land or tenure was lost due to examples of past discriminatory laws and practices.

128. The public duty to fund public interest projects from public funds, cannot be horizontally shifted onto private property owners in a formalistic or haphazard manner – based on the pure happenstance that these property owners hold land that has been identified as suitable for land reform or land restitution project.

129. We submit that Prof van der Walt[102] correctly notes that the mere fact that land reform is constitutionally special, does not justify the conclusion that the constitutional balance is tipped in favour "*of land reform from the very start*".[103]

130. This approach is reflected cases dealing with the Restitution Act.

131. In *Florence,*[104] the Court held that "*compensation within the scheme of the Restitution Act is neither punitive nor retributive. It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise*

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[102] Van der Walt: *"Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation"* 2006 SALJ 23

[103] At p 37-38

[104] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC)

computation of loss on a 'but-for' basis. It is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past."

132. So too, in *Goedgelegen*,[105] the Court held that land restitution cases "*advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt.*"

133. But, this does not mean that private people bear no duties in this regard.

134. Thus, in *Grootboom*,[106] the Court's order sets out that the State's "d*uty includes to devise, fund, implement and supervise measures to provide relief to those in desperate need.*"

135. That being said, Court was clear that section 26 housing rights also have consequences for private people –

> "*A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.*"[107]

136. This has largely been taken to mean is that private individuals may have to tolerate unlawful occupiers who cannot be evicted until the local authority can provide alternative accommodation. This is not equivalent to expecting a private person, who has already had to suffer the impact of losing their property, to take a further blow to help the State acquire land on the cheap.

137. In *Juma Musjid*,[108] the Court considered an eviction of a public school from privately owned land. The Court found that section 8(2) of the Constitution

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105 Similarly, see *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at 67-68
106 *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 96
107 At para 35
108 *In Juma Musjid Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC)

(horizontal application) did not mean that private landowners shared the State's positive obligation to provide basic education (in terms of section 29(1)(a) of the Constitution).

138. However, the Court noted that socio-economic rights "*may be negatively protected from improper invasion*",[109] and the landowners bore a "*negative constitutional obligation not to impair the learners' right to a basic education.*"[110]

139. In this regard, the Court was mindful of the fact that "*the primary obligation in respect of the learners' right to a basic education is that of the state*", while that of the landowner was "*secondary*".[111] This duty was met because the landowners acted reasonably in their interactions with the authorities to avoid the eviction proceedings.[112]

140. In *Daniels v Scribante*,[113] a lawful occupier planned to make improvements to her house on a farm. However, the farm manager adopted an aggressive approach to stop this. He suggested that it would cause prejudice if Ms Daniels was allowed to make these improvements, because she could possibly later claim compensation from the farm (under ESTA) if she vacated the house.

141. As a further argument, the farm manager argued that if Ms Daniels made the alterations, "*that would be tantamount to indirectly placing a positive obligation*

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[109] Citing the *First Certification* judgment, *supra*, at para 78, and several cases (at n70-73) in which private conduct may amount to an improper failure to respect the right, a failure to prevent the direct infringement of the right by another, or diminish the existing protection of a right.
[110] At para 60
[111] At para 62
[112] At para 65. In these circumstances, the Court granted a provisional order allowing the State an opportunity to make alternative arrangements for the affected learners. However, once those measures were taken, the eviction was just and equitable (at para 44-p79)
[113] *Daniels v Scribante* 2017 (4) SA 341 (CC)

on the owner or person in charge to ensure an occupier's enjoyment of the section 25(6) right".[114]

142. To deal with this argument, the Court referred to section 8(2) of the Constitution, which allowed horizontal application of the Bill of Rights in appropriate case. In this determination, the Court held as follows –

> *"I am not suggesting that the positive nature of the obligation imposed by the right in issue is of no moment. It is relevant. Section 8(2) places 'the nature of the duty' imposed at the centre of the enquiry. The quality of being positive is about 'the nature of the duty'. So, it must come into the equation.* "

143. The Court found that its previous judgments should not be understood to suggest that socio-economic rights could not operate horizontally.[115]

144. The Court indicated that the "*positive / negative obligation argument needs to be confronted head-on. … Although the right we are concerned with here is expanded on in ESTA, its true source is section 25(6) of the Constitution, which is located in the Bill of Rights.* "

145. The minority, however, found "*[w]ith regard to socio-economic rights, no positive obligation is imposed by those rights upon private persons. Instead the positive obligation is imposed on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights defined in section 26(1) and 27(1) of the Constitution.*"

146. In *Commando,*[116] the Court dealt with evictions that flowed from aggressive 'gentrification' developments in Woodstock, that disrupted existing communities.

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[114] At para 37
[115] At para 43-44
[116] *Commando v City of Cape Town* 2025 (3) SA 1 (CC)

147. When that matter served before this Court,[117] it was noted that the gentrification of Woodstock was encouraged and facilitated by the City.

148. The majority in the Constitutional Court pointed out that "*the gentrification policy seeks to achieve that which the forced removal policy of apartheid failed to achieve and destroy one of the only communities that had managed to resist removals from "white" Cape Town under apartheid. It is quite disconcerting that with this knowledge, the City failed to have an adequate plan for the evictees.*"[118]

149. The majority concluded that the City should have foreseen that its policies "*would lead to displacement. Its conduct was unreasonable because it failed to mitigate the effects and consequences of gentrification on the most vulnerable. It, in effect, forced the most vulnerable out of the city. This is a retrogressive measure particularly in the light of South African history.*" [119]

150. The minority (per Bilchiltz AJ) further considered the obligations on private persons. It was noted that non-binding documents of the United Nations Human Rights Council looked beyond the State, and "*introduced the responsibility of businesses to conduct human rights due diligence processes which, amongst other elements, require the identification of a business's impact on fundamental rights and efforts to prevent and mitigate any such impacts.*"[120]

151. Under these principles, the minority raised the idea that positive obligations could be imposed on developers to, for instance, include –

> "*specific planning to provide a component of the development for low-cost housing or contributing to another low cost development in the vicinity. In this way, private actors can play a significant part in addressing the legacy*

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[117] *Commando v Woodstock Hub (Pty) Ltd* [2021] 4 All SA 408 (WCC)
[118] At para 82
[119] At para 103
[120] At para 183

> *of spatial apartheid and ensuring adequate housing for those who remain in a state of socio-economic vulnerability.*"

152. In these circumstances, we submit that the Act improperly assumes that an expropriation for a public interest always allows a reduction in compensation.

153. But, in appropriate case, the facts may justify a reduction in compensation. This may be because the project that will be undertaken presents a quantifiable benefit to the affected property owner; or repairs or stops environmental damage caused by existing or past uses of the expropriated property.

154. It may also include cases in which a developer is required to make land available for low-cost housing; to repair damage to the surrounding community caused by the manner in which the property owner has been used, or is being developed; or to correct a historical injustice (such as a case in which the property owner agitated the exercise of racist laws and practices to acquire an expropriated property at a bargain).

H. THE CHALLENGES TO SECTION 12(3)(a)

155. The Speaker suggests that section 12(3)(a) relates to "*unused speculative land*" – and that compensation can legitimately be reduced in a public interest expropriation against land speculators who hold unused land. The Speaker argues that this factor was proper as it relates to the use of the property, the purpose of its acquisition, and the purpose of the expropriation (identified as relevant factors in section 25(3)(a), (b), and (e)).

    155.1. But the Speaker does not assist the Court in an understanding of:

    155.2. What "*speculative*" land ownership means. I note that the Speaker does not take issue with paragraph 51 of my founding affidavit, in which I indicated my understanding that the intention was to target investors who purchase land with the intention to speculate on the market value.

155.3. Why speculative land ownership is a problem that requires special consideration and measures? In other words, is there a compelling reason or public interest in extracting property from the hands of speculative owners? It is possible that in some cases an investor may target an area, and use their position to either drive properties higher or lower depending on their preferences. However, without any evidence in this regard, there is no basis to assume that this is a problem that requires special measures through a general rule that provides for under-compensation.

155.4. Why a speculative property owner's "*interests*" (as that term is used in section 35(3) of the Constitution) in a property are weaker than those of other property owners and can be addressed with reduced compensation?

156. In fact, for most speculative property owners, their interest in the property is its asset value, no more and no less.

157. Notably, in *FNB* the Constitution stated: "*A speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce money on resale*[121]."

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[121] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance CCT19/01, 2002.*

158. The reliance interest that speculators have in the correct belief that the Constitution secures their property rights goes some way to explaining why billions of rands are paid annually in vacant land tax[122].

159. Furthermore, the wording of section 12(3)(a) goes much further than speculative property owners. In fact, the provision would be triggered in the case of any vacant erf held by any person, when they had no ability or firm plans to develop the property in the near future. The provision would also apply in respect of an undeveloped portion of an erf or a farm.

I. THE CHALLENGES TO SECTION 12(3)(b)

160. The Speaker argues that this provision is appropriate between spheres of governments.

161. However, section 41(1) of the Constitution provides that these three spheres of government (national, provincial, and local) are distinctive, interdependent, and interrelated.

162. Section 14 of the Local Government: Municipal Finance Management Act 56 of 2003 provides that a municipality can only sell property if its council is satisfied that the property is not necessary to "*provide a minimum level of basic municipal services*". In these cases, there must be a determination of the property's market price.

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[122] IRR Legal RA

But this now means that whenever a municipal council identifies any property that can be sold (because it is not required to provide a minimum level of basic municipal services), that property would immediately be susceptible to expropriation by an organ of state in another sphere of government or another municipality, at a knock-down price under section 12(3)(b) of the Act. J. THE CHALLENGE TO SECTION 12(3)(c)

163. The EFF states that the provision is not vague because "*abandonment is a familiar concept in our law*". But this only compounds the problem.

164. Under the common law, abandonment requires that the owner of a property must give up the property with the intention that it should become an unowned thing. This involves proof of two factors: (a) the property owner's intention to relinquish the property; and (b) as a matter of fact, the owner has given up control of the property.[123]

165. Significantly, if the test is satisfied, the property is considered *derelicto* and becomes *res nullius*. As such, the property then vests in the State.[124]

166. In the circumstances, the provisions cannot have anything to do with the common law concept of abandonment:

166.1. **First**, an abandoned prophecy would not need to be expropriated at all, because it's already vests in the State; and

166.2. **Second**, the test under the provision does not require any consideration of the property owner's intention, and does not require evidence that the owner has given up control of the property.

[123] *Ruigtevlei Farm Labour Tenant Association v Harbich and Others* (12045/19) [2020] ZAWCHC 182 (18 December 2020) atg para 23-25
[124] *Fourie v Tropical Winter Trading (Pty) Ltd and Another* [2023] 3 All SA 429 (KZP) at para 27

167. Thus, the provision (properly understood) introduces an entirely new legal concept, in which the sole decisional referent is that the property owner has failed "*to exercise control over the property, despite being reasonably capable of doing so.*"

168. The Speaker suggests that the subsection is <u>not</u> vague, and "*requires more than neglect, temporary absence, unlawful occupation despite genuine efforts by the owner, or an inability to exercise control*".

169. However, what remains obscure is:

169.1. Whether the provision only relates to a situation where a property owner has exercised no control over their property at all; or whether it also applies whenever an expropriating authority finds that the control measures on the property are thought to be inadequate?

169.2. Whether and why a reduction in the compensation amount would be appropriate if the inadequate control measures have not resulted in any harm?

169.3. Whether a property owner could take steps to introduce adequate control measures after becoming aware of an intention to expropriate the property, thus avoiding a reduction in the offer of compensation? Furthermore, would the property owner be entitled to claim compensation for improvements introducing control measures?

170. The Speaker contends that the provisions are not vague because a Court is the ultimate arbiter. I reiterate that this is no answer in respect of the antecedent administrative decisions taken by the expropriating, including: the determination of an offer of compensation (in the section 6 and 8 notices); the provision of

further particulars (under section 14); and negotiations and mediation (under section 19(1)).

K. THE CHALLENGES TO SECTION 12(3)(d)

171. The Speaker contends that this provision would not unduly prejudice beneficiaries of land reform programs, because its purpose is not to punish but "*to avoid double compensation where the states has already funded value equal to or greater than the market value of the land.*"

172. This is incorrect for two reasons:

173. **<u>First</u>**, the provision not only operates against beneficiaries of land reform programmes, but also those who made successful claims for restitution

174. In *Haakdoornbult* ,[125] the LCC noted that restitution cases are very different from land reform matters. Notably, under sections 25(6) and (7) of the Constitution, restitution (granted in terms of the Restitution Act) is an entitlement.

175. If the State now attempts to expropriate property provided to restitution claimants, the result will not be 'double compensation'. On the contrary, these restitution claimants would be forced to re-experience their dispossession all over again.

176. **<u>Second</u>**, the beneficiaries of future land reform programmes will not enjoy any meaningful security of tenure.

    176.1. This is so because the State could decide to re-expropriate the subject land and to make it available to other land reform beneficiaries, while setting off the investment Managed to acquire the farm.

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[125] *Haakdoornbult Boerdery CC v Mphela* 2007 (5) SA 596 (SCA) (30 May 2007)

176.2. Because of this tenuous position in which land reform beneficiaries would find themselves, it will also be quite difficult for them to obtain financing or any more ambitious investments. Financial institutions would be prepared to lend money to land reform beneficiaries, because a mortgage bond over the land would have little or no value.

L. THE CHALLENGES TO SECTION 12(4)

177. The Speaker and the EFF fail to appreciate the overall scheme under the Labour Tenants Act. In short: that:

177.1. Labour tenants, who live in accommodation provided by an employer, receive protection from eviction while they remain in the employment of the employer. In return, the employer retains control over the housing unit, and can take it back into their control if the person ceases to remain in their employment.

177.2. An established labour tenant may seek to be granted ownership of the housing unit. This would prejudice the employer as they would then lose control over the housing unit. But, this would be made good by compensation (under section 23 of the Labour Tenants Act).

178. Section 23(1) of the Labour Tenants Act already ensures that compensation to a property owner following a successful claim by a labour tenant must be calculated in accordance with section 25(3) of the Constitution.[126]

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[126] Section 23(1) provides:

"*The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.*"

179. In *Uys v Msiza*,[127] the SCA considered a compensation claim for an expropriation under section 23(1) of the Labour Tenants Act. The SCA noted that the LCC had adopted an approach similar to the two-stage approach set out in *Du Toit*, in which the market value was used as a starting point; followed by a consideration whether other circumstances indicated that the compensation payable to the landowner should be higher or lower than market value.

180. The LCC had reduced the compensation payable based on its assessment of other relevant circumstances,[128] including the manner in which the landowner had used the property; and that "*the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform*".

181. Two aspects of the SCA's judgment are directly relevant to the current case:

181.1. **First**, considerations regarding how the landowner had used the property would already be factored into the calculation of the market value. This is now even more compelling under the Property Valuation Act, as dealt with above.

181.2. **Second**, the SCA noted that there was "*no justification for stigmatising the [landowner's] claim as 'extravagant'. Nor was there any evidence that the fiscus is unable to pay [the determined market value]. In fact it*

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[127] *Uys N.O v Msiza* 2018 (3) SA 440 (SCA)

[128] These were summarised by the SCA as follows (at para 23):

"*[T] here was a 'disproportionate chasm' between the amount paid by the trust and the market value it sought to claim; that the trust made no significant investment in the land; that the use of the land had not changed since it was acquired; that when the land was acquired there was a land claim and the Msiza family were residing on the land; that the land had been awarded to the Msiza family in 2004 and had not been transferred; that as the object of the compensation is land reform the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform; that the Msiza family had lived and worked on the farm since 1936 as labour tenants and should receive compensation.*"

accepted that the valuation was appropriate. There is similarly no evidence that the State is unable to meet claims of this nature. On the contrary it is the amount the State was willing to pay."

M. SECTION 36 - LIMITATIONS

182. We submit that the Respondents' failure to establish a basis to invoke the general limitations provisions in section 36 of the Constitution. In particular, if this Court finds that the impugned provisions of the Act violate section 25(3) of the Constitution, it follows that the scheme set out in the Act allows for compensation which is <u>unjust and inequitable</u>. The Respondents fail to establish any basis to suggest that an unfair and inequitable compensation regime can be justified under section 36 of the Constitution.

183. In *One Movement*,[129] the Constitutional Court affirmed that an impugned law will cross a rights boundary where it intentionally seeks to restrict protected activity or unintentionally limits the right where it is overbroad or has deterring effects.

184. In *Rayment*, the Constitutional Court held (at para 107) when no legitimate purpose has been shown for a limitation of a right entrenched in the Bill of Rights, one cannot begin to talk about less restrictive means to achieve a purpose. Less restrictive means can only be considered in relation to a legitimate purpose that has been shown.

185. In *SAMWU*,[130] the court held that it would in most instances require empirical evidence to justify a rights violation, as the courts cannot act on the mere say-so of Parliament.

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[129] *One Movement South Africa NPC v President of the Republic* 2024 (2) SA 148 (CC) at para 282
[130] *SAMWU v Minister of Home Affairs and Others* 2024 (2) SA 591 (CC)

186. This requires a justification for each subsection of 12(3), and separate justifications for 12(2)(e) and (4). Thus, for instance, what is the factual concern regarding speculative landowners?

187. Furthermore, the term “*equitable balance*” is distinguished from a policy judgment, a partisan balance, or the kind of balancing act that Parliament undertakes when it passes budgets.

188. No evidence was given to indicate a resource-based rationale for limiting this right in terms of either section 36(1)(b) or section 36(1)(d) of the Constitution.

189. No evidence was given as to less restrictive means of achieving the same purpose as the subsection limitations in the impugned provisions.

190. The inference from a lack of evidence is adverse in a section 36(1) analysis, as the state is compelled to limit the Bill of Rights only when it is reasonable and justifiable to do so, which are high standards to meet.

N. CONCLUSION

191. In the circumstance, we submit that IRR Legal is entitled to an order, striking down section 12(1), 12(3)(a) to (d) and 12(4) of the Act, including the costs occasioned on the employment of two counsel, one being senior counsel.

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