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Key legal consequences of expropriation of land without compensation

By

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Summary

There is an urgent need and constitutional imperative to expedite land reform in South Africa to maintain peace and stability.¹ Against this backdrop, the Presidential Advisory Panel on Land Reform and Agriculture ("**the Panel**"), in its Final Report dated 4 May 2019, gave input on a proposed constitutional amendment that would permit expropriation of land without compensation ("**EWC**") to take place in South Africa.²

Taking the Panel's work into account, Parliament then gazetted a Bill setting out proposed amendments to section 25 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). Significantly, the proposed Bill contemplates the first ever amendments to the Bill of Rights in the Constitution since the dawn of democracy in South Africa.

Although the proposed Bill and its associated draft, enabling legislation have put in motion the process to introduce EWC in South Africa, it is uncertain what the key legal consequences of doing so will be. It is particularly uncertain what the key legal consequences of introducing EWC in South Africa will be in light of the impact of the COVID-19 pandemic on South Africa's economy.

This dissertation addresses what some of the key legal consequences of EWC will be. It highlights the myriad of procedural and substantive constitutional legal challenges that await the proposed Bill and its associated enabling legislation. It then analyses the impact of EWC on common law property rights and the law of contract before addressing the impact of EWC on lenders and borrowers where a mortgaged property is the target of an EWC process. Finally, this dissertation addresses the potentially significant and unintended tax consequences that EWC will have on taxpayers and the *fiscus* and which may, in fact, benefit some of South Africa's wealthiest land owners.

¹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), iv.

² Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), iv - vi.

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Chapter 1:

Introduction

1.1 Background

There is an urgent need and constitutional imperative to expedite land reform in South Africa in order to maintain peace and stability.³ It is also generally accepted that South Africa's colonial and apartheid past;⁴ unique trifecta of social challenges, namely inequality, poverty and high levels of unemployment;⁵ and muted economic growth have all contributed to excluding the majority of South Africans from the mainstream economy.⁶

Against this backdrop, the Presidential Advisory Panel on Land Reform and Agriculture ("**the Panel**") stated in its Final Report of 4 May 2019 ("**Final Report on land reform**") that it advocates for a future where land ownership is approximate to the demographic of South Africa.⁷ The Panel's ideal is:

"for clarity of vision and outcomes and a future where land ownership must approximate the demographic of the country informed by critical levers such as coherent, co-ordinated good governance, and capable and well-resourced

³ JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1) (2014) 3 *Journal of South African Law* 425-446, 425; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), iv.

⁴ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 675; JM Pienaar *Land Reform* 2014, 655; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 2.

⁵ MA Mubecua, MW Mbatha, SE Mpanza & SK Tembe "Conflict and Corruption: land Expropriation without compensation in South Africa" 2020 9(2) *African Journal of Peace and Conflict Studies* 61-76, 62; "J Cogger "Inheritance and intergenerational inequality" 2017 17(6) *Without Prejudice* 12-14, 13; J Chong J and W Grimm Fiscal Pressure - Tax Hikes are not the solution *Webber Wentzel* available online <https://www.webberwentzel.com/News/Pages/fiscal-pressure-tax-hikes-are-not-the-solution.aspx> (accessed 6 July 2020).

⁶ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

institutions supported by skilled and capable officials who are focussed and determined to implement policies for the benefit of the people."⁸

In order to achieve these lofty ideals, the Panel gave input on a proposed constitutional amendment that would make explicit those instances under South Africa's constitutional dispensation that may give rise to expropriation of land without compensation ("**EWC**").⁹ The Panel also emphasises the critical importance of government's political will and ability to implement its policies for the benefit of South Africans.¹⁰

On 13 December 2019, Parliament gazetted a proposed amendment to section 25 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") ("**the property clause**") for public comment by 31 January 2020 ("**the Amendment Bill**") after taking the Panel's input into account. Although the Amendment Bill has put in motion the process to introduce EWC in South Africa, it is uncertain what the key legal consequences of introducing EWC in South Africa will be. It is particularly uncertain in light of the global economic downturn caused by the COVID-19 pandemic and its impact on South Africa's already struggling economy. This dissertation addresses what some of the key legal consequences of EWC will be.

1.2 Structure

Chapter 2 addresses what the constitutional law legal consequences of EWC will be, with reference to the Amendment Bill, the required enabling legislation and the likely legal challenges that the Amendment Bill and its associated enabling legislation will face.

For purposes of the remaining chapters of this dissertation, I assume at the end of Chapter 2 that the Amendment Bill and any enabling legislation enacted to give effect to it will pass constitutional muster.

⁸ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), vi.

¹⁰ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), vi.

Chapter 3 analyses the impact of EWC on common law property rights and the law of contract. It also addresses the possibility and need to develop the common law to provide for a duty of support between the South African government and beneficiaries of EWC ("**EWC beneficiaries**").

Having dealt with the broader impact of EWC on the law of contract in Chapter 3, Chapter 4 addresses the legal consequences of EWC on lenders who finance the acquisition of land-based property and on borrowers (consumers) who have borrowed money to purchase property.

Chapter 5 addresses the tax consequences of implementing EWC in South Africa. In particular, Chapter 5 addresses the significant capital tax losses that will arise in the owner's hands when they are subjected to an EWC process regarding their land-based property and how this may give rise to an unintended tax benefit for wealthy property owners.

Chapter 2:

Constitutional legal consequences

2.1 Introduction

Land ownership in South Africa is predominantly still seen through a classical liberal lens, which accepts that a land owner has absolute power to do with their property as they please.¹¹ Section 25 of the Constitution - the property clause - currently protects existing property rights from arbitrary deprivation and makes provision for expropriation of land subject to the payment of compensation.¹² Section 25 also mandates the South African government to ensure equitable redress of past injustices by fostering conditions which enable citizens to gain access to land on an equitable basis.¹³ Despite this, since South Africa became a constitutional democracy in 1994, the pace of land reform has been frustratingly slow.¹⁴ Furthermore, no clear policy has been created or consistently implemented to define how all citizens may gain access to land on an equitable basis.¹⁵

¹¹ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 132; *Gien v Gien* 1979 (2) SA 1113 (T). 1120C-1121A where the original Afrikaans reads at 1120C-D: "*Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas*".

¹² Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 5; s 25(2)(b) of the Constitution of the Republic of South Africa ("**Constitution**"); J Cogger "Inheritance and intergenerational inequality" 2017 17(6) *Without Prejudice* 12-14, 12.

¹³ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 5; s 25(5) of the Constitution.

¹⁴ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.1.

¹⁵ N Vorster "Land and identity in South Africa: An immanent moral critique of dominant discourses in the debate on expropriation without compensation (2019) 75(4) *a5290 HTS Theological Studies*, 1-9, 4; s 25(5) of the Constitution; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 33.

The South African government has delivered 8.4 million hectares of land in terms of its various land reform programmes between 1994 and March 2018.¹⁶ The South African government has acquired 4.9 million hectares of land through 5 407 projects and transferred this land to previously disadvantaged individuals and 3.5 million hectares of land was similarly transferred through 62 475 claims.¹⁷ In practical terms, this comprises the transfer of less than 10% of all commercial farmland in South Africa over 23 years compared to the state's initial targets of over 30% commercial farmland transferred by 2014.¹⁸

The reasons for this slow rate of change include (i) an absence of security of tenure, (ii) lack of transfer of title deeds to beneficiaries of acquired portions of land and (iii) poor post-settlement support from a state characterised by deficient co-ordination and limited and misaligned allocation of resources.¹⁹ The reasons for the slow rate of change have been exacerbated by corruption.²⁰

The First National Land Policy was published in 1997 and sought to deal with the burning issue of land-related reform. It failed to do so.²¹

To date, none of the redistribution programmes in South Africa have been wholly successful.²² These programmes include (i) The Settlement/Land Acquisition Programme, (ii) The Land Redistribution and Agriculture Development Programme,

¹⁶ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

¹⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

¹⁸ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

¹⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²⁰ MA Mubecua, MW Mbatha, SE Mpanza & SK Tembe "Conflict and Corruption: land Expropriation without compensation in South Africa" 2020 9(2) *African Journal of Peace and Conflict Studies* 61-76, 66; A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 18; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²¹ *Ragase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.2.

²² *Ragase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.3.

(iii) The Proactive Land Acquisition Strategy, and (iv) The Settlement and Production Land Acquisition Grant.²³ The ineffectiveness of land reform and restitution has, consequently, necessitated judicial intervention on several occasions.²⁴

The Panel argues in the Final Report that Parliament must enact legislation infused with African-based value systems that give effect to the will of the South African people.²⁵ It is unsustainable and inappropriate for South Africa's constrained judiciary to attempt to meaningfully satiate the "hunger for land amongst the dispossessed".²⁶ This is, as the Panel alludes to, the function of the Parliament and Cabinet.

2.2 EWC proposal

On 13 December 2019, Parliament gazetted the Amendment Bill for public comment by 31 January 2020. The deadline for public comment was later extended to the end of February 2020 after which public hearings were held in the provinces.²⁷

The Amendment Bill intends to amend the Bill of Rights (i.e. Chapter 2 of the Constitution) in terms of section 74(2) of the Constitution and is the first such proposal in a democratic South Africa. The Amendment Bill proposes to amend the property clause by explicitly providing that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil and that this is a legitimate option for land reform in South Africa.²⁸

The Amendment Bill proposes to insert a proviso into the wording of section 25(2)(b) of the property clause.²⁹ The proviso explicitly provides that a court

²³ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.3.

²⁴ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.3.

²⁵ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 69.

²⁶ Preamble of the Constitution Eighteenth Amendment Bill, 2019 Notice 652 of 2019 in Government Gazette 42902 on 13 December 2019 ("**Amendment Bill**").

²⁷ Media Statement: Ad Hoc Committee on section 25 extends deadline for written submissions 30 January 2020 available online: <https://pmg.org.za/committee-meeting/29587/>, (accessed 24 April 2020).

²⁸ Summary of the Amendment Bill.

²⁹ S 25(2)(b) of the Constitution currently states that: "*Property may be expropriated only in terms of law of general application: (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court*".

may determine that the amount of compensation to be paid for expropriating certain land and any improvements thereon may be nil in circumstances to be specified in national legislation.³⁰

2.3 National legislation

Expropriation may only take place in terms of a law of general application and under prescribed circumstances and no law may permit the arbitrary deprivation of property.³¹ The Expropriation Act 63 of 1975 ("**Expropriation Act**") currently fulfils this function and provides for a market-related amount of compensation to be paid where property (which includes movable and immovable property) is expropriated.³²

The Expropriation Act has not been amended during the democratic South Africa. The Draft Expropriation Bill, 2019 ("**Expropriation Bill**") was gazetted on 21 December 2018 to change this position. The Expropriation Bill proposes to repeal and replace the Expropriation Act in its entirety and provide for the expropriation of property, including EWC, for a public purpose or in the public interest.³³ The Expropriation Bill therefore provides for more than EWC as it is intended to replace the Expropriation Act as well as provide for EWC.

The Expropriation Bill replicates several features of the Expropriation Act such as (i) empowering officials to investigate property to determine its suitability for expropriation, (ii) vesting the relevant expropriating authority with the power to expropriate property for a public purpose, (iii) obliging an expropriating authority to publish a notice of intention to expropriate and mechanisms for owners to engage with the expropriating authority, (iv) regulating the earning of income and payment of charges associated with the property after expropriation but before the state occupies the property, and (v) resolution of disputes before the courts.³⁴

³⁰ S 1(c) of the Amendment Bill.

³¹ S 25(1) of the Constitution; B Slade "The less invasive means argument in expropriation law" 2013 2 *Journal of South African Law* 199-216, 206.

³² E Du Plessis "Restitution of expropriated property upon non-realisation of the public purpose" (2011) 3 *Journal of South African Law* 579-592, 580; s 1 definition of "property" and s 3(2)(h) read with s 12 of the Expropriation Act 63 of 1975 ("**Expropriation Act**").

³³ S 30 of the Draft Expropriation Bill, 2019, Notice number 1409 in Government Gazette 42127 on 21 December 2018 ("**Expropriation Bill**").

³⁴ K Wheeler Expropriation without compensation: The Expropriation Bill 6 February 2019 *CDH* available online: <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-alert-6-february-expropriation-without-compensation-the-expropriation-bill.html> (accessed 29 April 2020).

The Expropriation Bill has, for example, an entire chapter - Chapter 5 - that deals with compensation for expropriation. The focus of this enquiry, however, is on its provisions regarding EWC, the novel provision in the Expropriation Bill.³⁵

Insofar as interpreting the Expropriation Bill is concerned, any law dealing with the expropriation of property that was in force immediately prior to the commencement of the Expropriation Bill must be interpreted in a manner consistent with the Expropriation Bill.³⁶ Where any conflict arises between the Expropriation Bill and any other law dealing with expropriation of property, the Expropriation Bill shall prevail, which will be significant during any disputes that arise in relation to its implementation.³⁷ Despite this provision, the Expropriation Bill still needs to articulate clearly how it will practically interact with and/or replace a myriad of other Acts of Parliament.³⁸

An overview and analysis of the key definitions and provisions of the Expropriation Bill follows below.

2.3.1 Expropriation Bill

The following definitions must be considered before analysing the relevant provisions of the Expropriation Bill. The Expropriation Bill defines "expropriation" as the compulsory acquisition of property by an expropriating authority or organ of state.³⁹ An "expropriating authority", in turn, means an organ of state or a person empowered to acquire property through expropriation. The Expropriation Bill then defines "property" to mean property as defined in the property clause of the Constitution.

³⁵ B Slade "Towards a clearer understanding of the difference between the obligation to pay compensation and the validity requirements for an expropriation" *Speculum Juris* 33(1), 9.

³⁶ S 29(1) of the Expropriation Bill.

³⁷ S 29(2) of the Expropriation Bill.

³⁸ Including: the Expropriation Act; Restitution of Land Rights Act 22 of 1994; Upgrading of Land Tenure Right Act 112 of 1991; Land Titles Adjustment Act 111 of 1993; Ingonyama Trust Act 3 of 1994; Land Reform (Land Tenants) Act 3 of 1996; Communal Property Associations Act 28 of 1996; Interim Protection of Informal Rights Act 31 of 1996; Extension of Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction and Unlawful Occupation Land Act 19 of 1998; Distribution and Transfer of Certain State Land Act 119 of 1993; Government Immovable Asset Management Act 19 of 2007 (There is a tension between this piece of legislation and the Amendment Bill. The Government Immovable Asset Management Act 19 of 2007 requires that government realise the best value for public land whereas the Amendment Bill caters more towards the social value and function land); and Spatial Planning and Land Use Management Act 16 of 2013; JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1) (2014) 3 *Journal of South African Law* 425-446, 434-435.

³⁹ S 1 definition of "expropriation" of the Expropriation Bill.

Section 25(4)(b) of the property clause in the Constitution states that property is "not limited to land". Property, as defined in the property clause, therefore includes movable and immovable property as well as tangible and intangible property and may also include rights.⁴⁰

Section 2 of the Expropriation Bill deals with its application. More specifically, section 2(1) states that an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest.⁴¹ The meaning of "arbitrary" is not defined in the Expropriation Bill. However, in the context of section 25(1) of the Constitution, "arbitrary" has been defined by the Constitutional Court to mean when the law in question does not provide sufficient reason for the particular deprivation or is procedurally unfair.⁴² Public purpose is defined broadly and open-endedly to include any purposes connected with the administration of the provisions of any law by an organ of state. Public interest is not defined in the Expropriation Bill, but is defined in section 25(4)(a) of the Constitution

⁴⁰ *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP), para 121; G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 609; JM Pienaar *Land Reform* 2014, 180.

⁴¹ S 2(1) of the Expropriation Bill.

⁴² *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 100. Sufficient reason is established as follows (i) by evaluating the relationship between the means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question; (ii) considering the complexity of the relationships in question; (iii) considering the relationship between the purpose of the deprivation and the person whose property is affected; (iv) considering the relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation regarding that property; (v) considering whether the property in question is ownership of land or a corporeal moveable as a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason in such instances; (vi) considering whether the deprivation in question embraces all or some of the incidents of ownership as the purpose for the deprivation will have to be more compelling where the deprivation embraces all incidents of ownership; (vii) determining the interplay between the variable means and ends, the nature of the property in question and the extent of its deprivation as there may be circumstances where sufficient reason is established by a mere rational relationship between means and ends whereas in others a proportionality evaluation, in line with section 36(1) of the Constitution, will be required; (viii) considering all relevant facts of each particular case, while always bearing in mind that the enquiry is concerned with the meaning of "arbitrary" in relation to the deprivation of property under section 25 of the Constitution; J Cogger "Inheritance and intergenerational inequality" 2017 17(6) *Without Prejudice* 12-14, 13; JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1) (2014) 3 *Journal of South African Law* 425-446, 427; W Freedman "The constitutional right not to be deprived of property: the constitutional court keeps its options open" (2006) 1 *Journal of South African Law* 83-100, 87-90.

to include South Africa's commitment to land reform and reforms to bring about equitable access to all of South Africa's natural resources by its people.⁴³

More work is required to clarify the meanings of each term, namely "arbitrary", "public purpose" and "public interest" for purposes of EWC in the Expropriation Bill.⁴⁴ If this is not done in the Expropriation Bill, it is likely that these terms will be challenged and scrutinised in accordance with the established meanings of the terms and approach to the interpretation of the Constitution, statutes and existing case law.⁴⁵

The terms (and the statute itself) will be interpreted using an objective, unitary process considering (i) the language used in light of the ordinary rules of grammar and syntax, (ii) the context where the provisions appear, (iii) the apparent purpose which the provisions are directed towards and (iv) the material and information known and available to those responsible for its production.⁴⁶

Section 2(2) of the Expropriation Bill prohibits an expropriating authority from expropriating the property of a state-owned corporation or a state-owned entity without the concurrence of the executive authority responsible for that corporation or entity. In the absence of clear guidance regarding the circumstances and conditions when an expropriating property may (and should) expropriate land from state-owned entities and a framework establishing how such a concurrence of interests should be achieved, this provision will give rise to significant disputes and result in the bizarre anomaly that the South African government may, in effect, litigate against itself. It is also unclear why provision needed to be made in the Expropriation Act for the ability for one state department (an expropriating authority) to expropriate land essentially belonging to other state departments as expropriation, per definition, takes place without the other party's permission. If these issues are not addressed, they will further delay and undermine land reform in South Africa.

⁴³ *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 64.

⁴⁴ E Du Plessis "Restitution of expropriated property upon non-realisation of the public purpose" (2011) 3 *Journal of South African Law* 579-592, 584-586; *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 64; B Slade "The less invasive means argument in expropriation law" 2013 2 *Journal of South African Law* 199-216, 207.

⁴⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

⁴⁶ *C:SARS v United Manganese of Kalahari Proprietary Limited* (264/2019) 2020 ZASCA 16 (25 March 2020), para 8.

Section 2(3) of the Expropriation Bill states that a power to expropriate property may not be exercised where the expropriating authority has failed to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition of that property on reasonable terms. On the face of it, section 2(3) of the Expropriation Bill is to be welcomed.

The term "owner" in the Expropriation Bill is broadly defined in relation to property or a registered right in property as the person in whose name such property or right is registered. The definition of owner then also sets out a closed list of nine scenarios where an owner may be represented due to a legal restriction or disability. These scenarios include where an owner is deceased or sequestered, a juristic person which is being wound-up and where the property has been attached in terms of an order of court. The "holder of a right" is defined as the holder of an unregistered right in property. In its current form, the definition of a holder of a right will give rise to disputes regarding who a "holder" is and to what extent a particular right constitutes an unregistered right,⁴⁷ which is recognised and protected by law. The current definition of the term "holder of a right" in the Expropriation Bill must be clarified by clearly defining what an unregistered right means for purposes of the Expropriation Bill.

When section 2(3) of the Expropriation Bill is applied to EWC, it makes it clear that EWC (like ordinary expropriation) is not a remedy of first resort for an expropriating authority and, arguably, should only be considered as a remedy of last resort.⁴⁸ Practically, this means that section 2(3) of the Expropriation Bill will delay any EWC process as an expropriating authority would have to show that it has explored all other options under the Expropriation Bill before resorting to EWC or face the risk of the EWC process being set aside on administrative law grounds.

Chapter 3 of the Expropriation Bill contains detailed provisions regarding the investigation and valuation of property for purposes of expropriation, which provide for engagements with the owner or occupier of the relevant property, a duly

⁴⁷ S 1 definition of "unregistered right" of the Expropriation Bill "means a right in property, including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered".

⁴⁸ B Slade "Towards a clearer understanding of the difference between the obligation to pay compensation and the validity requirements for an expropriation" *Speculum Juris* 33(1), 2.

appointed valuator (under the Expropriation Bill), the expropriating authority and relevant organs of state.⁴⁹

Chapter 4 of the Expropriation Bill then sets out the processes and procedures pertaining to expropriation of property, including what constitutes proper notice. It also imposes a positive duty on the expropriating authority to acknowledge receipt of correspondence in writing and take into account all objections and submissions timeously received before proceeding with an expropriation process.⁵⁰

Under the current scheme of the Expropriation Bill, when a property is expropriated, ownership of the property and all unregistered rights in such property (for example, the rights of workers and their families who have been living on a property for generations) are expropriated, unless those unregistered rights are specifically excluded in the relevant notice of expropriation issued in terms of Chapter 4.⁵¹

Chapter 5 of the Expropriation Bill deals with compensation for expropriation. More specifically, section 12 of Chapter 5 deals with the determination of compensation. Section 12(1) sets out the requirements that must be taken into account when property is expropriated against compensation. Section 12(2) sets out a list of factors that may only be taken into account in exceptional circumstances when determining the amount of compensation under section 12(1). Section 12(3) is the most relevant provision of the Expropriation Bill for purposes of EWC.

Section 12(3) states that EWC may be just and equitable where land is expropriated in the public interest, having regard to all relevant circumstances. It then sets out the following non-exhaustive list of circumstances when it may be just and equitable for EWC to take place, namely where (i) land is occupied or used by a labour tenant (as defined in the Land Reform (Labour Tenants) Act 3 of 1996, (ii) land is held for purely speculative purposes, (iii) land is owned by a state-owned corporation or other state-owned entity; (iv) the owner of the land has abandoned the land; [and/or]⁵² (v) the market value of the land is equivalent to, or less than, the

⁴⁹ Ch 3 of the Expropriation Bill.

⁵⁰ S 7(5) of the Expropriation Bill.

⁵¹ S 9(1) of the Expropriation Bill.

⁵² There appears to be an error in the wording of the Expropriation Bill regarding whether the list is conjunctive or disjunctive.

present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.⁵³

It is interesting to note that while the Expropriation Bill deals with property, as broadly defined to include movable and immovable property, the circumstances under which it contemplates the payment of nil compensation currently only refer to land (i.e. immovable property).⁵⁴ If these circumstances are not clarified, this provision is vulnerable to being challenged. For example, the Expropriation Bill does not currently provide a mechanism for owners of land falling within the meaning of section 12(3) and specifically targeted for EWC to offer to donate the equivalent value of the property sought to be expropriated without compensation to the relevant beneficiaries or to government to purchase similar land of their own choosing.⁵⁵ This arguably achieves the purpose of EWC, which is land reform, in a less restrictive way and without any actual dispossession of land taking place and is endorsed by the Panel.⁵⁶ In the context of expropriation against compensation, the Supreme Court of Appeal has stated that it is for the expropriating authority to decide how best to achieve the objective of expropriation for purposes of land reform. The evaluation of whether an expropriation is expedient or necessary lies with the expropriating authority. The fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a "public purpose".⁵⁷ Given the profound implications arising from EWC, it is unclear whether a court will extend this principle to apply to an EWC process that has been challenged and where the owner has offered to donate the equivalent value of the property sought to be expropriated to either the beneficiaries or to government. Any proposed attempt

⁵³ S 12(3) of the Expropriation Bill.

⁵⁴ K Wheeler Expropriation without compensation: The Expropriation Bill 6 February 2019 *CDH* available online: <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-alert-6-february-expropriation-without-compensation-the-expropriation-bill.html> (accessed 29 April 2020).

⁵⁵ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), vi and 78.

⁵⁶ B Slade "The less invasive means argument in expropriation law" 2013 2 *Journal of South African Law* 199-216, 199; S 36(1)(e) of the Constitution; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), vi and 78.

⁵⁷ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (914/10) 2011 ZASCA 246, para 16; B Slade "The less invasive means argument in expropriation law" 2013 2 *Journal of South African Law* 199-216, 214.

at EWC will probably be challenged to determine whether it is in fact for a public purpose and the courts will be asked to decide if that public purpose may be achieved without the actual expropriation of any land for nil consideration.

Both section 12(3) and the Expropriation Bill more broadly also fail to define what the terms "purely speculative" and "abandoned" mean for purposes of EWC. This is a significant oversight, which must be corrected to limit protracted and costly litigation for the relevant expropriating authority and owners.

In the broader South African property law context, the Constitutional Court has held that a speculator has no less right of ownership in goods purchased exclusively for resale because they have no subjective interest in those goods but sees them only as objects that will produce money on resale.⁵⁸ An expropriating authority will therefore have to adduce evidence and prove how and why land held for speculative purposes and targeted for EWC should be treated differently from the established legal position.

Abandonment, by contrast, is a common law way in which a person may lose ownership of property, land in this context.⁵⁹ For land to be abandoned in the legal, technical sense, an owner must first discard that land with the intention of no longer owning it.⁶⁰ Logically, the more valuable the land is, the less likely it is that an owner would abandon that land within the meaning stated above.⁶¹ In the context of land which an owner has purchased, inherited or even acquired through a prior expropriation process, it is highly improbable that an expropriating authority would be able to prove that an owner has abandoned that land even where such an owner does not have possession of that land or neglects it.⁶² Furthermore, any attempt by an expropriating authority to expropriate land without compensation on the basis that it has been abandoned would more likely than not be vigorously opposed by the

⁵⁸ *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 56.

⁵⁹ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 305.

⁶⁰ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 305.

⁶¹ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 306.

⁶² G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 306.

relevant owner. The mere fact that an owner opposes an EWC process would also evidence the fact that the owner has not abandoned that land.

Even if the terms "purely speculative" and "abandoned" are defined for purposes of EWC, any owner facing the prospect of having their land expropriated without compensation because an expropriating authority alleges that the land is either held for purely speculative purposes or that the owner has abandoned the land, may successfully challenge that allegation.

The scenario where land may be expropriated by an expropriating authority without compensation where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land,⁶³ is also problematic. Both section 12(3) and the Expropriation Bill more broadly fail to state who must determine the market value of the land in question or how the present value of direct state investment or subsidy in the acquisition or capital improvement of that land should be calculated. This lack of certainty exposes struggling beneficiaries of previous land expropriation processes to having their land expropriated without compensation by unscrupulous expropriating authorities. This undermines the symbolic significance of the land to such beneficiaries as being a manifestation of their having overcome past injustices and dispossession, which applies irrespective of the developmental and economic success of the land post restitution.⁶⁴ It is also concerning to note that EWC under these circumstances would result in similar dispossession and injustice for those beneficiaries as what they may have been subjected to during Apartheid, which totally undermines the objective of land reform in South Africa.⁶⁵

Where an owner receives an offer of no compensation under section 12(3) of the Expropriation Bill, they must submit a motivated and substantiated claim setting out what constitutes just and equitable compensation in their view.⁶⁶ This may either be accepted by the expropriating authority or rejected with a just and equitable offer

⁶³ S 12(3) of the Expropriation Bill.

⁶⁴ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 698; JM Pienaar *Land Reform* 2014, 655.

⁶⁵ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

⁶⁶ S 14(1)(b) of the Expropriation Bill.

of compensation to the owner, which may be nil.⁶⁷ It is settled law that where a deprivation of property is for a public purpose or in the public interest or is otherwise found to be non-arbitrary, compensation is not required.⁶⁸ Having regard to the special role that the property clause plays in facilitating the fulfilment of South Africa's nation-building and reconciliation responsibilities, especially by recognising the need to open up economic opportunities to all South Africans,⁶⁹ it is possible that such considerations may, similarly, be found to weigh more heavily than any individual right to land in the context of EWC for a public purpose or in the public interest.⁷⁰

During any EWC process, either the expropriating authority or owner may request reasonable particulars regarding the owner's claim for just and equitable compensation or the expropriating authority's offer of just and equitable compensation.⁷¹ As an EWC process is an administrative process, it would be subject to review under the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"). Section 3 of PAJA entrenches the constitutional right to fair administrative action set out in section 33(1) of the Constitution.⁷² Section 3(1) of PAJA requires a decision which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair. Section 3(2) of PAJA sets out the standard position regarding administratively fair action, which may only be departed from in appropriate circumstances.⁷³ Any such administrative process may also be subjected to a separate challenge in terms of the principle of legality.⁷⁴ It is settled law that the Constitution requires every administrative action to be underpinned by plausible reasons, justifying the action taken.⁷⁵

⁶⁷ S 15(1) of the Expropriation Bill.

⁶⁸ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 59.

⁶⁹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 60.

⁷⁰ *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), paras 49 - 50.

⁷¹ S 16(1) of the Expropriation Bill.

⁷² *Kohler Bricks (Pty) Ltd v City of Cape Town* (21362/2017) 2019 ZAWCHC 6, para 18.

⁷³ *Kohler Bricks (Pty) Ltd v City of Cape Town* (21362/2017) 2019 ZAWCHC 6, para 18.

⁷⁴ *State Information Technology Agency SOC Limited v Gijima Holdings Proprietary Limited* 2018 (2) SA 23 (CC), para 12.

⁷⁵ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.3.2.

Before EWC may be enforced, both the Amendment Bill and the Expropriation Bill must first finish their respective, formal Parliamentary approval processes, which are dealt with below.

2.4 Legal process

The Amendment Bill is a bill in terms of section 74(2) of the Constitution in that it proposes to amend the Bill of Rights, specifically the property clause. The Bill of Rights may only be amended by a Bill passed by the National Assembly with a supporting vote of at least two thirds of its members and the National Council of Provinces, with a supporting vote of at least six provinces.⁷⁶ The Amendment Bill will also be referred to the National House of Traditional Leaders under section 18(1)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003 because it contains provisions pertaining to customary law and customs of traditional communities.

When it is tabled in Parliament, the Amendment Bill is highly likely to succeed as both the majority political party (the African National Congress) and third largest party (the Economic Freedom Fighters), who together account for more than the requisite two-thirds majority, are in favour of its adoption.⁷⁷

When the Amendment Bill is passed by Parliament in accordance with the Constitution, the President of the Republic of South Africa ("**the President**") must either assent to and sign the Amendment Bill or, if the President has reservations about the constitutionality of the Amendment Bill, refer it back to the National Assembly for reconsideration.⁷⁸

If the President refers the Amendment Bill back to Parliament, both the National Assembly and the National Council of Provinces must participate in its reconsideration as section 74(2) of the Constitution applies to the passing of the Amendment Bill.⁷⁹

⁷⁶ S 74(2) of the Constitution.

⁷⁷ M Merten Constitutional amendment process for expropriation without compensation is revised *Daily Maverick* 26 July 2019 available online: <https://www.dailymaverick.co.za/article/2019-07-26-constitutional-amendment-process-for-expropriation-without-compensation-is-revived/> (accessed 29 April 2020).

⁷⁸ S 79(1) of the Constitution.

⁷⁹ S 79(3)(b) of the Constitution.

Once Parliament has reconsidered the Amendment Bill and ensured that it accommodates the President's reservations, the President must then assent to and sign the Amendment Bill or refer it to the Constitutional Court for a decision on its constitutionality.⁸⁰ If the Constitutional Court decides that the Amendment Bill is constitutional, the President must assent to and sign it.⁸¹

Having addressed the legal process that the Amendment Bill must follow through Parliament, the legal process regarding the Expropriation Bill is briefly addressed below because the Amendment Bill is the primary driver of introducing EWC in South Africa. Simply stated, if the Amendment Bill fails, the Expropriation Bill will also fail.

2.4.1 Expropriation Bill

The Expropriation Bill is a bill in terms of section 76 of the Constitution in that it is an ordinary bill affecting the provinces. The Expropriation Bill would, similar to the Amendment Bill,⁸² likely succeed in Parliament and be submitted to the President for assent as it would have the support of the African National Congress and Economic Freedom Fighters.⁸³

The President's powers of referral regarding any reservations that he may have with the Expropriation Bill's constitutionality are the same as in relation to the Amendment Bill and in accordance with section 79 read with sections 84(2)(b) and (c) of the Constitution, which are discussed above.

If the Amendment Bill is not passed into law, the legal process regarding the Expropriation Bill's promulgation would likely stop because its provisions regarding EWC would be redundant and, arguably, unconstitutional depending on the reasons for the Amendment Bill not being passed into law.

2.5 Legal consequences

The possible constitutional legal consequences regarding the Amendment Bill are divided into three parts, namely (i) those arising prior to the President assenting to the Amendment Bill, (ii) those arising once the President has assented to the

⁸⁰ S 79(4) of the Constitution.

⁸¹ S 79(5) of the Constitution.

⁸² See para 2.4 above.

⁸³ S 76(1)(a) and (b) of the Constitution.

Amendment Bill and it becomes the "Amendment Act" and (iii) possible subsequent constitutional challenges to what will be the Amendment Act.

2.5.1 Prior to assent

As stated above, the President may refer the Amendment Bill back to Parliament for reconsideration. If the President does so, it will delay the Amendment Bill's coming into existence.

If the President refers the Amendment Bill back to Parliament, Parliament must reconsider it taking the President's reservations into account. If, once Parliament has reconsidered the Amendment Bill and referred it back to the President for assent, the President is still unsure regarding its constitutionality, the President may invoke his constitutional power and refer the Amendment Bill to the Constitutional Court for a decision regarding its constitutionality.⁸⁴

The first time that the President exercised the power to refer a Bill to the Constitutional Court for a decision on its constitutionality, under section 84(2)(c) read with section 79(4) of the Constitution, was in the case of *Ex parte the President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* ("**the Liquor Bill case**").⁸⁵

In terms of the *Liquor Bill* case, the President is required to itemise his "reservations" regarding the constitutionality of the Amendment Bill.⁸⁶ Under the Constitutional Court's rules, all political parties represented in Parliament may also make written submissions relevant to the determination of that Bill's constitutionality.⁸⁷ In this case, the Constitutional Court would be required to consider the President's reservations together with any submission relevant to those reservations raised by any party represented in Parliament in determining the Amendment Bill's constitutionality.⁸⁸ Such a process would take a significant amount of time and would delay the Amendment Bill being enacted. It would also considerably reduce the possibility, scope and content of subsequent legal

⁸⁴ S 79(4) read with s 84(2)(c) of the Constitution.

⁸⁵ 2000 (1) SA 732 (CC).

⁸⁶ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), para 13.

⁸⁷ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), para 18.

⁸⁸ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), para 18.

challenges due to the principle that a final Court of Appeal will not likely depart from its past decisions,⁸⁹ which is discussed in more detail in paragraph 2.5.3 below.

If the Constitutional Court orders that the Amendment Bill is unconstitutional for one or more reasons, Parliament would have to reconsider those parts of the Amendment Bill and follow the amendment process again, which would significantly delay its promulgation. Such a process and decision would, however, give guidance to Parliament regarding what the content of the Amendment Bill should look like if Parliament hopes for it to pass constitutional muster. It would also give owners in South Africa insight as to the possible scope and content of constitutionally acceptable EWC.

If the Constitutional Court decides that the Amendment Bill is constitutional, subsequent constitutional challenges, post-enactment, are not excluded, except where the Constitutional Court has already decided on such constitutional questions as part of the aforementioned referral process.⁹⁰ The principle that a court of last instance - the Constitutional Court in this case - will not depart from its previous decisions unless those decisions are shown to be clearly wrong would apply.⁹¹ This is addressed in paragraph 2.5.3 below.

2.5.2 **Post assent**

Immediately after the President has assented to and signed the Amendment Bill and it becomes the "Amendment Act", the next provision that requires consideration is section 80 of the Constitution.

This section empowers members of the National Assembly to apply to the Constitutional Court for an order that "all or part" of an Act of Parliament is unconstitutional - the Amendment Act in this case.⁹² Such an application would have to be supported by at least one-third of the members in the National Assembly and would have to be brought within 30 days of the date on which the President assented

⁸⁹ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), para 28; *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), para 19.

⁹⁰ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), para 19.

⁹¹ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), para 19.

⁹² *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), para 12.

to and signed the Amendment Act. The application would have to be made directly to the Constitutional Court and comply with Rule 15 of the rules of the Constitutional Court ("**Constitutional Court Rules**").⁹³ In terms of Rule 15 of the Constitutional Court Rules, an application in terms of section 80(1) of the Constitution must be brought by way of notice of motion supported by an affidavit, lodged with the Registrar of the Constitutional Court and served on, amongst others, the Speaker of the National Assembly and Chairperson of the National Council of Provinces. The Speaker of the National Assembly would also have to issue a certificate confirming that the abovementioned requirements of section 80 of the Constitution have been complied with.

It is unlikely that at least one-third of the members in the National Assembly would support a constitutional challenge to the Amendment Act in terms of section 80 of the Constitution as some parliamentarians from the African National Congress and/or the Economic Freedom Fighters would have to openly defy their respective political party's position on EWC.

Where an application under section 80 of the Constitution is made, the Constitutional Court may order that all or part of the Amendment Act that is the subject of such an application has no force or effect until the Constitutional Court has decided the application where (i) the interests of justice requires this and (ii) the application has a reasonable prospect of succeeding.⁹⁴ If the Constitutional Court were to consider such an application and grant such an interim order, the effect of the Amendment Act would be suspended pending its final decision. In principle, and with the consent of the parties to the matter, this would also give *amici curiae* (friends of the court) an opportunity to apply to be admitted to the proceedings under Rule 10 of the Constitutional Court Rules.

As detailed above, the Amendment Act would likely continue to enjoy the support of more than two-thirds of the members of Parliament. Therefore, although theoretically possible, it is improbable that the Amendment Act would face a challenge under section 80(1) of the Constitution. However, if such an application was brought and it was entertained by the Constitutional Court, it would delay the

⁹³ S 167(4)(d) of the Constitution; Rule 15 of the Constitutional Court Complementary Act 13 of 1995.

⁹⁴ S 80(3) of the Constitution.

commencement of the operation of the Amendment Act by many months. It would also cause political turmoil within the ranks of the African National Congress and Economic Freedom Fighters. The consequences regarding certainty as to the possible scope and content of EWC provisions and reduction of possible, subsequent legal challenges, as discussed above, would also apply at this stage in the process.

2.5.3 Subsequent legal challenges

The most probable and vociferous challenges that the Amendment Act will face will be urgent and ordinary course interdict proceedings regarding its constitutionality, which will be brought by persons having standing under section 38(1) of the Constitution. In particular, such persons with standing will be those acting in their own interest, associations acting in the interests of their members and those claiming to be acting in the public interest.

Whether those seeking to challenge the constitutionality of the Amendment Act will look to co-ordinate their efforts and share costs or bring their various legal challenges separately will likely depend on whether the President refers the Amendment Bill to the Constitutional Court for consideration prior to its enactment or summarily assents to and signs the Amendment Bill into law. Practically, where the President refers the Amendment Bill to the Constitutional Court, its decision would likely remove a number of potential constitutional challenges and discourage many potential applicants from instituting proceedings as the fundamental doctrine of precedent (a fundamental component of the rule of law) would apply.⁹⁵ Where the President does not refer the Amendment Bill to the Constitutional Court before assenting to and signing it, it will face diverse and nuanced legal challenges from a myriad of applicants representing a diversity of views.

As the Amendment Act proposes to amend the property clause in the Bill of Rights, any constitutional challenge to it must be brought directly to the Constitutional Court in terms of section 38(1) read with 167(4)(d) of the Constitution read together with section 167(6) of the Constitution and Rule 18 of the Constitutional Court Rules.

⁹⁵ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), para 28.

Any such application would have to be served on all parties with a direct or substantial interest in the relief claimed, which would include Cabinet, Parliament and, arguably, every person who owns property or is the holder of a right over property in South Africa.⁹⁶ Any party wishing to oppose the application would have to notify the applicant(s) and the Registrar of the Constitutional Court in writing of their intention to oppose the application.

2.5.3.1 Procedural challenges

It is probable that the Amendment Act will face procedural challenges regarding its inception in terms of the principle of legality to the extent that it is inconsistent with the Constitution in terms of section 172(1)(a).⁹⁷ These challenges will include questions regarding whether the public participation process was adequate and whether all public participation was taken into account and, if not, the reasons for this.⁹⁸

This is particularly relevant in view of the fact that Parliament's National Programming Committee recently unanimously resolved to allow the "Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25" ("**EWC Committee**") to lapse with a view to reviving it when the COVID-19 pandemic restrictions are sufficiently relaxed.⁹⁹ Practically, this means that the South African government's response to COVID-19 has stalled the Amendment Bill's consultation process and passage through Parliament.

When the National Programming Committee revives the EWC Committee, this will have to be done in terms of the relevant rules of Parliament, in particular

⁹⁶ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 19; Rule 18(2) of the Constitutional Court Complementary Act 13 of 1995.

⁹⁷ *Buffalo City Metropolitan Municipality v Asla Construction Proprietary Limited* 2019 (4) SA 331 (CC), para 67.

⁹⁸ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 26.

⁹⁹ J Gerber "Land expropriation: Lapsed ad hoc committee on section 25 was not in vain - chairperson" *News24* available online: <https://www.news24.com/news24/southafrica/news/land-expropriation-lapsed-ad-hoc-committee-on-section-25-was-not-in-vain-chairperson-20200529> (accessed 31 May 2020).

Rule 214 of the National Assembly Rules.¹⁰⁰ If incorrectly done, this will be a further basis for attack by, for example, opposition political parties in Parliament.

The fact that the EWC Committee lapsed after it had already started the public consultation process is a further procedural difficulty that exposes the Amendment Bill to procedural attack, especially if the submissions received to date may not be used by the constituted EWC Committee. Even if the Amendment Bill is found to have been procedurally promulgated (as the Amendment Act), it will still also face substantive challenges.

2.5.3.2 Substantive challenges

The substantive challenges against the Amendment Act may be based on various grounds, including that the Amendment Act (i) is unconstitutional and void in its entirety,¹⁰¹ (ii) undermines the core values of human dignity and the advancement of human rights and freedoms (which includes the freedom to acquire and dispose of property), and (iii) that the enabling legislation (Expropriation Bill) does not satisfy the requirements of the limitation of rights clause in section 36 of the Constitution.

Where it is argued that the Amendment Act is substantively void and unconstitutional in its entirety, the challenge may be based on the "basic structure" doctrine, which posits that any proposal to amend the Constitution must still operate within the logic and framework of the Constitution as a whole.¹⁰² Any such substantive challenge would have to show that the right to property enshrined in the property clause and its associated and inseverable right to compensation forms part of the basic structure of the Constitution.¹⁰³ A weighty factor in support of this argument is that private property is linked to the very notion of constitutionalism as it is, arguably, the only means that people have to exercise autonomy from the state.¹⁰⁴ A difficulty that the "basic structure" doctrine faces is that the Constitutional Court has not formally accepted it into South African jurisprudence and would have to

¹⁰⁰ Rules of the National Assembly (9 ed 26 May 2016).

¹⁰¹ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 28.

¹⁰² M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 27.

¹⁰³ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 27.

¹⁰⁴ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 28.

accept that the Amendment Act proposes to fundamentally destroy the basic structure of the Constitution.¹⁰⁵

A substantive constitutional review of the Amendment Act based on the founding values in section 1 of the Constitution and corresponding rights and freedoms may also be brought.¹⁰⁶ It is arguably easier to accept that the Amendment Act and the enabling legislation intended to give effect thereto (i.e. the Amendment Bill) may infringe on the core values of human dignity and the advancement of human rights and freedoms and the corresponding rights in the Bill of Rights than that they undermine an unknown "basic structure" of the Constitution.¹⁰⁷ These rights include that:¹⁰⁸

(i) everyone present in South African has inherent dignity and the right to have their human dignity respected and protected.¹⁰⁹ It may be argued that EWC strips owners and holders of rights of their human dignity because it prevents them from acting independently of the state;¹¹⁰

(ii) everyone in South Africa has the right to privacy, which includes the right not to have their property searched or possessions seized.¹¹¹ Chapter 3 of the Expropriation Bill contains detailed provisions regarding the investigation and valuation of property for purposes of expropriation. The provisions in Chapter 3 of the Expropriation Bill contemplate invasive and in-depth processes involving various valuers, assessors and government officials scrutinising and evaluating the suitability of a property for expropriation.¹¹² These provisions constitute an invasion of an owner or holder of a right's privacy and must be tested to determine if they pass constitutional muster in terms of section 36 of the Constitution;

(iii) every citizen has the right to enter, to remain in and to reside anywhere in South Africa and no one may be evicted from their home without an order of court

¹⁰⁵ *Kesavanda Bharti v Union of India* (1973) 4 SCC 225, para 693.

¹⁰⁶ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 27.

¹⁰⁷ Ss 1(a), 10 and 14(c) of the Constitution.

¹⁰⁸ JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1) (2014) 3 *Journal of South African Law* 425-446, 434-438.

¹⁰⁹ S 10 of the Constitution.

¹¹⁰ M van Staden "The basic structure doctrine: A challenge to expropriation without compensation?" *De Rebus* (January/February 2019) 26-28, 28; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71.

¹¹¹ S 14(c) of the Constitution.

¹¹² S 5(2) of the Expropriation Bill.

made after considering all the relevant circumstances.¹¹³ At its most extreme, due to the open-ended nature of the wording of section 12(3) of the Expropriation Bill, land where owners or holders of rights reside may be subject to EWC and they may be left destitute, which undermines these constitutional rights;

(iv) everyone has the right to have the environment protected through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹¹⁴ Neither the Amendment Act, nor the Expropriation Bill currently make any provision for safeguarding the value of land that is subject to EWC. Simply stated, perceived productive land (particularly agricultural land) should not be taken without compensation and given to owners who lack the skills or interest to productively utilise that land to the best advantage of present and future generations of South Africans;¹¹⁵ and

(v) property may be expropriated only in terms of a law of general application and for a public purpose or in the public interest and subject to compensation, as agreed or determined by a court.¹¹⁶ This right is at the heart of this enquiry and is patently undermined by the Amendment Act and provisions contained in its proposed enabling legislation (i.e. the Expropriation Bill, which will become the New Expropriation Act).

2.5.3.3 Other legal challenges

Section 195 of the Constitution deals with the basic values and principles governing public administration. Section 195(1) specifically provides that the public administration must be governed by democratic values and principles enshrined in the Constitution, including that a standard of professional ethics must be promoted and maintained and the efficient, economic and effective use of resources must be promoted.¹¹⁷ Although these constitutional principles do not necessarily found a right

¹¹³ S 21(3) read with s 26(3) of the Constitution.

¹¹⁴ S 24(b)(iii) of the Constitution.

¹¹⁵ S 24(b) of the Constitution; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 95; N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 132.

¹¹⁶ S 25(2) of the Constitution.

¹¹⁷ S 195(1)(a) and (b) of the Constitution.

to bring an action,¹¹⁸ they might embolden those seeking to hold the South African government and public administration to account to roll out EWC as a constitutional right.

Where the South African government and public administration delay rolling EWC out, a pending EWC beneficiary may seek to rely on section 237 of the Constitution, which demands that all constitutional obligations must be performed diligently and without delay and argue that the ear-marked land be expropriated and transferred to them without delay.¹¹⁹

A strong commitment by those in government and the public administration to performing constitutional obligations without delay contributes to the consolidation of democracy, greater respect for the Constitution and confidence that the law can and does work.¹²⁰ Failure by state officials to comply with and discharge their duties under section 237 read with the property clause would arguably constitute a breach of the State's constitutional duties.¹²¹

Post promulgation of the Amendment Act, Parliament will also need to enact legislation pursuant to section 25(5) of the Constitution, which prescribes how the South African government can create an enabling environment for citizens to gain access to land and achieve land redistribution.¹²² Furthermore, as land and water are fundamentally connected, as citizens obtain access to land through land reform and EWC, so too should they progressively obtain access to water.¹²³ Where government and the public administration fail to do so, this may give rise to litigation in the same genre as the famed *Government of the Republic of South Africa v*

¹¹⁸ *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC), paras 15 - 17.

¹¹⁹ S 237 of the Constitution; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) 2017 ZACC 47, para 217.

¹²⁰ *District Six Committee and Others v Minister of Rural Development and Land Reform and Others* 2019 (5) SA 164 (LCC), para 104.

¹²¹ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.8.

¹²² Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 13.

¹²³ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 18; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 13.

Grootboom and Others decision.¹²⁴ As the Constitutional Court stated in that case, legislative measures alone are insufficient to achieve the progressive realisation of socio-economic rights.¹²⁵ Any legislative measures, including the promulgation of the Amendment Act and any subsequent enabling legislation must be supported by effective programs implemented by the government of South Africa, which must be reasonable in their conception and implementation.¹²⁶ Post the commencement of the Amendment Act this means promoting access to land and water.

Practically, it is also probable that any administrative decision to enforce EWC will be challenged under PAJA and/or the principle of legality. Any decision-maker involved in taking administrative action, including expropriating property without compensation, is required to make the decision concerned with regard to its substantive import and effect, but also with conscientious regard to the consideration of the affected parties' constitutional right to procedural fairness.¹²⁷ In a constitutional state, like South Africa, state action must be capable of being analysed and justified rationally.¹²⁸ Where an applicant can show that state action to perform EWC could not be justified rationally, that decision may be challenged and set aside.¹²⁹

¹²⁴ 2001 (1) SA 46 (CC).

¹²⁵ *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC), para 42.

¹²⁶ *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC), para 42.

¹²⁷ *Kohler Bricks (Pty) Ltd v City of Cape Town* (21362/2017) 2019 ZAWCHC 6, para 17.

¹²⁸ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 84; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC), para 49.

¹²⁹ B Slade "The less invasive means argument in expropriation law" 2013 2 *Journal of South African Law* 199-216, 200; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 84; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC), para 49; *S v Makwanyane and Another* 1995 (3) SA 391, para 156.

2.6 Conclusion

Land ownership in South Africa is still premised on the basis that a land owner has absolute power to do with their property as they please.¹³⁰ The Amendment Bill and Expropriation Bill propose to change this by introducing EWC.

As EWC is supported by the requisite majorities in Parliament, both the Amendment Bill and Expropriation Bill will probably succeed in the National Assembly and the National Council of Provinces.

As the primary driver of EWC, a number of legal consequences arise from the Amendment Bill's proposed passage through Parliament. These include that the President may refer the Amendment Bill back to Parliament for reconsideration and that the President may refer the Amendment Bill to the Constitutional Court for a decision on its constitutionality. If that happens, opposition parties represented in Parliament and, potentially, other interested parties may seek to present arguments to the Constitutional Court regarding EWC. Referring the Amendment Bill to the Constitutional Court would clarify many constitutional, legal issues and would discourage many potential applicants from challenging the Amendment Bill's constitutionality.

Once the Amendment Bill is promulgated and becomes the Amendment Act, the most probable and vociferous challenges that it will face will be urgent and ordinary course interdict proceedings challenging its procedural and substantive constitutionality.

If and when the Amendment Act and the New Expropriation Act (as they will be referred to henceforth) are found to be constitutional, any proposed EWC process will probably also face a PAJA and legality review.

The revised land policy intended to give practical effect to EWC and its implementation will need stringent conditions and oversight in order to stem the rampant corruption and ineptitude that plagues the current system.¹³¹ Furthermore,

¹³⁰ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 132.

¹³¹ MA Mubecua, MW Mbatha, SE Mpanza & SK Tembe "Conflict and Corruption: land Expropriation without compensation in South Africa" 2020 9(2) *African Journal of Peace and Conflict Studies* 61-76, 67; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

if EWC is to succeed, the institutional shortcomings that enable corrupt practices to flourish must be eradicated.¹³² If not, EWC beneficiaries will not hesitate to turn to the courts to enforce their newfound constitutional right to EWC and hold the South African government and public administration to account to perform their constitutional obligations diligently and without delay, which will also include the progressive realisation of the right of access to water.

The magnitude of the fact that EWC requires an amendment to the property clause in the Bill of Rights cannot be over-stated. Due to EWC's far-reaching legal consequences, some of which are dealt with in this dissertation, EWC will face robust and sustained legal attacks. Therefore, even if EWC eventually passes constitutional muster and we assume for the remaining chapters of this dissertation that it does through the vehicle of the "Amendment Act" read with the "New Expropriation Act",¹³³ it will be many years before EWC starts to benefit South Africans at a grass roots level as envisaged by the Panel.

¹³² Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

¹³³ Once enacted, the Expropriation Bill will replace the Expropriation Act. Therefore, it is referred to as the New Expropriation Act in this dissertation.

Chapter 3:

Legal consequences of EWC for selected common law rights

3.1 Introduction

Assuming that EWC overcomes the myriad of procedural and substantive constitutional legal challenges that await it, it will present further, more nuanced, legal consequences upon commencement. Against the backdrop of Chapter 2, which deals with the constitutional legal consequences of introducing EWC in South Africa, Chapter 3 explores the legal consequences of EWC on the common law rights of ownership, support and contract.

3.2 Ownership

Ownership is, together with the law of contract, one of the basic, common law concepts underpinning private law in South Africa and forms the basis of commercial exchange globally.¹³⁴

Ownership is the most extensive right that a person can have over property.¹³⁵ It confers upon an owner the most comprehensive right in or control over property.¹³⁶ There is, however, no standard definition of ownership in South African law and the meaning and concept of ownership differs from one community to another.¹³⁷ The origin of the lack of precision in defining ownership is found in Roman law on which South Africa's rules of property ownership are largely based.¹³⁸

¹³⁴ R Ely *Property and contract in their relations to the distribution of wealth* (1 ed 1915), Ch 3 107-108; C Van der Merwe "Things" in *The Law of South Africa* 27 (2 ed 2014), 133.

¹³⁵ C Van der Merwe "Things" in *The Law of South Africa* 27 (2 ed 2014), 133.

¹³⁶ *Van der Merwe and Another v Taylor NO and Others* 2007 (11) BCLR 1167 (CC), para 26.

¹³⁷ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 132; G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 103; JM Pienaar *Land Reform* 2014, 3.

¹³⁸ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 104; JM Pienaar *Land Reform* 2014, 68; N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 132.

Insofar as property is concerned, a person is free to use their property as they choose, subject to any restrictions imposed on that freedom by law.¹³⁹ Ownership, like any other right, is therefore not absolute.¹⁴⁰ Ownership generally entails the following key entitlements over property, namely for owners to (i) use the property, (ii) obtain the benefit of the fruits of that property (including any income generated by that property), (iii) possess the property and claim the property back from any unlawful possessor of it, (iv) dispose of the property, and (v) consume and destroy the property.¹⁴¹

Despite the entitlement to consume and destroy the property, there is no entitlement to neglect such property.¹⁴² Sibanda argues that an absolutist idea of ownership of property often leads to the irresponsible, dangerous and wasteful neglect of property to the detriment of society in the context of land restitution.¹⁴³ This argument is particularly relevant in the South African context where the South African government admits that most of its land reform initiatives have, to date, largely failed.¹⁴⁴ In terms of current land reform initiatives in South Africa, white-owned and productive commercial farms have been targeted for restitution and given back to black beneficiaries who do not have the tools, expertise or will to productively

¹³⁹ *Gien v Gien* 1979 (2) SA 1113 (T). 1120C-1121A where the original Afrikaans reads at 1120C-D: "Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas".

¹⁴⁰ *Van der Merwe and Another v Taylor NO and Others* 2007 (11) BCLR 1167 (CC), para 26.

¹⁴¹ *Chetty v Naidoo* 1974 (3) SA 13 (A), 20; *King v Dykes* 1971 3 All SA 517 (RA), 546; N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 135; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 48.

¹⁴² *King v Dykes* 1971 3 All SA 517 (RA), 546; N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 135.

¹⁴³ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 135-139.

¹⁴⁴ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 130.

run those farms.¹⁴⁵ This has reduced the number of productive commercial farms in South Africa from approximately 120000 in 1994 to approximately 37000 in 2013.¹⁴⁶

In order for EWC to live up to the Panel's lofty ideals in practice,¹⁴⁷ the following legal consequences for the common law notions of property ownership are probable.

3.2.1 Legal consequences

Ownership, like any other right, is not absolute.¹⁴⁸ The strong nature of ownership as a right, however, has created a common misapprehension that owners of land in South Africa should be protected against any external interference regarding how they use, enjoy and dispose of their property.¹⁴⁹ This misapprehension may also be observed in the context of land awarded to beneficiaries of restitution processes.¹⁵⁰ This understanding, however, lacks nuance as ownership is not absolute.¹⁵¹ The fact that ownership is not an absolute right in South Africa informs the remainder of this dissertation.

To date, South Africa's broader land restitution process has been focussed on restoring "quantities of hectares" of land to formerly dispossessed persons and, as a result, many once productive farms have been given to beneficiaries who are not utilising them productively.¹⁵² The pattern for once thriving commercial farms to fall into dilapidation and disuse to such an extent that government estimates approximately 90% of restituted farms are now completely unproductive is

¹⁴⁵ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 9.

¹⁴⁶ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 9.

¹⁴⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

¹⁴⁸ *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), paras 49 - 50; *Chetty v Naidoo* 1974 (3) SA 13 (A), 20; *King v Dykes* 1971 3 All SA 517 (RA), 546; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 47.

¹⁴⁹ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 48.

¹⁵⁰ JM Pienaar *Land Reform* 2014, 26; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 48.

¹⁵¹ *First National Bank of SA Limited t/a Wesbank v C: SARS; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), paras 49 - 50; *Chetty v Naidoo* 1974 (3) SA 13 (A), 20; *King v Dykes* 1971 3 All SA 517 (RA), 546; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 47.

¹⁵² JM Pienaar *Land Reform* 2014, 528; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 20.

unsustainable and poses a risk to South Africa's food security.¹⁵³ Therefore, a refinement to the general understanding of the entitlements of ownership is required in order to safeguard South Africa's food security.¹⁵⁴ The right to food and food security is discussed in more detail in Chapter 4 below.

The Constitutional Court has accepted that the right to property entails important duties to use, manage and look after that property responsibly.¹⁵⁵ It is also trite in neighbour law that an owner must responsibly handle their property to not infringe on their neighbours' use and enjoyment of their properties.¹⁵⁶

In the context of EWC, which contemplates a profound limitation on existing owners' property rights, land reform requires safeguards against the irresponsible use of arable land to ensure that the land remains productive to safeguard food security.¹⁵⁷ Land, like mineral resources, is a scarce and finite resource in South Africa.¹⁵⁸

In the context of mineral law in South Africa, if a holder of a right to exploit minerals fails to actively exercise such right, they run the risk of losing that right to another person who is willing and able to do so.¹⁵⁹ In implementing EWC, the South African government will have to balance land restitution through EWC to redress past injustices and the country's need for real and sustained food security. The case of the Republic of Zimbabwe vividly shows the potentially severe consequences on food security of expropriating once productive commercial farms through EWC in favour of beneficiaries who do not have the will and/or means to ensure the continued production on that land.¹⁶⁰

¹⁵³ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

¹⁵⁴ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 21.

¹⁵⁵ *Monhunram and Another v National Director of Public Prosecutions and Another* (Law Review Project as Amicus Curiae) 2007 (4) SA 222 (CC), para 60.

¹⁵⁶ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD) 106H - 107A.

¹⁵⁷ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 49.

¹⁵⁸ E Van der Schyff "Who "owns" the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act" (2008) 4 *Journal of South African Law* 757-768, 765; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 13.

¹⁵⁹ S 51 of the Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁶⁰ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 17; N Vorster "Land and identity in South Africa: An immanent moral critique of dominant discourses in the debate on expropriation without compensation (2019) 75(4) *a5290 HTS Theological Studies*, 1-9, 3.

If the South African government hopes to implement EWC and maintain food security, it will, out of necessity, need to impose an accountability obligation on EWC beneficiaries to productively utilise the land given to them. This accountability obligation may resemble the positive duty imposed on beneficiaries of mineral rights in terms of section 17(5) read with section 19(2)(b) of the Mineral and Petroleum Resources Development Act 28 of 2002.

If the South African government adopts a similar approach to land restitution in the context of EWC as with mineral rights in the context of mining and imposes an accountability obligation on EWC beneficiaries, this will create a significant tension between government and EWC beneficiaries, which will give rise to protracted and expensive litigation.

The tension can be described as follows: whereas restitution holds symbolic significance to EWC beneficiaries as a manifestation of their overcoming past injustices and dispossession, irrespective of the developmental and economic success of the land post restitution,¹⁶¹ the South African government would simultaneously want to advance restitution and safeguard food security in South Africa.¹⁶²

A consequence of enacting EWC through the vehicle of the Amendment Act read with the New Expropriation Act may therefore be that government enacts an accountability obligation on EWC beneficiaries to productively utilise that newly-acquired land. Both government and potentially other interested parties (for example, owners of neighbouring properties)¹⁶³ having standing, may then seek to enforce that accountability obligation on EWC beneficiaries to productively utilise the land given to them, especially where such land is agricultural land, linked to food security in South Africa.¹⁶⁴ Such applications would likely be opposed by EWC beneficiaries who would perceive any such application as an attempt to interfere with

¹⁶¹ N Vorster "Land and identity in South Africa: An immanent moral critique of dominant discourses in the debate on expropriation without compensation (2019) 75(4) a5290 *HTS Theological Studies* 1-9, 4;.G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 698; JM Pienaar *Land Reform* 2014, 655.

¹⁶² N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 47.

¹⁶³ *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD) 106H - 107A.

¹⁶⁴ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 140.

their entitlements of ownership and use their land in a certain way - something land owners outside of EWC processes are not required to do.¹⁶⁵

Whether in terms of a legislated accountability obligation or in terms of specific, contractual agreements that the South African government and EWC beneficiaries enter into, which is discussed in paragraph 3.4 below, it will need to be made clear to EWC beneficiaries that they are holding that land in trust for the benefit of future generations and, consequently, must not neglect it otherwise it may be given to other beneficiaries.¹⁶⁶

The enactment of such an accountability obligation in the legislative scheme of the Amendment Act and New Expropriation Act would necessitate reframing the definition of private ownership as bestowing owners (EWC beneficiaries) with an absolute safeguard against external interference regarding their use of their property.¹⁶⁷ An accountability obligation would also accord with the Constitutional Court's acceptance that the right to property entails duties to use, manage and look after that property responsibly.¹⁶⁸

In order for EWC beneficiaries to be legally required to productively use the land awarded to them for their benefit and for the benefit of South African society more broadly,¹⁶⁹ a further legal consequence of EWC may be the imposition of a corresponding duty on the South African government to support EWC beneficiaries post restitution.

3.3 Duty of support

The Final Report on land reform states that a failing of South Africa's current land reform programme is that beneficiaries of restitution fail to maintain the productive use of their newly obtained land, in part, because of poor post-settlement support

¹⁶⁵ *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP), para 122; JM Pienaar "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1) (2014) 3 *Journal of South African Law* 425-446, 428.

¹⁶⁶ *King v Dykes* 1971 3 All SA 517 (RA), 545; s 12(3)(e) of the New Expropriation Act.

¹⁶⁷ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 48.

¹⁶⁸ *Monhunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), para 60.

¹⁶⁹ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 12.

from the government.¹⁷⁰ This failure has also been confirmed in our jurisprudence on several occasions.¹⁷¹

Although it is accepted that owners, EWC beneficiaries in this case, should generally be responsible for their land,¹⁷² it is arguable that better and well-resourced post restitution support would assist EWC beneficiaries to productively utilise their new land.¹⁷³ This would reduce the pattern of once thriving commercial farms falling into disuse and becoming economically unviable and, as stated in Chapter 2 above, protect EWC beneficiaries from also facing the prospect of being subjected to an EWC process because the market value of their land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of that land.¹⁷⁴

If the South African government intends imposing an accountability obligation on EWC beneficiaries not to neglect their newly obtained land, a consequence of that may be that EWC beneficiaries may claim support from the South African government. The duty for the South African government to support EWC beneficiaries may either arise contractually, which is discussed in paragraph 3.4.2 below, or as a development of the existing common law duty of support similar to that observed in the family law context.

Our current law has generously developed and accepted (albeit in the context of family law) that a common law duty of support can arise in a given case from the fact-specific circumstances of a proven relationship from which it is shown that a binding duty of support was assumed by one person in favour of another.¹⁷⁵ The point of departure in determining whether there is a duty of support is whether a

¹⁷⁰ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

¹⁷¹ *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP), para 5.4.3.

¹⁷² *Monhunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), para 60.

¹⁷³ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

¹⁷⁴ S 12(3)(e) of the New Expropriation Act; N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

¹⁷⁵ *T v Road Accident Fund* 2015 (1) SA 609 (GJ), para 26.

particular person has a claim worthy of protection.¹⁷⁶ In the decision whether there is a duty of one party to support the other, many factors must be considered including history, the morals of society, justice and ease of administration.¹⁷⁷

EWC beneficiaries are dependent on the South African government for land restitution and, in most cases, post restitution support to ensure that they productively utilise the land that they have obtained through an EWC process.¹⁷⁸ Given (i) the historical context of systematic disenfranchisement and discrimination within which EWC arises, (ii) that EWC is assumed to have been sanctioned by the Constitutional Court (and found to be consistent with the morals of South African society), (iii) the South African government's view that EWC is merely an extension of existing expropriation law and (iv) that the South African government already provides post-settlement support to beneficiaries of expropriation,¹⁷⁹ a strong argument may be made that the South African government has a duty to support EWC beneficiaries.

3.3.1 Legal consequences

In accordance with the generous view towards the common law duty of support favoured by our courts, which have consistently recognised the changing nature of relationships of dependency in a modern, South African society and the inherent flexibility of the common law,¹⁸⁰ it is possible that the courts may be called upon to recognise that a duty of support (maintenance) exists between the South African

¹⁷⁶ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 1 July 2020), para 18.

¹⁷⁷ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 2 July 2020), paras 19-20.

¹⁷⁸ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

¹⁷⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v; JM Pienaar *Land Reform* 2014, 837.

¹⁸⁰ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 1 July 2020), para 24; *Paixao and Another v Road Accident Fund* 2012 (6) SA 377.

government and EWC beneficiaries, which is similar to the duty of support (maintenance) in a family law context.¹⁸¹

The South African government's duty of support to EWC beneficiaries would arise from the obligation imposed on EWC beneficiaries to productively and sustainably utilise the land awarded to them as a result of an EWC process. Similar to children being unable to attend and progress through schooling without clothing, food and school fees being paid for by someone owing a duty of support to them, EWC beneficiaries would be unable to safeguard food security in South Africa unless they receive sufficient and on-going post-settlement support from the South African government.¹⁸²

South Africa's land restitution programme is also already characterised by significant government involvement as all land claims are lodged against the state and there is no indication in either the Amendment Act or New Expropriation Act that this position will change. In addition to this, the Department of Agriculture, Rural Development and Land Reform already provides and co-ordinates post restitution support to beneficiaries who are irrefutably previously disadvantaged and disenfranchised and continue to be so post restitution.¹⁸³

Although not identical to the duty of support in the family law context, a strong argument may be made that a relationship between the South African government and EWC beneficiaries exists and that the South African government assumes a duty of support in favour of EWC beneficiaries when it expropriates land and awards it to them (EWC beneficiaries).¹⁸⁴ Given the historical context in which EWC arises,¹⁸⁵ it would be difficult for the South African government to refute that EWC beneficiaries have a claim to support that is worthy of protection, which is the current

¹⁸¹ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC, 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 1 July 2020), para 18.

¹⁸² G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 698; JM Pienaar *Land Reform* 2014, 837.

¹⁸³ JM Pienaar *Land Reform* 2014, 837.

¹⁸⁴ *T v Road Accident Fund* 2015 (1) SA 609 (GJ), para 26.

¹⁸⁵ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

test that is applied when determining if a duty of support exists.¹⁸⁶ This, if infused with the value of Ubuntu, which acknowledges the communal nature of South African society interwoven with the ideas of humaneness, social justice and fairness and incorporates the values of group solidarity, compassion, respect, human dignity, conformity to basic norms and the collective,¹⁸⁷ EWC beneficiaries' claim for support from the South African government gains further traction. If the South African government seeks to impose an accountability obligation on EWC beneficiaries not to neglect their newly obtained land without acknowledging that it has a corresponding duty to provide on-going support (akin to maintenance) to those EWC beneficiaries, the courts may soon be called upon to develop the common law to recognise that such a duty of support exists and is worthy of protection.¹⁸⁸ Practically, in a post-EWC context, this means that the Department of Agriculture, Rural Development and Land Reform may find itself having to expand and formalise its existing post restitution support measures, which will only be possible with an increased budget from National Treasury.¹⁸⁹

Whether a duty of support from the South African government to EWC beneficiaries is better accommodated within the law of contract is addressed in paragraph 3.4.2 below, but that discussion is preceded by an analysis of the impact of EWC on the law of contract more generally.

3.4 Contract

Ownership and the law of contract are the primary common law concepts underpinning private law in South Africa and form the basis of commercial exchange globally.¹⁹⁰ Contractual relations, in particular, are the bedrock of economic life.¹⁹¹

¹⁸⁶ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 1 July 2020), para 18.

¹⁸⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), para 71.

¹⁸⁸ *Langa and Others v Road Accident Fund* (2014/67644) 2016 ZAGPPHC 876 (22 September 2016) available online: <http://www.saflii.org.za/za/cases/ZAGPPHC/2016/876.html> (accessed 1 July 2020), para 18; *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC), para 33.

¹⁸⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

¹⁹⁰ R Ely *Property and contract in their relations to the distribution of wealth* (1 ed 1915), Ch 3 107-108; C Van der Merwe "Things" in *The Law of South Africa* 27 (2 ed 2014), 133.

The achievement of many of the rights and promises made by our Constitution also depend on the continued economic development and prosperity of South Africa.¹⁹² Certainty in contractual relations promotes an enabling environment for the advancement and realisation of constitutional rights and freedoms.¹⁹³

The principle that contracts freely entered into must be honoured (*pacta sunt servanda*) continues to play a crucial role in the judicial control of contracts through the instrument of public policy as it gives expression to the constitutional values of freedom and dignity.¹⁹⁴ The principle of *pacta sunt servanda* is but one of a variety of principles and values that inform public policy in South Africa.¹⁹⁵ Safeguarding the sanctity of contracts (also known as the principle of *pacta sunt servanda*) is therefore integral to realising the constitutional vision of an egalitarian South Africa.¹⁹⁶

The Amendment Act and New Expropriation Act will have a direct impact on the law of contract, particularly on the principle of sanctity of contracts. The impact of the Amendment Act and the New Expropriation Act on the ability of owners to enter into and perform in terms of contracts is addressed in this part of Chapter 3. As alluded to above, this is followed by a discussion regarding whether EWC beneficiaries should insist on a "duty of support clause" in their favour in terms of any agreement entered into between them and the South Africa government and if such a clause would be enforceable by our courts. The contents of this part of Chapter 3 underscores the legal consequences set out in Chapter 4 below on lenders and borrowers.

3.4.1 Overview of impact on owners

There is only one system of law in South Africa, which is shaped by the Constitution, as the supreme law, and all law (including the common law) derives its force and

¹⁹¹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 19.

¹⁹² *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 85.

¹⁹³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 85.

¹⁹⁴ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 83.

¹⁹⁵ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 87.

¹⁹⁶ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 85.

effect from the Constitution and is subject to constitutional control.¹⁹⁷ The rule of law requires that the system of law be clear and ascertainable.¹⁹⁸ Within the above legal framework, the application of the common law rules of contract should therefore result in reasonably predictable outcomes, enabling owners to enter into contractual relationships with the belief and understanding that they will be able to approach a court to enforce their agreements where necessary.¹⁹⁹

Courts, in turn, are required under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law, which includes the law of contract. Where there is a divergence between the common law and the spirit, purport and objects of the Bill of Rights, courts must develop the common law to remove that deviation and the common law must be adapted to be constitutionally compliant.²⁰⁰

The departure point of the analysis that follows is that the Amendment Act and the New Expropriation Act are assumed to be constitutional. Therefore, where the Amendment Act and the New Expropriation Act undermine the principle of sanctity of contracts, courts will have to reconcile this principle with the Amendment Act and New Expropriation Act and develop the law of contract accordingly.

The fundamental issue that is created by EWC in a contractual law context is that existing owners of property face the prospect of their contractual rights and freedoms being adversely impacted by either a potential or actual EWC process.

The specific legal consequences of the commencement of EWC on the law of contract are set out below and are divided into three categories, namely (i) impact on the freedom to contract, (ii) supervening impossibility of performance, and (iii) diminished bargaining power.

¹⁹⁷ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 44; *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC), para 38.

¹⁹⁸ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 81.

¹⁹⁹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 81.

²⁰⁰ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC), para 33.

3.4.1.1 Impact on the freedom to contract

Where parties are confident that the contracts that they enter into will be upheld, they are incentivised to contract with other parties to their mutual benefit.²⁰¹ Unfortunately, the first legal consequence emanating from EWC in relation to the law of contract is that owners of property ear-marked for EWC or likely to be subject to EWC - see the list of property (land) stated in section 12(3) of the New Expropriation Act, which is discussed in more detail in Chapter 2 above - will struggle to dispose of their property post commencement of EWC as there is no incentive for potential purchasers to acquire that property. This is a profound and unavoidable limitation of owners' freedom to contract, a constitutional value.²⁰²

3.4.1.2 Supervening impossibility

The next legal consequence that arises in the context of the law of contract applies to owners who have entered into contracts to sell their properties upon commencement of EWC. If that property is then subject to EWC before it is registered in the purchaser's name in terms of the Alienation of Land Act 68 of 1947 and the Deeds Registries Act 47 of 1937,²⁰³ the seller may no longer be able to perform in terms of the contract that gave rise to the purported transfer of their real right, despite the purchaser having performed in full.

Contractual obligations may be validly extinguished by supervening events post conclusion of the contract provided that it becomes objectively impossible for any person to physically perform or cannot reasonably be expected of them to perform in terms of a particular contract.²⁰⁴ Mere subjective impossibility, or, phrased differently, the inability of a particular party to perform is insufficient to release a party from their contractual obligations.²⁰⁵ The question that then arises is whether it becomes subjectively or objectively impossible for a seller to perform in terms of the contract entered into with the purchaser where the property in question has been expropriated without compensation in the intervening period.

²⁰¹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 84.

²⁰² *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), para 23.

²⁰³ S 2(1) of the Alienation of Land Act 68 of 1981 read with s 16 of the Deeds Registries Act 47 of 1937.

²⁰⁴ L van Huyssteen, G Lubbe & M Reinecke *Contract: General Principles* (5 ed 2016) Ch 13, 517.

²⁰⁵ L van Huyssteen, G Lubbe & M Reinecke *Contract: General Principles* (5 ed 2016) Ch 13, 517.

As objective impossibility only arises where an unavoidable event, outside the control of the ordinary person occurs, such as a natural or man-made disaster,²⁰⁶ it is arguable that EWC of the property in this context would only make it subjectively impossible for the seller to honour the agreement entered into with the purchaser.²⁰⁷ However, it is still objectively possible for the state to deliver the property, which has been expropriated without compensation, to the purchaser.

The related, and more vexed, question that then arises is what happens if the purchaser, having performed in terms of the agreement, claims specific performance from the seller (who is subjectively unable to perform) and joins the South African government to the proceedings as a co-defendant as is the purchaser's right.²⁰⁸ Although this issue may also arise during an expropriation for compensation process, the nuance in an EWC context is that there is no way for the seller to limit the purchaser's loss. Therefore, where all three parties fail to reach agreement in terms of section 18(1) of the New Expropriation Act regarding what should happen with the land and the payment of the purchase price, the courts will be called upon to balance the constitutional imperative of EWC against the principle that contracts freely entered into must be honoured (*pacta sunt servanda*), which expresses the constitutional values of freedom and dignity.²⁰⁹

The Constitutional Court recently held in the seminal case *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*²¹⁰ that it is crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.²¹¹ If EWC occurs as described above, it would clearly impinge on both the seller and purchaser's freedom to contract and their ability to honour obligations in terms of an agreement freely and voluntarily entered into. This would undermine legal certainty, and in particular the sanctity of contracts in South Africa. It would also give rise to the further, adverse legal consequences in relation to parties' diminished bargaining power.

²⁰⁶ L van Huyssteen, G Lubbe & M Reinecke *Contract: General Principles* (5 ed 2016) Ch 13, 518.

²⁰⁷ L van Huyssteen, G Lubbe & M Reinecke *Contract: General Principles* (5 ed 2016) Ch 13, 517.

²⁰⁸ L van Huyssteen, G Lubbe & M Reinecke *Contract: General Principles* (5 ed 2016) Ch 13, 517.

²⁰⁹ S 18(1) read with s 21 of the New Expropriation Act; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 83.

²¹⁰ 2020 ZACC 13.

²¹¹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 84.

3.4.1.3 Diminished bargaining power

The legal consequences arising from the enforcement of the Amendment Act and New Expropriation Act in the context of the law of contract will necessitate a further enquiry into the social policy and normative content of how courts adjudicate contractual disputes on the basis of public policy.²¹² For example, post the commencement of EWC, a purchaser may enter into a contract to purchase a property from a seller for a particular amount of money. As a term of the agreement, the purchaser may offer to only pay a portion of the full purchase price to the seller because that property is used, in part, by a labour tenant, as defined in the Land Reform (Labour Tenants) Act 3 of 1996 and as listed in section 12(3)(a) of the New Expropriation Act. The purchaser may then also retain the balance of the purchase price for a period of time (e.g. 10 to 15 years) as a form of security should the South African government elect to expropriate that property without compensation. Another example is where a purchaser inserts a clause that purports to cancel a contract and the transfer of a property upon notice of the commencement of an EWC process in respect of that property. Clauses providing similar protections for buyers are likely to become common-place post the commencement of EWC. Despite the serious implications of such clauses, some sellers may nevertheless agree to these or similarly harsh terms. Significant legal disputes regarding the interpretation and enforceability of such clauses are therefore inevitable and our courts will be called upon to determine if such clauses are compliant with public policy. The courts will be required to achieve a balance and strike down any unacceptable excesses of freedom of contract, while permitting purchasers and sellers the dignity and autonomy to regulate their own lives and economic affairs.²¹³

There has been controversy in the law of contract in South Africa as to how the concepts of good faith, fairness and reasonableness inform public policy, particularly when juxtaposed to the principle of certainty of contract, which also informs public policy.²¹⁴ The Supreme Court of Appeal has also on more than one occasion held that good faith, reasonableness and fairness are not legal rules capable of being

²¹² *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 16.

²¹³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71.

²¹⁴ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 20.

enforced as contractual terms and merely inform the substantive rules of the law of contract.²¹⁵

The Constitutional Court held in *Barkhuizen v Napier*²¹⁶ that public policy is deeply rooted in the Constitution and its underlying values and that the test is to determine whether or not an impugned term of a particular contract undermines one or more of the constitutional values found in the Bill of Rights.²¹⁷ The Constitutional Court also held in that case that public policy incorporates the need to do simple justice between people and is informed by the value of Ubuntu.²¹⁸

In applying this framework to the principles underlying the law of contract, the Constitutional Court held that the principle that people must be bound by the contracts that they enter into (*pacta sunt servanda*) is a moral principle on which the proper functioning of society is based.²¹⁹ The principle of *pacta sunt servanda*, so the Constitutional Court held, also informs the constitutional values (and rights) of freedom and dignity and that the ability to regulate one's own affairs is essential to the freedom and a vital part of human dignity.²²⁰ Purchasers and sellers therefore will not easily be able to escape complying with the terms of contracts that they enter into. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,²²¹ the Constitutional Court re-affirmed that the *Barkhuizen v Napier*²²² decision remains the leading authority in South African law on the role of equity in contract, insofar as public policy considerations are concerned.²²³

The Constitutional Court then set out the test for fairness in the context of contractual clauses as a two stage enquiry. The first stage involves a consideration of whether the particular clause is unreasonable.²²⁴ The second stage, if the clause is found to be reasonable, is whether it should be enforced in the particular factual

²¹⁵ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), para 32; *South African Forestry v York Timbers* 2005 (3) SA 323 (SCA), para 29.

²¹⁶ 2007 (5) SA 323 (CC).

²¹⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 30.

²¹⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57.

²¹⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 87.

²²⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57.

²²¹ 2020 ZACC 13.

²²² 2007 (5) SA 323 (CC).

²²³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 58.

²²⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 56.

circumstances.²²⁵ Practically, this means that a court must look at a clause that has been challenged and determine if, on its face, it is so unreasonable as to be repugnant to public policy.²²⁶ If so, the court must strike down that clause. However, where the clause is found to be reasonable, the second stage is considered and an analysis of all the surrounding circumstances must be conducted to determine if enforcing that clause would be contrary to public policy.²²⁷ Focus must be placed on the reason for non-compliance with a particular clause.²²⁸ Purchasers and sellers, as the context requires, would have to lay a clear, legal foundation as to why they did not comply with a particular clause in a contract, especially where they allege that it is repugnant to public policy.

In applying these tests to the examples stated above, it is probable that a clause requiring a portion of the purchase price be held as security for a period of time would be reasonable security against the backdrop of EWC. Depending on the specific facts of the case, a court will then have to determine whether or not that clause should be enforced in the particular circumstances. Where that security is held in respect of farmland used, in part, by a labour tenant, as defined in the Land Reform (Labour Tenants) Act 3 of 1996 and listed in section 12(3)(a) of the New Expropriation Act, it is arguable that enforcing that clause would be consistent with public policy. However, where that security is sought to be held in respect of a piece of land acquired in Sandton (an urban area) and on which a sectional title apartment block was subsequently developed, it may be found to be unreasonable and repugnant to public policy. The reason for this is that a piece of land in an urban area on which a large apartment block was constructed and in which hundreds of people live is not the primary target of EWC in terms of the New Expropriation Act. Furthermore, it is not an objective of EWC to evict hundreds of people from their primary residence simultaneously, if at all, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 would apply to any contemplated eviction. By comparison, a contractual clause that purports to summarily cancel a contract and the transfer of a property upon notice of the commencement of an EWC

²²⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 56.

²²⁶ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 37.

²²⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), paras 56 and 58.

²²⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 69.

process in respect of that property, is more likely to be found to be unreasonable, especially where it is not linked to a specific period of time. The reasons for this are (i) it is uncertain if that property will be subject to an EWC process, (ii) even if it is subject to an EWC process, it is uncertain if that process will culminate in EWC under the New Expropriation Act, (iii) even if that property is subject to an EWC process it may be many years before notice of the commencement of that process is issued, and (iv) it is improbable that a court will permit a contract to summarily cancel the real agreement that gave rise to the transfer of ownership of the property into the purchaser's name as this would undermine legal certainty and the principle of freedom to contract.

It is established in our law of contract that agreements that offend public policy may be struck down by our courts, subject to the caveat that this power be exercised sparingly.²²⁹ Where contracts infringe on the fundamental values embodied in the Constitution, courts should not hesitate to strike down those contracts as being repugnant to public policy.²³⁰ The values of fairness, reasonableness and justice inform public policy in South Africa. Ubuntu, which is recognised as an independent constitutional value in South Africa encompasses the values of fairness, reasonableness and justice and also informs public policy.²³¹ These values also inform the operation of substantive law of contract and the development of the law of contract to give effect to the spirit, purport and objects of the Bill of Rights.²³²

The commencement of EWC in South Africa will diminish owners' bargaining power when disposing of their property. Conversely, buyers will be in a strong bargaining position and will look to secure their interests and capital in respect of property transactions as far as possible. The legal consequence of this is that sellers may agree to restrictive and one-sided contractual terms in order to sell their properties, which upon closer scrutiny may be found to be repugnant to public policy

²²⁹ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

²³⁰ *Brisley v Drotzky* 2002 (4) SA 1 (SCA), para 93 (see the separate but concurring judgment of Cameron JA).

²³¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), para 71; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71.

²³² *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71.

in South Africa.²³³ As set out above, the Constitutional Court has affirmed the legal framework to determine whether a particular clause or its enforcement is repugnant to public policy. It is also imperative that owners remember that any party who attacks the provisions of a contract or its enforcement bears the onus to establish the facts as to why it should not be enforced.²³⁴

3.4.2 Contractual duty of support

The possible recognition of a duty of support, akin to the duty of support well-known in family law in South Africa, is discussed paragraph 3.3 above. This part of Chapter 3 addresses whether EWC beneficiaries should insist on a "duty of support clause" in their favour in terms of any agreement entered into between them and the South Africa government and if this clause would be enforced by our courts.

The background to this part of Chapter 3 is that the pattern for once thriving commercial farms to fall into dilapidation post expropriation cannot continue as it would undermine food security in South Africa.²³⁵ The number of productive commercial farms in South Africa has already reduced drastically (from approximately 120000 in 1994 to approximately 37000 in 2013).²³⁶

It is a fact that the majority of beneficiaries of restitution fail to maintain the productive use of their newly obtained land, in part, because of poor post-settlement support from the South African government.²³⁷ While EWC beneficiaries should generally be responsible for their land,²³⁸ better and well-resourced post restitution support would assist EWC beneficiaries to productively utilise their new land.²³⁹ This would reduce the pattern of once thriving commercial farms falling into disuse and

²³³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), paras 70-71.

²³⁴ *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA), para 27.

²³⁵ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

²³⁶ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 9.

²³⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²³⁸ *Monhunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), para 60.

²³⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

becoming economically unviable.²⁴⁰ Furthermore, if the South African government intends imposing an accountability obligation on EWC beneficiaries not to neglect their newly obtained land, EWC beneficiaries are well-placed to request support from the South African government.

As EWC beneficiaries will enter into some form of written contract with the South African government in order for their newly-acquired land to be registered in their names in the relevant Deeds Office, that contract would be a suitable vehicle within which to incorporate a "duty of support clause".

As set out above, EWC beneficiaries are dependent on the South African government for land restitution and, in most cases, post restitution support to ensure that they productively utilise the land that they have obtained through an EWC process.²⁴¹ When this is overlaid by the historical context of systematic disenfranchisement and discrimination within which EWC arises and that the South African government already provides post-settlement support to beneficiaries of expropriation,²⁴² a strong argument may be made that the South African government has a duty to support EWC beneficiaries.

Based on the analysis set out in paragraph 3.4.1 above, specifically paragraph 3.4.1.3, and subject to the appropriate internal administrative controls within the Department of Agriculture, Rural Development and Land Reform there is no public policy reason preventing the South African government and EWC beneficiaries from agreeing to a duty of support in favour of EWC beneficiaries, within available resources. As courts may only refuse to uphold a contractual term, or its enforcement, if it is so unfair, unreasonable or unjust that it is contrary to public policy,²⁴³ it is improbable that a duty of support clause, as envisaged, would be struck down or found to be unenforceable.

²⁴⁰ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

²⁴¹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²⁴² Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v; JM Pienaar *Land Reform* 2014, 837.

²⁴³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 80.

However, in order to succeed, the South African government and the Department of Agriculture, Rural Development and Land Reform in particular must ensure that any support offered to EWC beneficiaries is co-ordinated, well-resourced and free from the scourge of corruption that has plagued all land reform programmes and post-settlement support to date.²⁴⁴ Any corruption identified in the context of providing support to EWC beneficiaries must be dealt with swiftly and harshly.

3.5 Conclusion

Contractual relations are integral to economic activity in South Africa and South Africa's economic development largely hinges on the willingness of parties to freely and voluntarily enter into contractual relationships on an on-going basis.²⁴⁵ Where parties are confident that contracts entered into will be upheld, they will be incentivised to contract with other parties to their mutual benefit.

The first legal consequence of EWC for the law of contract, and a profound limitation on owners' freedom and ability to contract with other parties, is that owners of property ear-marked for EWC or likely to be subject to EWC will struggle to dispose of their property as there is no incentive for potential purchasers to acquire that property.²⁴⁶

A further legal consequence of EWC on the law of contract pertains to supervening impossibility arising where owners enter into contracts to sell their properties and those properties are expropriated without compensation before being registered in the purchaser's name.²⁴⁷ In those cases, it will be subjectively impossible for the seller to perform in terms of the contract that gave rise to the purported transfer of their real right, despite the purchaser having performed in full. It, however, remains objectively possible for the state to deliver the property, which has been expropriated without compensation, to the purchaser. If EWC occurs, as described above, and an agreement in terms of section 18(1) of the New Expropriation Act is not reached between the buyer, seller and expropriating

²⁴⁴ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²⁴⁵ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 84.

²⁴⁶ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), para 23.

²⁴⁷ S 2(1) of the Alienation of Land Act 68 of 1981 read with s 16 of the Deeds Registries Act 47 of 1937.

authority, it will infringe on both the seller and purchaser's freedom to contract and their ability to honour obligations in terms of an agreement freely and voluntarily entered into. This would undermine legal certainty, and undermine the sanctity of contracts in South Africa.

EWC will also diminish owners' bargaining power when disposing of their property. While owners may purport to agree to restrictive and one-sided contractual terms in favour of buyers in order to sell their properties, disputes will arise in relation to the enforcement of such clauses. When called upon to adjudicate on the reasonableness and enforceability of such clauses, it is highly probable that courts will either strike down those clauses or refuse to enforce them for being repugnant to public policy.²⁴⁸

A further consequence of EWC is that EWC beneficiaries may insist that a duty of support clause be inserted into the contracts that they enter into with the South African government regarding land that they obtain through an EWC process. Provided that such support is co-ordinated, well-resourced and free from the scourge of corruption that has plagued all land reform programmes and post-settlement processes to date,²⁴⁹ this contractual duty of support would reduce the pattern of once thriving commercial farms falling into disuse and becoming economically unviable as a result of expropriation.²⁵⁰ If properly implemented, such a contractual duty of support would also withstand scrutiny on public policy grounds.

Having set out the broader legal consequences of EWC on the law of contract in paragraph 3.4 above, the more specific legal consequences of EWC on lenders and borrowers are dealt with in Chapter 4 below.

²⁴⁸ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), paras 70 - 71.

²⁴⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 11.

²⁵⁰ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

Chapter 4:

Legal consequences of EWC for lenders and borrowers

4.1 Introduction

The legal consequences of EWC on the law of contract are dealt with generally in paragraph 3.4 above. Chapter 4 focuses on the key legal consequences of EWC for lenders and borrowers where a mortgaged property is the target of an EWC process.²⁵¹

Against the backdrop of the New Expropriation Act's legislative matrix regarding when mortgaged properties may be subject to an EWC process, this chapter addresses the legal consequences for lenders as they attempt to manage the impact of EWC on their businesses and the corresponding legal consequences that will arise for borrowers.

As the legal consequences of EWC discussed in this chapter also have a direct impact on food security in South Africa, Chapter 4 also addresses the legal consequences of EWC on food security.

4.2 Mortgaged property subject to EWC

In relation to property that is encumbered by a registered mortgage bond, section 18(1) of the New Expropriation Act states that an expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the lender, after the claimant has notified the expropriating authority of that mortgage agreement.²⁵² A claimant for purposes of the New Expropriation Act means a person who has lodged a claim for compensation with an expropriating authority arising from or in connection with an expropriation process.

Section 18(1) of the New Expropriation Act therefore assumes that where an owner or holder receives a notice of expropriation and no compensation is offered, that owner or holder will, within 20 business days of receiving that notice of

²⁵¹ S 18(1) of the New Expropriation Act.

²⁵² See paragraph 2.3.1 for the definitions of expropriating authority, owner and holder for purposes of the New Expropriation Act.

expropriation, deliver a written statement to the expropriating authority setting out the amount they claim as just and equitable compensation for that property.²⁵³

An owner or holder issuing a claim for compensation to an expropriating authority against an EWC process must include certain particulars therein, namely (i) a copy of the valuation of the land in question, (ii) full particulars of all improvements on the land, (iii) details of all unregistered rights that exist in respect of the land, (iv) the owner or holder's personal details and (v) the owner or holder's banking particulars where a payment of compensation may be made.²⁵⁴ In addition to this, and upon request from the expropriating authority, an owner or holder must deliver or cause to be delivered to the expropriating authority the title deed of the land in question within 30 business days of a request for the title deed.²⁵⁵ If that owner or holder is not in possession of the title deed, they must direct the expropriating authority to the relevant person who is in possession of the title deed who, in turn, must deliver the title deed to the expropriating authority within 20 business days of a request for the title deed.²⁵⁶

If an expropriating authority does not accept the amount claimed by a claimant in a claim for compensation, the expropriating authority must make a just and equitable counter-offer to the claimant in writing within 20 business days of receiving the claim for compensation. Although the meaning of the term "just and equitable" is not defined in the New Expropriation Act, section 12(3) of the New Expropriation Act states the circumstances where just and equitable compensation may be nil for land expropriated in the public interest, which is relevant for present purposes.²⁵⁷

The offer of just and equitable compensation issued by the expropriating authority, which may still be nil in the context of an EWC process, must be accompanied by full particulars regarding how the amount was calculated and, if that amount of compensation differs from the amount set out in the original notice of expropriation, reports detailing how and why the offer of just and equitable compensation is different.²⁵⁸

²⁵³ S 14(1)(b) of the New Expropriation Act.

²⁵⁴ Ss 14(1)(c) to (f) of the New Expropriation Act.

²⁵⁵ S 14(2)(a) of the New Expropriation Act.

²⁵⁶ Ss 14(2)(a) and (b) of the New Expropriation Act.

²⁵⁷ S 15(1) read with s 12(3) of the New Expropriation Act; see paragraph 2.3.1.

²⁵⁸ Ss 15(1) and (2) of the New Expropriation Act.

If the owner or holder fails to issue a claim for compensation to the expropriating authority or the owner or holder and the expropriating authority cannot reach consensus regarding the appropriate amount of compensation for the property (land for purposes of EWC) in question, the parties may attempt to resolve the matter through mediation.²⁵⁹ If the owner or holder does not agree to mediation or if mediation fails, the expropriating authority must refer the matter to a competent court to decide or approve the counter-offer of just and equitable compensation.²⁶⁰ It is interesting to note from the wording of section 21 of the New Expropriation Act that an expropriating authority appears to have no right to refuse to participate in a mediation process. Section 21(4) of the New Expropriation Act also states that a person (which includes an owner or holder) may approach a competent court for relief on any matter relating to its application.²⁶¹

Where a court finds that a provision of the New Expropriation Act has not been complied with, it must make such order as it considers just and equitable having regard to all relevant factors including (i) the nature and extent of the interest of the person who has challenged the conduct in question, (ii) the materiality of the non-compliance, (iii) the stage which has been reached in the expropriation process, and (iv) the interests of other persons which may be affected by the relief ordered.²⁶²

Pertinently for purposes of this Chapter 4, a dispute on the amount of compensation alone shall not preclude the ownership of the property described in a notice of expropriation transferring to the expropriating authority free of any mortgages on that property.²⁶³ This means that a borrower (owner or holder) whose land is subject to an EWC process may still be liable to the relevant lender for the full amount of the mortgage over that land despite that land having been expropriated by the expropriating authority for nil compensation. This also means that even if an owner or holder has disputed the amount of compensation offered by an expropriating authority through a court process and has not interdicted the

²⁵⁹ S 15(3) read with s 21 of the New Expropriation Act.

²⁶⁰ S 21(2) of the New Expropriation Act.

²⁶¹ S 21(3) of the New Expropriation Act.

²⁶² S 21(4) of the New Expropriation Act.

²⁶³ S 21(5) read with ss 9(1)(a) and (d) of the New Expropriation Act.

expropriating authority from taking possession of the land, the owner or holder may be dispossessed of that land pending finalisation of the relevant court process.²⁶⁴

After an explanation regarding which entities comprise "lenders" in South Africa, the legal consequences of the above legislative matrix on lenders are addressed below.

4.3 Lenders

The Banking Association South Africa ("**the Banking Association**") is an industry body representing all 35 banks registered in terms of the Banks Act 94 of 1990, and operating in South Africa.²⁶⁵ The Banking Association has a direct exposure to EWC of R1.6 trillion due to the financing that it currently provides to farmers, property developers, companies and households.²⁶⁶ Therefore, for purposes of this dissertation, although the term "lenders" refers primarily to members of the Banking Association, it also encompasses other private sector lenders within its ambit.

In its submission to the EWC Committee, the Banking Association stated its support for land reform in South Africa that (i) increases agricultural production, (ii) contributes to economic growth and development, (iii) promotes food security and (iv) rectifies historical dispossession and discrimination.²⁶⁷ The Banking Association is, however, opposed to the dilution of existing property rights because property rights and the economic prosperity of a country are inextricably linked as lenders place reliance on property as security for the loans that they grant.²⁶⁸ Members of

²⁶⁴ S 9(2) read with s 8(3)(f) of the New Expropriation Act.

²⁶⁵ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 1.

²⁶⁶ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 14.

²⁶⁷ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 676, JM Pienaar *Land Reform* 2014, 655; The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 2.

²⁶⁸ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 2; N Vorster "Land

the Banking Association are, for example, required under the Banks Act 94 of 1990 and the global bank capital adequacy regulatory framework, known as Basel III, to value assets in their hands at market value.²⁶⁹ South Africa, as a member of the G20, is obliged to implement the Basel regulatory frameworks.²⁷⁰

The introduction of EWC will have a number of legal consequences for lenders. These legal consequences are addressed under three broad categories below, namely (i) systemic risk, (ii) reduced international investment, and (iii) lenders' rights as mortgagees.

4.3.1 Systemic risk

Property rights and the law of contract are the basis of exchange globally and the extension of ownership to capital goods (including land) is the foundation upon which the financial markets in which lenders operate are developed.²⁷¹

If EWC is implemented in its current form, it will negatively impact on the capital adequacy and stability of all lenders in South Africa, which would create a systemic risk for the South African financial sector and, by extension, the country.²⁷² This negative impact can be observed where an expropriating authority has issued a notice of expropriation to an owner or holder of mortgaged land and a lender has no right to deliver a claim for compensation to the expropriating authority to safeguard

and identity in South Africa: An immanent moral critique of dominant discourses in the debate on expropriation without compensation (2019) 75(4) *HTS Theological Studies* 1-9, 3.

²⁶⁹ S 12 of the Banks Act 94 of 1990; Bank for International Settlements *The Basel Framework* available online: https://www.bis.org/basel_framework/index.htm (accessed 5 July 2020); The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 2.

²⁷⁰ S 12 of the Banks Act 94 of 1990; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 2.

²⁷¹ R Ely *Property and contract in their relations to the distribution of wealth* (1 ed 1915), Ch 3 107-108; C Van der Merwe "Things" in *The Law of South Africa* 27 (2 ed 2014), 133; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 9.

²⁷² T Boshoff "Land expropriation without compensation will impact the ordinary citizen – agribusiness update" (2017) 3(12) *FarmBiz* 13, 13; s 12 of the Banks Act 94 of 1990; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 9.

its interests, despite having partially or wholly financed the purchase of that land.²⁷³ For the same reasons, and unless a lender offers to fund an owner or holder's challenge to the expropriation process, a lender has limited control over the content of a claim for compensation and the content of any legal challenge raised by an owner or holder against an EWC process.²⁷⁴ The fact that mortgaged land, which is subject to an EWC process, may be expropriated without regard to any mortgage over that property will directly impact on lenders' capital adequacy and stability and poses a systemic risk to all lenders in South Africa.²⁷⁵

In an attempt to continue to operate, lenders will take steps to protect their businesses, which will include (i) refusing to provide new loans to borrowers where land-based property, like agricultural land, is offered as security for those loans; (ii) reducing the extent of loans that they are prepared to offer compared to land-based property values.²⁷⁶ This would involve a revision of the "maximum loan to property value" ratio that lenders currently use to determine the extent of loans they grant to borrowers. For example, where a property is valued at R2 million and a lender would previously have granted a loan of R1.5 million to a borrower and the loan constituted 75% of the value of the property, the lender may now only grant a loan of R500 000 to that borrower, which is equivalent to 25% of the value of the property; and (iii) increasing borrowing interest rates to compensate for the additional risk to lenders in the event of EWC.

The direct result of lenders taking one or more of the above measures to manage the impact of EWC is that the property market in South Africa would stagnate and property prices across the economy would fall.²⁷⁷ The legal consequence of this is that lenders, specifically the members of the Banking Association, would be required to hold additional capital under the capital adequacy

²⁷³ S 8(1) read with s 18 of the New Expropriation Act.

²⁷⁴ S 8(1) read with 18 of the New Expropriation Act.

²⁷⁵ Ss 9(1)(d) and (2) read with s 8(3)(f) of the New Expropriation Act.

²⁷⁶ T Boshoff "Land expropriation without compensation will impact the ordinary citizen – agribusiness update" (2017) 3(12) *FarmBiz* 13, 13.

²⁷⁷ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 16.

requirements of Basel III read with the Banks Act 94 of 1990. The practical effect of this consequence is that there would be reduced credit in the economy.²⁷⁸

Coupled with the stagnation of the property market, a further legal consequence of EWC for lenders is that they will also seek to renegotiate all existing loan agreements where land-based property was used as security for the loans. The reason for this is that existing loan agreements do not provide for a situation where the land-based property is expropriated without compensation.²⁷⁹

While lenders and borrowers may, under section 117 of the National Credit Act 34 of 2005 ("**National Credit Act**"), agree to change the terms of the agreement in place between them, lenders are, under section 120 of the National Credit Act, prohibited from summarily increasing borrowing interest rates to compensate for the additional risk caused by EWC, unless borrowers are in default on their loans.²⁸⁰ The legal consequence of lenders being unable to summarily increase interest rates to compensate for the increased risk posed by EWC and higher levels of debt write-offs in their hands is that they will either go insolvent or require financial assistance from the South African Reserve Bank.²⁸¹

EWC therefore poses a risk to the survival of the entire financial sector in South Africa and the property market. The systemic risk posed by EWC would both be caused and exacerbated by reduced local and international investment in South African lenders.

4.3.2 Reduced international investment

Continued international investment into land-based property is both essential and critical to job creation and economic growth and, by extension, food security in South Africa.²⁸² If EWC is implemented as envisaged in the Amendment Act and New Expropriation Act, it will be contrary to the international norm that adequate or

²⁷⁸ S 13(1) of the Banks Act 94 of 1990.

²⁷⁹ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

²⁸⁰ Ss 103(1) and 120(1) of the National Credit Act 34 of 2005 ("**National Credit Act**").

²⁸¹ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" dated 30 January 2020 available online <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf>, 16.

²⁸² B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48.

fair compensation should be paid to owners subject to expropriation.²⁸³ This is despite the fact that international research confirms that land reform programmes are exponentially more successful where compensation is paid for expropriations, compared to confiscation or nationalisation.²⁸⁴

Consequently, foreign investors may perceive EWC as a threat to their existing investments in South Africa and a potential threat to any future investments they had considered making in South Africa.²⁸⁵ This, when read with section 13(5) of the Protection of Investment Act 22 of 2015, which provides that international arbitration in respect of disputes regarding foreigner's investments in South Africa may only be resorted to after domestic remedies have been exhausted, will motivate foreign investors to dispose of existing investments and not make additional investments into South Africa, thereby starving South Africa of critical foreign, direct investment.²⁸⁶

The legal consequence of the introduction of EWC read with the Protection of Investment Act 22 of 2015 is that foreign investors will perceive South Africa as attempting to undermine its international, treaty law obligations by invoking its internal law, which is impermissible.²⁸⁷ In addition to being perceived as attempting to undermine its international law obligations, EWC also proposes to undermine all lenders' real rights as mortgagees.

²⁸³ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 16.

²⁸⁴ JM Pienaar *Land Reform* 2014, 651.

²⁸⁵ S McKenzie *et al.* South African investment laws - foreign investors with treaty protection may challenge proposed expropriation of land *Webber Wentzel* available online: <https://www.webberwentzel.com/News/Pages/south-african-investment-laws-foreign-investors-with-treaty-protection-may-challenge-proposed-expropriation-of-land.aspx> (accessed 6 July 2020); The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 4.

²⁸⁶ S 13(5) of the Protection of Investment Act 22 of 2015.

²⁸⁷ S McKenzie *et al.* South African investment laws - foreign investors with treaty protection may challenge proposed expropriation of land *Webber Wentzel* available online: <https://www.webberwentzel.com/News/Pages/south-african-investment-laws-foreign-investors-with-treaty-protection-may-challenge-proposed-expropriation-of-land.aspx> (accessed 6 July 2020); Article 27 of the Vienna Convention on the Law of Treaties, which treaty binds all states regardless of whether they are a party to it or not.

4.3.3 Lenders' rights as mortgagees

Under South Africa's existing property law regime, where a lender has registered a mortgage bond over a consumer's property they have certain rights,²⁸⁸ which include (i) the right to foreclose,²⁸⁹ (ii) a preference on disposal of the property on insolvency of the consumer,²⁹⁰ (iii) that the mortgage cannot be overcome by either alienation or the registration of leases or servitudes over that property as the mortgage attaches to the property,²⁹¹ and (iv) that a consumer may not terminate a mortgage without the lender's prior, written consent unless the principal debt has been discharged.²⁹²

It is clear that a mortgage secures an indebtedness owing by a consumer to a lender and affords a lender certain rights.²⁹³ In terms of the New Expropriation Act, ownership of land subject to expropriation transfers to the expropriating authority free of the encumbrance of the mortgage on that property.²⁹⁴ Although a borrower whose land is subject to an EWC process may still be liable to the relevant lender for the full amount of the mortgage over that land despite that land having been expropriated by the expropriating authority, the lender will be unable to attach and sell that land to discharge the borrower's obligations under the loan agreement because the land has been expropriated without regard to the mortgage over that land.²⁹⁵ The New Expropriation Act therefore seeks to override lenders' existing rights under mortgages.²⁹⁶ This is a dire consequence for lenders, especially in the context of mortgaged land subject to EWC where a just and equitable amount of compensation cannot be agreed on between an expropriating authority and a borrower.²⁹⁷

The legal consequence of mortgaged land being expropriated without compensation by an expropriating authority will also give rise to a repudiation of the loan agreement by the borrower in most instances. The reason for this is that the borrower will stop paying the instalments due under the loan agreement as a result

²⁸⁸ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 69.

²⁸⁹ GF Lubbe "Mortgage and Pledge" in *The Law of South Africa* (2 ed 2008) 17(2), 327.

²⁹⁰ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 70.

²⁹¹ S 1 definition of "mortgage bond" in the Deeds Registries Act 47 of 1937.

²⁹² S 60 of the Deeds Registries Act 47 of 1937.

²⁹³ GF Lubbe "Mortgage and Pledge" in *The Law of South Africa* (2 ed 2008) 17(2), 327.

²⁹⁴ S 21(5) read with ss 9(1)(a) and (d) of the New Expropriation Act.

²⁹⁵ S 21(5) read with ss 8(3)(f), 9(1)(d) and 9(2) of the New Expropriation Act.

²⁹⁶ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 69; s 1 definition of "mortgage bond" in the Deeds Registries Act 47 of 1937; s 60 of the Deeds Registries Act 47 of 1937.

²⁹⁷ S 15(3) read with s 21 of the New Expropriation Act.

of no longer having the benefit of the land in question and, as stated above, the lender is unable to attach and sell that land to discharge the borrower's obligations under the loan agreement.²⁹⁸ Lenders will have to follow a legal process and enforce the contractual remedies at their disposal under the loan agreement, which may include an accelerated repayment plan, the foreclosure of the property, or the calling up of other loans made to the borrower, or sequestration of the borrower, each of which will adversely affect the borrower.²⁹⁹

Where a lender seeks to enforce contractual remedies against a borrower for breach of a mortgage agreement caused by an EWC process, this will give rise to litigation requiring courts to balance competing public policy grounds including the enforceability and enforcement of loan agreements by lenders against a borrower's right to use, enjoy and own property that they pay for.

In this regard, the Constitutional Court has stated that public policy incorporates the need to do simple justice between people and is informed by the value of Ubuntu.³⁰⁰ The Constitutional Court has also held that the principle that people must be bound by the contracts that they enter into (*pacta sunt servanda*) is a moral principle on which the proper functioning of our society is based.³⁰¹

The principle of *pacta sunt servanda*, so the Constitutional Court has held, informs the constitutional values (and rights) of freedom and dignity and that the ability to regulate one's own affairs is essential to freedom and a vital part of human dignity.³⁰² Despite the public policy considerations favouring the enforcement of contractual obligations owing by borrowers to lenders where their mortgaged land is the subject an EWC process,³⁰³ courts may be reluctant to enforce such contractual obligations. The reason for this is simple. The very property (land) over which the

²⁹⁸ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

²⁹⁹ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

³⁰⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57.

³⁰¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 87.

³⁰² *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57.

³⁰³ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

mortgage was obtained by the borrower has been expropriated from them by an expropriating authority without compensation in the public interest.

Even if lenders successfully sequester a borrower's estate to recoup some of the losses that arise where a property over which a mortgage is held is expropriated without compensation, lenders still face the prospect of significant debt write-offs by virtue of (i) being unable to attach and sell the relevant land subject to EWC to discharge the borrower's obligations in terms of the loan agreement, (ii) protracted litigation processes to enforce the contractual obligations of borrowers under loan agreements and (iii) the constant risk that additional land within the ambit of section 12(3) of the New Expropriation Act over which they hold mortgages will be subject to EWC.

In setting out the legal consequences of EWC on lenders, the legal consequences of EWC on borrowers are alluded to. The specific legal consequences of EWC on borrowers are set out below.

4.4 Borrowers

The Amendment Act and New Expropriation Act will, in principle, make a portion of the 8.5 million black, coloured and Indian home owners and 1 million white home owners vulnerable to EWC, potentially undermining a lifetime of endeavour.³⁰⁴ These are the people referred to as "borrowers" in this dissertation.

The legal consequences of EWC insofar as they relate to lenders, as dealt with in paragraph 4.3 above, directly relate to the legal consequences of EWC on borrowers. The legal consequences of EWC on borrowers are therefore similarly addressed under two broad categories below, namely (i) systemic risk and (ii) borrowers' rights as mortgagors.

4.4.1 Systemic risk

As stated above, contractual relations are integral to economic activity and South Africa's economic development is largely dependent on the willingness of people to

³⁰⁴ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 19.

freely and voluntarily enter into contractual relationships with each other.³⁰⁵ Where borrowers are confident that contracts that they enter into to, amongst others, purchase property will be upheld, they will be incentivised to contract with other parties (lenders) to their mutual benefit.

The Constitutional Court recently held in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*³⁰⁶ that it is crucial to economic development in South Africa that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.³⁰⁷

EWC undermines this by threatening to interpose the state into ordinary commercial dealings and destabilise capital adequacy and certainty in the financial sector.³⁰⁸ As lenders in the financial sector struggle to operate in a post-EWC South Africa, they will take drastic steps to protect their businesses. The impact of these steps will be borne by borrowers.

The first legal consequence of EWC on borrowers is that lenders will refuse to provide new loans to borrowers to finance land-based property purchases and, where they do, these loans are likely to be drastically reduced in comparison to what they would have been in a pre-EWC context.³⁰⁹

As there is also no legal duty or obligation in South Africa that compels lenders to grant loans to borrowers to purchase land-based property,³¹⁰ lenders will not take on additional risk and will decline to provide new mortgages to borrowers. Consumer demand for new properties will therefore decrease because borrowers will be unable to finance the acquisition of new properties and, consequently, property

³⁰⁵ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 84.

³⁰⁶ 2020 ZACC 13.

³⁰⁷ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 84.

³⁰⁸ Banks Act 94 of 1990; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 9.

³⁰⁹ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 19.

³¹⁰ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 43.

prices will decrease. Where reduced consumer demand is sustained over a period of time, the property market will stagnate and then begin to contract.

Where lenders have already granted borrowers loans to finance land-based property purchases prior to the commencement of EWC, they will carefully monitor these agreements. If borrowers default on their loans, lenders may use the opportunity to summarily increase interest rates on those mortgages, within the parameters of the National Credit Act, to compensate for the increased risk imposed by EWC.³¹¹ It is also probable that where borrowers default on their loans, lenders will look to enforce acceleration clauses within the ambit of the National Credit Act.³¹² If lenders elect to enforce acceleration clauses against borrowers, the numbers of over-indebted credit consumers within the ambit of the National Credit Act will also drastically increase.³¹³ One of the key consequences of this is that borrowers will be unable to obtain access to short, medium and long-term credit.

Where a borrower feels that they may be over-indebted and unable to satisfy all the obligations under their credit agreements in a timely manner, they may apply to a debt counsellor to be declared over-indebted.³¹⁴ Where a debt counsellor rejects a borrower's application for debt review, that borrower may (with leave of the Magistrates' Court having jurisdiction),³¹⁵ apply to the Magistrates' Court for an order in terms of section 87 of the National Credit Act re-arranging the borrower's obligations by extending the period of a credit agreement, postponing the dates of payments under an agreement or reducing the amount of each loan repayment due by that borrower to a lender.³¹⁶ A further legal consequence of EWC therefore is that the numbers of borrowers applying for debt review and having their affairs re-arranged by Magistrates' Court in terms of the National Credit Act will drastically increase. This will arise as a direct result of lenders strictly enforcing the contractual remedies available to them where borrowers default on loan repayments in respect of land-based property and generally reducing borrower's access to credit to safeguard their own capital adequacy and operations. Additional legal

³¹¹ Ss 103(1) and 120 of the National Credit Act.

³¹² S 66 of the National Credit Act.

³¹³ S 79 of the National Credit Act.

³¹⁴ Ss 79(1), 86(1) and 86(7) of the National Credit Act.

³¹⁵ S 86(9) of the National Credit Act.

³¹⁶ S 86(7)(c)(ii) of the National Credit Act.

consequences of EWC on borrowers arise in relation to borrowers' rights as mortgagors, which are addressed below.

4.4.2 Borrowers' rights as mortgagors

As dealt with in paragraph 4.3.3, under South Africa's existing property law regime, where a lender has registered a mortgage bond over a borrower's property, they have certain rights and the borrower's indebtedness to them is secured.³¹⁷

Where an expropriating authority expropriates the underlying land from a borrower without compensation and the borrower then refuses to honour their obligations under a loan agreement with a lender, the borrower's repudiation of the loan agreement will constitute a breach of contract.³¹⁸

The Banking Association has already obtained preliminary legal opinions confirming that borrowers would still be fully liable for any debt incurred under a mortgage irrespective of any land secured by a mortgage bond being expropriated without compensation from them by an expropriating authority.³¹⁹

The legal consequence of this is that lenders may validly seek to enforce the terms of the loan agreement against the borrower using the contractual remedies available to them where a borrower repudiates the loan agreement. This is underscored by the provisions of the New Expropriation Act, which state that a dispute between a borrower and an expropriating authority regarding the amount of compensation payable in terms of an expropriation process (or EWC process), shall not preclude the ownership of the property in question transferring to the expropriating authority free of the encumbrance of the mortgage.³²⁰

Although there are public policy considerations in the form of the sanctity of contract doctrine, which favour the enforcement of contractual obligations owing by

³¹⁷ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 69; GF Lubbe "Mortgage and Pledge" in *The Law of South Africa* (2 ed 2008) 17(2), 327.

³¹⁸ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

³¹⁹ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

³²⁰ S 21(5) read with ss 9(1)(a) and (d) of the New Expropriation Act.

borrowers to lenders,³²¹ the principles of good faith and fairness also underlie our law of contract.³²² The enforcement of any such contractual rights by lenders would therefore be resisted by borrowers on public policy ground of fairness because they are not benefitting from the use of the land-based property over which the lender's mortgage was registered in the Deeds Registries Act as a result of an EWC process,³²³ which was in the public interest. Borrowers may, in the context of EWC, therefore justifiably approach courts to balance these competing interests in a particular factual scenario.

Our courts have consistently recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness and, more recently, Ubuntu) when assessing the terms and the enforcement of contracts.³²⁴ The values of fairness, reasonableness and justice inform public policy in South Africa. Ubuntu, which is recognised as an independent constitutional value in South Africa encompasses the values of fairness, reasonableness and justice and also informs public policy.³²⁵ These values also inform the operation of substantive law of contract and the development of the law of contract to give effect to the spirit, purport and objects of the Bill of Rights.³²⁶

If the courts do not agree with borrowers' fairness-based arguments against the enforcement of loan agreements, the legal consequences for borrowers subject to an EWC process will be (i) drastically increased levels of insolvency and (ii) increased over-indebtedness within the ambit of the National Credit Act, which will reduce borrowers' access to credit.³²⁷

A further consequence of EWC, if implemented in its current form, is that it will undermine food security in South Africa in two respects, namely (i) lenders will be

³²¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 87.

³²² *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC), para 45.

³²³ S 1 definition of "mortgage bond" in the Deeds Registries Act 47 of 1937.

³²⁴ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 80.

³²⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), para 71; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71.

³²⁶ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, paras 71 and 76.

³²⁷ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 70; The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

unable and/or unwilling to extend credit to farmers to fund their operations, which will decrease the supply of food and (ii) borrower's will have constrained resources to purchase the limited food that is available. The impact of EWC on food security in South Africa is addressed below.

4.5 Food security

Section 27(1)(b) of the Constitution provides that everyone present in South Africa has the right to have access to sufficient food.³²⁸ Section 27(2) of the Constitution simultaneously acknowledges that the right to access to sufficient food is only possible to the extent that there are the available state resources to realise it and mandates the South African government to take positive measures to ensure that everyone present in South Africa has adequate access to food.³²⁹ In terms of Statistics South Africa's 2017 Household Survey, approximately 21.3% (approximately 12 million) South Africans experience food insecurity.³³⁰ This means that as at 2017, 21.3% of households in South Africa were are unable to physically obtain access to adequate food supply.³³¹

The slow pace of land reform, which EWC hopes to overcome, is often cited as one of the key obstacles preventing the progressive realisation of food security in South Africa, particularly for black South Africans.³³² It is also often argued that one of the best approaches to assist people to obtain food security is by improving their access to agricultural land.³³³ However, the South African government's estimates indicate that approximately 90% of agricultural land which has been restituted is now completely unproductive.³³⁴ This undermines the argument that improving access to

³²⁸ The Constitution, s 27(1)(b); B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 47.

³²⁹ The Constitution, s 27(2); B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 47.

³³⁰ B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48; Statistics South Africa "General Household Survey" (2017) Statistical Release P0318 available online: <http://www.statssa.gov.za/publications/P0318/P03182017.pdf>, 6.

³³¹ B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48; Statistics South Africa "General Household Survey" (2017) Statistical Release P0318 available online: <http://www.statssa.gov.za/publications/P0318/P03182017.pdf>, 6.

³³² B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48.

³³³ B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 57.

³³⁴ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61.

agricultural land for many black South Africans will provide them with food security.³³⁵ Furthermore, South Africa is already 65% urbanised and is likely to be 70% urbanised by 2030.³³⁶ The Panel's recommendation that small-scale, subsistence farming be implemented across South Africa stands in stark contrast to the reality that most South Africans already live in cities and that more people are expected to move cities in the coming years.³³⁷ The Panel's emphasis on subsistence farming and recommendation that water rights in South Africa need to be re-allocated away from commercial farmers to subsistence farmers also ignores the trend in South Africa of people moving to urban areas and away from rural, farming areas.³³⁸

If the South African government introduces EWC in its current form and does not drastically amend its policy to hold EWC beneficiaries accountable for the maintenance of their newly obtained agricultural land,³³⁹ it is likely that the trend for once commercially viable agricultural land to fall into dilapidation and disuse will continue and it will also impoverish and disenfranchise many South Africans by forcing them to become subsistence farmers.³⁴⁰

³³⁵ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 61; B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 47.

³³⁶ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 11.

³³⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 94; A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 11.

³³⁸ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 95; A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 11.

³³⁹ See paragraph 3.2 regarding the creation of an "accountability obligation" regarding EWC beneficiaries.

³⁴⁰ HJ Moolman "Expropriation without compensation: chaos without direction – good governance" (2018) 4(3) *FarmBiz* 37; A Jeffery "Reaching the promised land: an alternative to the report of the

The consequence of this is that South Africa's food security would be undermined as commercial farms are broken up into smaller, subsistence farms and subsistence farmers are unable to produce sufficient output to meet South Africa's growing food needs due to a lack of scale and lack of expertise.³⁴¹ Those remaining commercial farmers would also have to curtail their operations (and ability to meet South Africa's food needs) as lenders refuse to advance credit to them to maintain and expand their operations because of the threat of EWC. This would directly undermine everyone living in South Africa's right to have access to sufficient food,³⁴² which is a justiciable right.³⁴³ Therefore, if the justiciable right to access to food (i.e. food security) is undermined by EWC, the courts will be approached to hold the South African government accountable and to enforce the right to access to food within available state resources.

4.6 Conclusion

If EWC is implemented in its current form, it poses a systemic threat to the South African financial sector.³⁴⁴ It will also, when read with the Protection of Investment Act 22 of 2015, be perceived as an attempt by South Africa to undermine its international, treaty law obligations.³⁴⁵

In an attempt to continue to operate in a post-EWC context, lenders will take drastic steps to protect their businesses, which will cause the property market to stagnate and, later, contract.³⁴⁶ Borrowers will experience this stagnation as an inability to finance land-based property purchases.³⁴⁷

presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 11.

³⁴¹ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 56.

³⁴² S 27(1)(b) of the Constitution.

³⁴³ B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48, 60.

³⁴⁴ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 9.

³⁴⁵ Article 27 of the Vienna Convention on the Law of Treaties, which treaty binds all states regardless of whether they are a party to it or not.

³⁴⁶ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution

Lenders will also move swiftly, within the ambit of the National Credit Act, to renegotiate the terms of existing loan agreements with borrowers as no loan agreements currently provide for a situation where land-based property is expropriated without compensation.³⁴⁸ Those lenders who are unable to favourably renegotiate existing loan agreements and sufficiently increase interest rates on their products to compensate for the increased risk and debt write-offs, which EWC will cause them, face insolvency or the prospect of requiring financial assistance from the South African Reserve Bank, which may be unable to assist.

Although there are strong public policy grounds supporting lenders' ability to enforce loan agreements against borrowers in respect of properties subject to EWC, such enforcement will mostly result in the borrower concerned being declared insolvent and lenders having to write off significant amounts of bad debt.³⁴⁹

The primary legal consequences of EWC on borrowers will be increased rates of insolvency and over-indebtedness. This will arise as a direct result of lenders strictly enforcing the contractual remedies available to them where borrowers default on loan repayments in respect of land-based property that may be subject to EWC.

Preliminary legal opinions obtained by the Banking Association indicate that borrowers would still be fully liable for any debt incurred under mortgages irrespective of that land being expropriated without compensation from them.³⁵⁰ These legal opinions confirm the position set out in the New Expropriation Act which states that where a borrower's only dispute with an EWC process is the fact that nil

Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 16.

³⁴⁷ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 19.

³⁴⁸ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

³⁴⁹ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

³⁵⁰ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

compensation has been offered to them by an expropriating authority, the land in question may still be expropriated from them without regard to the mortgage. The borrower would still be liable to the relevant lender for the full amount of the mortgage over that land despite that land having been expropriated by the expropriating authority without compensation.³⁵¹ In those circumstances, the lender will also be unable to attach and sell that land in execution of the debt due by the borrower because the land would have been expropriated without regard to the mortgage over that land.³⁵²

If the courts do not find the enforcement of the loan agreements by lenders against borrowers, whose property has been expropriated without compensation, unfair, the legal consequences for borrowers will be increased levels of insolvency,³⁵³ increased over-indebtedness and reduced access to credit as well as decreased food security.³⁵⁴

The right of access to food (i.e. food security) is a justiciable right under the Constitution.³⁵⁵ A further consequence of EWC, if implemented as currently envisaged, is that it will undermine food security in South Africa. Lenders will be unable and/or unwilling to extend credit to farmers to fund their operations as their land is at a high risk of being expropriated without compensation and borrowers will have constrained resources to purchase the dwindling supplies of food that are available.

If EWC, like all existing land restitution programmes in South Africa to date, results in viable commercial agricultural land falling into dilapidation and disuse, food insecurity in South Africa will increase.³⁵⁶ If this happens, the courts will be

³⁵¹ Ss 9(1)(d) and (2) read with s 8(3)(f) of the New Expropriation Act.

³⁵² S 21(5) read with ss 8(3)(f), 9(1)(d) and 9(2) of the New Expropriation Act.

³⁵³ *Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit*, NO 1928 AD 66 (A), 70.

³⁵⁴ The Banking Association South Africa "Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

³⁵⁵ B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 48, 60.

³⁵⁶ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LL.D thesis University of the Western Cape, 61; B Nkrumah "Opening Pandora's box: a legal analysis of the right to food in South Africa" 2019 *De Jure* 47-64, 47.

approached to hold the South African government accountable for EWC and asked to enforce the right to access to food within available state resources.³⁵⁷

The taxation related legal consequences of EWC are dealt with in Chapter 5 below and affect the availability of state resources to ensure the progressive realisation of food security and all other socio-economic rights contained in the Bill of Rights.

³⁵⁷ Ss 27(1)(b) and 27(2) of the Constitution.

Chapter 5: Tax consequences of EWC

5.1 Introduction

The explanatory memorandum on the objects of the Amendment Act states that there will be no financial implications for the state should it introduce EWC.³⁵⁸ As the tax consequences of EWC, which are dealt with in this chapter, demonstrate, this is incorrect. The tax consequences of EWC will have a financial implication for the South African Revenue Service and, by extension, the National Revenue Fund and South Africa.³⁵⁹

A brief overview of how taxation works in South Africa precedes the discussion regarding the tax consequences of EWC.

5.2 Overview

South Africa's common law imposes no liability for tax.³⁶⁰ The obligation to pay tax in South Africa and the quantification of the tax liability that a person (both natural and juristic) has is determined exclusively by various pieces of tax legislation.³⁶¹ The common law, as developed and applied by the courts, also provides many of the most important tax concepts and principles, which are not defined in the legislation, but without which the legislation could not function effectively.³⁶²

The key pieces of legislation that apply to the tax consequences of EWC are set out briefly below.

The Income Tax Act 58 of 1962 ("**Income Tax Act**") establishes a person's liability for income tax (normal tax), donations tax, withholding tax and turnover tax, as applicable.³⁶³ A percentage of a taxpayer's capital gains are, in terms of section 26A of the Income Tax Act, included in a taxpayer's income for a particular

³⁵⁸ Memorandum on the objects of the Constitution Eighteenth Amendment Bill, 2019.

³⁵⁹ S 213 of the Constitution defines the National Revenue Fund as the fund into which all money received by the national government must be paid, unless excluded by an Act of Parliament.

³⁶⁰ AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

³⁶¹ AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

³⁶² AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

³⁶³ AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

year of assessment in terms of the provisions of the Eighth Schedule to the Income Tax Act ("**Eighth Schedule**").

The Value-added Tax Act 89 of 1991 ("**VAT Act**") provides for the taxation of the supply of goods and services and the importation of goods into South Africa.³⁶⁴

The Transfer Duty Act 40 of 1949 ("**Transfer Duty Act**") consolidates the laws relating to the levying of a duty on the value of any property transferred over a particular threshold amount.³⁶⁵ Property for the purposes of the Transfer Duty Act is defined broadly to mean any land in South Africa and anything attached to that land and includes any real right in land.³⁶⁶

The Tax Administration Act 28 of 2011 ("**Tax Administration Act**") provides for the effective and efficient collection of "tax", which is broadly defined to include a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act such as the Income Tax Act and VAT Act.³⁶⁷

The Income Tax Act, VAT Act, Transfer Duty Act and Tax Administration Act as well as the conduct of all officials of the South African Revenue Service ("**SARS**") in implementing these and other pieces of tax-related legislation are all subject to the Constitution.³⁶⁸

In summary, a liability for tax in South Africa is imposed by statute, including the Income Tax Act, VAT Act and Transfer Duty Act.³⁶⁹ Section 5(1) of the Income Tax Act, for example, states that income tax (referred to as normal tax in the Income Tax Act) shall be paid annually by natural and juristic persons for the benefit of the National Revenue Fund in respect of taxable income that they receive or that accrues to them.

Tax residents of South Africa are taxed on their worldwide income, including capital gains, whereas non-residents are only taxed in South Africa on income and certain capital gains sourced in South Africa or deemed to be from a source within

³⁶⁴ S 7 of the Value-added Tax Act 89 of 1991.

³⁶⁵ S 2(1) of the Transfer Duty Act 40 of 1949.

³⁶⁶ S 1 definition of "property" in the Transfer Duty Act 40 of 1949.

³⁶⁷ S 1 definition of "tax" and "tax Act" read with s 2 of the Tax Administration Act 28 of 2011.

³⁶⁸ Ss 2 and 33 of the Constitution; AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

³⁶⁹ AP de Koker *Silke on South African income tax* February 2020 - SI 66, 1.1.

South Africa.³⁷⁰ A natural person will be tax resident in South Africa where that person is ordinarily resident in South Africa or if the requirements of the physical presence test set out in the Income Tax Act are met.³⁷¹ A juristic person will be tax resident in South Africa where that person is incorporated, established or formed in South Africa or is effectively managed from a place within South Africa.³⁷² Any person deemed to be exclusively a resident of another country in terms of an agreement for the avoidance of double taxation entered into between South Africa and that other country, is specifically excluded from qualifying as a resident under the Income Tax Act.³⁷³ Having provided a brief overview of how taxation works in South Africa, the key tax consequences of EWC are now addressed.

5.3 Tax consequences

Section 25(4)(b) of the property clause in the Constitution states that property is "not limited to land". Property, as defined in the property clause, may therefore include movable and immovable property as well as tangible and intangible property.³⁷⁴ The rights in the property clause therefore include the right to "no expropriation of property without compensation".³⁷⁵

The introduction of the Amendment Act and New Expropriation Act, which abolish the right to not expropriate property without compensation, would arguably give rise to the extinction of that "asset", as defined in the Eighth Schedule, in all South African property owners' hands by operation of law.³⁷⁶

³⁷⁰ S 1 definitions of "capital gain", "gross income" and "resident" (paras (a) and (b)), ss 7, 8 and 9 of the Income Tax Act 58 of 1962 ("**Income Tax Act**"); para 3 of the Eighth Schedule to the Income Tax Act.

³⁷¹ *CIR v Kuttel* 1992 54 SATC 298, defines the term "ordinary resident" to mean the place where a person normally resides apart from temporary or occasional absences; s 1 definition of "resident" para (a) of the Income Tax Act.

³⁷² S 1 para (b) definition of "resident" of the Income Tax Act.

³⁷³ S 1 definition of "resident" of the Income Tax Act.

³⁷⁴ G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 1, 609; JM Pienaar *Land Reform* 2014, 180.

³⁷⁵ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

³⁷⁶ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

Under the provisions of the Income Tax Act, the extinction of an "asset" would usually give rise to either a capital gain or a capital loss in a taxpayer's hands.³⁷⁷ A taxpayer's capital gain or capital loss for any year of assessment is calculated with reference to:

- (i) the definition of an asset under the Income Tax Act;
- (ii) the disposal of that asset;
- (iii) the proceeds, if any, received or accrued in respect of the disposal of that asset; and
- (iv) the base cost of the asset disposed of.

Where one or more of the elements ((i) - (iv)) is missing, no capital gain or loss arises in a taxpayer's hands.

Under the current wording of the Amendment Act and New Expropriation Act, all owners of land subject to EWC may, in principle, be able to claim a capital loss in their annual tax returns in the year of assessment when EWC commences. This analysis, however, ignores two important issues (i) what happens when an actual EWC process occurs in respect of a particular piece of land and (ii) the dispute resolution process envisaged under the New Expropriation for owners and an expropriating authority to agree on a just and equitable amount of compensation for any expropriation.³⁷⁸

Therefore, to the extent necessary, each element ((i) - (iv)) is addressed below insofar as it relates to the extinction of the right to "no expropriation of property without compensation" in owners' hands, when an actual expropriation without compensation occurs and if a just and equitable amount of compensation for an expropriation is subsequently agreed between an expropriating authority and an owner.

5.3.1 Asset

Paragraph 1 of the Eighth Schedule defines an "asset" as including a right or interest of whatever nature to or in property.³⁷⁹

An asset, as defined, would therefore include a right to "no expropriation of property without compensation". An asset, as defined, would also include the right

³⁷⁷ Paras 3 and 4 of the Eighth Schedule to the Income Tax Act.

³⁷⁸ See paragraph 4.2; ss 14(1), 15(1), 18(1) and 21 of the New Expropriation Act.

³⁷⁹ Para 1 definition of "asset" of the Eighth Schedule to the Income Tax Act.

or interest of an owner in a piece of land falling within the ambit of section 12(3) of the New Expropriation Act.

The dispute resolution process envisaged in the New Expropriation Act regarding the amount of compensation payable for an expropriation has no impact on whether a thing qualifies as an "asset" or not in terms of the Income Tax Act.

As the right to "no expropriation of property without compensation" and the right or interest in a piece of land both constitute an asset in an owner's hands, the first requirement to determine whether a capital gain or loss arises in an owner's hands as a result of an EWC process is met.

5.3.2 Disposal

Paragraph 11(1) of the Eighth Schedule defines a disposal for capital gains tax purposes as any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset, and expressly includes the expropriation of an asset.³⁸⁰

If the right to no expropriation of property without compensation, which constitutes an asset for capital gains tax purposes, is abolished by the Amendment Act, this would constitute the extinction of that asset in South African property owners' hands and a disposal for purposes of the Eighth Schedule would arise.³⁸¹

Similarly, the actual expropriation of a piece of land by an expropriating authority under the New Expropriation Act would also qualify as a disposal in terms of paragraph 11(1)(a) of the Eighth Schedule as an expropriation is specifically listed as a way in which an asset may be disposed of in terms of the Income Tax Act.³⁸²

The dispute resolution process envisaged in the New Expropriation Act regarding the amount of compensation payable for an expropriation has no impact on whether a disposal of an asset has taken place.

The second requirement to determine whether a capital gain or loss arises in an owner's hands as a result of an EWC process is also met.

³⁸⁰ Para 11(1)(a) of the Eighth Schedule to the Income Tax Act.

³⁸¹ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

³⁸² S 8(3)(f) read with ss 9(1)(a) and (d) of the New Expropriation Act.

5.3.3 Proceeds

In the context of EWC, the amount of "proceeds" received by owners for purposes of paragraph 32 of the Eighth Schedule regarding the extinction of their right to no expropriation of property without compensation would be nil.³⁸³ The reason for this is that on commencement of the Amendment Act, no owners will be compensated for the fact that their right to no expropriation of property without compensation has been disposed of within the meaning of the Income Tax Act.

The amount of "proceeds" received by a specific owner for purposes of paragraph 32 of the Eighth Schedule regarding the actual expropriation of their property without compensation would similarly be nil.³⁸⁴

Where an owner and expropriating authority agree on a just and equitable amount of compensation for the expropriation through the dispute resolution process envisaged in the New Expropriation Act, the amount agreed on would constitute the proceeds for purposes of paragraph 32 of the Eighth Schedule.³⁸⁵

Therefore, the third requirement to determine whether a capital gain or loss arises in an owner's hands as a result of an EWC process is also met.

5.3.4 Base cost

The final requirement to determine if a capital gain or loss arises in any owner's hands pertains to the base cost of the asset in question in terms of paragraph 20 of the Eighth Schedule.

It is suggested that an acceptable valuation of the base cost of the right to no disposal of property without compensation would be the value of all property owned prior to the commencement of the Amendment Act that may be subject to EWC, less the value of all property post commencement of the Amendment Act that may be subject to EWC.³⁸⁶ In simple terms, the base cost of the right to no disposal of property without compensation would be approximately equal to the value of all property owned by taxpayers immediately before the commencement of the Amendment Act that may be subject to EWC.³⁸⁷

³⁸³ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

³⁸⁴ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

³⁸⁵ Ss 14(1), 15(1), 18(1) and 21 of the New Expropriation Act.

³⁸⁶ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

³⁸⁷ D Davis *et al.* "Expropriation without compensation" (2018) 67(7) *The Taxpayer* 121-122, 122.

This analysis applies equally to the situation where property is actually expropriated from a specific owner in terms of an EWC process and an owner and expropriating authority agree on a just and equitable amount of compensation in respect of the land to be expropriated. The current value of property in South Africa that will be affected by EWC is estimated to be in excess of R7 trillion.³⁸⁸

Although base cost of the right to no expropriation of property without compensation for all property owners in South Africa may be valued at R7 trillion, the base cost regarding the actual expropriation of particular pieces of land for no compensation can only be determined on a case-by-case basis. Nevertheless, the final requirement to determine whether a capital gain or capital loss arises in an owner's hands as a result of an EWC process is also met.

5.3.5 Unintended tax consequences

In terms of paragraph 4 of the Eighth Schedule, a capital loss in respect of the disposal of an asset is determined by calculating the difference between the proceeds received or accrued in respect of that disposal and the base cost of that asset - all as defined above in the context of EWC.

The extinction of the right to no expropriation of property without compensation in owners' hands would, in principle, give rise to a capital loss equal to the value of all property in their hands that may be subject to EWC prior to the commencement of the Amendment Act, which is currently estimated to be R7 trillion in total in South Africa. The effect of the above is that, in terms of the current wording of the Amendment Act and New Expropriation Act, all owners of land subject to EWC may, in principle, be able to claim a significant capital loss in their annual tax returns in the year of assessment when EWC commences. Although theoretically correct, this scenario is unlikely to arise in practice, because it is impractical and would be lobbied against by SARS due the impact it would have on SARS' already compromised annual tax collections.

In practice therefore, it is more probable that owners will only seek to claim the capital loss that they may be entitled to when they are subjected an actual EWC

³⁸⁸ The Banking Association South Africa *"Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)* 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 3.

process. Where an owner is subjected to an actual EWC process, a capital loss equal to value of the specific land in their hands that may be subject to EWC prior to the commencement of the Amendment Act would arise.

Where the dispute resolution process in terms of the New Expropriation Act results in an expropriating authority and an owner agreeing on a just and equitable amount of compensation,³⁸⁹ a capital loss will only arise in an owner's hands where the amount of just and equitable compensation is less than the base cost of the land that has been expropriated. If the amount of just and equitable compensation is higher than the base cost of the land that has been expropriated, a capital gain will arise in the owner's hands in terms of paragraph 3 of the Eighth Schedule. A percentage of the owner's capital gains would then need to be included in their income for a particular year of assessment in terms of the provisions of the Eighth Schedule and in accordance with their applicable marginal rate of tax.³⁹⁰

The legal consequence of this is that most owners subject to an EWC process would realise a significant capital loss in their hands, which they may then use to set off against all future capital gains that arise from the disposal of other assets in their hands. Practically, this means that the wealthiest property owners in South Africa who have numerous properties and other investments may derive a significant and unintended tax benefit from EWC.

5.4 Conclusion

The explanatory memorandum on the objects of the Amendment Act incorrectly states that there will be no financial implications for the state should it introduce EWC.³⁹¹ EWC will have a financial implication for South Africa and all property owners in South Africa who own land within the meaning of section 12(3) of the New Expropriation Act.

In principle, in terms of the current wording of the Amendment Act and New Expropriation Act, all owners of land subject to EWC may be able to claim a significant capital loss in their annual tax returns in the year of assessment when EWC commences. However, it is more probable that owners will only seek to claim

³⁸⁹ S 21(2) of the New Expropriation Act.

³⁹⁰ S 26A of the Income Tax Act.

³⁹¹ Memorandum on the objects of the Constitution Eighteenth Amendment Bill, 2019 (i.e. the Amendment Act for purposes of Chapters 3 - 5 of this dissertation).

any capital loss that they may be entitled to when a property that they own is the subject of an actual EWC process, which they may then use to set off against all future capital gains that arise from the disposal of other assets in their hands. In its current form therefore, EWC will give rise to an unintended capital gains tax benefit for many wealthy South Africans who own numerous properties and other investments.

Chapter 6: Conclusion

South Africa's colonial and apartheid past saw the majority of its people dispossessed of their land.³⁹² The persistently high levels of inequality, poverty and unemployment and muted economic growth have all drawn the need for land reform in order to maintain peace and stability in South Africa into sharp focus.³⁹³

The magnitude of the fact that EWC requires an amendment to the property clause in the Bill of Rights in the Constitution cannot be over-stated. Due to EWC's far-reaching legal consequences, some of which have been addressed in this dissertation, EWC will face robust and sustained legal attacks, particularly once it has been promulgated. Practically, where the President refers the Amendment Bill to the Constitutional Court to consider before it is promulgated, its decision would likely prevent a number of potential constitutional challenges from arising.³⁹⁴ Assuming that EWC is found to be constitutional, it will have a number of legal consequences on common law property rights and the law of contract.

Ownership is, together with the law of contract, one of the basic, common law concepts underpinning private law in South Africa and forms the basis of commercial exchange globally.³⁹⁵ Ownership, like any other right, is not absolute.³⁹⁶ Despite the entitlement to consume and destroy the property, there is no entitlement to neglect property.³⁹⁷ The Constitutional Court has also accepted that the right to property

³⁹² G Muller, R Brits, ZT Boggenpoel & JM Pienaar *Silberberg and Schoeman's: The Law of Property* (6 ed 2019), 677; JM Pienaar *Land Reform* 2014, 655.

³⁹³ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 13; Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), iv.

³⁹⁴ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), para 28.

³⁹⁵ R Ely *Property and contract in their relations to the distribution of wealth* (1 ed 1915) Ch 3, 107-108; C Van der Merwe "Things" in *The Law of South Africa* 27 (2 ed 2014), 133.

³⁹⁶ *Van der Merwe and Another v Taylor NO and Others* 2007 (11) BCLR 1167 (CC), para 26.

³⁹⁷ N Sibanda "Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership" (2019) 35(2) *SAJHR* 129-146, 135.

entails important duties to use, manage and look after that property responsibly.³⁹⁸ Therefore, if the South African government hopes to implement EWC and maintain food security in South Africa, it will, out of necessity, have to impose an accountability obligation on EWC beneficiaries to productively utilise the land given to them. This accountability obligation may resemble the positive duty imposed on beneficiaries of mineral rights in terms of section 17(5) read with section 19(2)(b) of the Mineral and Petroleum Resources Development Act 28 of 2002.

In order for EWC beneficiaries to be legally obliged to productively use the land awarded to them,³⁹⁹ they would require an incentive to do so. The manifestation of this incentive would be the imposition of a duty of support on the South African government to support EWC beneficiaries post restitution, which is akin to the duty of support (maintenance) in a family law context.

The legal consequences arising from EWC in the context of the law of contract, both in relation to a contractual duty of support and more generally, will necessitate a further enquiry into the social policy and normative content of how courts adjudicate contractual disputes on the basis of public policy.⁴⁰⁰ Of particular concern is that the commencement of EWC will jeopardise owners' ability to contract freely to dispose of their property and where they do contract to dispose of their property it will be from a weakened bargaining position. The legal consequence of this is that while owners may agree to restrictive and one-sided contractual terms in order to sell their properties, those terms may upon closer scrutiny be found to be repugnant to public policy in South Africa and struck down.⁴⁰¹

In an attempt to continue to operate in a post-EWC context, lenders who enter into contracts with borrowers to finance property purchases will take drastic steps to protect their capital adequacy and operations. These steps will cause the property market to stagnate and property prices across the economy to fall.⁴⁰² Borrowers will

³⁹⁸ *Monhunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), para 60.

³⁹⁹ N Sibanda *The social obligation norm as the framework for land restitution in South Africa* (2017) LLD thesis University of the Western Cape, 12.

⁴⁰⁰ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 16.

⁴⁰¹ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 ZACC 13, para 71; *Barkhuizen v Napier* 2007 (5) SA 323 (CC), paras 70 - 71.

⁴⁰² The Banking Association South Africa *"Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution*

experience this stagnation as an inability to finance land-based property purchases.⁴⁰³

To the extent permitted under the National Credit Act, lenders will also seek to renegotiate all existing loans with borrowers as no loan agreements currently provide for a situation where land-based property is expropriated without compensation.⁴⁰⁴

Although there are strong public policy grounds supporting lenders' ability to enforce loan agreements against borrowers in respect of properties which have been expropriated without compensation, such enforcement will mostly result in borrowers being declared insolvent and lenders having to write off significant amounts of bad debt.⁴⁰⁵ Similarly, the primary legal consequences of EWC on borrowers will be significant increases in the rates of insolvency and over-indebtedness with an associated decrease in the access to short, medium and long-term credit. A key reason for the dire legal consequences of EWC on lenders and borrowers is that property may expropriated by an expropriating authority from a borrower for nil compensation without regard to any mortgage over that property,⁴⁰⁶ which means that lenders are unable to attach and sell that property to discharge borrowers' contractual obligations to them.

Under the current wording of the Amendment Act and New Expropriation Act, most owners of property that may be subject to EWC will, in principle, realise a significant capital tax loss in their hands upon commencement of EWC. However, it is more probable that owners will only seek to claim any capital loss that they may be entitled to when a property that they own is the subject of an actual EWC process. Owners may then use that capital loss to set off against all future capital gains that

Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 16.

⁴⁰³ A Jeffery "Reaching the promised land: an alternative to the report of the presidential advisory panel on land reform and agriculture" *South African Institute of Race Relations* (September 2019) available online: <https://irr.org.za/reports/atLiberty/liberty-reaching-the-promised-land-an-alternative-to-the-report-of-the-presidential-advisory-panel-on-land-reform-and-agriculture> (accessed 6 July 2020), 19.

⁴⁰⁴ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 13.

⁴⁰⁵ The Banking Association South Africa "*Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill)*" 30 January 2020 available online: <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 6 July 2020), 31.

⁴⁰⁶ S 21(5) read with ss 8(3)(f), 9(1)(d) and 9(2) of the New Expropriation Act.

arise from the disposal of other assets in their portfolio. Ironically, it is wealthy landowners in South Africa who have numerous properties and other investments that will benefit most from a capital loss arising as a result of one or more of their properties being the subject of an EWC process.

6.1 Final remark

The outbreak of the COVID-19 pandemic and the South African government's response to it have again focussed attention on the question of inequality in South Africa, which land ownership forms part an integral part of.⁴⁰⁷

Land reform will not succeed without the co-operation and involvement of current landowners.⁴⁰⁸ Consequently, the revised land policy intended to give practical effect to EWC will need to be clearly articulated, well-administered and with strict oversight measures to prevent the rampant corruption and ineptitude that has plagued (and continues to plague) all land reform processes.⁴⁰⁹

The variety and extent of the key legal consequences that will arise if EWC is introduced in South Africa in its current form should give those agitating for its implementation pause for reflection, especially against the backdrop of the COVID-19 pandemic's dire impact on South Africa's economy, which is estimated to be between R300 billion and R500 billion or 10% of South Africa's gross domestic product.⁴¹⁰ Those agitating for the rapid implementation of EWC should also take note that even if EWC passes constitutional muster, is properly implemented and free from corruption, it will still be many years before a working model of EWC will start to benefit the sons and daughters of the soil in South Africa.

⁴⁰⁷ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), v.

⁴⁰⁸ JM Pienaar *Land Reform* 2014, 653.

⁴⁰⁹ Final Report of the Presidential Advisory Panel on land reform and agriculture (4 May 2019) available online: <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000> (accessed 6 July 2020), 12.

⁴¹⁰ Statement by President Cyril Ramaphosa on Further Economic and Social Measures in response to the COVID-19 epidemic, 21 April 2020 available online: <http://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-further-economic-and-social-measures-response-covid-19> (accessed 6 July 2020).

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