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Date: 17 April 2020

AN OFFER: PORTION 406 OF THE FARM DRIEFONTEIN 85 IR

1. INTRODUCTORY REMARKS

1.1. I refer to the settlement agreement between the parties which compelled the City of Ekurhuleni Metropolitan Municipality ("CEMM") to make an offer pertaining to the expropriated property, namely portion 406 of the farm Driefontein 85 IR ("property"). The settlement agreement concluded between the parties is attached hereto and marked as **Annexure ("CEMM1")**. It was agreed that an offer will be made by the CEMM on or before 17 April 2020 and that at an appropriate time, either party is entitled to make the aforementioned settlement agreement an order of court.

1.2. In compliance with the settlement agreement and the expropriation regulatory framework exploited fully hereunder, the CEMM records herein its offer for just and equitable compensation informed by substantive and yet non-exhaustive grounds. In making the offer for just and equitable compensation, the CEMM adopted the following structure:

1.2.1. Brief factual background surrounding the Notice of Expropriation;

1.2.2. Owner's offer for compensation through a written statement dated 8 April 2019;

1.2.3. CEMM's response to the owner's offer;

1.2.4. CEMM's substantive grounds for offering a just and equitable compensation; and

1.2.5. Conclusion.

2. BRIEF FACTUAL BACKGROUND SURROUNDING THE NOTICE OF EXPROPRIATION

2.1. On 6 February 2019, the CEMM issued a Notice of Expropriation (No 1 – 2019) expropriating portion 406 of the farm Driefontein 85 IR ("expropriated property") owned by Business Venture Investments No. 900 (Pty) Ltd ("owner"). The property was for all intents and purposes expropriated on 30 April 2019, and thus by operation of law, ownership passed from the owner (Business Venture Investments No. 900 (Pty) Ltd) to the CEMM on the same date. The CEMM has been in lawful possession and ownership of the property since the date of expropriation. The original title deed for the expropriated property was delivered by the owner to the CEMM. A copy of the title deed is attached hereto and marked as **Annexure ("CEMM 2")**.

2.2. Of importance, the Notice was issued in terms of the laws of general application, namely Section 9(3) of the Housing Act 107 of 1997 ("Housing Act") read with the relevant provisions of the Expropriation Act 63 of 1975

("Expropriation Act"). The Notice is attached hereto and marked as **Annexure ("CEMM3")**. Although the legality of the Notice is not in dispute, it is important to briefly outline that the Notice was issued in compliance with the provisions of Section 9 of the Housing Act. On 21 November 2018, the CEMM obtained prior approval from the MEC of Housing to expropriate the property. The MEC's requisite approval is attached hereto and marked as **Annexure ("CEMM4")**. Further, the Notice was published within the required six month-period of the date on which the permission of the MEC was granted.

2.3. The CEMM's offer for just and equitable compensation and the property owner's offer for compensation is so far apart that the expropriated property could not be purchased through negotiations in the normal course.

3. THE OWNER'S OFFER THROUGH A WRITTEN STATEMENT DATED 8 APRIL 2019

3.1. Since the offer for compensation was not contained in the Notice, the owner was advised of its rights in terms of Section 9 of the Expropriation Act 63 of 1975 ("Expropriation Act"). Section 9 of the Expropriation Act provides that "an owner whose property has been expropriated in terms of this Act, shall within 60 days from the date of the notice in question deliver a written statement indicating – (*inter alia*) (b) if no such Compensation was offered, the amount claimed as compensation by him and how much of that amount represents each of the respective amounts contemplated in Section 12(1)(a)(i) and (ii) or (b) and full particulars as to how such amounts are made up".

3.2. On 8 April 2019 and as advised in the Notice, the owner duly submitted its written statement in terms of Section 9 (1)(b) of the Expropriation Act. The

Section 9(1)(b) written statement is attached herein and marked as **Annexure ("CEMM5")**.

3.3. In terms of paragraphs 8 – 12 of the owner's written statement, the owner claims compensation for the amount in the sum of R30 050 000.00 **(Thirty Million and Fifty Thousand Rand)**.

4. THE CEMM'S RESPONSE TO THE OWNER'S OFFER

4.1. In response to the owner's offer, the CEMM records herein that it rejects the owner's claim and is not prepared to pay the claimed amount as compensation, as it is of the view that the said amount does not constitute a just and equitable compensation envisaged in Section 25 of the Constitution, 1996.

4.2. The provision of Section 10(4) of the Expropriation Act (offers of compensation) provides that "if an owner has in terms of Section 9(1) indicated what amount is claimed by him as compensation and has furnished the relevant information in terms of Section 9 and the Minister is not prepared to pay that amount as compensation, the Minister shall within a reasonable period offer him an amount as compensation and indicate how much of that amount represents each of the respective amounts contemplated in Section 12(1)(a)(i) and (ii) or (b) and furnish full particulars as to how such amounts are made up.

4.3. There can be little doubt that the provision of Section 9(3) of the Housing Act, being the expropriating legislation, empowers the City Manager in his/her capacity as the Chief Executive Officer or the Accounting Officer to make the

offer for compensation as contemplated in Section 10 (4) of the Expropriation Act, as the word Minister must be construed as referring to the Chief Executive Officer of the relevant Municipality.

4.4. For reasons fully stated hereunder, the CEMM offers Nil compensation being the sum in the amount of R0.00 (Zero Rand). Consequently, the CEMM shall provide hereunder substantive and yet non-exhaustive grounds for making an offer of Nil compensation as a just and equitable compensation.

4.5. In terms of Sections 10(4) and 12(1) of the Expropriation Act read with Section 25 of the Constitution 1996, the CEMM offers Nil compensation being the sum in the amount of R0.00 ("Zero Rand").

5. CEMM'S SUBSTANTIVE GROUNDS FOR OFFERING NIL COMPENSATION AS A JUST AND EQUITABLE COMPENSATION

5.1. As a starting point, it is of immense importance to provide the CEMM's position in respect of matters raised in the owner's offer for compensation dated 8 April 2019. In doing so, the CEMM states as follows:

5.1.1. The CEMM notes the information provided by the owner at paragraphs 9 – 12 of the written statement. The CEMM's view in respect of the said paragraphs is that it is fully in agreement with the owner that indeed the property is vacant. As a matter of fact, the property has been vacant for over 30 years;

5.1.2. Further, the CEMM is fully in agreement with the owner that there are no improvements on the property. The CEMM's position is that there has not been any improvement on the property for over 30 years;

5.1.3. The CEMM disputes the owner's version that there is a security fence surrounding the property. The CEMM's position is that there are remnants of what used to be a security fence scattered around the property;

5.1.4. The CEMM is fully in agreement with the owner that the property is currently unoccupied. The CEMM's position is that the property has not been occupied for over 30 years;

5.1.5. The CEMM accepts the owner's view that there is no lease agreement entered into with regard to any part of the property. The CEMM's position is that the property, being zoned for farming, has not generated any commercial activity, particularly agriculture – related activity in the past 30 years;

5.1.6. The CEMM is fully in agreement with the owner's view that the property has not been sold and no person has any right or claim to take transfer of the property. The CEMM's records show that the property has not changed any ownership since 2005 and that the property has been owned by interrelated entities since 1887 to date. Further particulars with regard to the history of the property shall be provided hereunder when dealing with the history of acquisition and use of the property under the Section 25(3) of the Constitution, 1996; and

5.1.7. The CEMM accepts the owner's view that there is no existing builder's lien over the expropriated property.

5.2. It shall be evident hereunder as to why the above mentioned factors are a critical – mass in the determination of Nil compensation as a just and equitable compensation contemplated in Section 25 of the Constitution.

5.3. With regard to Section 12(1)(a)(i) of the Expropriation Act, the CEMM's decision is that this factor relates to market value and as such it shall be dealt with simultaneously under the Section 25(3) analysis. The provision of Section 12(1)(a)(i) requires the CEMM to offer the amount which the property would have realized if sold on the date of the notice in the open market by a willing Seller to a willing Buyer. CEMM's position is that Section 25 of the Constitution enjoins it to offer just and equitable compensation and not market value or a willing buyer to a willing seller price. It is trite that the Constitution is the supreme law and thus a cardinal point of reference when dealing with Expropriation.

5.4. However, even at this stage, it is important to mention that the property has never been sold at a market value. And admittedly by the owner at paragraph 4 of the written statement, the property was not purchased at a true market value during 2005 when it was purchased by the owner from an interrelated entity within a related group of entities. Further, the CEMM shall illustrate herein and in due course, and at an appropriate forum that the property has never been sold at a market value, particularly when it was sold in 1997 to an interrelated entity within a group of related entities. In this regard, the value for the property to be relied upon could be R1 (One Rand) or R1 million or Zero Rand depending on the underlying speculative motives within the interrelated group of entities. As explained, this factor shall be dealt with under the Section 25(3) analysis because ultimately, the compensation which must be paid is not market value or what could be determined as a price between

a willing seller and willing buyer, but it must be just and equitable, taking into account the below detailed Section 25(3) analysis.

5.5. Further, Section 10(4) requires CEMM to assess a respective amount in terms of Section 12(1)(b), being an amount to make good any actual financial loss caused by the expropriation. The CEMM's position as articulated hereunder is that the owner suffered no financial loss as a result of the expropriation. Again, the CEMM takes the position that the owner's claimed loss of R50 000 is Nil, taking into account that any amount paid by CEMM to the owner including the claimed actual loss must be just and equitable, and as shown hereunder, the just and equitable amount is Nil.

6. ANALYSIS OF SECTION 25 OF THE CONSTITUTION IN MAKING JUST AND EQUITABLE COMPENSATION

6.1. It is critical to import the entire provisions of Section 25 of the Constitution. Section 25 of the Constitution provides as follows:

"25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

(2) Property may be expropriated only in terms of law of general application -

(a) For a public purpose or in the public interest; and

(b) subject to compensation, 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.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this Section:

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6)."

6.2. *Section 25(1): No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

6.2.1. Although expropriation is a form of deprivation, the CEMM's position is that it's Notice must be evaluated in terms of Section 25(2) which deals directly with expropriation and also an appropriate approach that has been recently adopted by our courts in dealing with an analysis of Section 25 when dealing with expropriations. As a matter of law, the CEMM has taken over ownership of the owner's property through expropriating it and permanently taking dominion over it, and it has not caused deprivation in the sense that it imposed restrictions

on the owner's right in terms of imposing zoning laws, nuisance laws, health and safety laws or some form of regulations.

6.2.2. However, to an extent that it may be argued that there is a grey area in that the expropriation in question constitutes a deprivation for purposes of Section 25(1), the CEMM maintains that it is compliant in that such deprivation was conducted in terms of the laws of general application, namely the provisions of the Housing Act and the Expropriation Act. Having regard to the current case law on Section 25 of the Constitution, it is trite that both the Housing Act and the Expropriation Act are indeed laws of general application.

6.2.3. Further, both laws, as read in conjunction with the provisions of Section 25 of the Constitution, do not permit for arbitrary deprivation as they pursue a legitimate public interest and public purpose such as the provision of social housing for the historically marginalized, poor and the most vulnerable in society. Further, the said pieces of legislation permit for some form of compensation for the deprivation albeit such compensation must be just and equitable having regard to the provisions of Section 25 of the Constitution. Even at this stage, it is important to state that .the contention on whether the expropriation in question also constitutes a deprivation under Section 25(1) is a complex legal question that will be dealt with at an appropriate forum. The CEMM's position is that it's expropriation falls squarely within Section 25(2).

6.3. *Section 25(2): Property may be expropriated only in terms of law of general application for public purpose or in the public interest subject to agreed compensation or compensation approved by a court.*

6.3.1. As mentioned above and as informed by the current constitutional jurisprudence, both the Housing Act and the Expropriation Act constitute laws of general application. The expropriation is compliant with Section 25 (2) in that it was done in terms of Section 9 of the Housing Act 107 of 1997 read with the Expropriation Act 63 of 1975.

6.3.2. The expropriation is for a public purpose and it is in the public interest in that the CEMM expropriated the property in order to fulfill its statutory obligations to develop, amongst others, social housing projects as provided for in terms of Section 9 of the Housing Act.

6.3.3. In a nutshell, it is in the public interest or for a public purpose for the CEMM to have expropriated the property in question in order to fulfill its obligations in terms Section 9 of the Housing Act and more importantly, to give effect to the constitutional rights in the Bill of Rights, particularly the rights in terms of Section 10 (Dignity), Section 24 (Environment), Section 26 (Housing), Section 27 (Water) and any other interrelated right in respect of the poor, marginalized and vulnerable people who are residing in 123 different informal settlements (123 squatter camps), and condensed in 11 900 settlement units (Household) within the jurisdiction of the CEMM. Further, the CEMM has over 43 112 poor people living in the City-owned hostels and has a backlog of housing in excess of 427 802.

6.3.4. With regard to compensation, there is no agreement with regard to the amount of compensation payable and it is improbable that an agreement would be reached given the sum of (**Thirty Million Rand**) required by the owner and the sum of Nil compensation offered by

the CEMM. The owner's position is that thirty million is fair market value between willing buyer and willing seller whereas the CEMM's position is that Nil compensation constitutes a just and equitable compensation as contemplated in Section 25 of the Constitution. Consequently, the question of compensation is to be approved by court.

7. ***STRIKING AN EQUITABLE BALANCE BETWEEN THE PUBLIC INTEREST AND THOSE OF THE LANDOWNER: SECTION 25(3) FACTORS INCLUDING ALL OTHER RELEVANT CIRCUMSTANCES WHICH INCLUDE FACTORS NOT SPECIFICALLY MENTIONED IN SECTION 25(3) OF THE CONSTITUTION***

7.1. The provision of Section 25 (3) requires that the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected (Landowner), having regard to all relevant circumstances, including Section 25(3)(a – e).

7.2. Prior to dealing with factors in Section 25(3), it is opportune for the CEMM to outline that its understanding of Section 25(3) is as follows:

7.2.1. That Section 25(3) is non – exhaustive or that it is open –ended. And as such, the CEMM is entitled to consider all relevant circumstances including factors which are not listed in Section 25(3) (a – e). In other words, the CEMM is entitled to show all factors and circumstances which are relevant and, which have informed it in arriving at Nil compensation;

7.2.2. That Section 25(3) does not limit itself to arithmetic formulae or quantitative quantum but that the provision requires that consideration and substantive value judgment be given to acute socio – economic conditions or lived experiences of those who are landless and subjected to inhuman living conditions in informal settlement as well as the CEMM's constitutional obligations to ameliorate the conditions of those vulnerable and landless;

7.2.3. That Section 25(3) must be considered equally and cumulatively or with everything else, without granting any specific factor the status of a super or superior factor, overwhelming factor, decisive factor or an entry factor; and

7.2.4. That in order to satisfy the constitutional standard in Section 25(3) in offering Nil as a just and equitable compensation, the CEMM's decision must be informed by striking an equitable balance between the public interest and those of the owner, and that relevance is decisive in what ought to be included or excluded as a consideration.

7.3. Section *25(3)(a):the current use of the property*

7.3.1. The current use of the property means exactly that, current use. The property is approximately 33.684 ha and is zoned for agriculture or farming. The property is vacant and has been vacant for over 30 years. The land use of the property has not changed for the last 30 years or more. Since acquiring ownership in 2005, the owner has not used the property. And admittedly, at paragraph 9 of the owner's written statement, the owner has not made any investments or improvements in the property.

7.3.2. In this regard, the CEMM is of the strong view that in light of the property being vacant for over 30 years and there being no investments or improvements on the property, the equitable balance favours the public interest over those of the owner. And thus, in taking a cumulative effect of all the relevant factors including current use, it is just and equitable to pay Nil compensation for the property.

7.4. Section *25(3)(b): the history of acquisition and the use of the property*

7.4.1. The record from the deeds office shows that on 26 November 1887, Mr. William Knight ceded the property as part of a large property to the Witwatersrand Gold Mining Company ("Gold Mining Company") with registration no: 1910/000032/06. The Cession documents as provided by the deeds office are attached hereto and marked as **Annexure ("CEMM 6")**.

7.4.2. The deeds records show that in 1997, a related entity to the Gold Mining Company was registered as "THE TRUSTEES FOR THE TIME BEING OF THE WITWATERSRAND GOLD MINING REALISATION TRUST N.O. IT 2417/97 ("Gold Mining Realization Trust"), and immediately thereafter, the property being part of a larger property namely THE REMAINING EXTENT of the farm DRIEFONTEIN 85, measuring in extent of 1282, 8256 ha, was purchased by the Gold Mining Realization Trust from the Gold Mining Company under deed of transfer no:T21249/99. The copy of the deeds office's record is attached hereto and marked as **Annexure ("CEMM7")**.

7.4.3. However, what is staggering about the sale of the property between the aforementioned interrelated entities is that the property was sold for the sum of R51 million **("Fifty-One Million Rand")** and the price included the sale of 14 other properties listed as follows:

7.4.3.1. Remaining Extent of the farm Driefontein 85, Registration Division I.R., Province of Gauteng;

7.4.3.2. Remaining Extent of Portion 1 of the farm Driefontein 87, Registration Division I.R., Province of Gauteng;

7.4.3.3. Remaining Extent of Portion 4 (a portion of Portion 1) of the farm Driefontein 87, Registration Division I.R., Province of Gauteng;

7.4.3.4. Remaining Extent of Portion 9 (a portion of Portion 1) of the farm Driefontein 87, Registration Division I.R, Province of Gauteng;

7.4.3.5. Remaining Extent of Portion 71 (a portion of Portion 1) of the farm Driefontein 87, Registration Division I.R, Province of Gauteng;

7.4.3.6. Portion 72 (a portion of Portion 4) of the farm Driefontein 87, Registration Division I.R. Province of Gauteng;

7.4.3.7. Remaining Extent of Portion 134 (a portion of Portion 1) of the farm Driefontein 87, Registration Division I.R. , Province of Gauteng;

7.4.3.8. Portion 6 of the farm Vogelfontein 84, Registration Division I.R., Province of Gauteng;

7.4.3.9. Portion 38 (a portion of Portion 5) of the farm Olifantsvlei 327, Registration Division I.R., Province of Gauteng;

7.4.3.10. Erf 3457 Piet Potgietersrus Extension 3 Township, Registration Division K.S., Northern Province;

7.4.3.11. Erf 5155 Middelburg Township, Registration Division J.S., Province of Mpumalanga;

7.4.3.12. Portion 1 of Erf 100 Groblersdal Township, Registration Division J.S., Province of Mpumalanga;

7.4.3.13. Portion 2 of Erf 357 Groblersdal Township, Registration Division J.S., Province of Mpumalanga;

7.4.3.14. Portion 3 of Erf 357 Groblersdal Township, Registration Division J.R., Province of Mpumalanga;

7.4.3.15. Erf 198 Newtown Township, Registration Division I.R., Province of Gauteng;

7.4.3.16. Erf 200 Newtown Township, Registration Division I.R., Province of Gauteng;

7.4.3.17. Erf 555 Brenton, in the Local Transitional Council of Brenton, Division of Knysna, Province of the Western Cape; and

7.4.3.18. Erf 88456 Cape Town at St James in the Municipality of Cape Town, Province of the Western Cape;

7.4.4. There is a compelling suspicion that when the property was sold together with the other properties listed herein above, the sale was not between the willing seller and willing buyer but was between interrelated entities and was for speculative purposes and was hopelessly below market value. Should the need arise, the CEMM will bring a property specialist that would assist the Court in showing that even in 1997, the property in question and together with other properties were collectively sold below market value and for speculative purposes and/or restructuring purposes.

7.4.5. It appears that after 1997, there was subdivision of THE REMAINING EXTENT of the farm DRIEFONTEIN 85, measuring in extent of 1282, 8256 ha, as a portion of this property became PORTION 406 of the farm Driefontein 85 measuring 33,6847 ha, and it is this 33,6847 that was transferred by the Gold Mining Realization Trust to the owner ("Business Venture Investments No.900 (Pty) Limited") on 23 September 2005 under title deed no: T4960/2005 attached hereto and marked as **Annexure ("CEMM8")**.

7.4.6. The owner purchased the expropriated property for the sum of R1 000 000 **(One Million Rand)**. Admittedly by the owner, this amount was not a true market value due to the transaction being concluded amongst the interrelated entities and solely for restructuring purposes. It is important to note that the owner was only incorporated on 24 April 2004 under registration number 2004/010990/07, a period of a year prior to the property being sold for restructuring purposes.

7.4.7. At paragraph 4 of the owner's written statement, it is stated that "The Property was transferred to our client from a related entity within the same group of Companies as part of a restructuring of the group. A Purchase price of R1 Million was allocated to the transfer, although this value did not reflect the true market value of the property at the time".

7.4.8. It is CEMM's view that even if it could be disputed that the 1997 transaction was not for speculative purposes, there is no doubt that the 2005 transaction between Gold Mining Realisation Trust and Business Venture Investments (interrelated entities) was for speculative purposes.

7.4.9. With regard to the use of the property, although the property was historically zoned for farming or agricultural purposes and it remains zoned as such, it was used for mining operations including being used as a mining dump site. At least from 1997 up to date, the property has been vacant and there has been no development or any substantive investment on the property.

7.4.10. Since 2005, the property remained vacant despite change of ownership. In this regard, it is important to reiterate the contents of the owner's written statement that the property has been vacant, no improvements on the property, the property is unoccupied, the property did not derive any commercial income in the form of a lease and that there is no *lien* over the property. It simply follows that the property is being held in abeyance for speculative purposes.

7.4.11. Should the need arise, the CEMM intends to provide the services of an expert to assist the Court seized with determining just and equitable compensation by giving a full account of the history of this property in the context of mining operations and its impact within the jurisdiction of CEMM. Further, the expert will show that not much commercial value could be derived out of the property given the context of the property dynamics in the area in question.

7.4.12. In 2018, the owner's developers lodged an application for land use for purposes of developing a proposed COMET Extension 8 Township, after a period of over 13 years since taking over the property. At the time of expropriation, the owner's application was not finalized due to an Appeal by sections of the residents opposing the owner's land use application. At the time of expropriation, the owner had requested an extension to submit plans for the development in light of the pending Appeal. The owner's letter is attached hereto and marked as **Annexure ("CEMM 9")**.

7.4.13. The CEMM's view is that use of the property is use of the property and nothing less, and that is not future based. And a just and equitable determination of Nil compensation must be freed from unwarranted influences of speculative forces such as potential for future township development which will greatly distort the value of what constitutes just and equitable compensation.

7.4.14. With regard to Section 25(3)(b), CEMM's view is that considering the history of acquisitions of the property between interrelated companies at below market value and for speculative purposes and/or restructuring purpose, the protracted period of vacancy of the

property and lack of any improvements or investments and lack of any commercial activity or commercial income being derived from the property, requires that the equitable balance between the public interest and those of the owner be struck in favour of the public interest to an extent that compensation be payable at Nil taking into account the cumulative effect of all factors in Section 25(3).

7.5. Section 25(3)(c): The market value of the property

7.5.1. Prior to dealing with the factor of the market value of the property, the CEMM deems it imperative to reiterate what it understands about the constitutional concept of the market value of the property as envisaged in Section 25:

7.5.1.1. That market value of the property is not an entry point or superior factor or overwhelming factor, decisive factor to any of the factors in Section 25(3) including other relevant factors or circumstances not specifically mentioned in the said provision given the open – endedness of the subsection;

7.5.1.2. That market value of the property is to be considered together with all other factors including those that require value judgment and are not arithmetic in nature or easily determinable in rand value but involves a substantive consideration of social justice and the lived experiences of those who are landless and subjected to inhuman living conditions in informal settlement; and

7.5.1.3. That what Section 25 requires is the payment of just and equitable compensation and not market value. And that such a determination inherently requires striking an equitable balance (not arithmetic or formulaic balance) between the public interest and those interests of the landowner via a cumulative analysis of all relevant factors.

7.5.2. With regard to the market value of the property, at least since 1997, there is no evidence of the property ever being sold at a market value and if anything, there is an admission by the owner that the property has been sold below the market value for speculative purposes and/or restructuring purposes among interrelated entities.

7.5.3. The CEMM is of the view that the market value is really an amount similar to the amount contemplated in Section 12 (1)(a)(i) of the Expropriation Act, being the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer. However, in an event of expropriation such as this case in point, what is payable is not market value or a willing seller willing buyer value but a just and equitable compensation.

7.5.4. The CEMM's position is that it is improbable to arrive at a fair market value of the property in question. CEMM notes that there are no legally entrenched rules of valuation for market value but the practice has been to use the comparable sales method as the most acceptable norm or measure of market value. This method entails the identification, analysis and application of recent comparable sales involving similar properties in the general proximity of the subject property.

7.5.5. In determining market value for this property, the obvious challenge that arises is that historically, particularly in the last 20 years, the property has not been sold at a market value but was sold below market value and for speculative purposes among interrelated entities. The property has not been used to generate any commercial activity as it has remained vacant for a period of 20 years. The property is zoned for agricultural use and it has not been used for the said purpose for over 30 years or even more. In this regard, there are serious challenges to compare the property in question with other properties due to the uniqueness of the said property given the aforesaid factors.

7.5.6. The CEMM disputes the owner's value of thirty million as market value. The CEMM is of the view that in assessing any market value, the following factors need to be considered:

7.5.6.1. Historical usage of the property as a mine dump;

7.5.6.2. Protracted vacancy;

7.5.6.3. No improvements on the property;

7.5.6.4. No history of sales on market value in the recent past and that the property is being held and/or transacted for speculative purposes;

7.5.6.5. There has been no real commercial value being derived from the property for the protracted period; and

7.5.6.6. The challenges that arise in comparing this property with other properties through a comparable sale model in order to arrive at market value.

7.5.7. The CEMM is of the view that the aforementioned factors cannot be ignored in trying to attach some form of market value to the property, and that equitable balance favours the interest of the public in ensuring that the owner cannot derive benefit out of a market value of the property when it never purchased the property at market value in the first place.

7.5.8. CEMM's position is that in striking an equitable balance between the public interest and those of the owner, the equitable balance favours the public interest for Nil compensation in instances where market value has never been a factor in the purchase of the property.

7.6. Section 25(3)(d): The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property

7.6.1. The CEMM is currently investigating evidence to demonstrate that the Apartheid State or the post 1994 Democratic State made any direct State investment or any subsidies in the acquisition and beneficial capital improvement of the property.

7.7. Section 25(3)(e): The purpose of the expropriation

Fulfillment of Constitutional and Legislative obligations

7.7.1. The purpose of the expropriation is to give effect to its obligations in terms of Section 9 of the Housing Act and more importantly to give effect to the constitutional rights in the Bill of Rights, particularly the rights in terms of Section 10 (Dignity), Section 24 (Environment), Section 26 (Housing), Section 27 (Water) and any other interrelated right in respect of the poor, marginalized and vulnerable people who are residing in 123 different informal settlements (123 squatter camps), and condensed in 11 900 settlement units (Household) within the jurisdiction of the CEMM. Further, the CEMM has over 43 112 poor people living in the City- owned hostels and has a backlog of housing in excess of 427 802.

7.7.2. In terms of Section 2 of the Housing Act, the CEMM must amongst others undertake the following:

7.7.2.1. respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution;

7.7.2.2. give priority to the needs of the poor in respect of housing development;

7.7.2.3. ensure that housing development –

7.7.2.3.1. provides a wide choice of housing and tenure options as is reasonably possible;

7.7.2.3.2. is economically, fiscally, socially and financially affordable and sustainable;

7.7.2.3.3. encourage and support individuals and communities, including, but not limited to, co – operatives, associations and other bodies which are community based, in their efforts to fulfil their own housing needs by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community;

7.7.2.3.4. promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;

7.7.2.3.5. promote the process of racial, social, economic and physical integration in urban and rural areas;

7.7.2.3.6. promote the effective functioning of the housing market while levelling the playing fields and taking steps to achieve equitable access for all to that market;

7.7.2.3.7. implement measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;

7.7.2.3.8. ensure higher density in respect of housing development to ensure the economical utilization of land and services;

7.7.2.3.9. ensure the meeting of special housing needs, including, but not limited to, the needs of the disabled; and

7.7.2.3.10. ensure the provision of community and recreational facilities in residential areas.

7.7.3. Further and in terms of Section 9(1) of the Housing Act, the CEMM is obligated to undertake the following:

7.7.3.1. As part of its integrated development, planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to –

7.7.3.1.1. ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

7.7.3.1.2. ensure that the conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

7.7.3.1.3. ensure that services in respect of water, sanitation, electricity, roads, stormwater

drainage and transport are provided in a manner which is economically efficient;

7.7.3.1.4. set housing delivery goals in respect of its area of jurisdiction;

7.7.3.1.5. identity and designate land for housing development;

7.7.3.1.6. create and maintain a public environment conducive to housing development which is financially and socially viable;

7.7.3.1.7. promote the resolution of conflicts arising in the housing development process; and

7.7.3.1.8. initiate plan, co – ordinate , facilitate, promote and enable appropriate housing development in its area of jurisdiction.

7.7.4. Further, the purpose of the expropriation is to avail the property to enhance amongst others, the CEMM's meaningful participation in the NATIONAL HOUSING PROGRAMME: UPGRADING OF INFORMAL SETTLEMENTS, wherein through the exploitation of the expropriated property, the CEMM aims to transform the lives of people living in informal settlement by ensuring that, on a progressive basis, such people have access to permanent and dignified residential structures with secure tenure, provision of sustainable and adequate sanitary facilities including portable water and energy supply.

7.7.5. Further, the CEMM aims to exploit the expropriated property in order to bring to a progressive realization the development of health and securing safe living environments through the sustainable provision of scalable, affordable municipal engineering infrastructure to the residents in order to restore the dignity of the urban poor, vulnerable and marginalized people living in informal settlement.

7.7.6. Further, the expropriated property is well located for the use of social residential township (social housing) particularly for higher density due to its proximity to major routes, easy access to public transport. In this regard, expropriation aims to provide social housing for people to reside in proximity to economic opportunities such as work, education and better health care in an era where pandemics such as the Coronavirus may have fatal effects in areas such as informal settlement.

Alleviate the Continuing unsustainable Financial Obligations from the CEMM

7.7.7. Further, the CEMM is of the view that the purpose of expropriating this property for housing development must be understood in the context where there is unavailability of suitable land due to the legacy of extensive mining in the area and substantial amount of dolomitic land which is unsuitable for housing development, particularly multi-story development given the lack of suitable land.

7.7.8. Furthermore, the purpose of the expropriation is to ensure the provision of permanent social housing settlement in order to alleviate

the CEMM's ongoing financial burden in providing temporary sanitary, water and other services at the 123 informal settlements.

7.7.9. Currently, the CEMM's public finances have been strained by the provision of temporary services to informal settlements, and the cost could be significantly reduced when the expropriated property is fully exploited for the development of social housing. The CEMM is unable to provide permanent infrastructure in dolomitic areas where some of the informal settlements are based and also in areas where it does not own the land.

7.7.10. In 11 900 settlement units (a unit being a single household), the CEMM is spending R5 712 000, 00 **(Five Million Seven Hundred and Twelve Thousand Rand)** per month at a rate of R48 **(Forty-Eight Rand)** per unit, which amounts to the sum of R68 544, 000.00 **(Sixty-Eight Million Five Hundred and Forty-Four Thousand Rand)** per annum. The aforesaid amount, with the necessary inflation adjustment, has been spent by the CEMM going back many years.

7.7.11. In addition, the CEMM is currently incurring a further cost of R35 million per month for the provision of emergency services of water and sanitation in informal settlement, which cost equates to over R420 million **(Four Hundred and Twenty Million Rand)** per annum. The said amount has been spent going back many years.

7.7.12. The CEMM finds itself in a desperate situation wherein its expenditure on temporary services to informal settlement is in excess of half a billion rand per annum, simply because there is inadequate

suitable land to construct permanent and sustainable social housing development to accommodate the residents of informal settlement.

7.7.13. In this regard, as long as there is unavailability of land, the CEMM will continue to incur the aforementioned cost of temporary services given that the CEMM is constitutionally obligated to provide alternative accommodation and temporary services even in cases of evictions of people residing in informal settlements. The CEMM's peremptory obligation is informed by the case of ***Occupiers of Erven 87 288 Berea v De Wet No and Another 2017(5) 346 (CC)***, which was decided on 8 June 2017.

7.7.14. The CEMM is currently receiving a huge number of requests for alternative accommodation on a monthly basis, and the alternative accommodation is accompanied by the obligation to provide temporary services at a huge cost to the Municipality and ratepayers. In recent times, the CEMM was forced to incur an unbudgeted amount of over twenty million rand in respect of an eviction matter involving eviction of residents of informal settlement, namely "Glen Marikana". The lack of suitable land within the jurisdiction of the CEMM has resulted in a situation wherein those with properties such as the owner in question, exploit the CEMM for each square meter in order to make obscene profits.

7.7.15. As already mentioned, CEMM shall avail an expert to explain the unique circumstances of CEMM with respect to unavailability of land due to the peculiar history of mining, dumping sites and dolomitic nature of land in the area, in order to assist in determining just and equitable compensation for the property in question. The lack of

suitable property within the CEMM is to be considered in the context of the owner being in possession of unused land for a protracted period and having kept such land for speculative purposes and/or restructuring purposes for long period of time and the area deriving no commercial value from the property for the longest of times.

7.7.16. In considering the purpose of expropriating the property in question, the CEMM had regard to the following legal issues confronting it:

7.7.16.1. That there is a clear public interest in housing the landless and the marginalized currently residing in informal settlements;

7.7.16.2. That the expropriated property is being expropriated for a public purpose, namely provisions of social housing to residents of informal settlements;

7.7.16.3. That any monies required by owners of unused properties kept for speculative purposes, ultimately emanate from the public purse which in CEMM's case is already strained by the cost of half a billion rand yearly expenditure on the provision of temporary services in informal settlement. And as such, it would not be just and equitable to compensate owners of unused land held for speculative purposes handsomely, the object of Section 25 is not to reward property speculators;

7.7.16.4. That a Bill of rights value judgment is to be made when dealing with the purpose of the expropriation in determining what is a just and equitable compensation;

7.7.16.5. That the ratepayers and the CEMM's finances must not be frustrated by unjustifiable compensation claims in respect of unused land held for speculative purposes;

7.7.16.6. That the purpose of expropriation must be viewed in the context of the CEMM's social and political history which created an acute socio – economic disaster of unequal spatial development planning and the creation of the urban poor residing in informal settlement due to landlessness;

7.7.16.7. It is the purpose of expropriation which ultimately guards against the question of just and equitable compensation being left to market forces, particularly in respect of compensation for unused land held for speculative purposes;

7.7.16.8. That giving effect to the purpose of expropriation being the provision of social housing, regard must be had to the gross inequality in relation to health and access to land resources by the residents of informal settlements and their continuing disastrous conditions;

7.7.16.9. That the lack of well-situated land to provide urban settlement for the resident of informal settlement within the CEMM remains a stark legacy of Apartheid planning

and discrimination, and the untold damage created by the legacy of mining operations in the area;

7.7.16.10. CEMM's view is that the purpose of expropriation enquiry is not mathematical or formulae based but rather it is value based considering the purpose to be achieved by the expropriation and substantive issues of social justice and the fulfillment of rights in the Bill of rights; and

7.7.16.11. The application of any sort of arithmetic calculation model is not applicable when dealing with the purpose of expropriation because by its nature, the purpose of expropriation is a counter – weight to market value or market forces. The enquiry into the purpose of expropriation is fact based or lived experienced based and not arithmetic based.

7.7.17. Therefore, in considering an equitable balance between the public interest and those of the landowner, the equitable balance favours the public interest considering the purpose of expropriation being to give effect to the fundamental rights in the Bill of rights, Housing Act, National Housing Programme for Informal Settlement, reduction of the CEMM's financial burden of over half a billion per annum in the provision of temporary services to over 11900 settlement units in 123 different informal settlement and addressing over 400 000 backlog in housing.

7.7.18. The equitable balance favours the public interest taking into account the unavailability of suitable land for housing due to legacy of Mining

operations and Apartheid spatial development patterns, and that the expropriated land has not been used for a protracted period of time and it has been held for speculative purposes. It is in the aforesaid context that the CEMM's decision that the purpose of expropriation warrants an offer of Nil compensation.

7.8. THE OTHER RELEVANT FACTORS

7.8.1. The CEMM is of the view that Section 25(3) envisages that beyond the Section 25(3)(a – e) factors, there must be a consideration of all relevant circumstances and that Section 25(3) is open – ended in that any relevant factor is to be considered when determining what constitutes just and equitable compensation. That the additional factors are to be considered in a manner that satisfies the constitutional standard in Section 25(3) by striking an equitable balance between the public interest and those of the landowner. In other words, the CEMM's approach is that relevance determines inclusion or exclusion of any additional factor.

Debt owed to the CEMM by the Owner in respect of rates and taxes

7.8.2. In this regard, the CEMM is of the view that there is a debt that was incurred by the expropriated property prior to the expropriation. As a result, the CEMM has included the sum of R 3 358 101.71 **(Three Million Three Hundred and Fifty-Eight Thousand One Hundred And One Rand Seventy-One Cents)** being the debt owed. The amount is in respect of the following accounts:

7.8.2.1. Account No 220 935 7167 (R3 284 448.65); and

7.8.2.2. Account No 220 975 1971 (R73 653.06).

7.8.3. The aforesaid accounts have not been paid by the owner in respect of the expropriated property for over many years. In this regard, the owner has failed to comply with its legal obligations as a responsible owner of the property.

Potential Expenditure to be incurred by the CEMM in making the land suitable for constructing a social housing development

7.8.4. As already mentioned, CEMM is faced with a unique problem of unsuitability of land due to historical legacies of mining operations and a plethora of mining dump sites in the area. Any land expropriated by the CEMM has to be subjected to extensive geo – technical studies in order to ensure its suitability. Within the jurisdiction of the CEMM, it is really a matter of turning the desperate and worse situation and making the best out of what is there in terms of available land due to the scarcity of suitable land.

7.8.5. The property in question was historically used as a Mining dump site despite it being zoned for agricultural purposes. Prior to expropriating the property, the CEMM conducted desktop feasibility studies which revealed the following:

7.8.5.1. Costs will be incurred by CEMM in respect of Geo – hydrological studies to determine existing levels of soil and groundwater pollution;

7.8.5.2. Costs will be incurred by CEMM in respect of toxicity of chemicals contained in slime dams and the potential impact on proposed social development housing;

7.8.5.3. Improvement on land use since the expropriated property falls within a radio – active gold mine residue area;

7.8.5.4. That near surface soils may be either compressible or expansive, which need to be taken into consideration for the foundation structures and road pavement layers;

7.8.5.5. That housing structures must be designed to accommodate the potential seismic loading associated with the Area;

7.8.5.6. That Mine dumps and slimes buffer make the eastern portion of the property unsuitable for development; and

7.8.5.7. That mitigating measures such as proper surface drainage or localized sub – soil drainage measures will need to be implemented to accommodate potential problems associated with shallow seepage or ground water levels.

7.8.6. The Feasibility Report is attached hereto and marked as **Annexure "CEMM10"**. At this stage, the CEMM will be commencing with the necessary Geo – technical studies in order to quantify the cost to ensure the suitability of the expropriated property for social housing. The relevant report detailing potential expenditure by the CEMM shall

be made available in due course in order to assist in determining a just and equitable compensation in respect of the property. The CEMM's position is that whatever cost revealed by the envisaged report must be included as a relevant factor in making an equitable balance between the public interest and the interests of the owner.

8. In Conclusion, the CEMM believes its offer of Nil compensation is just and equitable and was arrived at after having shown that the equitable balance favours the interest of the public, especially after taking into consideration all of the above mentioned grounds and which grounds are non – exhaustive, and will be supplemented at an appropriate forum.

9. In the event that the owner rejects this offer, the owner is at liberty to refer this matter to Court in accordance with the applicable legislative regime for the Court to finally determine what is just an equitable compensation.

Kind Regards

DR M I MASHAZI
CITY MANAGER

17/04/2020
DATE