

Overview of the IRR's Alternative Expropriation Amendment Bill

Scope:

The IRR's alternative Expropriation Amendment Bill (a framework document which is also available on the IRR website), deals with direct and indirect expropriation by all expropriating authorities – whether the minister of works or any other organ of state. It covers both movable and immovable property as well as mining and water rights; mortgages, servitudes, and other registered rights; shares in companies; and intellectual property rights, including patent rights.

Principles:

An expropriating authority must fulfil all relevant constitutional requirements, including those governing 'just and equitable' compensation. It must also obtain a High Court order confirming that it has done so, before it may proceed issue a notice of expropriation.

Compensation must start with the market value of the property, less the four 'discount' factors listed in the property clause of the Constitution. However, since expropriation places an ordinate burden of redress for past societal wrongs on the shoulders of particular individuals, compensation must also include damages for all consequential losses, including moving expenses and any loss of future income. If the property to be expropriated includes the owner's home, his eviction must expressly be authorised by the High Court and suitable alternative accommodation may also have to be provided.

Initial processes:

An expropriating authority must start by negotiating with the owner with a view to agreeing on a voluntary purchase. If these talks fail, it must issue a notice of possible expropriation, invite objections, and give reasons in writing for rejecting any objections submitted to it. It may also investigate the value of the property.

If the expropriating authority then wishes to proceed, it must give the owner 180 days' notice of its intention to seek a High Court order confirming the constitutional validity of the proposed expropriation.

High Court hearing on constitutionality:

The expropriating authority bears the onus of proving, on a balance of probabilities, that its proposed expropriation meets all constitutional requirements. During the court hearing, the owner's evidence and representations must be heard in full. The expropriating authority must pay the owner's reasonable legal costs in participating in these proceedings (on an attorney-and-client basis).

If the High Court confirms the constitutionality of the expropriation, it must issue an order dealing with all relevant issues, as listed in this Bill. Among other things, the court's order must instruct the expropriating authority to pay all compensation due to the owner at least 15 working days before the transfer of ownership to it is due to take place.

Notice of expropriation:

If the High Court confirms the constitutionality of the proposed expropriation, the expropriating authority may thereafter issue a notice of expropriation. This notice must be in keeping with the High Court order and accompanied by a copy of it. The notice must give the owner 90 days from the date of service of the notice before the transfer of ownership to the expropriating authority may take place, and another 90 days before possession may pass. However, the owner may agree in writing to shorter periods if he so chooses.

The expropriating authority must pay all the compensation due to the owner at least 15 working days before ownership is to pass to it. If the expropriating authority cannot provide written evidence of having done so, the expropriation notice is automatically set aside and has no further force or effect.

If suitable alternative accommodation is required for an owner being evicted from his home, this accommodation must also be provided 15 working days before ownership is due to pass. The same consequences follow for any failure to do so.

The owner has the right to the use of, and income from, the property until possession passes to the expropriating authority, but must look after the property, pay municipal rates and charges (if applicable) and maintain the property's value.

Third party rights:

The expropriating authority must pay any mortgage holder as much of the total compensation due as is needed to settle the debt; and must do so at least 15 working days before ownership is due to pass to it. On the same day, it must also pay the remaining balance to the owner. If the mortgage holder has been paid timeously and in full, the mortgage ends when ownership is transferred to the expropriating authority.

If the expropriating authority wishes to expropriate mining rights or other registered rights in land, it must follow the process set out in the Bill in relation to each rights holder. However, if the matter is particularly urgent, the expropriating authority may seek and obtain High Court authorisation to issue the same notice of expropriation to all rights holders, each of whom will be entitled to just and equitable compensation and the other protections set out in this Bill.

Incidental matters:

Further rules will apply where the owner cannot be traced, and will govern the withdrawal of a notice to expropriate. The existing Expropriation Act of 1975 (and earlier amendments to it) will be repealed when a new Bill along these lines is enacted and comes into effect.

Regulations:

Any regulations must be consistent with this Bill and tabled in Parliament for approval three months in advance.

Precedence over other expropriation legislation

To ensure that the procedures and requirements outlined apply to all expropriations, this Bill will have the capacity to trump all other laws dealing with expropriation.