

Institute of Race Relations (IRR) submission to the Portfolio Committee on Public Works and Infrastructure on the Expropriation Bill of 2020 [B23-2020]

1. *The enormous importance of the Expropriation Bill to all South Africans*

If the Expropriation Bill of 2020 (the Bill) is enacted into law in its current form, it will allow the government to seize ownership or control of both land and many other assets. Homes, pensions, business premises, mining rights, shares, and unit trusts will all fall within the Bill's definition of 'property', making them vulnerable to expropriation for 'nil' or inadequate compensation.

Contrary to government reassurances, the Bill will not be limited to land reform. Nor will it solve land reform problems, which stem largely from inefficiency, corruption, and an absence of secure ownership. Instead, the Bill will threaten the property rights of all South Africans: from the 9.5 million people with home ownership to the roughly 18 million with customary law plots, and the estimated 17 million who belong to pension funds. It will also harm all business owners, both large and small. At the same time, the economic fall-out from the Bill will further hurt the 11 million individuals now unemployed by reducing investment, limiting growth, and stalling post-lockdown recovery.

2 *Particularly damaging provisions in the Bill*

Under the Bill, 'nil' compensation may be paid for land expropriations in five listed circumstances. This means, for example, that no compensation may be paid to owners who have lost control to land invaders or building hijackers. However, the circumstances in which 'nil' compensation may be paid are expressly 'not limited' to the five set out in the Bill – so no one can tell how much more widely 'nil' compensation may in time extend.

Nil compensation will also apply should the government later take custodianship of all land in the country, as the Economic Freedom Fighters (EFF) and the African National Congress (ANC) have long desired. No compensation will then be payable because of the way in which the Bill defines 'expropriation'. This definition draws a technical, artificial, and unconstitutional distinction between the *taking of ownership* by the state – which counts as an expropriation requiring 'just' compensation – and the state's *assumption of custodianship*, which does not.

The Bill's procedures for expropriation are heavily skewed in favour of the state. All 'expropriating authorities' (which will include all provincial premiers and municipalities) must begin by negotiating with owners, investigating the properties to be taken, and issuing notices of their intention to expropriate. Objections from owners must be considered, but need not be answered.

Once it has taken these preliminary steps, an expropriating authority may serve the owner with a notice of expropriation. Under this notice, both the ownership and the right to possess the property will automatically pass to the expropriating authority on specified dates. These dates could be set very soon: within a week or fortnight of the notice being received.

The compensation, if any, that has been offered is supposed to be paid when the expropriating authority takes possession, but in practice could often be delayed. An

expropriated owner may contest the compensation offered in the courts, but people already reeling from the sudden loss of their homes, business premises, or other assets will generally find it too costly and difficult to litigate. They will also bear the onus of proving that the compensation offered is not enough – and will have to pay much of the expropriating authority's legal costs, in addition to their own, if they fail to convince the courts of this.

Mortgage bonds on expropriated houses or other properties will automatically terminate on the date when ownership passes to the state. However, expropriated owners must still pay off their outstanding debts, despite having lost their assets to the government. Any compensation payable must thus be apportioned between owners and banks, as the Bill provides, with owners responsible for remaining shortfalls.

3. *Enormous likely economic damage from the Bill*

South Africa's economy is already reeling from the impact of prolonged Covid-19 lockdowns. Some 2 million jobs have been lost in the past year, the budget deficit is expected to exceed 15% of GDP, the government is having to borrow some R2.2bn a day to help fund its (mainly consumption) spending, and a sovereign debt default cannot be ruled out.

The country urgently needs an upsurge in foreign and local investment to jumpstart growth, expand employment, and quicken its economic recovery. But this will not be possible under the Bill, which – contrary to the ANC's own 54th national conference resolution – is sure to destabilise the agricultural sector, endanger food security, and undermine economic growth. It will also erode business confidence, restrict investment, constrain tax revenues, and add to an already unsustainable burden of public debt.

4. *The unconstitutionality of the Bill*

The Bill contradicts Section 25 of the Constitution (the property clause), which requires 'just and equitable' compensation on all expropriations, including any assumption of custodianship by the state. Section 25 further demands a prior court order confirming the validity of any expropriation or other taking *before* it is implemented.

The Bill is also inconsistent with other provisions in the Bill of Rights, including:

- Section 33, which requires just administrative action, rather than expropriation procedures heavily skewed against the citizen and in favour of the state;
- Section 34, which gives everyone a right of access to court, which may not be undermined by reverse onus or other unreasonable provisions; and
- Section 26, which requires court orders before people can be evicted from their homes.

5. *The right way forward – a better alternative*

The current Expropriation Act of 1975 is inconsistent with Section 25 and must be replaced. However, the Bill is just as unconstitutional as the present Act, and needs to be jettisoned in favour of a better alternative. This alternative bill should require just and equitable compensation for every expropriation or other taking, together with damages for consequential losses such as moving costs and lost incomes. Prior court orders confirming the

validity of all proposed takings should be mandatory. In addition, an alternative bill should require the payment of all compensation *before* ownership passes to the state, failing which any notice of expropriation should automatically become invalid.