South African Institute of Race Relations NPC (IRR)

SUBMISSION

to the Select Committee on Transport, Public Service and Administration,
Public Works and Infrastructure,
National Council of Provinces,
regarding the Expropriation Bill [B23B-2020]

3 March 2023 (revised 25 September 2023)

By e-mail: expropriationcomments@parliament.gov.za

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SUMMARY

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 9.75 million people with home ownership to the roughly 18 million with customary law plots, and the estimated 17 million who belong to pension funds.[1] 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 11.9 million individuals now unemployed (on the expanded definition)[2] by reducing investment, limiting growth, and stalling post-lockdown recovery.

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 and others 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

[1] Centre for Risk Analysis (CRA), *2023 Socio-Economic Survey of South Africa*, pp344, 584

[2] https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q2%202023.pdf

the property will automatically pass to the expropriating authority on specified dates. These dates could be set very soon: within a day or a week of the notice being served. Despite recent changes in its wording, the Bill still does not require the expropriating authority – *before* it serves a notice of expropriation – to reach agreement with the owner or obtain a court order confirming the validity of the proposed expropriation and deciding on the compensation payable. Yet serving a notice of expropriation before these requirements have been met is a breach of the Constitution.

In addition, though the compensation, if any, that has been offered by the expropriating authority is supposed to be paid when it takes possession of the property, the wording of the Bill still makes it possible for such payment to be long delayed. In theory, an expropriated owner or rights holder has the right to contest both the validity of the expropriation and the compensation payable in the courts. In many instances, however, it will be impossible for people to bring such cases before ownership and the right to possession pass to the expropriating authority. In addition, people who are already reeling from the loss of their homes, business premises, or other key assets will generally find it too costly and challenging to go to court. They may also fear an adverse costs order, for the Bill seeks to burden them with the onus of proving, say, that the compensation offered is inadequate. If they fail to discharge this onus – and the vague criteria for computing compensation will make this difficult to do – they might end up paying many of the expropriating authority's legal costs, in addition to their own substantial legal expenses. These provisions in the Bill will so skew the playing field that most people will too afraid to use their rights to litigate.

In addition, mortgage bonds on expropriated houses or other properties will automatically terminate on the date when ownership passes to the state. However, the compensation payable, if any, may be significantly less than what expropriated owners still owe on their mortgage debts – and which those owners will still have to pay off, despite having lost their assets to the government. (According to the Bill, any compensation payable must be apportioned between owners and banks, with owners responsible for remaining shortfalls.)

Enormous likely economic damage from the Bill

South Africa's economy is already reeling from the impact of prolonged Covid-19 lockdowns, damaging loadshedding, and rising inflation. Tax revenues are declining, employment has not yet fully recovered to pre Covid-19 lockdown levels, and the finance minister has warned of the need for major spending cuts – failing which the budget deficit is likely to reach some 6.5% of GDP in the 2023/24 tax year. The government is already spending around R1bn per day simply on mounting debt-service costs, the rand has lost much of its value against the US dollar, and sovereign debt default cannot be ruled out. [3]

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

[3] https://www.biznews.com/undictated/2023/09/11/magnus-heystek-south-africa-economic-catastrophe

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.

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.

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, which the IRR has drafted and can be found in the *Appendix* to this submission. This alternative bill requires 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 disputed expropriations are mandatory before any notice of expropriation may be served, as the Constitution requires. In addition, compensation must be paid in full before ownership passes to the state, failing which the relevant notice of expropriation automatically becomes invalid.

1 Introduction

The Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure in the National Council of Provinces (**the committee**) has invited public input on the Expropriation Bill [B23B-2020] (**the Bill**) by 6 March 2023.

This submission is made by the South African Institute of Race Relations NPC (**the IRR**), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

1.1 Format of this submission

The committee has called for all submissions to be made via a Google Forms facility. This form asks respondents whether they support or oppose the Bill, whether they wish to make

oral presentations, and to submit comments on each of the Bill's 31 clauses. The IRR inquired from the committee whether using this form was compulsory or optional, but at the time of submission had received no response.

In our view this form is unsuited to submissions that include reasoned arguments not exclusively relating to particular clauses. Instead, such facilities must allow respondents to upload their own documentation. In the interests of not placing barriers in the way of public participation, members of the public should also have the freedom to make submissions in other formats.

Given this, the IRR presents this submission as a standalone document, and its additional submission using the form should not be construed as accepting this practice in principle. The alteration of the process to adopt the Bill midstream, after the ordinary process in the National Assembly, in addition to its restricting nature, is confusing and disruptive to public participation. The IRR is therefore not submitting more of the signatures of those who signed up to oppose expropriation without compensation through us, but instead makes this submission to the National Council of Provinces on their behalf.

In addition, this disruption resulting from a change of process should be ameliorated by the Council facilitating public hearings on the Bill. The IRR has via separate correspondence explicitly requested that public hearings be held; the use of a restrictive format of participation (through a Google Forms facility) reinforces the arguments listed in that correspondence.

2 Background to the Bill

The current Expropriation Act of 1975 (the Act) allows the minister of public works (the minister) to expropriate property for public purposes, such as the building of a new road. The compensation payable for expropriated property must be based on market value, along with 'an amount to make good any actual financial loss caused by the expropriation'. Such financial losses would include moving costs as well as lost income from the expropriated property. Ownership and possession pass to the minister on the dates specified in the expropriation notice, but at least 80% of the compensation due must be paid when the minister takes possession. Interest on the outstanding balance is also payable from then on. These provisions limit the scope for expropriation and ensure an adequate measure of compensation, so helping to prevent any abuse of the power to expropriate.

The African National Congress (ANC) has long argued that the Act is unconstitutional for two reasons. First, the Act does not allow expropriation 'in the public interest', whereas the Constitution does. Second, the Act leaves out four factors listed in Section 25 of the Constitution (the property clause) as relevant to the compensation payable on expropriation. These four factors are often called the 'discount' factors because the monetary value assigned to them is generally deducted from the market value of the property.

Under Section 25, compensation on expropriation must be 'just and equitable' in the light of all the relevant circumstances. Factors expressly listed as relevant include both market value and the four 'discount' factors, which are:[4]

- the current use of the property;
- the history of its acquisition;
- the extent of any direct state subsidy in its acquisition or capital improvement; and
- the purpose of the expropriation.

The ANC is correct in highlighting these two contradictions between the Act and the Constitution. However, it overlooks the most important contradiction of all. Provisions allowing the minister to take ownership of property by notice to the owner could not be legally challenged in 1975, when the current Expropriation Act was adopted and the principle of parliamentary sovereignty applied. However, they are now clearly in conflict with South Africa's Constitution. Instead of recognising this reality, the Bill repeats these contentious provisions and seeks to give them new life.

To elaborate on this vital point, when the 1975 Act was adopted, there was nothing to prevent the government from giving the minister of public works the power to expropriate property by:

a) completing certain preliminary steps, and then
b) serving a notice of expropriation on the owner, under which both the ownership of the property and the right to possess it would automatically vest in the minister on the dates specified in the notice.

However, since the final Constitution took effect in 1997, South Africa has had the benefit of an entrenched Bill of Rights. This lays down binding criteria for a valid expropriation, guarantees that administrative action will be reasonable and procedurally fair, gives everyone a right of access to the courts, requires judicial authorisation before people can be evicted from their homes, reinforces the principle of equality before the law, and guarantees the supremacy of the rule of law.

The Bill nevertheless seeks to bypass these constitutional guarantees by giving all expropriating authorities the very same power to expropriate by:

a) completing certain preliminary steps, and then
b) serving a notice of expropriation on the owner, under which both ownership and the right to possess the property will automatically vest in the expropriating authority on the specified dates.

The Bill's list of preliminary steps is longer than that in the Act, and often reflects the impact of the Bill of Rights. However, these increased safeguards matter little because no equivalent protections apply at the point of expropriation. Yet this is when safeguards matter most – and

[4] Section 25(3), Constitution of the Republic of South Africa, 1996 (Constitution)

when the requirements in the Bill of Rights must undoubtedly be met if any expropriation is to comply with the Constitution.

3 Key features of the Bill

3.1 Various flawed definitions in Clause 1 of the Bill

3.1.1 A narrow definition of 'disputing party'

The Bill defines a 'disputing party' as 'an owner, mortgagee, holder of a right, including an owner and holder, of a right contemplated in Section 20, expropriated owner or expropriated holder, who rejects the expropriating authority's offer of compensation'.

This definition is too narrow, for it seeks to prevent those who object to the validity of an expropriation, or to their unauthorised eviction from their homes, from being included in the meaning of 'disputing party'.[5] This definition, along with various others, must therefore be amended, as set out in the IRR's alternative expropriation bill in the *Appendix* below.

3.1.2 A narrow definition of 'expropriation' and 'expropriate'

According to the Bill, '"expropriation" means the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority or an organ of state upon request to an expropriating authority' and '"expropriate" has a corresponding meaning'.

To most people, the new definition looks harmless enough, for it describes expropriation, in essence, as the forced 'acquisition' of property by the state. The significance of this wording can be understood only in the light of the main Constitutional Court judgment in the *Agri SA* case in 2013.

This case began when a company, Sebenza (Pty) Ltd, found it lacked the funds needed to convert an unused 'old-order' mining right it had bought in 2001 for R1m into a 'new-order' mining right under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. This Act, which took effect in 2004, vested all mineral resources in the 'custodianship' of the state. It also required all unused old-order rights to be converted within a year, failing which they would 'cease to exist'. Since Sebenza could not afford the application fee for this conversion, the mining right for which it had paid R1m duly came to an end, prompting it to sue for compensation. Agri SA, a lobby group for commercial farmers, many of whom had earlier owned unused old-order rights to the minerals beneath their land, took over the claim and brought it before the Pretoria high court.[6]

The high court found that Sebenza had lost all the competencies of ownership it had previously enjoyed, while the MPRDA had given the mining minister substantially similar rights. The state had thus acquired 'the substance of the property rights' that Sebenza had previously owned, and it made no difference that the state's competencies were termed 'custodianship' rather than 'ownership'. Expropriation had indeed occurred and compensation of R750 000 was payable.[7]

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[5] Clause 1, Bill

[6] *Agri South Africa* v *Minister of Minerals and Energy and Another* (55896/07) [2011] ZAGPPHC 62; [2011] 3 All SA 296 (GNP); 2012 (1) SA 171 (GNP); 2012 (1) BCLR 16 (GNP) (28 April 2011)

[7] *Business Day* 4 May 2011; Pretoria high court judgment, supra, para 96

However, this ruling was in time taken on appeal to the Constitutional Court, which overturned it. The main judgment was penned by Chief Justice Mogoeng Mogoeng, who agreed that Sebenza had suffered a 'compulsory deprivation' of its mining right and that the 'custodianship' of this resource was now vested in the state. However, 'the assumption of custodianship' did not amount to expropriation because it did not make the state the owner of the right in issue. Stated the chief justice: 'Whatever "custodian" might mean, it does not mean that the state has acquired and thus become the owner of the rights concerned.' No expropriation had thus occurred, and this meant that no compensation was payable.[8] What the Pretoria high court had seen as a meaningless distinction between the state's powers as 'owner' or 'custodian' thus became, in the main judgment at least, an issue of major legal and monetary importance.

But Chief Justice Mogoeng also stressed that his ruling was based solely on the particular facts before him, before going on to say: 'A one-size-fits-all determination of what acquisition entails is not only elusive but also inappropriate… A case-by-case determination of whether acquisition has in fact taken place presents itself as the more appropriate way of dealing with these matters,…[as] acquisition is likely to assume many variations.' He further emphasised that 'it would…be inappropriate to decide definitively that expropriation is, in terms of the MPRDA, incapable of ever being established…. I accept that a case could be properly pleaded and argued to demonstrate that expropriation did take place. That avenue…must be left open, particularly when regard is had to the express provision made for expropriation in item 12 of Schedule II to the MPRDA' (which deals with the compensation that would then be payable).[9]

In a separate concurring judgment, two of the Constitutional Court judges in the case cautioned against the approach taken by Chief Justice Mogoeng. In this ruling (handed down by Judge Johan Froneman), the two noted that the Constitutional Court had never before had to grapple with 'the nature of the change brought about by vesting the natural resources of the country in the state as custodian of those resources'. Nor had the main judgment 'addressed the issue squarely'. Earlier relevant Constitutional Court rulings had 'laid down no requirement of state acquisition as an inflexible requirement for expropriation' and 'it would be inadvisable to extrapolate an inflexible general rule of state acquisition as a necessary requirement'. Such an approach would also be at odds with 'foreign jurisprudence, [which] recognises that expropriation may take place even if the [relevant] rights or property have not been acquired by the state'.[10]

Added Judge Froneman: 'If private ownership of minerals can be abolished without just and equitable compensation – by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights – what prevents the abolition of private property of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer from existing private property holders to others, if done by the state as custodian of the country's resources, from being recognised as

[8] *Agri South Africa* v *Minister of Minerals and Energy*, CCT/51/12, 18 April 2013, paras 71, 72
[9] Ibid, paras 64,72, 75
[10] Ibid, paras 101, 102, 103

expropriation. This is done without a thorough examination of what the entirely new legal concept of state custodianship holds for our law, or whether the transfer will be just and equitable. In that way, one of the crucial aspects of our historical compromise, the equitable balancing between the protection of existing property rights and the public interest under Section 25, is bypassed. I find that unfortunate.'[11]

Another Constitutional Court judge in the case, Judge Edwin Cameron, also handed down a separate concurring ruling, in which he 'shared the caution' expressed by Judge Froneman. Stated Judge Cameron: 'Acquisition by the state is, in my view, a general hallmark of expropriation. But not necessarily and inevitably so. Whether an expropriation contemplated by Section 25 has occurred is – as the main judgment finds – a context-based inquiry demanding a case-by-case approach. I therefore agree with [Judge] Froneman that it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.' [12]

As these passages highlight, Chief Justice Mogoeng's judgment was based solely on the particular facts before him, while both he and the other judges in the case were reluctant to lay down a sweeping new rule making state 'acquisition' a requirement for expropriation. The *Agri SA* judgment is therefore not enough to validate the Bill's definition of expropriation.

The Bill's definition is also in conflict with the customary international law meaning of expropriation, which does not always require state acquisition. Yet customary international law must be taken into account in interpreting the Bill of Rights,[13] and cannot simply be ignored by Parliament in adopting a contradictory definition.

At the very least, the current definition in the Bill should be omitted. If a definition is to be included – which may now be important to remove doubts and provide legal certainty – it should be worded in a comprehensive way, as set out in the *Appendix* below.

3.1.3 An extended definition of 'expropriating authority'

The Expropriation Act of 1975 confers the power to expropriate on the minister of public works alone (though municipalities that have expropriation powers under other laws are expected to comply with the 1975 statute too).[14] The Bill, however, extends the power to expropriate to any 'expropriating authority'. It defines such an authority very widely, as 'an organ of state or person empowered by this Act or any other legislation to expropriate property *or to bring about the compulsory acquisition of property contemplated in Section 2(3) for a public purpose or in the public interest'*.

Section 2(3) adds little clarity, for it says: 'An expropriating authority may expropriate property in terms of a power conferred on it by law of general application and in accordance with sections 5 to 25 and 28'. Overall, the italicised wording which has been inserted into the

[11] Ibid, para 105
[12] Ibid, para 78
[13] Section 39(1), Constitution; *Haffejee NO and others* v *Ethekwini Municipality and others*, [2011] ZACC 28, para 29
[14] Section 5, Expropriation Act of 1975

current version of the Bill seems repetitious, as 'expropriate' is in any event currently defined as 'the compulsory acquisition of property for a public purpose or in the public interest'. The new wording may be intended to help draw a distinction between the 'acquisition of ownership' and the 'assumption of custodianship', as set out in the *Agri SA* judgment earlier outlined. If this is indeed the aim, then the new wording rests on a shaky legal foundation and should rather be removed, as set out in the *Appendix* below.

'Organ of state' is defined in the Bill in the same way as it is in Section 239 of the Constitution. 'Any department of state or administration in the national, provincial or local sphere of government' is thus included. So too is 'any other functionary or institution' which is either 'exercising a [public] power or performing a [public] function' under the Constitution or 'any legislation'.[15]

This definition is extremely wide. Many municipalities and other organs of state have expropriating powers under various statutes, while the Bill could be read as giving various other organs of state a general power to expropriate under its own terms. The Bill thus seeks to give hundreds of state entities the very wide expropriation powers set out in its provisions. This will eliminate many of the statutory safeguards that currently help to prevent any abuse of the power to expropriate. Worse still, many of the Bill's wide powers are unconstitutional (see *Section 5* of this submission) and are all the more harmful for this reason.

3.2 Preliminary requirements for expropriation

According to the Bill, an expropriating authority must start with various preliminary requirements before it may issue a notice of expropriation.

3.2.1 Negotiations for purchase on reasonable terms

First, the expropriating authority must negotiate with the owner and try to buy the property from him or her 'on reasonable terms'.[16] However, what the expropriating authority regards as 'reasonable' may be different from what owners and others would think. At minimum, thus, the Bill should be reworded to make it clear that an objective test of reasonableness is to be applied.

3.2.2 Investigation and consultation

If negotiations fail to produce agreement, the expropriating authority must investigate the suitability of the property for the purposes it has in mind, consult with any relevant municipality or government department, and find out what unregistered rights tenants and other third parties might have in the property.[17] (The matter of third-party rights is further examined below.)

In the course of its investigation, an expropriating authority may send suitably skilled inspectors to examine the property and, if necessary, 'survey, dig, or bore into it'. However,

[15] Clause 1, Bill; Section 239, Constitution
[16] Clause 2(2), Bill
[17] Clause 5, Bill

these inspectors may not enter the property without either the consent of the owner or an order of court.[18]

The Bill thus recognises that an order of court is required for the relatively small matter of empowering an inspector to enter the property. Yet it simultaneously denies that a prior order of court is needed for the far more harmful step of implementing a permanent expropriation. This unconstitutional contradiction in the Bill's provisions must be cured by requiring an expropriating authority, in the event of a dispute on the validity of a proposed expropriation – which would include a dispute on the adequacy of the compensation to be paid – to obtain a court order confirming the validity of its proposed taking *before* it serves a notice of expropriation on the owner (see the amendments proposed in the *Appendix* below).

Two new sub-clauses have been added under the current version of the Bill. Sub-clause 5(9) says, in essence, that all investigatory powers must be exercised according to 'the laws governing the protection of personal and private information'. In addition, sub-clause 5(10) states: 'If the property is not land, the expropriating authority may authorise a suitably qualified person or valuer to ascertain its suitability and value for determining an amount of compensation to be offered.'[19]

This last addition expressly authorises a valuer to investigate and put a value not only on land and buildings but also on any other kind of property targeted for expropriation, including licences, permits, patent rights, and other forms of incorporeal property. This sub-clause thus underscores the broad ambit of the Bill – and the concomitant need to ensure that all expropriations are carried out in strict accordance with the Constitution. Sub-clause 5(9) is also too narrow in that it fails to protect commercial information. By contrast, sub-clause 5(10) is too sweeping in that it empowers the expropriating authority to embark on an extensive and potentially commercially damaging probe of particular property, when such investigation should instead be authorised by the courts.

3.2.3 Notice of intention to expropriate

Once it has finished its investigation, the expropriating authority may decide if it still wants to expropriate the property. If it does, it must serve a notice of intention to expropriate on the owner as well as any 'mortgagee' or known holder of a right in the property. This notice must identify the property, explain the purpose of the expropriation, and set out the intended dates on which the expropriating authority will take ownership and possession. The notice must also invite 'any person who may be affected by the intended expropriation' to send in any objections or other submissions within 30 days. The expropriating authority must consider such objections, but is not obliged by the Bill to respond to them or to give reasons for rejecting them. This is contrary to the right to just administrative action set out in the Constitution, which requires all administrative action to be 'procedurally fair'.[20]

The notice of intention to expropriate must further include 'an offer of compensation which the expropriating authority considers just and equitable and an explanation of how the

[18] Clauses 5 (2) (3), Bill

[19] Sub-clauses 5(9), (10), Bill

[20] Clause 7(1), (2), Bill, Clause 7(1)(g), Bill; Clause 7(5), Bill; Section 33(1), Constitution

amount was arrived at with reference to supporting information'.[21] (Earlier provisions directing the owner to state what amount he would claim as 'just and equitable compensation' – and what amount the expropriating authority would instead offer – have thus fallen away.)

Instead, the expropriating authority states at the outset, without reference to the owner's views, what amount, if any, it is prepared to offer by way of compensation. Under sub-clause 7(4), the owner must then, within 30 days of the service of this notice, deliver to the expropriating authority a written statement '(i) stating whether he or she accepts the offer of compensation; (ii) requesting further particulars and section 14; or (iii) disputing the amount of compensation offered under section 19'.[22]

3.2.4 Deciding to proceed with an expropriation

Under sub-clause 7(5) of the current Bill, the expropriating authority 'must consider the statements lodged' by the owner under sub-clause 7(4) (as outlined above) 'in deciding whether to proceed with the expropriation'.[23]

In a further significant departure from the earlier terms of the Bill, sub-clause 7(6) goes on to say that the expropriating authority 'may decide to expropriate the property after the amount of compensation has been agreed with the owner, mortgagee, or holder of a right, or approved or decided by a court, *subject to section 19(8)*'.[24]

This wording seems to suggest that an owner will be able to insist on a court order 'approving or deciding' the amount of compensation *before* a notice of expropriation can be issued. However, there is also wording to the contrary in the Bill.

First, under the current wording of sub-clause 7(6), court approval or decision on the amount of compensation is '*subject to section 19(8)*'. Yet section 19 of the Bill deals with 'mediation and determination by court' only *after* a notice of expropriation has already been issued.

Second, section 19(8) will allow an expropriation to proceed even where a dispute over the amount of compensation remains unresolved in that an appeal against the relevant court decision has been lodged. Section 19(8) puts it thus: 'Any appeal against the decision of a court on the amount of compensation will not prevent the expropriating authority from expropriating for the amount approved or decided, unless a court grants an interim interdict based on *compelling prospects of success* of the appeal'.[25]

This provision needs to be read in conjunction with the Land Court Bill of 2021, which has already been adopted by Parliament and needs only the president's assent to be enacted into law. This Bill creates a new Land Court, which is likely to be given jurisdiction over disputes on the compensation to be paid on expropriation. Since this court will lack institutional independence, it may too readily approve an expropriating authority's offer of 'nil' or otherwise inadequate compensation. Under section 19(8), however, if the owner tries to

[21] Clause 7(2)(k), Bill
[22] Clause 7(4)(a), Bill
[23] Clause 7(5), Bill
[24] Clause 7(6)(a), Bill
[25] Clause 19(8), Bill, emphasis supplied by the IRR

overcome a flawed Land Court decision – for example, that 'nil' compensation should be paid – by lodging an appeal, the expropriation will nevertheless proceed for the 'nil' compensation the court has decided. To stop this from happening, the owner will have to obtain an interim interdict confirming that the appeal has 'compelling prospects of success'. In practice, such an interdict may be difficult to obtain.

In addition, what is stated in the notice of intention to expropriate is always less important than what is included in the notice of expropriation – and here the changes made are at best ambiguous too, as set out below. Overall, thus, the changes made to Clause 7 of the Bill are not enough to give the owner a clear right to a court order 'approving or deciding' the amount of compensation *before* a notice of expropriation is issued. The Bill thus remains inconsistent with Section 25(2)(b) of the Constitution, which requires that the amount of compensation, together with 'the time and manner of payment', must '*have…been* agreed by those affected or decided or approved by a court' before expropriation occurs.[26]

At no point in these preliminary processes is the expropriating authority called upon to demonstrate to the owner – let alone the courts – that the proposed expropriation is constitutional. Yet an expropriation cannot pass constitutional muster if:

- it is not in fact for public purposes or in the public interest;[27]
- the compensation offered is not truly just and equitable in all the relevant circumstances;[28]
- the compensation payable, along with the 'time and manner of its payment', have not yet been agreed, or 'decided or approved by a court', as is required in all but emergency situations;[29]
- the property to be expropriated includes a person's home and a court order authorising his or her eviction has not been obtained;[30] or
- other relevant constitutional requirements, ranging from the rights to equality, dignity, and administrative justice, have not been met.[31]

To ensure compliance with these provisions in the Bill of Rights, the expropriating authority must seek and obtain a court order confirming that a proposed expropriation meets all relevant constitutional requirements *before* it issues a notice of expropriation. Allowing the state to expropriate before it has obtained such a court order, as the Bill seeks to do, makes a mockery of guaranteed constitutional protections. Various amendments to the Bill are thus needed to bring its provisions into line with the Constitution, as set out in the *Appendix* below.

[26] Section 25(2)(b), 1996 Constitution, emphasis supplied by the IRR
[27] Section 25(2)(a), Constitution of the Republic of South Africa, 1996
[28] Section 25(3), Constitution
[29] Section 25(2)(b), Constitution
[30] Section 26(3), Constitution
[31] See sections 9, 11, 33 and 34, Constitution, among others

3.3 Notice of expropriation

According to the Bill, once an expropriating authority has completed these preliminary steps and decided to expropriate, it 'must cause a notice of expropriation to be served upon the expropriated owner, mortgagee, and expropriated holder in their preferred language'.[32]

This notice 'must contain', among other things, 'a statement of the expropriation of the property', a full description of the property, a short description of the purpose for which the property is required, and 'the reason for the expropriation of that particular property'.[33]

Under section 8(3)(g) of the Bill, a notice of expropriation (except in the case of urgent temporary expropriations), 'must' include 'the amount of compensation agreed upon or approved or decided on by a court *under section 19'*.[34] This could perhaps be seen as confirming that a court decision on the amount of compensation must already have been obtained before the notice is served. Again, however, the reference to section 19 casts doubt on this interpretation, as that section deals with litigation on the amount of compensation *after* the notice of expropriation has been served.

Section 19(2) puts it thus: 'If the expropriating authority and the disputing party do not settle the dispute [over the amount of compensation] by consensus or mediation, either party may within 180 days of *the date of the notice of expropriation*, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation'.[35]

This wording again shows that the owner cannot insist on a court decision on the amount of compensation *before* a notice of expropriation is served. On the contrary, section 19(2) clearly states that litigation on the compensation payable may be instituted 'within 180 days of the date of the notice of expropriation'.

The notice of expropriation must further specify 'the future date of expropriation' – the date of expropriation being the date on which 'the ownership of the property described in the notice of expropriation vests in the expropriating authority or in the person on whose behalf the property was expropriated'.[36] On this specified date and by automatic operation of law, ownership of the property will pass to the state. This will occur, regardless of any unresolved dispute on the compensation to be paid (including an appeal against a court decision on compensation).[37]

The notice of expropriation must further stipulate 'the future date on which the right to the possession of the property will pass to the expropriating authority after expropriation'. On this date, the expropriating authority will automatically acquire the right to possess the property, again irrespective of whether the amount of compensation has yet been agreed or

[32] Clause 8(1), Bill
[33] Clause 8(3)(a) to (d), Bill

[34] Clause 8(3)(g), Bill, emphasis supplied by the IRR
[35] Clause 19(2), Bill
[36] Clause 9(1)(a), Bill
[37] Clause 8(3)(g), 9(1)(a), 19(8)

decided by a court. The expropriated owner is entitled to the use and income from the property until possession passes, but must also take care of it and prevent its value deteriorating.[38]

According to the Bill, 'the date of expropriation may not be before the date of service of the notice of expropriation'.[39] Since no other time period is stipulated, there is nothing in the Bill to prevent ownership passing to the state on the day *after* the service of this notice. Johannes Lekala, Deputy Director: Expropriation in the Department of Public Works and Infrastructure has recently stressed that ownership will pass to the expropriating authority at the very moment when the notice is served.[40] This immediate passing of ownership may not be possible under the current wording of the Bill, which requires the notice of expropriation to include a 'future' date of expropriation. However, this small amendment will certainly not prevent the transfer of ownership on the day after the service of the notice, if that day is the 'future' date specified in the notice.

There is also little in the Bill to prevent the passing of the right to possession very soon after the transfer of ownership. Hence, if the notice of expropriation is served on the owner on the first day of a particular month, ownership could pass on the second day of that month (or even earlier) and the right to possession on the seventh day (or earlier still).[41]

These provisions in the Bill are inconsistent with Section 25 of the Constitution. This requires the expropriating authority to show that all the requirements for a valid expropriation have been met *before* it takes ownership of the property (as further explained in *Section 5* of this submission). These clauses also contradict:[42]

- Section 34 of the Constitution, which gives everyone the right to have a legal dispute (such as whether an expropriation is indeed valid) decided by the courts before that expropriation takes effect; and
- Section 33, which gives everyone the right to just administrative action and requires any such action to be 'reasonable' and 'procedurally fair'.

Where the expropriated property includes a person's home, these provisions also contravene Section 26(3) of the Constitution, which says that 'no one may be evicted from their home without an order of court made after considering all the relevant circumstances'.[43]

To cure the unconstitutionality of these clauses, the Bill must be amended to state that an expropriating authority, in the event of an unresolved dispute, must obtain a court order authorising the expropriation, and any eviction of people from their homes, *before* it serves a notice of expropriation on the owner or others. The necessary wording is set out in the *Appendix* below.

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[38] Clause 8(3)(f), Clause 9(2)-(5), Bill
[39] Clause 9(1)(e), Bill
[40] https://dailyfriend.co.za/2023/06/24/a-deceptively-avuncular-affair-the-last-of-the-expropriation-hearings/
[41] Clause 1, Bill
[42] Sections 34, 33, 1996 Constitution
[43] Section 26(3), 1996 Constitution

3.4 Determination of compensation prior to expropriation

In *Haffejee NO and others* v *eThekwini Municipality and others*, the Constitutional Court was asked to rule of the meaning of Section 25(2)(b). This says that 'property may be expropriated only in terms of law of general application…[and] subject to compensation, the amount of which and the time and manner of payment of which *have been* agreed by those affected or decided or approved by a court'.[44]

This wording in Section 25 indicates that the determination of compensation, whether by agreement or through the intervention of the courts, must *always* precede any expropriation. In the *Haffejee* case, Judge Johan Froneman (writing for a unanimous court) declined to interpret the provision in quite so categorical a way. He recognised that there could be exceptional circumstances – 'urgent expropriation in the face of natural disaster is one example' – in which it would be 'difficult, if not impossible, to determine just and equitable compensation' prior to expropriation. As a general rule, however, he stated, 'the determination of compensation…*before* expropriation will be just and equitable'. Moreover, in those few cases where there was no choice but to determine compensation only after expropriation, this would have to be done 'as soon as reasonably possible'.[45]

As this Constitutional Court judgment makes clear, it is only in exceptional and particularly challenging circumstance that the general rule need not be followed. And the general rule is that both the amount of compensation, and the date and manner of its payment, have to be agreed by the parties, or decided by a court, *prior* to expropriation. This further confirms that expropriating authorities cannot simply forge ahead with the taking of ownership and possession before these crucial steps have been taken. In practice, this again underscores the need for an appropriate court order *before* any disputed expropriation can proceed.

3.5 Amount of compensation

The Bill echoes Section 25(3) of the Constitution in stating that the compensation payable must:[46]

- be 'just and equitable' in the light of market value and all other relevant factors; and
- 'reflect an equitable balance between the public interest and the interests of the expropriated owner, having regard to all relevant circumstances'.

3.5.1 'Just and equitable' compensation

What compensation is 'just and equitable' depends on all the 'relevant circumstances'. Those circumstances start with the five expressly listed in both the Bill and the Constitution: these being market value and the four 'discount' factors earlier described (see *Background to the Bill*, above). However, many of the discount factors – for example, the 'current use of the

[44] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28; Section 25(2)(b), Constitution, emphasis supplied by the IRR
[45] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28, paras 39, 40, 43(b) and (c), emphasis supplied by the IRR
[46] Clause 12, Bill

property' and 'the history of its acquisition' – are inherently vague and difficult to quantify. There is also no objective way of putting a monetary value on these criteria.

This ambiguity undermines the legal certainty required by the rule of law. It is also likely to result in the unequal treatment of different expropriated owners, thereby infringing the guaranteed right to equality before the law. In addition, this vagueness gives the expropriated owner no firm ground on which to stand in trying to prove that the expropriating authority has erred in the value it has assigned to 'the history of the acquisition of the property' or 'the purpose of the expropriation'.

This greatly increases the risk that the expropriated owner who goes to court to contest the amount of compensation offered (see *Mediation and determination by a court***,** below) will fail to discharge the burden of proof seemingly resting on him under clause 19(5) of the Bill. This may in turn expose him to a negative costs order.

Though the Bill now empowers a court to 'make any order as to costs that it considers just and equitable' in any such proceedings,[47] there is still a risk that the expropriated owner who is unable to prove that the expropriating authority has erred in computing compensation will have costs ordered against him. He will then have to pay not only his own substantial legal expenses but also many of the legal costs incurred by the expropriating authority in contesting the case. Such an outcome will clearly not achieve the 'equitable balance' between competing public and individual interests that the Constitution requires.

3.5.2 An 'equitable balance'

The Bill (like the Constitution) also requires that 'an equitable balance' should be struck between the public interest and the interests of the affected owner. This criterion acknowledges that expropriation is a drastic measure that places an inordinately heavy burden on the shoulders of particular individuals in the course of the nation's attempt to redress past societal wrongs. The losses suffered by expropriated owners must therefore be taken into proper account and carefully weighed against society's interest in land reform.

The need for an 'equitable balance' between individual and societal interests is in keeping with international best practice: and also with the 2009 guidelines of the United Nations' Food and Agricultural Organisation (FAO). These FAO guidelines emphasise the principle of 'equivalence', which aims to ensure that the expropriated owner is 'neither enriched nor impoverished' through expropriation, but rather placed in essentially the same position as he was before. What this means in practice, says the FAO, is that expropriated owners should generally receive compensation based on the market value of their property, plus an amount to make good the additional direct losses they have suffered from the loss of 'their homes, their land, and at times their means of livelihood'.[48]

This approach already applies in South Africa under the current Expropriation Act of 1975. As earlier noted, the Act allows damages for all direct losses resulting from an expropriation,

[47] Clause 19(9), Bill

[48] See Agri SA, 'Agri SA Comments on Draft Expropriation Bill, 2019', pp13-14

including moving costs and loss of income. There is no sound reason for excluding a similar clause from the Bill, but this is nevertheless what the Bill currently provides.

The Bill must, of course, follow what the Constitution says about the compensation to be paid. But the Constitution states that *all* relevant circumstances must be taken into account in deciding compensation, *including* the five it lists. Hence, non-listed factors may also be considered in striking the necessary 'equitable balance between the public interest and the interests of those affected'.

If justice is to be done to expropriated owners, the full extent of their consequential losses must be taken into account, not disregarded. This can be achieved by amending Clause 12 of the Bill so as to entitle the expropriated owner (or other rights holder) to 'an amount to make good any actual financial loss caused by the expropriation'. The necessary change to Clause 12 is set out in the *Appendix* below.

3.6 'Nil' compensation provisions

According to Clause 12(3) of the Bill, 'it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest having regard to all relevant circumstances'. Such circumstances 'include, but [are] not limited to':

a) where the land is 'not being used' and the owner's 'main purpose is not to develop the land or use it to generate an income but [rather] to benefit from appreciation of its market value';[49]
b) where land is owned by an organ of state which is not using it for its core functions, is unlikely to use it for its future activities, and acquired it 'for no consideration';[50]
c) where 'an owner has abandoned the land by failing to exercise control over it', even though it is still registered in his name under the Deeds Registries Act;[51]
d) 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';[52] and
e) when 'the nature or condition of the property ['land' is the word that should be used here, as sub-clause 12(3) applies solely to land and not to other kinds of property] is such that it poses a health, safety, or physical risk to persons or other property'.[53]

In addition, under Clause 12(4) of the Bill, where 'a court or arbitrator determines the amount of compensation under Section 23 of the Land Reform (Labour Tenants) Act, 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances'.[54]

[49] Clause 12(3)(a), Bill
[50] Clause 12(3)(b), Bill
[51] Clause 12(3)(c), Bill
[52] Clause 12(3)(d), Bill
[53] Clause 12(3)(e), Bill
[54] Clause 12(4), Bill

3.6.1 An open-ended list

Since the list of five relevant circumstances in Clause 12(3) is expressly not a closed one, it follows that 'nil' compensation may be payable in many other instances too. This open-ended wording will allow a host of expropriating authorities to expand the scope for 'nil' compensation far beyond the circumstances listed in the Bill – and in ways that are unlikely to be uniform.

This invitation to contradictory and unequal decision-making on 'nil' compensation contradicts the guarantee of equality before the law in Section 9 of the Constitution. It is also inconsistent with what the Constitutional Court describes as 'the doctrine against vagueness of laws'. Under this doctrine, says the court, 'laws must be written in a clear and accessible manner'. Legislation is *not* sufficiently clear if different administrative officials could give the same provision different meanings, all of which would be plausible.[55]

The open list in Clause 12(3) of the Bill generates precisely this problem. This makes the clause too vague to pass constitutional muster. The uncertainty inherent in Clause 12(3) also puts it in breach of the rule of law, and hence with Section 1 of the Constitution. This founding provision guarantees the 'supremacy' of the rule of law and so requires that this be upheld at all times.[56]

3.6.2 The vagueness of the wording used

The wording used in Clause 12(3) is generally also impermissibly vague. Take, for example, sub-clause 12(3)(c), with its reference to land which has been 'abandoned' by an owner who is 'failing to exercise control over it'. If the owner of an inner-city building has stopped trying to obtain a court order for the eviction of illegal occupiers because he can no longer afford the costs of litigation, has he 'abandoned' the building within the meaning of this clause, despite his plans to recover it as soon as possible? Different officials in different expropriating authorities are likely to give this wording different meanings, all of which would be plausible. This sub-clause thus also offends against the doctrine against vagueness in laws.

In addition, the prevalence of land invasions in South Africa makes sub-clause 12(3)(c) particularly unjust and inimical to the rule of law. Take, for example, the case of William and Walter Mnyandu, who had their homes (located within a former Lutheran mission in Ekuthuleni) burnt down in 2014. This arson attack was allegedly carried out by an *impi* under the local chief's command. The police were present when the Mnyandus were threatened and driven out of their homes, which were then set ablaze. However, the police did not defend the Mnyandus, but rather helped escort them out. Nor did they intervene when the Mnyandus were told they would be killed if they tried to return home. William was still in hiding, thus, at the time of his death, while Walter found that the title deed he had finally obtained meant nothing in practice.[57]

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[55] *Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108
[56] Section 1(c), Constitution
[57] Gabriel Crouse, 'Expropriation Bill: The devil lies in the details', *Politicsweb.co.za*, 5 November 2020

Once sub-clause 12(3) of the Bill has been enacted into law, the local municipality (or any other relevant organ of state) could take advantage of Walter's plight to expropriate his land for nil compensation. This would be justified on the basis that he no longer 'exercised control' over it and had thereby 'abandoned' it. Such an outcome, however, would hardly be 'just and equitable'. The sub-clause could also encourage an upsurge in land invasions, a further crumbling of law and order, and a shift towards the notion that 'might is right'.

3.6.3 No need for Clause 12(3)

Clause 12(3) is not only impermissibly vague but also entirely unnecessary. Under Clause 12(1) of the Bill (echoing Section 25(2) of the Constitution), the courts already have the capacity to decide that 'just and equitable' compensation may be set at 'nil' in the very few instances where this is genuinely merited – in other words, where the property in issue objectively has no market value and the owner will suffer no direct loss from the expropriation.

By introducing a vague and open list of circumstances in which 'nil' compensation may be paid, Clause 12(3) contradicts the over-arching imperative – as set out in Section 25(3) of the Constitution – for 'an equitable balance' to be struck between the public interest and the interests of those affected by an expropriation. It also flies in the face of international law, which stresses the importance of paying compensation on expropriation and seeks to uphold the doctrine of 'equivalence', as described by the FAO.

'Equivalence' is what is needed to strike an equitable balance between the public interest and the interests of those affected by an expropriation. The 'nil' compensation provisions in Clause 12(3) should thus be removed. All expropriated owners and rights holders should be provided with 'just and equitable' compensation – which must include damages for all resulting loss if the necessary 'equitable balance' is to be struck. As earlier noted, the necessary wording to bring Clause 12 into line with the Constitution is set out in the *Appendix* below.

3.7 Requests for particulars

According to the new wording introduced in Clause 14 of the Bill, 'an owner, mortgagee and holder of a right may request the expropriating authority, in writing, to provide reasonable particulars about the offer of compensation and particulars so requested must be provided within 20 days'.

This request may be enforced via court action, if necessary. In addition, 'an offer of just and equitable compensation remains in force' until it is '(a) revised by the expropriating authority, (b) the amount of compensation has been agreed upon, or (c) the compensation has been decided or approved by a court'.[58]

[58] Clause 14, Bill

3.8 Mediation and determination by a court

3.8.1 Disputes over compensation

According to Clause 19, 'if the expropriating authority and the expropriated owner…do not agree on the amount of compensation, they may attempt to settle the dispute by mediation, which must be initiated and finalised without undue delay by either party'.[59]

The Bill then adds: 'If the expropriating authority and the disputing party do not settle the dispute by consensus or mediation, either party may, within 180 days of the date of the notice of expropriation, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation.'[60]

According to the Bill, if the disputing party does not wish to institute these court proceedings, he may – within 90 days of the date of the notice of expropriation – request the expropriating party to institute the proceedings, provided this is done within the overall 180-day time limit. Under Clause 19(5), however, 'the onus or burden of proof is not affected by whether it is the expropriating authority or the disputing party which institutes the[se] proceedings'.[61]

Clause 19(5) thus seeks to shift the onus of proof from where it belongs – on the expropriating authority who has initiated the expropriation process – to the disputing party (ie the expropriated owner), who will be expected to prove that the amount of compensation he has been offered is not in keeping with the wording in the Bill and is thus not an appropriate amount. If the expropriated owner fails to discharge this onus, he will lose the case. He will then have to pay not only his own substantial legal expenses, and probably also many of the legal costs incurred by the expropriating authority. This is a major risk, even though the current wording now empowers a court to 'make any order as to costs that it considers just and equitable'.[62]

As earlier noted, this risk is made all the greater by the vagueness of the criteria for assessing the compensation payable, as set out in the Bill. In the Mnyandu's case, as outlined above, for instance, if Walter Mnyandu (the surviving brother) wants to contest the 'nil' compensation he may be offered under sub-clause 12(3)(c), he must be able to prove, on a balance of probabilities, that he can still 'exercise control' over his land – despite the violence used to eject him from it and the death threats he faces if he tries to return to it. This onus of proof will clearly be very difficult for him to discharge.

Or take the example of Bheki Dlamini, whose 3 000 hectares of land in the Groutville area of KwaZulu-Natal were expropriated from him in 2013 and then registered in the name of the KwaDukuza Municipality, which wanted the land for a new housing development. This expropriation should not have proceeded, as the necessary notice of expropriation was never served on him (see *Disputes on the validity of the expropriation* below). For present purposes, however, the key question is what Mr Dlamini would need to do in contesting the

[59] Clause 19(1), Bill
[60] Clause 19(2), Bill
[61] Clause 19 (3), (5), Bill
[62] Clause 19(9), Bill

compensation offered him – assuming that his 3 000 hectares were to be expropriated from him in the future and under the terms of the Bill.

Since Mr Dlamini would bear the onus of proof, he would have to satisfy the presiding magistrate – or judge of the new Land Court – that the amount of compensation offered him is inconsistent with what the Bill requires. He would therefore have to prove that whatever amount the municipality has deducted from market value for 'the purpose of the expropriation' – which is to build new houses – is incorrect. However, since no one knows how to put a monetary value on a purpose of this kind, it would be extremely difficult for Mr Dlamini to prove, on a balance of probabilities, that the municipality has erred. And if he fails to provide that proof, then he will lose the case and may have to pay not only his own legal costs but also the great bulk of the legal costs incurred by the KwaDukuza Municipality.

Moreover, even if an expropriated owner manages to win the initial court battle, the expropriating authority will be able to take the matter on appeal, using tax revenues to fund this further litigation. Fighting the appeal will increase the owner's own legal costs. If he loses the appeal, he will have to pay not only his own (much increased) legal expenses but probably also many of the additional legal costs the expropriating authority will have incurred. In practice, the risks of major adverse costs orders will make it even harder for the expropriated owner to turn to the courts for relief.

The current version of the Bill deals briefly with costs, saying in sub-clause 9(5): 'A court may make any order as to costs that it considers just and equitable for proceedings contemplated in sub-sections (2) and (3)'. This new provision simply restates the general principle regarding costs awards: that these should be just and equitable. It does not, however, require that costs be awarded against the losing party, which is also the norm. Hence, the new sub-clause may give the courts additional scope not to order costs against an expropriated owner confronted with the vague terms of sub-clause 12(1) – and unable to prove the expropriating authority wrong on the amount it has deducted from market value for 'the purpose of the expropriation' (as in the example of Mr Dlamini above).

The earlier wording of Section 19(8) of the Bill said that 'a dispute on the amount of compensation alone does not preclude the operation of Section 9'.[63] (Section 9 provides for the automatic transfer of both ownership and the right to possess the property on the dates stated in the notice of expropriation.) Clause 19(8), by reiterating the mandatory transfer of ownership and the right to possession under section 9, thus used to reinforce the fact that both these rights would pass to the state regardless of whether the amount of compensation was still disputed.

The new Clause 19(8) no longer refers to section 9 at all. However, this omission makes no difference to the meaning or impact of section 9. What matters rather are the clear rules still contained in section 9 on the automatic transfer of ownership and the right to possession to the state on the dates specified in the notice of expropriation. Hence, that the new wording of Clause 19(8) no longer reinforces the provisions of Clause 9 is unimportant.

[63] Clause 21(8), Bill, but earlier, B23-2020, version

The new Clause 19(8) deals with a different issue – the impact of an appeal against a court decision on the amount of compensation which has already been handed down. According to the new sub-clause: 'Any appeal against the decision of a court on the amount of compensation will not prevent the expropriating authority from expropriating for the amount approved or decided, unless a court grants an interim interdict based on compelling prospects of success on appeal.'[64]

Say, thus, that the new Land Court, as earlier noted, has decided that the amount of compensation for certain land should be nil under sub-clause 12(3) of the Bill and the owner appeals against this decision. The usual effect of an appeal is to suspend the judgment in issue pending a final resolution of the appeal. But sub-clause 19(8) sidesteps this rule by providing that the expropriating authority can still go ahead and expropriate the land for nil compensation, unless the owner can show such 'compelling prospects of success in his appeal' that a court is persuaded to issue an interim interdict barring the expropriation from proceeding.

3.8.2 Disputes on the validity of the expropriation

The 2013 version of the Expropriation Bill tried to prevent the courts from adjudicating on the validity of an expropriation: on whether, for example, the expropriation was truly 'in the public interest' or really 'for a public purpose'. That attempt to oust the jurisdiction of the courts was clearly unconstitutional, which is why the current Bill makes (grudging) allowance for court adjudication on all disputes.

As earlier described, Clause 19(2) gives the disputing party 180 days to litigate on 'the amount of just and equitable compensation'. However, Clause 19(6) adds that this wording 'does not preclude a person from approaching a court on any matter relating to the application' of the Bill.[65] This wording is broad enough to cover disputes on validity as well as other issues: for example, whether an expropriated owner can be evicted from his or her home without a prior court order, as required by Section 26(3) of the Constitution.

The Bill nevertheless seems intent on encouraging people to believe that it is only disputes regarding compensation that can be taken to the courts. Most of the provisions in Clause 19 thus focus solely on disputes over the compensation to be paid. The definitions section of the Bill (Clause 1) reinforces this narrow focus by defining 'a disputing party' as an owner, mortgagee, or rights holder who 'rejects the expropriating authority's offer of compensation'. This definition leaves out the possibility that the owner may also reject the validity of the expropriation, or the expropriating authority's capacity to evict him without prior court authorisation.[66]

This narrow definition of 'disputing party' is inconsistent with Section 34 of the Constitution, which gives everyone the right to have legal disputes (including disputes as to the validity of expropriations) decided by the courts after a fair and public hearing. It also infringes Section 33 of the Constitution (the right to just administrative action), because it effectively allows an

[64] Clause 19(8), Bill
[65] Clause 21(6), Bill
[66] Clause 19(2), (6) read together with Clause 1, Bill

expropriating authority to act as judge and jury in its own cause in deciding for itself on the validity of an expropriation and in carrying out an unauthorised eviction. The definition of disputing party should therefore be changed, as set out in the *Appendix* below.

Clauses 19(2) and (3) envisage that any process of adjudication will generally begin only *after* a notice of expropriation has been served – and at a time when ownership and the right to possess the property may already have passed to the expropriating authority. In these circumstances, however, most people will be too financially and emotionally stressed to embark on litigation. The Bill's provisions effectively putting the onus of proof on them in any court proceedings will also make the risks and likely costs of doing so inordinately high.

The relatively few people with deep enough pockets will still be able to seek the help of the courts. But the great majority of expropriated owners (and rights holders) will find themselves under enormous pressure simply to accept the validity of the expropriation, along with whatever compensation the expropriating authority has offered. This will make a mockery of various constitutional guarantees, including the right to have the compensation payable on expropriation 'decided or approved by a court'. Moreover, as the *Haffejee* ruling makes clear, a court's decision on compensation must be made – in all but the most exceptional instances – *before* the expropriation may proceed (see *Determination of compensation prior to expropriation*, above).

Much of Clause 19 is thus inconsistent with Sections 34, 25, and 33 of the Constitution. Moreover, if the expropriated property includes a person's home, then Clause 19 is often also inconsistent with Section 26(3) of the Constitution. Clause 19 thus needs to be amended to comply with all relevant constitutional provisions. The wording required is set out in the *Appendix* below.

3.9 Date of payment of compensation

According to the Bill, 'the expropriated owner (or holder) is entitled to payment of compensation by no later than the date on which the right to possession passes to the expropriating authority'. However, another clause in the Bill allows the expropriating authority to avoid this obligation through the simple expedient of 'proposing a later date or dates' for payment.[67]

In these circumstances, the owner must either agree to this later date, or the matter must be referred to the courts for decision.[68] But if the expropriating authority has stipulated a later date for payment and is waiting for a court to authorise this date – a process which, given clogged court rolls, could take months or years – the expropriating authority is unlikely in practice to pay on the date it takes possession. Given the costs and time involved in litigation, most owners (or rights holders) will again have little choice but to agree to payment being deferred.

Worse still, the Bill also expressly states that 'any delay in making payment…will not prevent the passing of the right to possession to the expropriating authority…unless a court orders

[67] Clause 15(1), (4), Bill
[68] Clause 15(4), Bill

otherwise'.[69] This means that the expropriating authority will generally suffer no penalty for proposing a later date for payment. These provisions are so skewed against the owner or rights holder that they cannot be accepted as 'just and equitable', as Section 25 of the Constitution requires.

If these provisions in the Bill are to be brought into line with the Constitution, the expropriating authority must be obliged to pay the full amount of compensation *before* it takes ownership of the property on the date of expropriation stated in the notice of expropriation. Payment at this earlier point in time will help to strike the necessary equitable balance between the public interest and the interests of those affected. It is also particularly important in South Africa today, as state entities are notorious for not paying their bills on time – or even within 90 days of their falling due.

To ensure that payment is indeed made timeously, an effective sanction against late payment is needed. The Bill should therefore make it clear that any notice of expropriation will fall away and become invalid if the compensation is not paid in full ten days before the intended date of expropriation. The amendments needed to bring about these changes are set out in the *Appendix* below.

3.10 The rights of third parties

Since various third parties may have rights in property targeted for expropriation, the Bill allows an expropriating authority to expropriate not only the owner but also the holders of such third-party rights. The expropriating authority may carry out all these takings by means of a single notice of expropriation.[70]

According to the Bill, the impact of expropriation varies according to whether these third-party rights are mortgage rights, mining rights, other registered rights (such as servitudes), or unregistered rights, including leases and customary land-use rights.

3.10.1 Mortgage rights

If the expropriated property is mortgaged to a bank, the mortgage will automatically be terminated on the date of expropriation stated in the notice of expropriation. On that date, ownership passes to the expropriating authority free from any mortgage debt, while any registered mortgage automatically comes to an end.[71]

In this situation, the compensation payable must be paid out in accordance with an agreement reached between the expropriated owner and the bank to which the debt is owed as to how the compensation is to be apportioned between them. If no such agreement has been reached, the expropriating authority may deposit the compensation payable with the Master of the High Court, who will in time pay out the money in keeping with any relevant court order.[72]

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[69] Clause 8(1), Bill. (The Memorandum on the Objects of the Bill speaks, in para 3.4.1, of 'separate notices' being required, but this is not evident in the revised wording of the Bill.)
[70] Clause 8(5)(a) and (b), Bill
[71] Clause 9(1)(a), (d), Bill
[72] Clause 18, Bill

Some of these provisions in the Bill echo the current Expropriation Act, which also provides for the automatic termination of any mortgage bond when ownership of the property passes to the state. Under the Act, however, there is little danger that the amount of compensation due – market value, plus an amount to make good all financial loss resulting from the expropriation – will be less than the amount owing to the bank. The situation under the Bill is different. Since compensation will generally be less than market value and will sometimes be 'nil' under Clause 12(3), the amount payable could well be less than the outstanding loan.

If the Bill is enacted in its current form, banks will become more reluctant to extend mortgage finance, for they will know that houses and other properties that might in time be expropriated are unlikely to provide sufficient collateral for loans. This will make it more difficult for prospective homeowners – very many of whom are likely to be black South Africans – to secure mortgage bonds in the future. It will also become very much more difficult for farmers and a host of other businesses to borrow working capital using their land as collateral. This could gravely undermine agricultural production, food security, and the growth potential of the entire economy.

The situation is also unfair to the expropriated owner, who must repay the bank any outstanding balance on his mortgage bond. In practice, the obligation to repay the loan could make it impossible for him to replace the home, farm, business premises, or other property that he has lost through no fault of his own. Provisions which put expropriated owners in such a difficult situation do not strike 'an equitable balance between the public interest and the interests of those affected' (as required by Section 25) and are inconsistent with the Constitution.

These provisions in the Bill will also put banks, and the credibility of the entire financial system, under severe strain. Many mortgage debts on expropriated properties will inevitably remain unpaid. This will jeopardise the sustainability of the country's banks. It could also unleash a massive banking crisis with negative ramifications for all financial institutions.

3.10.2 Mining and prospecting rights

A mining or prospecting right will not automatically be expropriated at the same time as the mining land itself. However, there is little in the Bill to prevent an expropriating authority from expressly expropriating any such mining or prospecting right in the same notice of expropriation. All that is needed under the Bill is that this notice is served on the relevant rights holder as well, and that it sets out 'the amount of compensation agreed upon or approved or decided by a court under section 19'.[73]

Though this compensation will in time have to be paid to the rights holder, the prospect that mining companies could have both their mining land and their mining rights expropriated for inadequate compensation and generally without a prior court order will add to the insecurity of mining titles in South Africa. This could further undermine the sustainability of a mining industry already under great pressure from other onerous policies and a challenging operating

[73] Clause 9(1)(b)(ii) read together with Clause 8(3)(g), Bill

environment characterised by costly and unreliable electricity supply, deteriorating rail and port infrastructure, and a significant increase in illegal mining.

3.10.3 Other registered rights

A servitude, such as a right of way to an adjoining property, will continue to exist if it has been registered against the title deeds of the expropriated land. Again, however, there is nothing to prevent an expropriating authority from expropriating the servitude as well and doing so under the same notice of expropriation. Again, this notice must be served on the holder of the servitude, who is entitled to just and equitable compensation, as stated in the notice of expropriation.[74]

3.10.4 Unregistered rights

Unregistered rights include the rights of tenants to occupy residential and business premises under lease agreements, the rights of farm workers and other farm residents to live on commercial farms belonging to others, and the customary land-use rights of the 18m or so people currently living on land held in customary tenure.

Under the Bill, all unregistered rights are 'simultaneously expropriated' on the date that ownership passes to the expropriating authority.[75] Under Clause 12(1) of the Bill, an unregistered rights holder such as a tenant is entitled to 'just and equitable' compensation, which must be based on market value, less the four discount factors.[76] But how is the market value of an expropriated lease to a residential flat or to business premises (a take-away food outlet on a busy main road, for example) to be quantified? In addition, the market value of such a lease is likely to be limited and could easily be reduced by the discount factors, including 'the purpose of the expropriation'.

Yet the tenant is likely to suffer significant financial losses as a direct result of the expropriation. Among other things, he will have to find alternative premises, perhaps at a higher rental. He will also have to pay the costs of moving there. Moreover, if he has been leasing business premises, he will not be able to earn his normal income until he can find new premises and start up afresh. In addition, if his new premises are not as convenient to his customers, he may lose much of his existing clientele.

However, no compensation will be available to tenants for major losses of this kind because they do not fit the formula in Clause 12 of the Bill. This is neither just nor equitable and is clearly in breach of Section 25 of the Constitution.

The same will apply to farm workers or other farm residents, all of whose unregistered rights of residence on a commercial farm will 'simultaneously' be expropriated when ownership of that farm passes to the expropriating authority.[77] Farm residents will also lose their rights to possess their farm homes when possession of the farm passes to the expropriating authority.

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[74] Clause 9(1)(d), read together with Clause 8(3)(g), Bill

[75] Clause 9(1)(b), Bill
[76] Clause 12(1), Bill
[77] Clause 9(1)(b), Bill

Though farm residents will have rights to compensation under Clause 12(1), in practice the formula in that sub-clause will provide them with only small amounts.

The market value of an unregistered right of residence is again difficult to quantify. However, it is likely to be limited and may also be reduced by the discount factors. Yet farm workers who are evicted in this way will face many financial losses. They will have to find new homes and new means of livelihood. They will have to pay moving costs. They could suffer other losses, such as the value of livestock they can no longer keep. Farm residents should be entitled to an amount to make good such losses, all of which are a direct result of the farm's expropriation. But Clause 12(1) makes no provision for this.

Clause 12(1) must thus be amended to allow expropriated tenants and farm residents to claim amounts to make good all the direct losses they suffer as a result of an expropriation. This is allowed by the current Expropriation Act of 1975 but excluded under the current terms of the Bill. Unless Clause 12(1) of the Bill is amended to allow direct losses to be taken into account, both tenants and farm workers will receive very little compensation on the expropriation of the premises they lease or the farms on which they live.

However, if tenants and farm residents are to be allowed to claim for resulting losses, there is no reason why expropriated owners should not be able to claim for such losses too. Expropriated owners will also have to find alternative residential or business premises, which may be more costly than the ones they previously owned. They must also pay their moving costs. In the case of business premises, they will also lose their normal income until they can obtain new premises and start their businesses up again. In addition, if their new premises are less convenient to customers, they too could lose much of their existing clientele. If compensation is truly to be 'just and equitable' in all the circumstances, then an expropriated owner must also be able to claim an amount to make good all direct losses resulting from the expropriation.

The Bill must thus be amended to allow both expropriated rights holders and owners to claim for resulting losses. The relevant wording is set out in the *Appendix* below.

3.10.5 Unconstitutionality of the Bill's provisions relating to rights holders

The Bill overlooks the fact that any expropriation of third-party rights must also comply with all relevant constitutional provisions. Hence, under Section 25 of the Constitution, the expropriation of a mining right, a servitude, a lease, a farm residence right, or a customary land-use right must (objectively) be 'for public purposes' or 'in the public interest'. The compensation paid to these rights holders must also be truly 'just and equitable' in all the circumstances.

Holders of mining rights, servitudes, leases, farm residence, and customary land-use rights also have guaranteed rights of access to the courts (under Section 34 of the Constitution) and to just administrative action (under Section 33). Where residential rights are in issue – as they are for tenants leasing houses or flats, for farm residents living on commercial farms, and for people living on customary land-use plots – these rights holders also have the right not to be evicted without prior court orders authorising this.

The holders of registered and unregistered rights must thus also have the protection of an amended Clause 21, as set out in the *Appendix* below.

3.11 Expropriation by the minister of public works

Chapter 2 of the Bill deals with expropriation by the minister of public works and infrastructure (the Minister). The Bill gives the Minister the power to expropriate either for a public purpose or in the public interest. It also gives him the power to expropriate 'on behalf of an organ of state…which is not an expropriating authority' if (a) a relevant minister (with jurisdiction over that organ) 'requests [this] in writing' and (b) if 'the Minister is satisfied that the organ of state requires the property for a public purpose or in the public interest'.[78]

The powers thus given to the minister seem unnecessary, as many organs of state already have powers to expropriate under this Bill or other legislation. In addition, these provisions of the Bill – in laying down different rules for 'ministerial' expropriations (as opposed to others) – are sure to generate confusion and legal uncertainty.

Under an earlier version of the Bill, the Minister's powers to expropriate on behalf of other organs of state 'applied' only to 'property which is connected to the provision and management of the accommodation, land and infrastructure needs of [the relevant] organ of state'. Under the current version of the Bill, the Minister's powers have been broadened to 'include' the expropriation of property 'to be used' for these needs. The Minister's power to expropriate in this situation is expressly made 'subject to the provisions of Chapter 5' of the Bill, which deals with the amount of compensation and the time when it must be paid. This wording raises doubts as to whether ministerial expropriations are subject to the other chapters in the Bill, particularly Chapter 3 ('Investigation and valuation of property'), Chapter 4 ('Intention to expropriate and expropriation of property'), Chapter 6 ('Mediation and determination by court'), Chapter 7 ('Urgent expropriation'), and Chapter 8 ('Withdrawal of expropriation').[79]

As it is currently worded, the Bill could allow the Minister to brush aside all the requirements set out in all chapters other than Chapter 5. Among other things, this could bar an owner or rights holder who suffers a ministerial expropriation from having a dispute over the validity of such an expropriation referred to the courts. This is objectionable and clearly unconstitutional, for any ministerial expropriation must of course comply with all relevant constitutional guarantees.

Since there is little need for the Minister to have his own and seemingly different expropriation powers, Chapter Two should simply be deleted, as shown in the *Appendix* below.

3.12 Condonation for procedural defects

Clause 27 of the Bill states that 'a regulation or notice, or an authorisation [or] document' which has been 'made or issued' under the statute, 'but which does not comply with any procedural requirement of this Act is nevertheless valid if the non-compliance is not material

[78] Clause 3(2)(a) and (b), Bill
[79] Clause 3(3), 3(1) Bill

and does not prejudice any person'. Such a regulation, notice or other document 'may be amended or replaced without following a procedural requirement of this Act if (i) the purpose is to correct an error and (ii) the correction does not change the rights and duties of any person materially'.[80]

The Bill goes on to say that 'the failure to take any steps under this Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure (a) is not material, (b) does not prejudice any person, and (c) is not procedurally unfair'.[81]

Expropriation is such a drastic remedy and the powers given to expropriating authorities under the Bill are so far-reaching that condonation of this kind cannot be accepted. Expropriating authorities must be able to show that all constitutional requirements have been met, including those relating to administrative justice. They therefore cannot be allowed to argue that their failures to comply with procedural requirement do not invalidate their actions or decisions if those failures were 'not material', did not 'prejudice anyone', and were 'not procedurally unfair'. The practical effect will be to shift the burden of *disproving* these assertions on to the owners or rights holders affected by such non-compliance. Since all expropriating authorities must ensure that their proposed expropriations are fully compliant with the Constitution, they should instead be obliged to begin any expropriation process afresh if they fail to comply with relevant procedural requirements.

3.13 Trumping effect of the Bill

Part of the Bill's purpose (as the Memorandum on its Objects makes clear) is to 'ensure uniformity in the way that organs of state undertake expropriation'. This is important, the memorandum adds, because there is such an 'array of authorities within all spheres of government which have the power to expropriate through various pieces of legislation'. The Bill is thus intended to ensure a 'uniformity of procedure' for all expropriations, 'without interfering with the powers of expropriating authorities'.[82]

The Bill thus has several trumping provisions. It recognises in Clause 2(3) that an expropriating authority may 'expropriate property in terms of a power conferred on it by law of general application and in accordance with sections 5 to 25 and 28'. The Bill also requires that any existing law dealing with expropriation must be 'interpreted in a manner consistent with its terms', particularly as regards the compensation payable. To reinforce this point, the Bill further states that its provisions must 'prevail in the event of a conflict' between it and any other law dealing with expropriation.[83]

The Bill claims that this will ensure not only uniformity in procedures but also that all expropriations are 'consistent with the spirit and provisions of the Constitution'.[84] However, since the Bill contradicts the Constitution in all the ways outlined above (and further summarised below), all expropriations carried out in keeping with the Bill will in fact be

[80] Clause 27(1), Bill
[81] Clause 27(2), Bill
[82] Para 1.3, Memorandum on the Objects of the Expropriation Bill (Memorandum), 2020
[83] Clause 2(3), 28(1), (2), Bill
[84] Para 1.2, 1.3, Memorandum

unconstitutional and invalid. Any safeguards currently contained in other legislation against the abuse of the power to expropriate will also fall away. This makes it all the more important to ensure that all of the Bill's provisions are brought fully into line with the Constitution. This is vital to prevent a host of unconstitutional takings being implemented under many other expropriation statutes.

4 Likely socio-economic consequences of the Bill

The Bill empowers all expropriating authorities, at every level of government, to expropriate land and other property whenever they consider this to be 'for public purposes' or 'in the public interest'. Since such authorities will rarely find their expropriations challenged in the courts, many financially stressed, inefficient (and sometimes even corrupt) municipalities, government departments, and parastatals may be tempted to use the Bill to further their own narrow economic and/or political or factional interests.

4.1 No advance for land reform

The government claims that the Bill is needed to speed up land reform, but this is a tired and unconvincing justification that brushes over many inconvenient truths. In fact, only 2.6% of black South Africans see 'more land reform' as the best way to improve their lives.[85] In addition, some 70% of land reform projects have failed, with previously successful farms soon failing to produce. Over the past 29 years, the government has thus spent billions of rands on taking hundreds of farms out of production with little benefit to anyone. Such pointless waste must stop, not be given further impetus.

In addition, the government has little intention of transferring individual ownership of the land it acquires to emergent black farmers. Instead, it is determined to confine them to leasehold tenure, as stated in the State Land Lease and Disposal Policy (SLLDP) of 2013. Moreover, though President Cyril Ramaphosa and other ministers have recently put huge emphasis on skewed land ownership as the primary reason for poverty and inequality, the budget for land reform has long been set at less than 1% of total budgeted expenditure. In 2020, moreover, as in several earlier years, less was budgeted for land reform and restitution grants than was allocated for the protection of VIPs and dignitaries.[86]

In the 2022/23 budget, the Department of Agriculture, Rural Development and Land Reform (the land department) was allocated R28.4 billion, of which R1.1 billion was allocated to 'land reform' and R3.8 billion to 'restitution'. These amounts are to increase slightly over the medium term, but are insignificant compared to spending on environmental programmes, for example (R8.6 billion in 2022/23 alone).[87] The 'land reform' and 'restitution' allocations, together R4.9 billion, make up only 17.5% of the land department's total budget for the year. This is hardly indicative of land reform being the government's top priority. If the government is serious about land reform, it should begin by greatly increasing the budget for this, transferring individual ownership of land to emergent farmers, and taking effective measures to help them succeed as commercial producers.

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[85] IRR, October 2022 opinion poll

[86] https://www.treasury.gov.za/documents/National%20Budget/2023/review/FullBR.pdf, p67

[87] http://www.treasury.gov.za/documents/national%20budget/2020S/review/FullSBR.pdf p. 84

4.2 The Bill extends far beyond farming land

Though the government has successfully punted the Bill as a land reform measure, its ambit extends far beyond farming land. This is clear from the definition of the 'property' subject to the Bill, which is expressly defined as 'not limited to land'.[88]

Many people outside the agricultural sector have long tended to believe that the Bill will not affect them, but this is an illusion. Others may think that the risk of expropriation applies solely to white South Africans, but this too is a fallacy. In fact, the Bill is a draconian measure which gives all expropriating authorities the power to take from people their homes, business premises, customary plots, farms, mines, and other properties. Often these will be their sole assets – built up by them over a lifetime of endeavour. In return, less than adequate or 'nil' compensation will be paid.

Moreover, irrespective of what assurances Mr Ramaphosa and his ministers might now provide, once the Bill is on the Statute Book there will be little to prevent hundreds of state entities from resorting to it ever more often – and without having to wait for the trigger of a land claim.

4.3 A flawed definition of 'expropriation'

The definition of 'expropriation' contained in the Bill is particularly damaging. As earlier described, this definition raises the risk that the state will in future be able to avoid paying any compensation at all through the simple expedient of taking land as custodian, rather than as owner. If the flawed main judgment in the *Agri SA* case is followed, such a taking will not count as an expropriation and so former landowners will not qualify for any compensation. In this situation, the Bill's limited procedural safeguards regarding prior negotiation, notice of intended expropriation, and court adjudication will also fall away.

4.3.1 Custodianship of all land

The risk of the state taking custodianship of all land in the future is real. Already, the state has acquired custodianship of all mineral resources under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. Two thirds of these unsevered mineral resources beneath the ground used to be privately owned, but now all of them are vested in the custodianship of the state. None of the private individuals or firms that used to own these mineral resources has been compensated for their losses.

In the land context, moreover, the government in 2014 drew up a bill (the Preservation and Development of Agricultural Land Framework Bill of 2014) that aimed to vest all agricultural land in the custodianship of the Department of Agriculture, Forestry, and Fisheries (DAFF), as it then was. If this bill were to be revived and enacted into law, the land department's 'assumption of custodianship' would not count as an expropriation under the definition contained in the Bill – and so no compensation would be payable to erstwhile owners.

Once the state has taken custodianship of all land, moreover, farmers who currently own their land will find that their 'right to farm' has become subject to ministerial regulation. Such regulation could require them to obtain land-use leases from the government and comply with

[88] Clause 1, Bill, read together with Section 25(4)(b) of the Constitution

further conditions in order to do so. Such a situation would turn former owners, like their emergent counterparts under the State Land Lease and Disposal Policy of 2013, into perpetual tenants of the state.

The government could go further too by vesting all land – both urban and rural – in the custodianship of the state. This is also what it plans to do, according to Masiphulo Mbongwa, a senior manager in the then Department of Rural Development and Land Reform. Answering questions on the proposed EWC constitutional amendment at the World Economic Forum's January 2019 meeting in Davos (Switzerland), Mr Mbongwa said that the government planned to amend Section 25 of the Constitution so as to vest all land 'in the people of South Africa'. Thereafter, it would enact a National Land Act, which would be similar to the National Water Act of 1998 and the MPRDA.

In addition, the draft Constitution Eighteenth Amendment Bill of 2021 proposed to amend Section 25(5) of the Constitution so as to oblige the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable *state custodianship of certain land in order for* citizens to gain access to land on an equitable basis'.[89]

The crucial change lay in the insertion of words effectively requiring the state to take custodianship of 'certain' land. How much land might in time be taken into state custodianship under this sub-section was unclear. However, 'certain' land could in time be defined as meaning all privately-owned land in both urban and rural areas, and perhaps also all land held in customary tenure. The Constitutional Amendment Bill failed to muster the necessary two-thirds majority and was thus withdrawn – but the government's interest in the custodianship option remains.

In areas where the state takes custodianship of land, 'every title deed will be meaningless' (as Julius Malema of the Economic Freedom Fighters has put it). Yet former landowners will be barred from claiming any compensation under the Bill's restrictive definition of 'expropriation'.

People will also then need 'land-use licences' from the state, which might initially be set for a period of 25 years, as Mr Malema has mooted. At the start of this new system, people will presumably be allowed to keep using the residential, farming, industrial, mining, and other land they previously owned. However, the state will have broad powers to terminate these land-use licences when it so chooses. It could also make them subject to conditions that are increasingly difficult to fulfil, as mining companies have found under the MPRDA.

4.3.1 Many uncompensated 'regulatory' takings too

Under the Bill's definition of 'expropriation', indirect or regulatory expropriations, which do not vest the ownership of assets in the government, will not count as expropriations either. This could prompt the government to introduce 51% indigenisation requirements for all foreign businesses, along with 51% BEE ownership requirements for all local firms. Again, the government would be able to do this without having to compensate owners either for the

[89] Clause 1(3), Draft Constitution Eighteenth Amendment Bill of 2021, emphasis supplied by the IRR

loss of majority control over these firms, or for the depressed prices likely to result from a plethora of forced sales.

4.4 Overall economic ramifications of the Bill

The overall economic ramifications of the Bill are impossible to foresee because the measure trumps all existing laws touching on expropriation and is likely to encourage a host of custodial takings and regulatory expropriations for which no compensation will be paid. Inevitably, the Bill will have many consequences that cannot be anticipated. However, the threat to property rights implicit in the Bill will clearly:

- deter investment, growth, and job creation;
- contradict the National Development Plan (NDP), still supposedly the government's 'overriding' policy blueprint;
- encourage yet more businesses to shift investment away from South Africa; and
- make it harder still to recover from the economic crises arising from the prolonged Covid-19 lockdown, the July 2021 riots, the Russia-Ukraine conflict, and the high inflation and interest rates these events have helped to trigger.

The prolonged Covid-19 lockdown, in particular, helped to precipitate an economic crisis of unprecedented proportions. The government nevertheless seems to be ignoring this in pressing ahead with the Bill, as if nothing of substance has changed in the past year. Many of the economic problems already confronting South Africa are also likely to worsen and become yet more difficult to solve. This is likely to be particularly evident in the following spheres:

4.4.1 Economic growth

Even before the Covid-19 crisis, the country's growth rate had virtually ground to a halt, with growth of 0.8% of GDP recorded in 2018 and an even more meagre growth rate (0.2% of GDP) evident in 2019. In 2020, after many months of lockdown restrictions, the economy contracted by a staggering 6.3% of GDP. Thereafter, the eight days of riotous violence in KwaZulu-Natal and Gauteng in July 2021, the Russian invasion of Ukraine in February 2022, severe flooding in mid-2022 in KwaZulu-Natal, and loadshedding at unprecedented levels since late in 2022 have also contributed significantly to lacklustre economic performance.[90]

Though GDP growth rebounded off a low base to 4.9% in 2021, it dropped to 2.0% in 2022. The South African Reserve Bank forecasts dismal growth of 0.3% in 2023, 0.7% in 2024, and 1.0% in 2025.[91] The National Treasury has been slightly more optimistic, projecting 0.9% growth in 2023 and an average of 1.4% from 2023 to 2025.[92] However, the Treasury's

[90] https://theconversation.com/south-africas-economy-has-taken-some-heavy-body-blows-can-it-recover-183165

[91] https://www.statssa.gov.za/?p=16162; https://businesstech.co.za/news/business/660445/reserve-bank-sounds-the-alarm-for-south-africas-economy

[92] https://www.businesslive.co.za/bd/national/2023-02-28-treasury-and-reserve-bank-growth-forecasts-differ-over-impact-of-power-cuts

projections have consistently overstated the growth rates the country has actually achieved. Going back to 2010, in fact, projected growth figures from the National Treasury overestimated actual growth by a staggering 235%.[93] What seems more likely, thus, is that growth will decline to around 1.5% of GDP, which is its long-term average.

South Africa's economic growth has in fact been in decline since 2008.[94] With the South African economy already in such enormous crisis, the last thing the country needs is to enact a Bill which will greatly reduce investment and make it harder still to restore the economy even to its 2019 levels.

4.4.2 Debt and downgrades

In 2008, gross loan debt stood at R630bn or 26% of GDP. In 2022, however, it is expected to reach R4.73 trillion (71.1% of GDP), before rising further to R5.84 trillion (73.6% of GDP) in 2025/26. This is an enormous increase over a relatively short period. Debt-service costs will increase from 18% of main budget revenue in 2022/23 to 19.8% in 2025/26, averaging R366.8 billion a year over the next three years – over R1 billion a day. Already, these costs are increasingly crowding out spending on other healthcare, social services, and other essentials.[95]

The revenue shortfall in 2022 was estimated at R276bn and would have been worse still without a major increase in global commodity prices.[96] In these circumstances, the best way to close what former finance minister Tito Mboweni has called 'the jaws of the hippo' – in other words, the yawning gap between tax revenues and state spending – is to increase the growth rate to 5% of GDP or more and so expand the tax take. But the Bill will make it very much more difficult to achieve these goals. This will leave spending cuts of the kind mooted in the 2023 budget as the sole remaining option. This will harm all South Africans heavily dependent on the state for a wide range of essential goods and services.

4.4.3 Rand:dollar exchange rate

In 2009 the rand:dollar exchange rate stood at R8.44 to the dollar. In September 2023, it stands at some R18.80 to the dollar. South Africa's high ratio of public debt to GDP – which far exceeds the emerging market norm of some 60% of GDP – makes it particularly vulnerable to global risk aversion or other negative sentiment.

South Africa has already been downgraded to sub-investment or junk status by all international ratings agencies, one of which has the country on negative watch. If further downgrades are triggered in response to this Bill and other threats to property rights, the rand's value could in time slip to R20 or even R25 to the dollar.

4.4.4 Inflation

As the exchange rate deteriorates, inflation is likely to soar. If farming is disrupted by major

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[93] Ivo Vegter, The aloe ferox is dead, *The Daily Friend*, IRR, 26 February 2021
[94] https://theconversation.com/south-africas-economy-has-taken-some-heavy-body-blows-can-it-recover-183165
[95] https://www.treasury.gov.za/documents/National%20Budget/2023/review/FullBR.pdf, p3
[96] Ibid

farm expropriations, or by the taking of 'custodianship' of all agricultural land, food inflation is likely to be particularly severe. Having reached 13.4% in January 2023, food inflation now stands at 12% a year and could easily rise significantly higher once again.[97]

4.4.5 GDP per capita and unemployment

South Africa's GDP per capita was R128 375 in 2021, about the same level it was in 2014 – down from its all-time peak of R158 981 in 2011.[98] Additionally, there were only 15.9 million South Africans employed in the fourth quarter of 2022 (against a working-age population 40.4 million),[99] compared to 13.7 million in 2008 (working-age population then 31.4 million).[100]

On the narrow definition of unemployment, which counts only those actively looking for work – and so overlooks millions of people too discouraged to keep searching for jobs – the number of unemployed South Africans has gone up from 1.98 million in 1994 to 7.9 million in in the second quarter of 2023. The unemployment rate (on this same official definition) has gone up from 20% in 1994 to 32.6% in 2023 and has been on a relentless upward trend since 2008.[101] The youth unemployment rate, among people aged 15 to 24, has long been far worse and stood at 60.7% in 2023.[102]

Unemployment has long been at crisis levels and was driven even higher by the Covid-19 lockdowns. Under the malign impact of the Bill, however, the official unemployment rate could easily rise to 35% or more within the population as a whole and to 70% among young people.

4.4.6 Gross fixed capital formation

According to the World Bank's latest data (2021), South Africa's gross fixed capital formation sits at 13% of GDP, as opposed to a target rate of 30% set by the National Development Plan. This is the lowest rate of fixed investment in the country in more than six decades. Fixed investment has been in decline since 2008, some 15 years ago, when it peaked at 22%.[103]

These low levels of fixed investment reflect investors' profound distrust of the country's economic environment. Since the first draft of the Expropriation Bill was introduced in 2008, fixed investment has been steadily diminishing. This trend is likely to worsen, moreover, as the changes made to the Bill since 2020 – when provisions authorising 'nil' compensation were introduced – have further undermined confidence and increased investor concerns.

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[97] Trading Economics, https://tradingeconomics.com/south-africa/food-inflation

[98] https://www.macrotrends.net/countries/ZAF/south-africa/gdp-per-capita
[99] https://www.statssa.gov.za/?p=1568586
[100] https://www.statssa.gov.za/publications/Report-02-11-02/Report-02-11-022008.pdf
[101] Stats SA, https://www.statssa.gov.za/?p=16113
[102] https://tradingeconomics.com/south-africa/unemployment-rate
[103] https://data.worldbank.org/indicator/NE.GDI.FTOT.ZS?locations=ZA

4.4.7 State-owned enterprises

In November 2022 the African Rail Industry Association described Transnet's financial mismanagement as a 'massive disaster' for the economy. The volume of goods moved by Transnet has decreased by 24% in the past five years. The company's collapse was especially pronounced during an 11-day strike in October 2022, when the disruption was estimated to be costing the economy R815 million per day in the mining industry alone.[104]

In 2022 South Africa was also plunged into a then unprecedented electricity crisis, marked by 157 days of loadshedding during the yar. By contrast, during the preceding four years (between 2018 and 2021), there had been 111 days of loadshedding a year on average. By 29th January 2023, the country had already experienced 29 days of loadshedding, which meant there had been blackouts every single day.[105] This pattern has since continued, with blackouts experienced almost every day in 2023 and stage 6 loadshedding – involving ten hours of power cuts a day – becoming increasingly common.

Isiah Mhlanga, chief economist at RMB, estimates that every day of stage 6 loadshedding costs R4 billion in GDP. Francis Stofberg, senior economist at the Efficient Group, calculates that 'the South African economy could be at least 8% to 10% larger if there was no Eskom load shedding'. Economist Bonke Dumisa attributes the economic contraction of 0.7% in Q2 2022 to rolling blackouts.[106]

The failure of Eskom – for all intents and purposes a monopoly owned and managed by the South African government – to provide sustainable electricity to South Africa has clearly resulted in devastating economic harm, making the South African economy significantly more vulnerable than it otherwise would have been.

The electricity crisis has forced many South Africans to pour additional investment into their properties in the form of solar panels, inverters, and battery systems. The farming community has been particularly hard hit, as it needs to run generators at high cost to keep produce cold and irrigate crops.[107] The agricultural sector is desperately in need of new investment into more sustainable solar facilities, so as to keep their machinery, coolers, and irrigation systems running during prolonged Eskom outages. The uncertainty and unease regarding investment that the Bill has unnecessarily generated is thus particularly harmful at this juncture, contributing to further agricultural de-development.

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[104] https://www.engineeringnews.co.za/article/association-warns-of-imminent-collapse-of-transnet-2022-11-16

[105] https://twitter.com/EskomSePush/status/1619684171110305792

[106] https://www.iol.co.za/news/politics/opinion/the-catastrophic-impact-of-load-shedding-will-the-economy-recover-0d086bb3-148b-45aa-b525-c92f2f214f95

[107] https://www.engineeringnews.co.za/article/loadshedding-is-hitting-south-africas-agricultural-sector-and-food-inflation-is-sticky-2023-01-30

4.4.8 Adverse consequences both evident and projected

When the Bill was first gazetted for public comment, it should have been accompanied by a socio-economic impact report under the Socio-Economic Impact Assessment System (SEIAS) adopted in 2015 (see *No satisfactory SEIA assessment*, below). In June 2021, however, a SEIA report that had been drawn up in 2019 was finally released.

This report claimed that the Bill would have no adverse effects on investment, but nevertheless recorded the warning notes already being sounded by Agri SA and the Banking Association of South Africa (BASA). (It also implied that these warnings were insignificant – and that investors had no concerns at all about the looming prospect of expropriation for nil compensation as South Africa has long offered 'a stable and safe investment environment'.)[108]

However, the warnings from Agri SA and BASA are important and should not be dismissed. Said Agri SA: 'Most commercial farmers are no longer willing to invest on (sic) land due to fear of expropriation without compensation. Banks no longer view farming as safe for lending money due to the uncertainty created by the proposal.' BASA reported a similar trend, saying: 'Reluctance to invest further by commercial farmers is causing many business ventures to collapse. In turn, the financial sector is suffering a real and potential financial loss which may not be recoverable.'[109] In other words, the mere debate about EWC was already chocking off domestic investment even before the adoption or implementation of the Bill.

Also relevant is the economic modelling done by University of Pretoria Gordon Institute of Business Science (GIBS) academic Roelof Botha and University of Johannesburg Professor Ilse Botha. This analysis focused, among other things, on the economic impact of EWC policies of various kinds in seven countries: Portugal, Spain, Romania, Vietnam, Venezuela, Ethiopia, and Zimbabwe.[110]

In a 2021 study (further confirming an initial report in 2018), the authors found that the ratio of capital formation to GDP in these seven countries had declined by 14% a year on average after EWC-type policies had been introduced. A decline of this magnitude was therefore likely to result in South Africa too once EWC was implemented. Even if the decline was more limited – 5% a year in scenario one, and 10% a year in scenario two – the impact would be economically disastrous over the following ten quarters. In the first scenario, GDP would decline by 7.2% over the period, tax revenues would diminish by R215bn, and public debt as a percentage of GDP would increase to 95.8%. On the second and worse scenario, GDP would decline by 10.7% over the same period, while tax revenues would decrease by some R307bn, and the ratio of public debt to GDP would rise to 101.3%.[111]

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[108] Terence Corrigan, 'Opening up the tickbox', *Daily Friend*, 25 June 2021

[109] Ibid

[110] Gopa Group Southern Africa (Pty) Ltd, 'A macroeconomic impact assessment of a policy of land expropriation without compensation in South Africa', submitted to Agri SA, January 2021, pp5-6; https://www.businesslive.co.za/bd/national/2018-11-12-land-expropriation-without-compensation-spells-economic-disaster/

[111] Ibid

The 2021 study dealt mainly with the likely future consequences of implementing EWC. However, it also noted that, prior to the Covid-19 lockdown, the public debate about EWC in South Africa had significantly undermined business and consumer confidence and contributed to 'capital formation having declined by more than 9% over the past four years (in real terms)'. The economic damage was thus already high and would grow worse if EWC was adopted.[112]

4.4.9 A vicious cycle

The economy was in a much stronger position in 2008, when an initial version of the Bill was put forward and subsequently withdrawn. Since then, economic conditions have deteriorated very sharply, as illustrated by the data earlier provided. In addition, the Covid-19 lockdowns have enormously compounded the damage of the last 15 years. In these circumstances, the government's most urgent task is to embark on the structural policy reforms needed to restore business confidence, attract investment, increase growth, and help generate the millions more jobs urgently needed to help liberate the poor.

If, instead, the Bill is adopted in its current format, the economic crisis will worsen sharply. A vicious cycle of diminishing investment and growth rates, compounded by rising debt, inflation, and unemployment, could easily be set in motion. Moreover, for as long as the Bill remains on the statute book – and the property rights essential to prosperity remain fundamentally at risk – it will be extremely difficult to break out of this downward spiral. This in time could trigger a sovereign debt crisis, leaving the government unable to service debt, pay public sector salaries, keep failing SOEs afloat, or fulfil its essential obligations to its citizens.

5 No satisfactory SEIA assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[113]

According to the Guidelines, the SEIA system must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[114]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well

[112] Ibid
[113] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015
[114] *SEIAS Guidelines* p7

as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. A particularly important need, moreover, is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[115]

The Bill is likely to trigger precisely such 'excessive costs', in the form of both disinvestment and emigration. It will also deter investment, limit growth, reduce employment, add to inequality, and make recovery from the Covid-19 lockdown, which has caused unprecedented damage to an already ailing economy, yet harder to achieve. Yet no proper SEIAS assessment of the Bill has been carried out, while no final SEIA report was appended to the Bill to help inform the public in providing their comment.

Instead, the Memorandum on the Objects of the Bill vastly understates the likely 'financial implications' of the Bill. Instead of trying to assess its negative impact on the entire economy and the wider society, the document focuses solely on whether the Bill will result in any increased implementation costs for the state.

According to Paragraph 6 of the Memorandum, the state will have to pay just and equitable compensation to 'persons affected by expropriation'.[116] However, it makes no attempt to quantify what the costs of such compensation might be.

If these costs are to be minimal – because most expropriations or other takings (custodial or regulatory) will be carried out for nil or minimal compensation, the resulting blow to the economy will be enormous and could easily set in motion the economic implosions evident in both Zimbabwe and Venezuela. If, by contrast, the internationally recognised principle of 'equivalence' is to be followed, then the compensation payable on anything but a very small number of state takings is likely to be substantial. Yet the public debt is already so unsustainably high that this could help trigger a sovereign debt default with equally devastating consequences.

The Memorandum adds that the Bill's introduction of uniform procedures for expropriation should not in itself 'have a significant impact on the staff structures of expropriating authorities'.[117] This is probably correct, but it misses all the essential points about the likely wider costs of the Bill.

The Memorandum further notes that the Department of Public Works and Infrastructure will have to increase its spending to cope with two needs: providing guidance on the Bill's uniform procedures to all expropriating authorities; and developing and maintaining a register of all expropriations, which will 'require the development of a database accessible to the public and dedicated personnel'.[118] These additional costs could be significant, especially in the government's straitened financial circumstances. However, to highlight these costs alone – while ignoring the wider economic ramifications of the Bill for the prosperity of the

[115] *SEIAS Guidelines*, p11
[116] Para 6.1, Memorandum on the Objects of the Expropriation Bill, 2020
[117] Para 6.2, Memorandum
[118] Para 6.3, Memorandum

country and all its people – underscores how urgently a proper SEIA report is necessary to help guide the public's understanding of the Bill and enhance the committee's understanding of its likely costs and consequences.

(A SEIA report written in 2019 was finally made available in June 2021 under pressure from AfriBusiness, a lobby group for small firms. This report is both superficial and misleading. It praises the Bill for giving the state 'extraordinary authority to compulsorily take immovable property from persons and corporations for use in the public interest'. It assumes that such takings – sometimes for 'nil' compensation – will have nothing but positive effects, for they will 'facilitate access to land' and so help 'reduce unemployment, poverty, homelessness, criminality, and morbidity'. This will also 'promote entrepreneurship, food security, and the productivity of the nation in general'. That some 70% of land transferred for land reform purposes has since fallen out of production is ignored.

Having briefly acknowledged that 'government officials might abuse the powers in the legislation', the report swiftly brushes this concern aside on the basis that 'there are sufficient checks and balances in both government policy and different legislations (sic) to keep the issue in check'. It also claims that investors have no concerns about the looming prospect about the Bill's EWC provisions because South Africa has long offered 'a stable and safe investment environment' – and that there is 'no empirical evidence' of an adverse investment impact from the Bill at this point. But this discounts the warnings from Agri SA and BASA, as cited above. It also indicates that the drawing up of the report was a 'tickbox' exercise, rather than a meaningful attempt to analyse the likely costs and consequences of the Bill.[119]

6 Inadequate public participation

The public was invited to provide comments on the Bill on 6 February 2023, with the deadline being 6th March 2023. Given the serious nature and implications of the Bill highlighted throughout, it is clear that setting aside one month for the public to provide comments is inadequate. This is particularly the case for a Bill that has constitutional implications (discussed below).

The Constitutional Court has stressed that adequate time must be allowed for the public consultation process. In *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*,[120] for instance, it stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.[121] The Court continued:

> 'In drawing a timetable that includes allowing the public to participate in the legislative process, [Parliament] cannot act perfunctorily. It must apply its mind

[119] Terence Corrigan, 'Opening up the tickbox', *Daily Friend*, 25 June 2021
[120] [2016] ZACC 22
[121] Ibid, paras 61, 67

taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue.'[122]

In our view, at least three months' (90 days') allowance should have been made for the public adequately to review the proposed legislation and the surrounding circumstances that have played out (and changed) since the Bill was first mooted in 2008. As there was no adequate socio-economic impact assessment accompanying the Bill, the public is compelled to study for itself the likely and unforeseeable consequences of legislation of this nature.

Additionally, the delegations to the National Council of Provinces would be well-advised to return to their provinces to conduct public hearings among their constituents on the desirability of the Bill. Provincial legislatures should also be consulted.

If the Bill is adopted despite inadequate public consultation, there are procedural grounds upon which to challenge its adoption constitutionally.

7 The unconstitutionality of the Bill

The likely economic costs of the Bill are bad enough in themselves. Worse still is the unconstitutionality of the measure and the ANC's persistent refusal to acknowledge this. Many of these issues have already been flagged. However, the key reasons why the Bill is inconsistent with the Constitution are summarised here for ease of reference.

The core problem is that the Bill allows any expropriating authority, once it has completed some simple preliminary steps, to take property of virtually every kind by the simple expedient of serving a notice of expropriation on the owner (or other rights holder).

Ownership of the property in question will then pass automatically to the expropriating authority on the 'date of expropriation' identified in the notice, which could be very soon. All unregistered rights, such as customary land use rights, leases, and the rights of farm residents to live on commercial farms, will automatically be expropriated at the same time, while various registered rights could be expropriated in the same notice too. Thereafter, the right to possess the property will likewise pass to pass to the state, automatically and by operation of law, and without regard to unresolved disputes regarding compensation or whether any compensation at all has yet been paid.

The Bill thus empowers an expropriating authority to take property by notice to the owner – and leaves it to those stripped of ownership and possession to contest this in the courts thereafter, if they can afford to do so. The Bill also seeks to put the onus of proof on the expropriated owner (or rights holder), who will probably have to pay the expropriating authority's legal costs, as well as his own, if he fails to discharge this onus. (The revised Bill now allows the courts to make whatever costs order would be 'fair and equitable', but this reflects an existing principle and may make little difference in practice.)

[122] Ibid, para 70

Effectively, this allows an expropriating authority to resort to 'self-help' when it embarks on an expropriation. Yet this is contrary to common-law principles of liberty as well as core provisions of the Constitution.

For hundreds of years, the common law has had special rules to protect both the liberty and the property of the individual from the enormous power of the state. Under the common law, an individual cannot generally be arrested by the police or other officials – even if he is suspected of having committed a serious crime – without a prior court order in the form of a warrant for his arrest. At common law, too, an individual's property cannot generally be entered or seized by the police or other officials – even though that property may have been used in committing a major offence – without a prior court order in the form of a search-and-seizure warrant.

It is because of this centuries-old protection for property that most legislation giving investigative powers to the police and other entities clearly states that they may enter on to private property only if they have the consent of the owner or have obtained a prior court order in the form of a search warrant. Most statutes also make it clear that property cannot be seized by the state without a prior court order authorising this. Provisions of this kind are standard in legislation touching on property rights. They are always included to protect the individual, whose home and other assets are no less essential to his well-being than his right not to be arrested without a warrant authorizing this.

The Bill reflects and incorporates this common-law protection for property rights in three of its clauses. The first states that an inspector, sent to investigate a property with a view to its expropriation, may not enter that property unless he has the owner's consent or has obtained a prior court order authorising his entry. The second clause states that, unless a disaster has occurred, a temporary expropriation requires a prior court order, which may be granted only in 'urgent and exceptional circumstances'. The third clause provides that, if the expropriating authority wishes to extend a temporary expropriation (from 12 months to a maximum of 18 months) that authority must first obtain a court order allowing this.[123]

However, when it comes to the far more serious matter of a permanent expropriation, the Bill excludes the need for a prior court order. This exclusion is contrary to the common law principles of liberty which the Bill recognises as binding on the state in situations that are far less damaging to the owner.

Since 1996, moreover, common-law protections for property rights have been significantly buttressed by the Constitution. This lays down a number of important requirements which must be met if an expropriation is to be valid under Section 25 (the property clause). The Constitution also guarantees access to the courts (under Section 34), and gives all South Africans the right to just administrative action (under Section 33). In addition, Section 26(3) of the Constitution prevents people from being evicted from their homes without a prior court order authorising this. The Bill of Rights also guarantees the rights to dignity and to equality

[123] Clauses 5(3), 20(2), (7), Bill

before the law, while the founding provisions of the Constitution proclaim the 'supremacy of the rule of law' as a core value of the democratic order.

According to Section 25 of the Constitution, an expropriation must comply with various criteria. Among other things, it must be carried out for public purposes or 'in the public interest'. It must also be accompanied by 'just and equitable' compensation, which must 'reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances'. If an expropriation is to be valid, an expropriating authority must comply with all these requirements. If the owner disputes whether this has been done, the expropriating authority must then prove that its intended expropriation does indeed comply. It must also provide this proof – and obtain a court order confirming its compliance – *before* it proceeds with an expropriation. Otherwise, the relevant constitutional requirements will be severely weakened, if not set at naught.

Leaving it to the expropriated owner or rights holder to try to disprove the validity of the expropriation after it has already taken place is simply not good enough. This is especially the case when many expropriated owners and holders will battle to afford the necessary court challenge. In addition, those who find themselves evicted from their homes, businesses, and other assets through an expropriation which is in fact invalid will suffer an emotional trauma and economic loss that even a subsequent court order in their favour (assuming they can afford the litigation required to obtain this), cannot easily put right.

If the Bill is to be brought into compliance with the Constitution, it must therefore be amended in various important ways. If an expropriating authority issues a notice of intention to expropriate particular property and the owner then rejects either the compensation offered or the overall validity of the proposed expropriation, the expropriating authority must *then* go to court on the matter. It must seek and obtain a court order which confirms the validity of the expropriation, decides what compensation is just and equitable in all the circumstances, and rules on when that compensation must be paid. The onus of proof in such proceedings must lie on the expropriating authority, which must satisfy the court that the proposed expropriation meets all relevant constitutional requirements, including rights to equality, dignity, and administrative justice. Moreover, if the proposed expropriation will result in the eviction of anybody from their home, then the expropriation authority must also satisfy the court that this eviction should be authorised in all the circumstances.

Once the expropriating authority has obtained a court order confirming the validity of the expropriation, deciding the compensation payable and the time when payment is due, and authorising any eviction likely to result from it, then only should the expropriating authority be able to serve a notice of expropriation on the owner and other rights holders.

Since this is clearly what Sections 25 and 26 of the Constitution require, all provisions in the Bill which purport to absolve the expropriating authority from requiring a prior court order in cases where a dispute has arisen are inconsistent with the Constitution and invalid.

Also important is Section 34 of the Constitution, which gives everyone the right to have any legal dispute decided in a fair public hearing before a court. This provision is obviously

aimed at allowing legal disputes to be resolved by the courts, through the application of the relevant legal principles to the facts of the particular case.

Under the Bill, however, this necessary process of deliberation and adjudication will rarely be available. Instead, an expropriating authority (having taken certain preliminary steps) will be able simply to serve a notice of expropriation on the owner, under which his rights to ownership and possession will automatically pass to the state long before a court has had the opportunity to decide whether such outcomes are constitutionally justified. In most instances, moreover, the dispute will never go to court at all. Expropriated owners will lack the money required for litigation and will be too caught up in trying to find new homes, business premises, or other assets to be able to contemplate risky and costly court action.

Also important is Section 33 of the Constitution, which gives everyone the right to just administrative action, which is 'reasonable' and 'procedurally fair'. These requirements are not met when the expropriating authority (which bears the responsibility for upholding them and proving that it has done so) can summarily take ownership and possession via a notice of expropriation – and then pay compensation, which is far from just and equitable, only many months later.

Equally inconsistent with the Constitution is the definition of 'expropriation' that has been inserted into the Bill. This definition is clearly intended to absolve expropriating authorities in many cases from either paying compensation or following the Bill's (limited) procedural steps for expropriations. In particular, the state will be able to slough off all constitutional and other requirements for a valid expropriation whenever it:

- takes custodianship, rather than ownership, of land and the improvements on it; and/or
- introduces regulations giving rise to indirect expropriations.

In seeking to allow such uncompensated takings, this definition is clearly contrary to Section 25 of the Constitution and the careful balance this clause was intended to strike between upholding existing property rights and allowing redress for past injustice. It is also inconsistent with the usual meaning of expropriation under international law, the content of which is supposed to be taken fully into account in interpreting the Bill of Rights.[124]

The Bill's definition of expropriation has its origins in Chief Justice Mogoeng's majority ruling in the *Agri SA* case in 2013. However, that judgment is inconsistent with international law, and was handed down without regard to the meaning of expropriation under this important body of law. In addition, as Chief Justice Mogoeng took pains to stress, that judgment was confined to the facts before the court and was not intended to lay down a general rule. The *Agri SA* judgment thus cannot suffice to give constitutional validity to a restricted definition of expropriation which contradicts the established international law meaning of the term.

[124] Section 39(1), Constitution; *Business Day* 6 February 2019

Overall, the definition of 'expropriation' in the Bill is clearly inconsistent with the property clause in the Constitution (Section 25). It is also inconsistent with the rights to administrative justice (Section 33) and access to court (Section 34). It must therefore be deleted or substantially amended by the Department, as a former deputy minister of public works, Jeremy Cronin, has previously urged.

The Department seems to believe that the Bill will provide a replacement for the current Expropriation Act of 1975 which will be fully in line with the Constitution. However, this is not so. On the contrary, the Bill is just as unconstitutional as the current Act.

The Constitution's founding provisions clearly state that the Constitution is 'the supreme law of the Republic', and that it must be respected and upheld at all times by all branches of the government. The National Council of Provinces and this committee cannot therefore lawfully adopt the Bill and should decline to give it any further consideration.

8 Necessary amendments to the Bill

It is clear that the 1975 Act needs to be replaced by a constitutional alternative. To meet this need, the Department must bring the Bill into line with what the Constitution requires. To assist the Department in this task, the IRR has drawn up a list of necessary amendments to specific clauses in the Bill. This list is set out in the *Appendix* below.

The purpose of these amendments is primarily to:

a) bring the definition of expropriation into line with the Constitution;
b) put the onus on an expropriating authority to prove that an intended expropriation complies with all relevant constitutional provisions;
c) require an expropriating authority, whenever a dispute arises, to obtain a prior court order confirming the constitutionality of a proposed expropriation *before* it issues a notice of expropriation;
d) remove the vague and uncertain 'nil' compensation provisions now contained in Clause 12(3);
e) allow expropriated owners and rights holders to obtain compensation for direct losses resulting from expropriation (such as moving costs and loss of income), as such compensation is necessary to bring about 'an equitable balance between the public interest and the interests of those affected';
f) ensure that those expropriated receive the compensation due to them before ownership (or other rights) pass to the expropriating authority;
g) require that all relevant notices are delivered by hand to the owner or rights holder, who must acknowledge receipt, with court directions for service to apply where owners or rights holders cannot be located;
h) remove unnecessary and potentially harmful provisions allowing for the condonation of defects in notices of expropriation and other important documents; and
i) remove the unnecessary, contradictory, and unconstitutional powers of expropriation specifically conferred on the minister of public works in Chapter 2 of the Bill.

9 The vital importance of private property rights

Private property rights are vital for direct investment, economic growth, and the generation of new jobs. They are a key foundation for upward mobility and individual prosperity. They also provide an essential basis for economic independence from the state – and hence for political freedom and other fundamental civil liberties.

This explains why the racially discriminatory laws that earlier barred black South Africans from owning land, houses, and other property were so fundamentally unjust. It also explains why a key purpose of the struggle against National Party rule was not simply to end racial discrimination but also to extend to black people the private property rights that whites had long enjoyed.

Significant progress towards that goal is now evident. Helped by major redistribution from via the budget, black property ownership has been growing steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year leasehold, and then in 1986 by freehold rights. Today, some 9.75 million black South Africans own their homes, as do some 790 000 so-called 'coloured' and Indian people – and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 4.4 million hectares of rural land on the open market, without the intervention of the state.[125]

Though private property ownership is still racially skewed, black ownership of land, houses, and other assets has been growing steadily for many years. To accelerate this process, the country needs an annual average growth rate of 7% of gross domestic product (GDP), accompanied by an upsurge in investment and employment. Black home ownership also needs to be formalised in many instances through the issuing of proper title deeds, which would help unlock the full economic value of these houses. In addition, some 17.5 million black people living on roughly 13 million hectares of land in customary tenure in the former homelands need individual title to the plots they occupy, which again would help to bring this dead capital to life.

Instead, economic growth is being steadily undermined and the property rights of all South Africans are being put at risk. The government, moreover, is not really seeking to cure the unconstitutionality of the current Expropriation Act, as every expropriation bill it has put forward since 2008 has been just as unconstitutional as the 1975 statute. Nor is the ruling party's true objective to speed up land reform or the provision of new infrastructure. Rather, the ANC's real aim – in combination with its partners in the tripartite alliance – is to use expropriation to advance the national democratic revolution (NDR) in this its second and more 'radical' phase.

Both the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) openly describe the NDR as providing 'the most direct path' to a socialist and

[125] CRA, *2023 Socio-Economic Survey of South Africa*, p344; Agri SA, 'Land Audit: A Transactions Approach', *Politicsweb.co.za*, 1 November 2017, p9

then communist future. Though the ANC is more circumspect about overtly embracing this goal, it has nevertheless recommitted itself to the NDR at every one of its five-yearly national conferences. In pursuing the NDR, one of the ANC's key objectives, also regularly reaffirmed, is to bring about the 'elimination of apartheid property relations'. However, the word 'apartheid' is essentially a red herring. Replace it with the word 'existing' and the real meaning of this goal becomes apparent.

Socialist and communist countries are notorious for abusing the fundamental civil liberties of their citizens. Pervasive state ownership and economic controls within these countries have generally also crippled economic efficiency, leading to major shortages of food and other essentials, and impoverishing everyone except a small political elite. Socialist and communist countries – along with states that have nationalised or expropriated land, mines, banks, oil, and other assets without adequate compensation – are also among the poorest in the world. By contrast, those countries that limit state intervention and safeguard private property rights are among the richest in the world.

The practical importance of individual property rights and limited state ownership and control has been tracked for many years by the Fraser Institute in Canada, a think tank, in its *Economic Freedom of the World Index*. The Fraser Institute's research shows that the countries which do the best in upholding private property rights and limiting state power are the 'most free', in the economic sense. They are also by far the most prosperous. Moreover, the poorest 10% of people in the most free countries have a much higher standard of living than their counterparts in the 'least free' countries, where state ownership of land and assets is pervasive and private property rights are tenuous at best.

In 2020, the most recent year for which this comparative data is available, nations in the top quartile of economic freedom had average GDP per capita of some $48 250, compared to roughly $6 500 for nations in the bottom quartile (PPP constant 2017, international$). In the top quartile, moreover, the average income of the poorest 10% was some $14 200, as opposed to about $1 700 in the bottom quartile. Hence, the average incomes of the poorest 10% of people in the most free countries were almost eight times greater than the equivalent incomes in the least free countries. In addition, only 2% of the population in the most free countries lived in extreme poverty (on US$1.90 a day), whereas almost a third of people (31%) in the least free nations were extremely poor. Life expectancy, a good pointer to prosperity and adequate living conditions, was noticeably different too, standing at 80 years in the most free countries and at 66 in the least free ones.[126]

The importance of property rights is further confirmed by the experience of both Zimbabwe and Venezuela. In Zimbabwe, the expropriation of white farms has led to economic collapse, increasing hunger, hyperinflation, a 70% unemployment rate, and the flight of millions of impoverished people. Much the same is true in Venezuela, where the economy has shrunk by

[126] https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2022-annual-report

some 70% over the past decade, hunger is widespread, inflation has spiralled out of control, and some 7 million people (out of a population of 30 million) have been forced to flee.[127]

10 The way forward

The committee is bound by South Africa's Constitution, and thus cannot lawfully put the Bill forward for adoption by the National Council of Provinces in its current unconstitutional form. Like the rest of Parliament, the committee has an over-arching responsibility to the people of South Africa to help overcome unemployment, poverty, and inequality in the most realistic and sustainable way. Experience all around the world shows that countries which respect private property rights and limit the interventionist powers of governments have the fastest rates of annual economic growth and the highest average levels of GDP per head. Moreover, these benefits extend to the poorest 10% of their populations, helping greatly to increase their incomes, improve their living standards, and raise their life expectancy.

The formula for economic success and individual prosperity is well known. It requires an emphasis on growth rather than redistribution, and the adoption of legislation that attracts direct investment, increases the growth rate, and encourages the creation of millions more jobs.

For this reason too, the committee should fundamentally rethink and then recast this Bill. At the very least, the committee needs to bring the Bill into line with the Constitution by adopting the amendments set out in *Appendix* below. All these changes are needed to cure the inconsistencies between the Bill and the Constitution. They will also help promote the investment, growth and jobs that offer the best means of overcoming unemployment, poverty, and inequality and giving South Africans the realistic prospect of a better life for all.

APPENDIX 1: PROPOSED AMENDMENTS TO SPECIFIC CLAUSES OF THE BILL

Summary

As earlier stated, the purpose of the IRR's proposed amendments to the current Bill [B23B-2020] primarily to:

a) bring the definition of expropriation into line with the Constitution;
b) put the onus on an expropriating authority to prove that an intended expropriation complies with all relevant constitutional provisions;

[127] https://www.economist.com/the-americas/2021/02/13/cuba-and-venezuela-open-up-hesitantly-to-the-market?/; https://www.politicsweb.co.za/opinion/ewc-ramaphosa-is-following-mugabes-script-on-land; https://www.statista.com/statistics/370937/gross-domestic-product-gdp-in-venezuela/; https://www.statista.com/statistics/371895/inflation-rate-in-venezuela/; https://www.worldvision.org/disaster-relief-news-stories/venezuela-crisis-facts

c) require an expropriating authority, whenever a dispute arises, to obtain a prior court order confirming the constitutionality of a proposed expropriation *before* it issues a notice of expropriation;
d) remove the vague and uncertain 'nil' compensation provisions now contained in Clause 12(3);
e) allow expropriated owners and rights holders to obtain compensation for direct losses resulting from expropriation (such as moving costs and loss of income), as such compensation is necessary to bring about 'an equitable balance between the public interest and the interests of those affected';
f) ensure that those expropriated receive the compensation due to them before ownership passes to the expropriating authority;
g) require that all relevant notices are delivered by hand to the owner or rights holder, who must acknowledge receipt, with court directions for service to apply where owners or rights holders cannot be located;
h) remove unnecessary and potentially harmful provisions allowing for the condonation of defects in notices of expropriation and other important documents; and
i) remove the unnecessary, contradictory and unconstitutional powers of expropriation specifically conferred on the minister of public works and infrastructure in Chapter 2 of the Bill.

In each case, the proposed amendment is set out, with new wording <u>underlined</u> and necessary **deletions** to a provision marked in **bold**. Each proposed amendment is followed by a brief explanation, marked in *italics*, of why the change is needed. (A more complete account of why these changes are needed has already been set out above.)

Clause 1: Definitions

The particular definitions that need amendment are noted below:

<u>'"Claimant" means an owner or holder of a right who has received a notice of intention to expropriate in terms of Clause 7(1) and who does not accept the validity of the proposed expropriation, and/or the amount of compensation offered in that notice, and/or the legal authority of the expropriating authority to evict him or her from his or her home without a court order authorising this eviction.'</u> **[delete existing definition]**

The existing definition of "claimant" should be deleted and replaced as it seeks to confine disputes over expropriation to disputes over the compensation payable. However, there may also be disputes over the validity of an expropriation (for example, whether it is really in the public interest), and disputes over whether people may lawfully be evicted from their homes without court authorisation. Attempting to narrow the disputes that can be brought to court in this way is thus inconsistent with Sections 25, 26, and 34 (the right of access to court) of the Constitution, among other guaranteed rights.

<u>A "disputing party" means an owner or holder of a right who has received a notice of intention to expropriate in terms of Clause 7(1) and who does not accept the validity of the proposed expropriation, and/or the amount of compensation offered in that notice, and/or the</u>

legal authority of the expropriating authority to evict him or her from his or her home without a court order authorising this eviction.' **[delete existing definition]**

The existing definition should be deleted, as it too seeks to confine disputes arising from expropriation to disputes over the compensation payable. However, as described above, there may also be disputes over the validity of an expropriation and whether people may lawfully be evicted from their homes without court authorisation, among other things. Attempting to narrow the disputes that can be brought to court in this way is inconsistent with Sections 25, 26, and 34 of the Constitution, among other guaranteed rights.

"expropriation" means any nationalisation or expropriation, either direct or indirect, and any measure(s) having an effect similar to nationalisation or expropriation, either direct or indirect, and "expropriate" has a corresponding meaning' **[delete existing definitions]**

The existing definitions of "expropriation" and "expropriate" should be deleted, as they seek to narrow the normal meaning of expropriation in a manner that is not in fact authorised by the main judgment of the Constitutional Court in the Agri SA *case. They are also inconsistent with the meaning of expropriation in international law, which must be taken into account in interpreting the Bill of Rights. In addition, the current definitions in the Bill are inconsistent with key aspects of the property clause (Section 25) and other guaranteed constitutional rights. By contrast, the proposed new definitions are fully in keeping with the Constitution.*

'"date of expropriation" means the date mentioned in the notice of expropriation, which date must not be earlier than 180 days from the service of that notice **[delete existing definition]**

The expropriated owner or rights holder must be accorded a reasonable period of time, after the notice of expropriation has been served on him or her, to prepare for the expropriation and hence for the transfer of ownership of residential, business, or other assets to the expropriating authority.

'"expropriating authority" means an organ of state or person empowered by this Act or other legislation to expropriate property for a public purpose or in the public interest'

The insertion of the words *or to bring about the compulsory acquisition of property contemplated in Section 2(3)* should be deleted. The current wording seeks once again to broaden the meaning of 'expropriation' in a manner inconsistent with international law and various provisions in the Constitution, as outlined above.

'"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' **[delete existing definition**]

The wording of Section 25(4)(a) of the Constitution must be followed, not expanded in a way that goes beyond what the Constitution authorises.

'"property" means property as contemplated in Section 25 of the Constitution, except where property is expropriated in 'the public interest' in which case property must be limited to land and South Africa's natural resources' **[delete existing definition]**

Section 25(2) allows property to be expropriated either for public purposes or 'in the public interest'. However, it also defines the public interest as including 'the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'. The property which may be expropriated 'in the public interest' must be confined

to land and/or natural resources as there is no constitutional authority for expropriating property of other kinds 'in the public interest'.

'"service" in relation to a notice as contemplated in Section 22(1) means to serve (a) by delivering that notice by hand to an owner or rights holder who must acknowledge receipt in writing, or (b) to serve in accordance with the direction of a court, and "serve" has a corresponding meeting' **[delete existing definition]**

In recent years, various expropriations have taken place under the Expropriation Act of 1975 without a notice of expropriation ever having reached the expropriated owner or rights holder. Expropriation has thus taken place without the knowledge of owners, who have been astounded to discover long after the event that transfer of their land to expropriating authorities has also been registered in the Deeds Office. Since this is inconsistent with administrative justice and many other rights guaranteed by the Constitution, the Bill must make every effort to secure proper service of all important notices.

Hence, any notice of intention to expropriate, any notice of expropriation, and any other notice or document that needs to be served on the expropriated owner or rights holder under Clauses 7, 8, 11, 17, 20, 21, 22 or 23 must be delivered by hand to that person, who must also acknowledge its receipt in writing. If the identity or whereabouts of the owner or rights holder is unknown, the expropriating authority must seek the directions of the court as to what alternative method of communication (for example, by affixing the notice to the property where possible, or through repeated publication in local newspapers) may suffice. In addition, if an owner or rights holder has not provided written acknowledgement of the delivery to him or her of any notice of intention to expropriate, the expropriating authority must assume that the owner or rights holder disputes the validity of the expropriation or the compensation payable, and must seek a prior court order authorising it to proceed with the expropriation, as set out in (amended) Clause 8 of this Bill.

Clause 2: Application of the Act

The particular sub-clauses that need to be amended are set out below:

Clause 2(3): An expropriating authority may expropriate property in terms of a power conferred on such expropriating authority by or under any law of general application, provided that the exercise of such power is in accordance with this Act. **[delete existing Clause 2(3)]**

Since the Bill is intended to lay down the rules that are to govern all future expropriations, expropriating authorities must comply with all *the provisions of the Bill, not merely some of them.*

Chapter 2: Powers of minister of public works and infrastructure to expropriate

Chapter 2 should be deleted in its entirety.

The powers of expropriation thus expressly given to the minister of public works and infrastructure (the Minister) are unnecessary, as the Bill already empowers many organs of state to act as 'expropriating authorities'. Moreover, in laying down different rules for 'ministerial' and other expropriations, Chapter 2 generates confusion and uncertainty.

It is noteworthy, too, that the Minister's power to expropriate is expressly made 'subject to the provisions of Chapter 5' of the Bill, [Section 3(1), Bill] which deals with the amount of compensation and the time when it must be paid. No reference is made, however, to the various other chapters in the Bill. This wording raises doubts as to whether ministerial expropriations are in fact subject to the other chapters in the Bill, particularly Chapter 3 ('Investigation and valuation of property'), Chapter 4 ('Intention to expropriate and expropriation of property'), Chapter 6 ('Mediation and determination by court'), Chapter 7 ('Urgent expropriation') and Chapter 8 ('Withdrawal of expropriation').

As presently written, the Bill could allow the Minister to brush aside all the requirements set out in all chapters other than Chapter 5. Among other things, this could bar an owner or rights holder who suffers a ministerial expropriation from having a dispute over the validity of such an expropriation, or of the compensation payable, referred to the courts. This is objectionable and clearly unconstitutional, for any ministerial expropriation must of course comply with all relevant constitutional guarantees.

Since there is no need for the Minister to have his own and seemingly different expropriation powers, the whole of Chapter 2 should be deleted.

Clause 5: Investigation and gathering of information for purposes of expropriation

The sub-clauses needing amendment are noted below:

Clause 5(9): The powers, authority and obligations conferred or imposed by this section are subject to the laws governing the protection of personal, private, and commercially sensitive information.

It is not sufficient to protect information which is personal and private since commercially sensitive information must also be safeguarded.

Clause 5(10): If the property is not land, a court may authorise a suitably qualified person or valuer to ascertain its suitability and value for determining an amount of compensation to be offered.'

The property to be expropriated may be a patent right, a share or other investment in a private company, or some other form of incorporeal property meriting protection from disclosure to an expropriating authority without prior court authorisation.

Clause 7: Notice of intention to expropriate

The particular sub-clauses that need amendment are noted below:

Clause 7 (2): A notice of intention to expropriate must include –

(d) documents providing comprehensive supporting details of the purpose for which the property is required;

(k) an offer of compensation which the expropriating authority considers just and equitable with a full explanation of how every element in that amount was computed, and which must be accompanied by comprehensive supporting information;

Clause 7 (4): A person responding to a notice contemplated in subsection (1) must within 30 days of the service of the notice or, if the notice has not been served on him or her, within 30 days of publication, as directed by a court, as the case may be,

(a) deliver to the expropriating authority a written statement indicating –
  (i) whether he or she accepts that the proposed expropriation is valid in that it meets all relevant constitutional requirements, including those contained in Section 25 of the Constitution, and, if the property to be expropriated includes a person's home, also those contained in Section 26(3) of the Constitution;
  (ii) requesting further particulars under section 14; or
  (iii) disputing under section 19 of this Act the validity of the expropriation, the amount of the compensation offered, and the capacity of the expropriating authority to evict him or her from his or her home under Section 26(3) of the Constitution;
(b) [retain as currently written;] and
(c) state the address to which further documents in connection with the expropriation may be delivered by hand and the preferred language of communication;

Clause 7(5): The expropriating authority must consider the statements contemplated in sub-section (4), as well as any objections or submissions lodged in terms of subsection (2)(h), and respond to all of them in writing, providing full reasons as to why it rejects or disputes any of them.

Clause 7 (6): The expropriating authority may decide to proceed with an expropriation after the validity of the expropriation, as well as the amount of compensation and the manner and timing of its payment, have been agreed with the owner, mortgagee, or holder of a right or decided by a court under section 19.

Clause 7 (7): If no agreement on the validity of the expropriation, the amount of compensation and the manner and timing of its payment has been reached between the expropriating authority and the owner or rights holder within 40 days of the expropriating authority receiving the statement contemplated in subsection (4), the expropriating authority must, if it wishes to proceed with the expropriation, first comply with the provisions of Clause 19 before it issues a notice of expropriation.

Clause 7 (6)(b)(i): delete, see rather new Clause 19

Clause 7(6)(b)(ii): retain, renumbered as Clause (6)

It is inconsistent with Section 25 and other constitutional requirements for the expropriating authority to attempt to narrow disputes with the expropriated owner or rights holder to those over the compensation payable. It is also inconsistent with Section 25 and other guaranteed rights for an expropriating authority to proceed with a disputed expropriation before it has sought and obtained a court order confirming the validity of the proposed expropriation and determining the compensation payable.

These amendments also recognise that there may be disputes over issues other than the amount of compensation payable. They further make it clear that, when such disputes arise, an expropriating authority must seek a prior court order confirming that the proposed expropriation complies with all relevant constitutional requirements, including those in Section 26(3), before it may serve a notice of expropriation on the owner or rights holder. These amendments bring the Bill into line with Section 25(2)(b), as interpreted by the Constitutional Court in Haffejee NO and others *v* eThekwini Municipality and others, [2011] ZACC 28.

The expropriating authority must be proactive in supplying the owner or other rights holder with all information relevant to the proposed expropriation, including documents that fully explain the purpose for which the property is required (which should not simply be placed at a venue that may be inconvenient or difficult for the owner to reach). The comprehensive information made available must also include how every element in the amount of compensation on offer has been computed. Full details of the proposed date and manner of payment must also be supplied.

Clause 8: Notice of expropriation

The particular sub-clauses that need amendment are noted below:

Clause 8 (1): If, having complied with the provisions of Clause 19, the expropriating authority decides to expropriate a property, it must cause a notice of expropriation to be served on the owner, mortgagee, and known rights holder(s), as the case may be, whose rights in the property are to be expropriated and must do within the periods contemplated in clauses 19(7), 19(8), and/or 19(9). [**delete existing sub-clause (1)**]

Clause 8(3): The notice of expropriation served as contemplated in sub-clause (1) must contain –

(aa) a summary of the agreement reached, or of the court order authorising the expropriation, as obtained under the provisions of Clause 19, while a copy of this agreement or court order must be appended to the notice of expropriation;

(d) documents providing comprehensive supporting details of the purpose for which the property is required; [**delete existing sub-clause (d)]**

(e): the date of expropriation, which may not be earlier than 180 days after the date of service of the notice of expropriation, or, as the case may be, the date from which the property will be used temporarily, and also stating the period of such temporary use; **[delete existing sub-clause (e)]**

(ee) the date on which the expropriation authority will pay all the compensation, which must be ten (10) days before the date of expropriation set out paragraph (e);

(f): the date on which the right to possession will pass to the expropriating authority, which may not be earlier than 60 days after the date of expropriation; [**delete existing sub-clause (f)]**

(g): except in the case of an urgent expropriation contemplated in Clause 20, the amount of compensation payable, either as agreed or as decided or approved by a court under the provisions of Clause 19; [**delete existing sub-clause (g**)]

(h) a statement confirming that the property subject to the notice of expropriation may not be sold, mortgaged, or otherwise disposed of without the prior written consent of the expropriating authority and that any sale, mortgage or other disposal of the property which is entered into in breach of this sub-section has no legal force or effect;

(i) a statement confirming that, if the property subject to the notice of expropriation is not transferred into the ownership of the expropriating authority on the date of expropriation, then the owner or rights holder is unjustly enriched by the payment of compensation under sub-clause 8(ee) and must repay the amount received to the expropriating authority, together with interest at the prime rate plus two percentage points on any outstanding balance, until the full amount owing to the expropriation authority has been paid.

Clause 8(4): The notice of expropriation served as contemplated in sub-clause (1) must be accompanied by documents detailing the following:

Delete Section 8(4) (a)

[The date of payment of the compensation must instead be included in the notice of expropriation, as stated Clause 8(3)(ee), see above.]

(d): a copy of the agreement reached, or the court order authorising the expropriation, as obtained under the provisions of Clause 19; [**delete existing sub-clause (d)**]

Clause 8(6) (a): Rights in a property may be expropriated from different owners and holders of rights in the same notice of expropriation, provided that the expropriating authority must comply with the provisions of Clause 19 in relation to each owner, mortgagee, or rights holder.

Clause 8(6)(b): The just and equitable compensation payable to each owner, mortgagee, or rights holder, as agreed or as decided by a court under the provisions of Clause 19, must be stated in the notice of expropriation contemplated in paragraph (a).

The Bill's existing provisions are inconsistent with Section 25 of the Constitution and other guaranteed rights. By contrast, these amendments confirm that an expropriating authority, in the event of a dispute over a proposed expropriation, must either obtain agreement through mediation or obtain a court order confirming the validity of the proposed expropriation. Only thereafter may it serve a notice of expropriation, to which a copy of the agreement reached or the court order obtained must be appended.

Changes are also needed to what the notice of expropriation must contain. In particular, the notice must allow 180 days from the date of service of the notice until the date of expropriation, so as to allow expropriated owners and holders of other rights to find alternative residential or business premises and otherwise prepare for the loss of their ownership or other rights. The notice of expropriation must also state the date when all the compensation due will be paid, which must be ten days before the date of expropriation. In addition, the date on which possession will pass must be at least 60 days after the date of expropriation, again to allow expropriated owners and holders time to prepare and make alternative arrangements.

All these amendments are needed so as to strike 'an equitable balance between the public interest and the interests of those affected' by an expropriation, as required by Section 25 of the Constitution.

At the same time, the expropriating authority must also be protected in the event that it does not receive ownership of the property in return for the compensation it has already paid. Sub-clause 8(3)(h) will help to prevent this happening, while sub-clause 8(3)(i) allows the expropriating authority to recover the compensation it has paid, plus interest at prime plus 2 percentage points, should this be necessary. The expropriating authority can also help to prevent any unauthorised sale, mortgage, or other disposal of the property or rights in question by including all details of an expropriation in the register of expropriations as soon as it issues a notice of expropriation.

Clause 9: Vesting and possession of expropriated property

All sub-clauses of this Clause require some amendment, as set out below:

Clause 9(1): The effect of an expropriation of property is that –

(a) subject to paragraphs (c) and (d), the ownership of the property described in the notice of expropriation vests in the expropriating authority **[delete: or in the person on whose behalf the property was expropriated, as the case may be]** on the date of expropriation, provided that the compensation payable has been paid in full to the owner within the period required by Clause 8(3)(ee);

(aa) if the expropriating authority does not pay the owner the full amount of the compensation within the period required by Clause 8(3)(ee), the notice of expropriation becomes invalid and has no further force or effect;

(b) Subject to paragraph (d) below, all unregistered rights in the property described in the notice of expropriation vest in the expropriating authority **[delete: or in the person on whose behalf the unregistered rights were expropriated, as the case may be]**, on the date of expropriation, provided that the compensation payable has been paid in full to the holders of such rights within the period required by Clause 8(3)(ee);

(bb)if the expropriating authority does not pay the holders of such rights the full amount of the compensation due to them within the period required by Clause 8(3)(ee), the notices of expropriation served on them become invalid and have no further force or effect;

(c) in the case of a right to use property temporarily, the expropriating authority [**delete: or the person on whose behalf the property was expropriated**] may as from the date of expropriation exercise that right for its duration;

(d) Unregistered rights in the property described in the notice of expropriation will not be expropriated on the date of expropriation if --

(i) the expropriation of those unregistered rights is specifically excluded from the notice of expropriation; or

(ii) those rights, including permits or permissions, were granted or exist in terms of the provisions of the Mineral and Petroleum Resources Development Act, 2002 (Act no 28 of 2002);

(e) [**delete: the date of expropriation may not be before the date of service of the notice of expropriation**]

Clause 9(2)(a): The expropriating authority [**delete: or the person on whose behalf the property was expropriated**] must take possession on the date stated in terms of section 8(3)(f) or such other date as may be agreed upon….

In order to maintain 'an equitable balance between the public interest and the interest of those affected' by an expropriation, there must be an effective sanction or penalty if an expropriating authority fails to pay the compensation due ten days before the date of expropriation. If the expropriating authority does not do so, the owner or rights holder will lose his or her ownership or other rights without having the money available to acquire alternative residential or business premises or other assets. Since many organs of state in practice fail to pay their bills on time (despite Treasury rules requiring this), there is also a real risk that the payment of compensation may frequently be delayed.

Since late payment cannot be 'equitable' within the meaning of Section 25 of the Constitution, the proposed amendment provides an effective sanction. If payment is not made on time, then the notice of expropriation falls away and has no further force or effect. This will give expropriating authorities a compelling reason to ensure that payments are not late.

With the deletion of Chapter 2, there is no reason to include references to 'the person on whose behalf the property was expropriated'. Very many organs of state will be expropriating authorities in their own right and will thus have all the powers and obligations set out in the Bill.

Section 9(1)(e) must be deleted as relevant time periods regarding the date of expropriation (and the passing of ownership under it) have already been included in section 8(1)(e).

Clause 11: Consequences of expropriation of unregistered rights and duties of expropriating authority

The particular sub-section that needs amendment is noted below

Clause 11(1): An expropriated holder of an unregistered right in a property that has been expropriated by the operation of Clause 9(1)(b) is, subject to Clause 10 and this clause, entitled to compensation, <u>either as agreed or as decided or approved by a court under the provisions of Clause 19.</u>

The Bill's existing provisions are inconsistent with Section 25 of the Constitution and other guaranteed rights. By contrast, these amendments confirm that an expropriating authority, in cases of dispute over the proposed expropriation of unregistered rights in property, must either obtain agreement through mediation or obtain a court order confirming the validity of the proposed expropriation. Only thereafter may it serve a notice of expropriation, to which a copy of the agreement reached, or the court order obtained, must be appended.

Clause 12: Compensation for expropriation

As regards sub-clause 12(1), the additional provision needed is noted below:

Clause 12(1): The amount of compensation to be paid to an expropriated owner or an expropriated holder must be just and equitable, reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, 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; **[delete and]**
(e) the purpose of the expropriation; <u>and</u>
(f) <u>an amount to make good any actual financial loss caused by the expropriation of the property.</u>

*Para (f) mirrors the current wording in the Expropriation Act of 1975. Under Section 25 of the Constitution, compensation must be just and equitable in **all** the relevant circumstances. In addition, the list of five relevant factors included in Section 25 is not a closed list, but rather an open one. Hence, this additional factor can and should be inserted to help those affected by an expropriation with their moving costs, any temporary loss of income, and any other direct losses resulting from the expropriation.*

This is particularly important for tenants of residential and business premises, whose expropriated leases may have little market value and who may thus receive little compensation under the current formula. It is also particularly important for the 2.8 million or so people who currently have unregistered rights of residence on commercial farms. These expropriated residence rights may also have little market value, which may leave farm residents with little compensation under the current formula.

In addition, both tenants and farm residents are likely to suffer many losses on expropriation. Among other things, they will probably have to find new homes and livelihoods and pay their moving costs. Tenants with business premises may also lose income in the period before they can restart their businesses, and could lose existing clients who find their new premises less convenient. In addition, farm residents will have to find new jobs and may be unable to keep their livestock, which might have to be slaughtered or sold.

*Adding this factor to the existing formula will allow tenants and farm residents to claim for losses of this kind. Expropriated owners also need the benefit of this change, as they too will often suffer similar losses. Incorporating this factor into Clause 12 is also consistent with Section 25 of the Constitution, which says that **all** relevant factors must be taken into account, and then goes on to list **some** of the factors that are relevant.*

Clause 12(3) of the Bill ('nil' compensation in certain circumstances)

This sub-clause should be deleted in its entirety

This clause says that 'it may be just and equitable for nil compensation to be paid' in certain circumstances. However, this clause is too uncertain in its meaning to comply with the rule of law and the related doctrine against vagueness of laws. In addition, the courts already have the power to decide that 'just and equitable' compensation may be 'nil' in appropriate circumstances. There is thus no need to include this unconstitutional clause in the Bill and it should be deleted in its entirety.

Clause 12(4) of the Bill ('nil' compensation for certain labour tenant claims)

This sub-clause should be deleted in its entirety

The *courts already have the power to decide that 'just and equitable' compensation may be 'nil' in appropriate circumstances. There is thus no need to include this clause in the Bill and it should be deleted in its entirety.*

Clause 12(3) should be renumbered and amended to read as follows:

Clause 12(3): If the property is land, the expropriating authority must consider the amount of outstanding municipal property rates, taxes, levies, and charges relating to the property when making an offer of just and equitable compensation in a notice of intention to expropriate under section 7(2)(k).

This addition will ensure that the issue of outstanding municipal property rates or other charges is brought to the attention of both the expropriating authority and the owner or rights holder from the time a notice of intention to expropriate is served.

Clause 13: Interest on compensation

This clause should be deleted in its entirety.

Under the amendments earlier proposed, if compensation is not paid in full ten days before the date of expropriation stated in the notice of expropriation, the notice of expropriation becomes invalid and the expropriation cannot proceed. Hence, no provisions for interest on the late payment of compensation are needed.

Clause 14: Requests for particulars

This clause requires some amendment, as set out below:

Clause 14 (1): The owner, mortgagee, or holder of an unregistered right who receives a notice of intention to expropriate in terms of Clause 7(1) may, subject to section 23, within 30 days from the date on which that notice was served on that owner or rights holder, request the expropriating authority in writing to provide reasonable further particulars about the offer of compensation, including the date and manner of its payment, and the particulars so requested must be furnished within 20 days of such request.

Clause 14(2) should remain as it is now written

Clause 14(3): An offer of just and equitable compensation remains in force until –

(a) revised by the expropriating authority;
(b) the amount, timing and manner of payment of the compensation have been agreed upon; or

(c) a court order confirming the validity of the expropriation, authorising the eviction of a person from his or her home, and deciding the amount, timing, and manner of payment of compensation has been obtained under section 19.

This amendment empowers the owner or rights holder to obtain further particulars if these have not been adequately provided in the notice of intention to expropriate – and to seek court relief if the necessary particular are not timeously supplied. It further confirms that an offer of compensation made by an expropriating authority will remain in force until it is superseded by agreement between the parties, or by a court order confirming, among other things, the amount of compensation to be paid, along with the timing and manner of its payment.

Clause 15: Payment of compensation

The sub-clauses requiring amendment are set out below. In this instance, the reasons why particular amendments are needed are explained in italics after each sub-clause.

Clause 15(1): An owner or holder on whom a notice of expropriation has been served is entitled to payment of the full amount of the compensation ten days before the date of expropriation set out in the notice of expropriation, as required by Clause 8(3)(ee). **[delete existing Clause 15(1)]**

As earlier described, late payment cannot be condoned as it undermines 'the equitable balance between the public interest and the interests of those affected' which is required by Section 25 of the Constitution.

Clause 15(2): If the expropriating authority does not pay the full amount of the compensation due to the owner or the holder within the period required by Clause 8(3)(ee), the notice of expropriation becomes invalid and has no further force or effect; [**delete existing Clause 15(2)]**

To prevent late payment, there must, as earlier noted, be an effective sanction against late payment, which this amendment provides. In addition, it will not be possible for an expropriating authority to proceed with a disputed expropriation without either reaching agreement on compensation through mediation or obtaining a court order on the issue. Hence, there is no need for the existing provisions of Clause 15(2), which should be deleted.

Clause 15(3): Property which is subject to a notice of expropriation served on the owner or the holder of a right may not be sold, mortgaged, or otherwise disposed of without the prior written consent of the expropriating authority, and any sale, mortgage or other disposal of such property, which is entered into in breach of this sub-section, has no legal force or effect.

Clause 15(4): If compensation has been paid to the owner of property under sub-section (1) and the ownership of the property for which such compensation has been paid is not transferred to the expropriating authority on the date of expropriation set out in the notice of expropriation, then the owner is unjustly enriched by the payment of compensation and must repay to the expropriating authority the full amount received as compensation, together with interest (at the prime rate plus two percentage points) on any outstanding balance, until the full amount owing to the expropriating authority has been paid.

Clause 15(5): If compensation has been paid to the holder of a right in a property under sub-clause (1) and the right is not expropriated and transferred to the expropriating authority on the date of expropriation set out in the notice of expropriation, then the holder is unjustly enriched by the payment of compensation and must immediately repay to the expropriating authority the full amount received as compensation, together with interest (at the prime rate plus two percentage points) on any outstanding balance, until the full amount owing to the expropriating authority has been paid.

It is important that compensation should be paid to the owner or rights holder in good time, but the expropriating authority must also be protected in case it does not in fact obtain ownership of (or other rights in) the property. Sub-clause 15(3) will help to prevent any unauthorised sale or other disposal of the property or rights in question, while sub-clauses 15(4) and (5) will allow the expropriating authority to recover the compensation it has paid, plus interest at prime plus two percentage points, should this be necessary. The expropriating authority can also help to prevent any unauthorised sale, mortgage, or other disposal of the property or rights in question by including all details of an expropriation in the register of expropriations as soon as it issues the relevant notice of expropriation.

Delete existing Clause 15(3) and Clause 15(4)

Late payment is inconsistent with Section 25 and other constitutional guarantees and is no longer permitted under the amendments earlier proposed. Hence, these sections in the Bill, which are in any event to be replaced by new Clauses 15(3) and (4), as described above, should be deleted.

Delete existing Clause 15(5)

Payment of compensation should not be made dependent on the tax status of the owner or rights holder. If such an owner or rights holder is under an obligation to pay VAT, other mechanisms are available under other laws to enforce the payment of this tax. Hence, this sub-clause, which has also been replaced by a new Clause 15(5), is not needed and should be deleted.

Clause 15(6): The expropriating authority [**delete: Minister**] may prescribe the information and documentation to be delivered by a person to whom compensation **[delete: or interest]** is payable in terms of this Act, in order to facilitate electronic payment thereof.

It is the expropriating authority, not the minister, who should intervene in this way if necessary. Under the proposed amendments, moreover, late payment will not be allowed. Hence, there is no need to provide for the payment of interest on compensation and the reference to this should be deleted.

Clause 16: Property subject to mortgage or deed of sale

All sub-clauses should be amended, as set out below:

Clause 16(1): If the property the expropriating authority intends to expropriate is encumbered by a registered mortgage bond or is subject to a deed of sale, the owner must inform the expropriating authority of this bond or sale agreement within 30 days of the service on him or her of a notice of intention to expropriate in terms of Clause 7(1).

Clause 16(2): If a notice of expropriation is later served on the owner under Clause 8, the owner and the mortgagee, or the owner and the buyer, as the case may be, must agree on how the compensation payable is to be apportioned between them, and provide a written copy of their agreement to the expropriating authority within 30 days of the service of the notice of expropriation.

Clause 16(3): If the owner and the mortgagee, and the owner and the buyer, as the case may be, fail to reach agreement or fail to provide the expropriating authority with a written copy of their agreement, as required by subsection (2), the expropriating authority must deposit the compensation money with the Master of the High Court having jurisdiction in the area in which the property is situated and must do so within the period required by Clause 8(3)(ee).

Delete existing Clause 16

As soon as the owner receives a notice of intention to expropriate, he or she must inform the expropriating authority of any bond or sale agreement. If the owner is subsequently served with a notice of expropriation, he or she must reach agreement on the apportionment of the compensation payable with the bond holder or the buyer within 30 days of the service of that notice. The expropriating authority must then pay out the compensation in accordance with that agreement and must do so on the due date: in other words, ten days before the date of expropriation stated in the notice of expropriation. If such an agreement has not been concluded, or a copy of the agreement reached has not been provided to the expropriating authority, the expropriating authority must pay the compensation to the Master on the due date, ie ten days before the date of expropriation.

Clause 17: Payment of municipal property rates, taxes, and other charges out of compensation money

The sub-clauses needing amendment are set out below:

Sub-clause 17(1): The expropriating authority must pay outstanding municipal rates, taxes, levies and other charges out of the compensation money, if the court order obtained under section 19 so instructs.

Sub-clause 17(2): If land which the expropriating authority may wish to expropriate is subject to the charges contemplated in subsection (1), the municipal manager must, within 30 days days of receipt of a copy of the notice of intention to expropriate in terms of section 7(1), inform the expropriating authority in writing of such charges, unless the expropriating authority is the municipal council of the municipality where the land is situated;

Sub-clause 17(3)(a): The expropriating authority must, in writing, notify the [**delete: expropriated]** owner or [**delete: expropriated**] rights holder of any outstanding charges contemplated in subsection (1) within 20 days of being informed of them by the municipal manager under subsection (2);

Sub-clause 17(3)(b): If the [**delete: expropriated**] owner or [**delete: expropriated**] holder does not dispute the outstanding charges contemplated in paragraph *(a)*, within 20 days of the notification, or if a court order obtained under section 19 so instructs, the expropriating authority may utilise as much of the compensation money in question as is necessary for the

payment, on behalf of the [**delete: expropriated**] owner or [**delete: expropriated**] holder, of any outstanding charges contemplated in subsection (1).

Sub-clause 17(4): If the municipal manager fails to inform the expropriating authority of the outstanding charges contemplated in subsection (1) within the period of 30 days as contemplated in subsection (2), the expropriating authority may pay the compensation to the [**delete: expropriated**] owner or [**deleted: expropriated**] holder without regard to the outstanding municipal property rates or other charges, and in such an event and despite the provisions of any law to the contrary—
(a) the Registrar of Deeds must register the transfer of the expropriated property once ownership has passed to the expropriating authority on the date of expropriation;
(b) the expropriating authority [**delete: or the person on whose behalf the property was expropriated, as the case may be**], is not liable to the municipality concerned before or after such registration for the outstanding municipal property rates or other charges; and
(c) despite the provisions of any other law, the expropriated owner remains liable to the municipality for rates and other charges which are due and payable [**delete: levied**] on the property until the right to possession vests in the expropriating authority in terms of section 8(3)*(f)* or section 9(4).

Since claimed rates, taxes and other charges may not in fact be due and payable, the owner or rights holder must have the opportunity to reach agreement on any claims of this kind with the expropriating authority after a notice of intention to expropriate has been served. If no agreement can be reached, the issue should then be referred to court under section 19 for a decision as to whether such charges should be deducted from the compensation to be paid in due course, if the expropriation proceeds. The remaining changes to the text are consequential ones, as expropriation will not yet have occurred and the charges claimed may not be owing.

Clause 19: Mediation and determination by court

Each sub-clause needs to be amended, in the manner shown below:

Clause 19(1): If the owner or the holder of a right disputes the validity of an intended expropriation of which he or she has been given notice under Clause 7(1), or if he or she disputes the amount, timing or manner of payment of the compensation offered in that notice of intention to expropriate, the expropriating authority and the owner or holder, as the case may be, may attempt to settle the dispute by mediation, which must be initiated and finalised without undue delay by either party; provided that if such agreement is reached, the expropriating authority should then purchase the property on the terms agreed rather than proceed with an expropriation.

Clause 19(2): If an intended expropriation will involve the eviction of a person from his or her home, the expropriating authority must obtain an order of court authorising the eviction after considering all the relevant circumstances.

Clause 19(3): If the expropriating authority and the disputing party are unable to settle the dispute by consensus in the manner contemplated in sub-clause (1), or if the disputing party did not agree to mediation, the expropriating authority must refer the validity of the intended

expropriation or any other disputed issue, including the amount of compensation payable, to a competent court for decision.

Clause 19(4): In any court proceedings contemplated in sub-clauses (2) and (3), the expropriating authority bears the onus of satisfying the court, on a balance of probabilities, that:

(a) the intended expropriation meets all relevant constitutional requirements,
(b) the compensation offered, as well as the proposed timing and manner of its payment, are in keeping with all the factors identified in Clause 12 and are just and equitable in all the circumstances, and
(c) the eviction of a person from his or her home as a result of the intended expropriation should be authorised by the court after considering all the relevant circumstances.

Clause 19(5): If the court is satisfied on all the points set out in sub-clause (4), it may issue an order authorising the intended expropriation, determining the compensation payable, confirming that the compensation must be paid in full within the period set out in Clause 8(3)(ee), and authorising the eviction of a person from his or her home as a result of the expropriation.

Clause 19(6): If the court fails to grant any part of the order contemplated in sub-clause (5), the expropriating authority may not proceed with the expropriation.

Clause 19(7): If the court grants the order contemplated in sub-clause (5), the expropriating must either serve a notice of expropriation on the owner within 21 days, or notify the owner or holder, also within 21 days, that it is not proceeding with the expropriation.

Clause 19(8): If within the period of 21 days contemplated in sub-clause (7), the owner or holder lodges an appeal against the court order contemplated in sub-clause (5), the expropriating authority may not proceed with the expropriation until the appeals process has been exhausted and the relevant appeal court has either declined to hear the appeal or has dismissed it and so upheld the initial court order authorising the expropriation, as contemplated in sub-clause (5).

Clause 19(9): Once the expropriating authority has obtained a final court order authorising it to proceed with an expropriation under sub-clauses (5) or (7), it must either serve a notice of expropriation on the owner within 21 days, or notify the owner or holder, also within 21 days, that it is not proceeding with the expropriation.

Clause 19(10): If the expropriating authority fails to obtain any part of the order sought under Clause 19(5), or it if does not succeed in defeating any appeal lodged by the owner or rights holder under sub-clause 8, the court may order the payment of costs, on a party-and-party basis, against the expropriating authority.

Delete all the current provisions of Clause 19

Allowing an expropriating authority to press on with a disputed expropriation without a court order confirming the validity of the expropriation is inconsistent with Section 25 of the Constitution and other guaranteed rights. Allowing an expropriating authority to take possession of a person's home and so evict them is inconsistent with Section 26(3) of the Constitution and other guaranteed rights. All existing provisions in Clause 19 should

therefore be deleted and replaced with these clauses so as to bring the Bill into line with the Constitution.

Once an expropriating authority has obtained a final court order authorising the expropriation, it must decide within 21 days if it wishes to proceed with the expropriation or not. If, within that period, the owner or rights holder lodges an appeal against the court order authorising the expropriation, the expropriating authority must wait until the appeal has been resolved before it can proceed with the expropriation. Once a final court order, no longer subject to appeal, has been handed down, the expropriating authority must either serve the notice of expropriation within the next 21 days or inform the owner or rights holder that it is not proceeding with the expropriation.

The onus of proof should lie with the expropriating authority, which must satisfy the court that its proposed expropriation meets all constitutional requirements. If the expropriating authority fails to discharge the onus resting on it and so obtain the necessary court order authorising its proposed expropriation, costs should be awarded against it. The same should apply if it fails to defeat the owner's appeal under sub-clause 19(8). This is necessary to discourage the use of expropriation (which should always be a measure of last resort), uphold property and other guaranteed rights, and protect people against the enormous power of the state.

Clause 20: Urgent and temporary expropriations

The amendment that is needed to one sub-clause is shown below:

Clause 20(5A): No person may be evicted from his or her home, even for the temporary periods contemplated in sub-clauses (1) and (7)(c), without an order of court made after considering all the relevant circumstances.

No person may be evicted from his or her home, even for the purpose of a temporary expropriation, without a court order, as made clear by Section 26(3) of the Constitution. This amendment is needed to give effect to that constitutional guarantee.

Clause 22: Service and publication of documents and language used therein

The amendments needed are shown below:

Clause 22(1): Whenever a notice in terms of sections 7, 8, 11, 17, 20, 21, or 23 [**delete 7(1), 8(1), 11(2) or 17(3)(a) or a notice of withdrawal in terms of section 21(1)(b)]** is required to be served in terms of this Act, the original or a certified copy thereof must

(a) be delivered by hand **[delete: or tendered]** to the addressee personally at his or her residential address, place of work, place of business, or at such address or place as the expropriating authority and the address may, in writing, have agreed upon and the addressee must acknowledge this delivery in writing;

(b) if the provisions of sub-clause (a) have not been met, be delivered in accordance with such directions as the court, on application, may direct; [**delete existing sub-clauses (1)(b), (1)(c) and 1(d)]**

[Delete clauses 22(3) and 22(4)]

Clauses 22(5) and 22(6) should be retained but renumbered accordingly.

The changes to section 22(1) are needed to ensure that crucial documents, including a notice of expropriation, are personally received by the affected owner and/or rights holder. Sections 22(3) and (4) contradict the provisions of Clause 22(1) and must therefore be deleted. In addition, it is unacceptable for the Bill to authorise delivery by facsimile transmission, an outdated form of communication which in practice no longer exists. Nor should the Bill authorise delivery to a 'postal address', by 'ordinary mail' or by 'registered post' when the South African Post Office is in business rescue, has closed many post offices across the country, and is largely unable to meet its postal delivery obligations.[128]

Clause 23: Extension of time

Clause 23(b): Searching for and compiling information or documents which are reasonably required from source(s) not situated in the same town or city, [**delete: as may be reasonable in the circumstances, the persons contemplated in subsections (1)(a) and (b) and (2)**] the completion of which cannot reasonably be completed within the original period.

This change is needed as the words inserted refer to what is 'reasonably' needed and the existing wording makes little sense.

Clause 26: Regulations

Section 26(1)(b): **delete: any ancillary or incidental administrative or procedural matter that may be necessary for the proper implementation or administration of this Act**

This sub-clause repeats what is already contained in subclause 26(1)(a) and should be deleted.

Clause 27: Regulations, legal documents and steps valid under certain circumstances

The whole of Clause 27 should be deleted
As earlier noted, expropriating authorities must prove that they have fully complied with all constitutional requirements for a valid expropriation. If they have failed to adhere to the Bill's procedural requirements, they must start again from scratch, not claim condonation for their shortcomings.

[128] https://www.news24.com/fin24/companies/high-court-gives-nod-to-post-offices-business-rescue-staving-off-liquidation-amid-r24bn-bailout-20230710; https://businesstech.co.za/news/government/708404/heres-how-many-post-offices-have-been-forced-to-close-down-in-south-africa