The IRR's Response to a Flawed Legal Opinion on the Constitutionality of the IRR's Draft Expropriation Bill

IRR, 3rd August 2015

Introduction

The Department of Public Works (the Department), under the leadership of public works minister Thulas Nxesi, has put forward the Expropriation Bill of 2015 (the Nxesi Bill), which allows municipalities and all other organs of state to ride roughshod over constitutional requirements in expropriating property of virtually every kind.

The IRR (Institute of Race Relations) has thus proposed an alternative expropriation bill (the IRR Bill), which would allow expropriation where this drastic step is necessary – but would also be fully compliant with the Constitution.

In recent parliamentary hearings on the Nxesi Bill, Jeremy Cronin, deputy minister of public works (and first deputy general secretary of the South African Communist Party), tried to discount the IRR Bill by saying that the Department had recently obtained a legal opinion which:

- confirmed the constitutionality of the Nxesi Bill; and
- found that the IRR Bill was contrary to the Constitution.

In fact, this opinion says nothing about the validity of the Nxesi Bill – an issue which lay outside its brief. The opinion's criticisms of the IRR Bill are also flawed and unconvincing, for all the reasons set out below. The risk nevertheless remains that, through this stratagem, the Department may succeed in blurring the clear unconstitutionality of the Nxesi Bill, which would help it push the measure through the legislative process.

In this response to the Department and its legal opinion, the IRR sets out the nub of the difference between the Nxesi Bill and its alternative measure. It also outlines the fundamental flaws in the legal opinion the Department has obtained. The key weaknesses in this opinion are first summarised in brief outline, and thereafter explained in more detail.

The key difference between the Nxesi and IRR Bills

The Nxesi Bill allows a municipality or any other "expropriating authority' to take property by serving a notice of expropriation on the owner. Ownership of the property in question will then pass automatically to the State on the "date of expropriation" identified in the notice, which could be the day after the notice of expropriation has been delivered. The right to possess the property will likewise pass to the State on the stipulated date, which could be a day after the transfer of ownership.

Having taken ownership and possession of property by notice to the erstwhile owners, the Nxesi Bill seeks to prevent them contesting the validity of the expropriation by ousting the

jurisdiction of the courts to rule on this key issue. Instead, it allows expropriated owners to contest only the adequacy of the compensation offered to them by the expropriating authority.

The Nxesi Bill does not say in so many words that the courts may not rule on the validity of an expropriation, but the legal effect of expressly giving the courts the power to rule on the one issue only – the compensation payable – is the same. The relevant principle of legal interpretation is summed up in the Latin phrase, "*inclusio unius est exclusio alterius*", which means that the inclusion of the one means the exclusion of the other. This interpretation is strengthened by the fact that the 2013 version of the expropriation bill expressly allowed the courts to rule, firstly, on the compensation payable and, secondly, on "any other matter". By contrast, the second clause giving the courts jurisdiction over issues other than compensation has been removed from the Nxesi Bill.

The Nxesi Bill also seeks to limit access to the courts on the compensation issue by giving expropriated owners a mere 60 days in which to sue for additional compensation, failing which they will be "deemed" to have accepted the amounts offered by the State. However, most people will not be able to sue within this period, and especially so when they have already lost ownership and possession of what might have been their sole or key assets.

The Nxesi Bill thus contradicts the Constitution, which requires:

- In Section 25, that expropriations must be rational (not "arbitrary"), "in the public interest" , and accompanied by compensation which is "just and equitable" in all the circumstances, as "decided or approved by a court";
- Section 34, which gives everyone a right of access to court on both the validity of an expropriation and the amount and timing of the compensation payable;
- Section 33, which requires administrative decisions to be "reasonable" and "procedurally fair", and thus bars a municipality (or any other organ of state) from acting as "judge and jury in its own cause" in deciding what property it wants to expropriate and on what terms; and
- Section 26, which prevents people from being evicted from their homes without a court order authorising this.

By contrast, the IRR Bill aims to ensure that the executive properly fulfils all relevant constitutional requirements for the expropriation of property. Hence, where the preliminary negotiations and other interactions set out in the IRR Bill result in a dispute as to the constitutional validity of a proposed expropriation, that dispute must be resolved by the courts in favour of the executive before the expropriation may proceed.

The IRR Bill does not seek to fetter the executive or to make expropriation a judicial function rather than an executive or administrative one. The IRR Bill simply seeks to ensure that the courts are able to play their normal judicial role in resolving disputes over the validity of proposed expropriations where these arise. Once the courts have resolved such a dispute in

favour of the executive, the executive is entitled to proceed with the expropriation by serving a notice of expropriation in the usual way.

As the Constitutional Court stressed in the *ITAC* case, "all public power is now subject to the Constitution". According to this judgment, South Africa's courts *"do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so*". This, of course, is in keeping with the separation of powers and the vital function of the courts in acting as the "ultimate guardians of the Constitution". [*International Trade Administration Commission (Itac)* v *Scaw South Africa (Pty) Ltd*, 2012 (4) SA 618 (CC) at para 92, emphasis supplied]

The IRR Bill seeks to ensure that the courts are able to fulfil their constitutional duty, whereas the Nxesi Bill seeks to oust or limit the jurisdiction of the courts. That is the nub of the difference between the two.

The Department's legal opinion and the IRR's response, in summary

The Department has obtained a legal opinion (from Geoff Budlender SC and junior counsel) on the constitutionality of the IRR Bill. This opinion concludes that "the IRR draft is inconsistent with the approach to property which is reflected in our Constitution". [G M Budlender SC, U K Naidoo, Opinion, In re: Draft Expropriation Bill, 2015, 25 July 2015, para 73] However, the opinion is based on a host of flawed assumptions, along with various misinterpretations of the IRR Bill.

For ease of reference, the eight key criticisms set out in the opinion, and the IRR's response to these points, are summarised below.

The opinion claims that the IRR Bill is unconstitutional because:

1 The IRR Bill gives primacy to market value, allows damages for consequential losses that may be too "remote" from the expropriation in issue, and overlooks the requirement that compensation must be "just and equitable" overall.

However, the IRR Bill does not give priority to market value, as the opinion itself acknowledges. In addition, the normal principles of causation, as applied by the courts, will exclude losses that are too remote. Moreover, the whole thrust of the IRR Bill – unlike the Nxesi one – is on securing "just and equitable" compensation and "an equitable balance" between the public interest and the interests of expropriated owners.

2 The IRR Bill seeks to introduce a system of "judicial" expropriation when expropriation is an executive function. It also aims to give the courts new "administrative" functions.

Again, this is false. The IRR Bill simply seeks to ensure that the courts are able to play their normal judicial role in acting as the "ultimate guardians of the Constitution" and resolving disputes over the validity of proposed expropriations where these arise. As noted, once the courts have resolved such a dispute in favour of the executive, the executive is entitled to proceed with the expropriation by serving a notice of expropriation in the normal way.

3 The IRR Bill seeks to fetter the executive in the exercise of its functions, both by requiring disputes over validity to be resolved by the courts and by laying down various time periods before the next step in an expropriation may be taken.

These arguments are again unfounded. Instead, the IRR Bill seeks to ensure that the executive, in exercising its functions, acts in accordance with the Constitution (as described at point 2 above). By contrast, the Nxesi Bill seeks to oust the jurisdiction of the courts and so prevent them from acting as the "ultimate guardians of the Constitution".

In addition, the time periods laid down in the IRR Bill are needed to allow adequate time for negotiations, the assembling of all relevant information, the lodging of objections, and the formulation of full reasons for rejecting them. The longest period proposed (180 days) is in keeping with a Constitutional Court judgment suggesting this as a suitable period in which to prepare for court proceedings. Such proceedings may never transpire, of course, but they might also become necessary to resolve disputes over the validity of a proposed expropriation.

4 The IRR Bill erodes the doctrine of the separation of powers by giving the courts the power to disallow expropriations that it dislikes.

Again, this is not true. Under the IRR Bill, the courts may rule against a proposed expropriation if it is not in keeping with relevant constitutional criteria – but cannot disallow it simply because they would have preferred a different decision.

5 The IRR Bill requires pre-payment of the compensation, prior to the transfer of ownership, when there is no constitutional requirement for this.

The IRR Bill does not claim that early payment is constitutionally required. What it says is that, in a situation where many municipalities and other organs of state are notoriously late in making payments due, it is both wise and equitable to provide for pre-payment – and to include an effective sanction (the expropriation notice falls away) against any failure to uphold this obligation.

6 The IRR Bill requires the provision of suitable alternative accommodation wherever people are evicted from their homes, even where "just and equitable compensation" would suffice.

Where a dispute has arisen over an expropriation that involves the owner's eviction from his home, the IRR Bill requires an expropriating authority to put all relevant information before the court that must decide whether the expropriation is valid and may proceed. This data must include information on the suitable alternative accommodation that the expropriating authority would be able to provide. It is then up to the court to decide if the eviction is justified – and also if suitable alternative accommodation must in fact be made available.

The opinion overlooks the role given to the courts to decide on alternative accommodation. The opinion also seems careless of the fact that monetary compensation – especially when this is likely to be significantly less than market value – may not suffice while the housing backlog (at some 2.1m units) remains so acute. The provisions in the IRR Bill are needed in this situation to help ensure "an equitable balance" between the public interest and the interests of expropriated owners.

7 The IRR Bill makes provision for the "indirect" expropriation of property – a situation which arises where the State does not acquire ownership, but erstwhile owners, through the State's regulations, nevertheless lose many of the rights and benefits of ownership.

The opinion says recognition of "indirect" expropriation might be barred by the Constitutional Court's judgment in the *Agri SA* case, which indicated that there is no expropriation unless the State acquires ownership of the property in issue. However, the majority judgment there was expressly confined to the facts of the particular case, which involved an unused mining right which had "ceased to exist" under relevant mining law. The majority judgment also stressed that all future decisions on expropriation must be made on a "case-by-case" basis.

8 The IRR Bill seeks to bar Parliament from exercising its legislative powers.

Again, this is unfounded. The IRR Bill bars Parliament from indirectly amending its terms through the simple expedient of adopting conflicting new legislation and then giving the new statute primacy over all earlier expropriation laws. But the IRR Bill does, of course, allow an express amendment or repeal of its terms. Hence, this restriction poses no real constraint on legislative power. The same wording is also already contained in various other statutes previously adopted by the legislature.

The opinion adds that the IRR Bill is defective – rather than unconstitutional – because:

A It fails to make provision for temporary or urgent expropriations in times of natural calamity or war. These possibilities are not catered for in the IRR's "framework" document and could usefully be added.

B The provisions of the IRR Bill cover all "organs of state", without qualification, which makes its ambit very broad. This wording comes from the Nxesi Bill. Its use there is intended to ensure that all organs of state will in future be able to expropriate without any safeguards against the possible abuse of that power. The IRR Bill includes the same wide definition to make sure that all organs of state will, by contrast, be bound by the safeguards it includes.

The IRR's detailed response to the Department's legal opinion

The criticisms raised in the legal opinion, and the IRR's response to them, are set out more fully below. For ease of reference, the IRR's response follows the headings used in the opinion.

Property in South African Constitutional Law

As the opinion points out, the property clause in the Constitution (Section 25) clearly intends to "strike a proportionate balance" between "traditional property rights and the public interest" (this presumably being the public interest in land reform and the more equitable ownership of the country's natural resources to which Section 25 refers). The Constitution also aims to promote "social justice", places "positive obligations on the State with regard to social and economic rights", and requires due regard for the "historical context of systematised dispossession and disenfranchisement along racial…discriminatory lines". It is for this reason, as the opinion adds, that the Constitutional Court, in the *P E Municipality* case, stressed the need for an "orderly…restoration of secure property rights for those denied access to or deprived of them in the past". [Paras 6 to 9, Opinion]

The IRR, with its long history of fighting racial discrimination and injustice, is naturally fully aware of the content of Section 25 and its societal significance. However, it is clearly far more economically feasible for the State to enhance social justice and improve access to housing, healthcare, and the like in the context of a rapidly growing economy that is able to attract investment and generate jobs for the 8m South Africans who are now unemployed.

Yet the South African economy (as finance minister Nhlanhla Nene has recently warned) is already trapped in a low-growth trajectory, in which an annual growth rate of 5.4% of gross domestic product (GDP), as recommended by the National Development Plan (NDP), is simply unattainable. Even the 3% growth rate the National Treasury has identified as necessary to sustain social grants and the wider social wage is becoming unreachable.

This situation has arisen even before the mooted adoption of the Nxesi Bill. If this bill is introduced in its current form, it will not only be unconstitutional (for the reasons outlined above and more fully described below) but also economically damaging. It will choke off the investment, growth, and jobs most needed by the poor and disadvantaged. It will also contradict the constitutional imperative, as stressed by the Constitutional Court in the *P E Municipality* case, to "restore *secure* property rights" (emphasis supplied) to those unjustly denied them in the past.

As the IRR has previously pointed out, under the Nxesi Bill, the 8.6 million black people who now own their homes will be just as vulnerable to the expropriation of their houses as the 1.1 million whites with home ownership. Some 16.5m Africans with traditional land use rights in the former homeland areas – especially those living near major cities – could see their rights expropriated by municipalities and their land turned over to RDP housing or other purposes. The many black South Africans who have already bought some 2 million hectares of farming land on the open market since 1991 could likewise see their farms expropriated by any organ of state at any tier of government. In all instances, those affected will be left without adequate compensation and with no effective redress for the loss of their property.

In addition, if the Nxesi Bill is enacted into law, ever more land and other assets are likely to become vested in the Government – not transferred to individual black people or black firms. This will disempower all South Africans by increasing their dependency upon the State and restricting their scope for upward mobility. Far from helping to overcome disadvantage, the Nxesi Bill will make it much more difficult to counter unemployment and attendant poverty and inequality.

Property rights are, of course, subject to "societal considerations", as the opinion stresses. The IRR Bill does not in any way deny this. However, what it does seek to ensure is that *all* salient societal considerations are taken into account, including the vital need for investment, growth, jobs. The country simply cannot overcome past injustices through redistribution alone – especially when the "redress" envisaged by the Nxesi Bill is redistribution to the *State* and not to disadvantaged individuals.

Features of the IRR's Alternative Expropriation Bill

Here, the opinion purports to summarise "the salient features" of the IRR's Bill. Often, however, the summary provided is incorrect. At point 13.2, for instance, it claims that the IRR Bill says that "compensation for expropriation must principally be based on the market value of the property". However, this is not so, as the opinion itself subsequently acknowledges (and as further described below).

Since a full description of the relevant inaccuracies would be lengthy and provide little insight, the focus of this response is instead on the opinion's "evaluation" of the IRR Bill and the principal points it raises here.

Evaluation of the IRR's Draft

Market value in the computation of compensation

The opinion wrongly assumes that the IRR Bill seeks to "prioritise market value" and so concludes: "*If* the Bill were to accord market value a position of primacy,…it would not be constitutionally competent". [Para 24, Opinion, emphasis supplied] However, since this condition is not in fact fulfilled, what the opinion does is to take three-and-a-half pages and some 12 paragraphs to erect a "straw man" and then knock it down again.

The opinion repeatedly claims that the IRR Bill tries to make "market value the key factor against which remaining factors must be weighed", but this claim is false. It seems to be based on an explanatory paragraph (not part of the IRR Bill), which sets out the common understanding on the relationship between the five factors listed in Section 25 – these being market value and four others, which are often called the four "discount" factors.

The opinion also acknowledges that the IRR Bill itself does not reflect this (presumed) predominance for market value when it says: 'It does not seem that the IRR's intention to prioritise market value has found adequate expression in its draft." [Para 19, Opinion] This is precisely so. Since the IRR's Bill is *not* based on a (presumed) intention to "prioritise market value", its wording naturally does not reflect that presumed intention.

The opinion's legal quibble is thus based on the fact that, in listing the five factors relevant to compensation that are expressly included in Section 25, the IRR Bill starts with market value, whereas Section 25 puts this factor in third position. Yet this is hardly important, as the opinion admits when it says that "changing the sequence" has no legal effect. In addition, the opinion recognises that "in many cases, market value will be a convenient starting point", [Paras 19 and 25, Opinion] which is exactly what the IRR Bill provides for.

Contrary to what the opinion seeks to infer, there is nothing unconstitutional in putting the five factors listed in Section 25 into a different sequence. Hence, the opinion's real objection seems to be based, not on the relevant law, but rather on the ideological argument that the IRR's (assumed) emphasis on market value "stems from a strongly libertarian conception of property rights, which is inapposite when dealing with Section 25". [Para 23, Opinion]

However, there is nothing "inapposite" in seeking to ensure that those who were previously barred from owning land or houses should now have property rights that are "secure" (to cite the Constitutional Court in the *P E Municipality* case once again). Nor is there anything ideologically suspect in trying to ensure that black South Africans have adequate protection against the expropriation of their homes and other assets by a host of municipalities and other organs of state.

In this context, it is worth recalling some salient recent research findings by the Mapungubwe Institute for Strategic Reflection (Mistra). In 2013 Mistra found that "a substantial number" of local councillors were "employed into positions for which they were not qualified". Because they lacked professional qualifications, they were "dependent on political office for an income" and full of anxiety that they might not be redeployed into such positions in the future. Accordingly, many councillors "used their positions for self-enrichment" and were intent on "building themselves a nest" against the day when they lost office. [*The Times* 13 November 2013]

If the Nxesi Bill is adopted in its current form, this will give local councillors seeking to enrich themselves a new way to feather their nests: by expropriating township homes, or plots held under customary land-use rights, and then using the land so acquired for RDP housing or

other purposes. This would open the way for the conclusion of many more municipal contracts, some of which might well involve "back-handers" to the councillors concerned. In a situation in which the African National Congress (ANC) has itself acknowledged that councillors frequently "loot" state resources via municipal contracts, it is important that new expropriation legislation should contain adequate safeguards against any possible abuse of power. These safeguards are what the IRR Bill seeks to ensure.

The opinion then turns to the IRR Bill's proposal that compensation should include damages for consequential loss. Here, it begins by noting, quite correctly, that there is nothing "constitutionally objectionable" in this idea. However, the opinion then wrongly goes on to assert that the IRR's Bill seeks damages for "all" financial losses "resulting" from an expropriation "regardless of the remoteness of the loss to the expropriation", and regardless of "whether the payment of that amount would be just and equitable". [Paras 26, 27, Opinion]

These arguments are unfounded. As the authors of the opinion must surely know, the courts would apply the usual principles of causation in assessing consequential losses and would thus exclude losses that were too remote from the expropriation. Moreover, the whole purpose of the IRR Bill is to ensure that compensation is indeed "just and equitable" and that it strikes "an equitable balance between the public interest and the interests of those affected".

Based on these flawed arguments, the opinion concludes: "For these reasons, we consider the IRR's position on the correct method for computing compensation to be inconsistent with the constitutional formula and the jurisprudence in that regard". [Para 28] This flawed conclusion is based on:

- as assumed emphasis on market value which, by the opinion's own admission, is not in fact contained in the IRR Bill;
- a failure by the authors of the opinion to take into account the normal principles of causation, which would exclude consequential losses which are too remote; and
- an unsubstantiated assertion that the IRR Bill does not give enough emphasis to "just and equitable" compensation, when that is exactly what this bill (unlike the Nxesi Bill) is intended to achieve.

Proposed process

The opinion criticises what it describes as the "elaborate process" set out in the IRR Bill, and says this is intended to "make expropriation very difficult" and "prolong procedures" in a way that "may frustrate the public interest". [Paras 29, 30, Opinion]

However, the real aim of the IRR Bill is to ensure that there is no abuse of the power to expropriate. The IRR Bill thus allows adequate time for the initial negotiating process to take place and, if this fails, for all relevant information to be assembled, for objections to be lodged, and for the expropriating authority to reply fully and in writing to these objections. The IRR Bill, based on the Constitutional Court judgment in the *Brümmer* case, then also

allows adequate time for all parties to prepare for the court proceedings that may become necessary to resolve any remaining dispute over the constitutional validity of a proposed expropriation.

Separation of powers

The opinion suggests that the IRR Bill is in breach of the doctrine of the separation of powers. To this end, it cites a judgment of the Constitutional Court, in the *ITAC* case, which stresses that: [Para 34, Opinion]

- "all public power must be under constitutional control" ;
- "the courts are the ultimate guardians of the Constitution" and that
- "the courts not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so."

The IRR Bill's is not in breach of these principles, but rather in compliance with them. Its aim is also to ensure that these important rules are fully upheld. According to the IRR Bill, where negotiations fail and a dispute arises as to the constitutionality of a proposed expropriation, a high court must assess and, if it is satisfied on these points, confirm that the proposed expropriation is not "arbitrary", that it is truly "in the public interest" and that the proposed compensation is objectively "just and equitable", within the meaning of Section 25. In ruling on these issues, the courts will not be acting in breach of the Constitution, as the opinion suggests, but will instead be fulfilling their "duty" to "prevent the violation of the Constitution", as the *ITAC* judgment urges.

In addition, the IRR Bill does not allow the courts to disallow a proposed expropriation because that is their "preference", as the opinion further suggests. [Para 34, Opinion] It would, of course, be a breach of the doctrine of the separation of powers if the courts were to prohibit a proposed expropriation because they disliked or disagreed with it. It is not within the province of the courts to substitute their own decisions for those of the executive in this way.

But that is not what the IRR Bill allows. Instead, the IRR Bill gives the courts the task of adjudicating on and confirming the validity of an expropriation, where this is disputed. This is precisely what the Constitution requires. By contrast, the Nxesi Bill seeks to oust the jurisdiction of the courts by preventing them from ruling on the validity of an expropriation. The Nxesi Bill thus allows every expropriating authority to act as "judge and jury in its own cause"; and seeks to preclude the courts from fulfilling their duty to "prevent" constitutional violations.

The opinion goes on to stress that: "Expropriation is a competence that falls within the remit of the executive." [Para 36, Opinion] The IRR Bill does not dispute or alter this. All it requires is that the executive must act within the bounds set by the Constitution. Hence, where a dispute arises as to whether a proposed expropriation falls within these bounds, then the courts must first resolve this dispute before the disputed expropriation may proceed.

The opinion continues down the same wrong path in saying that expropriation "is not by its nature a judicial function". [Para 36, Opinion] The IRR Bill is not trying to turn it into a judicial function. Nor does it seek to make "judicial expropriation the norm". [Para 38, Opinion] What the IRR Bill says is that, where a dispute as to the validity of a proposed expropriation arises, then the courts must assess whether the proposed expropriation in fact meets all constitutional criteria. If the courts confirm that this is so, then the executive may proceed with the expropriation by issuing a notice of expropriation and taking ownership and possession of the relevant property under the terms of that notice.

In further pursuit of the same flawed argument, the opinion goes on to say that the "performance of administrative functions by judicial officers" may also infringe the doctrine of the separation of powers. [Para 40, Opinion] However, the IRR Bill does not seek to give the courts "administrative functions". Unlike the Nxesi Bill, it simply seeks to ensure that the jurisdiction of the courts to decide on the validity of an expropriation is not ousted – and that the courts are able to perform their proper judicial function in ruling on the validity of a proposed expropriation where a dispute on this issue has arisen. In carrying out this judicial function, the courts will of course be acting as "ultimate guardians of the Constitution" – a role which they are duty-bound to perform, as the Constitutional Court took pains to stress in the *ITAC* case. [Para 34, Opinion]

Based on this succession of flawed arguments, the opinion comes to an equally flawed conclusion. It claims that "the judicial function proposed by the IRR draft" is: [Para 41, Opinion]

- "not required by the Constitution", when the *ITAC* case in fact confirms that the courts have a duty to "prevent" constitutional violations by the executive;
- "inconsistent with the general function of the courts in South African law", when the *ITAC* case and the Constitution show this to be false; and
- "inconsistent with the general practice in constitutional democracies", when the role of the courts in upholding constitutional rights against executive (or legislative) erosion is of course generally acknowledged and upheld in such jurisdictions.

Compensation to be determined and paid before expropriation

The opinion also suggests that the IRR Bill is constitutionally flawed because it requires payment before an expropriating authority takes ownership, and says that an expropriation notice will become invalid if this requirement is not met. [Para 43, Opinion]

However, the IRR Bill does not claim that pre-payment is constitutionally required. It simply points out that it would be wise to require pre-payment – and to back this up with an effective sanction (the expropriation notice falls away if the payment is not made in time) – in a situation where the Government has for many years been struggling to get organs of state to pay their suppliers within a stipulated 30-day period.

Despite the 30-day rule – and despite the fact that many small black businesses have gone bankrupt while waiting for state entities to pay them, thereby undermining the Government's empowerment goals – relatively few organs of state can be counted upon to pay their bills on time. Against this background, it is important in practice that expropriating authorities should be given good reason to pay compensation to expropriated owners some three weeks before they lose the ownership of their property – and have to start relying on inefficient and often cash-strapped municipalities or other organs of state to discharge their financial obligations to them.

In a situation where many organs of state are notoriously late in making payments that are due, it is also clearly "just and equitable", within the meaning of Section 25, for the IRR Bill to include provisions aimed at ensuring that compensation for expropriation is timeously paid. South Africans who lose their homes, customary plots, businesses, or other assets to the State via expropriation need to receive adequate compensation upfront so that they can buy new homes, plots, or other assets, or start the time-consuming processes of establishing new businesses to replace the ones that they have lost to the State.

(Incidentally, in dealing with this aspect of the IRR Bill, the opinion downplays the real significance of the Constitutional Court judgment in the *Haffejee* case. [Paras 45, 46 Opinion] Here, the court declined to lay down a general rule that the amount of compensation must always be decided before an expropriation takes place, as it feared that this might hinder expropriations in situations of urgency. However, it also stressed that it would "generally…be just and equitable" for the determination of compensation to precede expropriation. It also stressed that, in those (urgent) cases where compensation had to be decided only after an expropriation had taken place, this must be done "as soon as reasonably possible". This shows that the court is well aware of the importance of prompt payment in helping to strike a "just and equitable" balance between the public interest and the interests of expropriated owners.)

Protracted timetable

The opinion goes on to criticise yet again what it describes as a "protracted timetable for effecting an expropriation", saying it could take "no fewer than 435 days" for an expropriation to be concluded. [Para 47, Opinion]

However, the time periods proposed in the IRR Bill will come into effect only where agreement on the purchase of property on reasonable terms cannot be reached. In addition, as earlier noted, the aim of the IRR Bill is to ensure adequate time for the initial negotiating process to take place and, if this fails, for all relevant information to be assembled and for all objections to the proposed expropriation to be considered and properly answered in writing. The IRR Bill also then allows time for adequate preparations to be made for the court proceedings that may become necessary to resolve any remaining dispute over the validity of a proposed expropriation.

In addition, the longest period proposed – 180 days' notice of high court proceedings on the validity of a disputed expropriation – comes from a Constitutional Court judgment (in the *Brümmer* case) indicating that this is the period that people need to prepare adequately for litigation. Other time periods proposed – for example, 90 days from the service of an expropriation notice until the transfer of ownership – can also be reduced by agreement.

The opinion further criticises the IRR Bill for failing to make provision for urgent expropriations, which "may be necessary…in the face of natural disasters or even war". [Paras 49, 50, Opinion] This overlooks the fact that the IRR Bill, by its own description, is simply a "framework document" that aims to set out the key provisions needed to ensure that expropriations are constitutionally compliant. Provisions for urgent expropriations, in the circumstances identified in the opinion, can of course be added.

Legislative duplication

The opinion criticises the IRR Bill for "endeavouring to incorporate aspects of the Prevention of Illegal Occupation and Unlawful Eviction from Land Act (the PIE Act)", which is "an unnecessary duplication". [Para 52, Opinion] It also criticises the IRR Bill for supposedly suggesting that "if an owner's home is the subject matter of the proposed expropriation, *this is sufficient to require suitable alternative accommodation* for him/her and affected persons". [Para 54, Opinion, emphasis supplied]

The italicised words distort what the IRR Bill actually says. They also overlook the constitutional requirement (in Section 26 of the Bill of Rights) that "no one may be evicted from their home…without an order of court made after considering all the relevant circumstances".

Given this constitutional provision, what the IRR Bill actually requires is that, where a proposed expropriation will "involve the eviction of the owner from his home, the expropriating authority must provide the high court [which is adjudicating on the validity of a disputed expropriation] with all relevant information, show that the eviction is just and equitable in all the circumstances, and give details of the suitable alternative accommodation it proposes to provide". [Section 9(4), IRR Bill] It is then, of course, up to the court to decide if the eviction may proceed – and to rule on the suitable alternative accommodation, if any, that it "may also require". [Section 10(4), IRR Bill]

Unlike the Nxesi Bill, which simply ignores the fact that expropriations may result in people being evicted from their homes, the IRR Bill is fully in keeping with Section 26. It is also fully in line with the Constitutional Court judgment in the *Haffejee* case, which stresses that "contested eviction matters must be resolved in the courts". This ruling also states that, "in disputed cases of eviction, the courts must grant orders that ensure just and equitable outcomes" in accordance with the Constitution. [Paras 41, 43, Haffejee judgment]

By contrast, the opinion seems careless of the great hardship that the expropriation of people's homes under the Nxesi Bill could easily trigger. According to the opinion, "it is

difficult to understand why alternative accommodation should be provided if the owner is guaranteed just and equitable compensation". [Para 55, Opinion] However, this overlooks the acute housing shortage and the fact that the housing backlog currently stands at more than 2.1 million units.

If black South Africans, in particular, are to be expropriated and evicted from their free-standing township homes by municipalities wanting land for RDP or social housing, for example, they will not easily be able to find suitable new houses in the face of the huge housing backlog. In these circumstances, a mere monetary payment – especially if the amount in question is significantly less than market value, as the Nxesi Bill clearly envisages – is unlikely to suffice. It will certainly not ensure "an equitable balance" between the public interest and the interests of the expropriated owner. By contrast, this balance is what the IRR Bill's provisions on eviction are intended to secure.

Identity of the expropriating authority

The opinion notes that the IRR Bill defines an "expropriating authority" as "including the minister of public works or any organ of state". It notes that "the latter term is unqualified" and points out that "the last part of the definition is extremely broad". [Paras 56, 57, Opinion]

This definition of "expropriating authority" is taken directly from the Nxesi Bill and is indeed extremely broad. What the Nxesi Bill is trying to do is to empower all organs of state, without exception, to expropriate virtually any kind of property without ever having to comply, or demonstrate their compliance, with the Constitution's criteria for a valid expropriation.

This risk is what the IRR Bill is seeking to avert. The IRR Bill thus seeks to bring all organs within the ambit of its provisions, as this would oblige all of them to comply with the various safeguards the IRR Bill lays down whenever they engage in expropriations.

Expropriation as acquisition of ownership only

The opinion criticises the IRR Bill failing to "cater for temporary expropriations. It adds that the State might need to "use a private hall as a temporary hospital or shelter during a flood or other crisis" and that "privately owned motor vehicles might be needed to transport supplies during war". [Paras 59, 60, Opinion]

However, as earlier noted, the IRR Bill is simply "a framework document" that seeks to incorporate essential safeguards into new expropriation law. Provisions for temporary expropriation, in the circumstances identified in the opinion, can of course be included within it.

Indirect expropriation

The opinion criticises the IRR Bill for including "indirect expropriation" without defining it. [Para 62, Opinion] However, as the opinion acknowledges, the term commonly connotes "regulatory" expropriations where the State does not acquire ownership, but the former

owner is nevertheless deprived of the powers and benefits of ownership in a manner that "arguably justifies compensation". [Para 64, Opinion]

The opinion questions whether indirect expropriations have been, or should be, recognised as "forming part of our law". [Para 65, Opinion] However, the Constitutional Court dictum it cites on this point leaves the point open, which reaffirms that there is no clear rule excluding them.

The opinion also argues that indirect expropriation may be barred from recognition by the Constitutional Court decision in the *Agri SA* case, which seems to aver that expropriation depends on "acquisition by the State of the property concerned". [Para 66, Opinion] However, there are many questions as to the import of the *Agri SA* case and whether it really lays down a new rule to this effect.

In penning a separate concurring judgment in the *Agri SA* case, Judge Edwin Cameron preferred to leave this question open. In their own concurring judgment, two other judges said that a new rule of this kind would effectively spell an end to all private property rights. Such an outcome would also, of course, prevent black South Africans from ever acquiring the "secure" property rights that they deserve – and would thus contradict the terms and spirit of the Constitution as well as the Constitutional Court ruling in the *P E Municipality* case.

In addition, as Martin Brassey SC has pointed out, the Constitutional Court, in the *Agri SA* case, was concerned with the narrow issue of whether an unused mining right, which had "ceased to exist" under the Mineral and Petroleum Resources Development Act of 2002 and so passed into the "custodianship" of the State, had been expropriated. The majority judgment, penned by Chief Justice Mogoeng Mogoeng, found that expropriation had not occurred, but also took pains to stress that this ruling was based on the facts of the particular case. Chief Justice Mogoeng also cautioned against "a one-size-fits-all" approach when "a case-by-case determination" was clearly the "more appropriate way" to proceed. [Para 64, *Agri SA* judgment]

The opinion further criticises the IRR Bill for failing to cater for indirect expropriation in the "the processes" it puts forward, which are clearly aimed "entirely [at] direct expropriations". [Para 68, Opinion] This criticism is unfounded, in that the processes envisaged in the IRR Bill could also be applied to indirect expropriations. However, those processes might also benefit from further careful consideration and the possible inclusion of some additional provisions catering more specifically for indirect expropriations.

Prospective supremacy over other acts of parliament

The opinion also criticises the IRR Bill for saying that it will "enjoy prospective supremacy over future acts of parliament, with the exception of an amendment to the Constitution or the Act itself". It says this is an attempt to "fetter the plenary powers conferred on Parliament by the Constitution", which is "constitutionally incompetent". [Paras 69 to 72, Opinion]

The opinion does not explain how this "fetter" will in fact arise, for it will clearly still be open to Parliament to repeal the IRR Bill or amend its terms, if it so chooses. All that the legislature is barred from doing is from enacting new expropriation legislation which supersedes and so indirectly puts an end to the protections contained in the IRR Bill.

Moreover, the formulation to which the opinion objects is already found in various statutes adopted by Parliament in the past. These include the Employment Equity Act of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, and the Broad-Based Black Economic Empowerment Act of 2003.

Conclusion

The opinion concludes: "In our view the IRR draft is inconsistent with the approach to property which is reflected in the Constitution, and certain provisions are defective for other reasons." [Para 73, Opinion] Since no further reasons are provided, the opinion's arguments for the unconstitutionality of the IRR Bill are those which have been earlier described – and which have already been found to have no substance.

Overall, it is clear that the IRR Bill is *not* in conflict with the Constitution, as the opinion wrongly avers. The real problem with constitutionality lies rather in the Nxesi Bill, as earlier outlined and more fully explained below.

The unconstitutionality of the Nxesi Bill

The Nxesi Bill allows a municipality or any other "expropriating authority' to take property by serving a notice of expropriation on the owner. Ownership of the property in question will then pass automatically to the State on the "date of expropriation" identified in the notice, which could be the day after the notice of expropriation has been delivered. The right to possess the property will likewise pass to the State on the stipulated date, which could be a day after the transfer of ownership.

Having taken ownership and possession of property by notice to erstwhile owners, the Nxesi Bill seeks to prevent them from contesting the validity of the expropriation by ousting the jurisdiction of the courts to rule on this key issue. Instead, it allows expropriated owners to contest only the adequacy of the compensation offered to them by the expropriating authority.

The Nxesi Bill does not say in so many words that the courts may not rule on the validity of an expropriation, but the legal effect of expressly giving the courts the power to rule on the one issue only – the compensation payable – is the same. The relevant principle of legal interpretation is summed up in the Latin phrase, "*inclusio unius est exclusio alterius*", which means that "the inclusion of the one means the exclusion of the other". This interpretation is strengthened by the fact that the 2013 version of the expropriation bill expressly allowed the courts to rule, firstly, on the compensation payable and, secondly, on "any other matter". By contrast, the second clause giving the courts jurisdiction over issues other than compensation has been removed from the Nxesi Bill.

The Nxesi Bill also seeks to limit access to the courts on the compensation issue by giving expropriated owners a mere 60 days in which to sue for additional compensation, failing which they will be "deemed" to have accepted the amounts offered by the State. However, most people will not be able to sue within this period, and especially so when they have already lost ownership and possession of what might have been their sole or key assets.

In addition, "self-help" of this kind is contrary to the common law and barred by the Constitution. Under the common law, the State cannot even temporarily seize property – not even that likely to have been used in committing crimes – without first obtaining court orders in the form of search-and-seizure warrants. This common-law protection for property rights has been significantly buttressed by the Constitution, which (as the opinion correctly says) "does not permit state interference in property rights by fiat". [Para 11, Opinion]

Instead, the Constitution lays down a number of important requirements for a valid expropriation in 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 of the Constitution prevents people from being evicted from their homes without express judicial authority, and may also require the provision of suitable alternative accommodation.

Under Section 25 of the Constitution, an expropriation may not be "arbitrary" (irrational), it must be carried out "for public purposes" or "in the public interest" (as defined in the Constitution), and it must 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". The circumstances listed include market value and four other factors, which are often called the "discount" factors because the monetary value assigned to them may be deducted from market value. These four factors are the current use of the property, the history of its acquisition and use, the extent of direct state investment in its purchase and capital improvement, and the purpose of the expropriation.

Under established principles of constitutional interpretation, it is *the State* that bears the onus of proving that all these requirements for a valid expropriation have been met where a dispute as to validity arises. The State must also discharge this onus *before* it proceeds with an expropriation, as its obligation to prove the constitutional validity of the taking is otherwise circumvented, while the Constitution's protections for property rights are severely weakened – if not set at naught.

Yet the Nxesi Bill allows the State to ignore a dispute over the validity of an expropriation which has arisen. It allows the State nevertheless to serve a notice of expropriation on the owner and then take ownership and possession on the dates specified. It also bars the courts from considering whether the State has shown that all the Section 25 requirements for a valid expropriation have (objectively) been met. The provisions of the Nxesi Bill allowing this are thus in breach of Section 25.

The Nxesi Bill also allows the expropriating authority to delay any payment until well after it has taken ownership and possession of the property. This is prima facie contrary to Section 25 of the Constitution in that it fails to strike "an equitable balance" between the public interest and the interests of the affected owner.

In addition, Section 34 of the Constitution 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 such disputes to be resolved by the courts, through the application of the relevant legal principles to the facts of the particular case. However, under the Nxesi Bill, this process of deliberation and adjudication is cut short: the State can simply issue a notice of expropriation and take ownership under it, long before a court has had the opportunity to consider or decide whether this is the appropriate outcome. In addition, under the Nxesi Bill, no legal dispute regarding the constitutional validity of the expropriation can be brought before the courts, which are confined to dealing with the sufficiency of the compensation. This ouster of the jurisdiction of the courts is clearly unconstitutional.

In many instances, expropriated owners will also be prevented from bringing legal disputes about the sufficiency of the compensation before the courts. This conflicts with both Section 34 and Section 25 of the Constitution.

Under the Nxesi Bill, the State may give expropriated owners 60 days in which to sue for more compensation, failing they will be deemed to have accepted whatever the State has offered. People who cannot find the means to sue within this time will be barred from having their legal disputes over compensation decided by the courts, which infringes their rights under Section 34. This situation also infringes their rights under Section 25 of the Constitution, which expressly requires that the amount of compensation must, in the absence of agreement, be "decided or approved by a court".

In addition, the 60-day period allowed by the Nxesi Bill is unconstitutionally brief, given the Constitutional Court's decision in 2009, in the case of *Brümmer* v *Minister for Social Development and others*. Here, a 30-day period to bring suit, which had been laid down under the Promotion of Access to Information Act of 2000, was struck down as unconstitutional, while the court indicated that a period of 180 days to sue would be more appropriate.

Also relevant is Section 33 of the Constitution, which gives everyone the right to just administrative action, which must (among other things) be "reasonable" and "procedurally fair". These requirements are not met when an expropriating authority can act as "judge and jury in its own cause" on the validity of a proposed expropriation. They are further eroded when such an authority can simply take ownership and possession via a notice of expropriation and then pay an amount of compensation (which may in fact be far from just and equitable) only many months later.

The Department of Public Works claims that the Nxesi Bill will bring the current Expropriation Act of 1975 into line with the Constitution, but this is simply not so. On the

contrary, the Bill is just as unconstitutional as the current Expropriation Act of 1975. In addition, 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. This means that neither the portfolio committee on public works nor South Africa's Parliament may adopt legislation which conflicts with the Constitution.

The Nxesi Bill must therefore be rejected. At the same time, the current defective Act needs to be replaced by a constitutional alternative. The IRR's Bill is not unconstitutional in any way and clearly meets this need. It recognises the State's power to expropriate where this is necessary, but also ensures that this power is exercised in a manner that is fully compliant with the Constitution. Only on the basis of the IRR Bill can there be, in the words of the Constitutional Court, "an orderly…restoration of *secure* property rights for those denied access to them or deprived of them in the past". [Para 9, Opinion, emphasis supplied]

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