

South African Institute of Race Relations NPC
Appendix 1 to IRR Submission to the Portfolio Committee on
Public Works and Infrastructure,
regarding the
Expropriation Bill of 2020 [B23-2020]
Johannesburg, 26th February 2021

Appendix 1: Proposed Amendments to Specific Clauses of the
Expropriation Bill of 2020 [B23-2020]

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Introduction

As stated in the IRR's *Submission*, the purpose of the IRR's proposed amendments to the Expropriation Bill of 2020 [B23-2020] (the Bill) 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 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 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 underlined 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 is set out in the IRR's *Submission*. (Headings have also been marked in bold to clarify the topics being dealt with and are not to be confused with needed deletions.)

1 Changes to the definitions clause

Clause 1: Definitions

The definitions that need to be amended are noted below:

1.1 “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 obtained under Section 26 of the Constitution.’ [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, or whether the administrative process being used is sufficiently fair), 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.

1.2 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 legal authority of the expropriating authority to evict him or her from his or her home without a court order obtained under Section 26 of the Constitution.’ [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, in the definition of ‘claimants’, there may also be disputes over other constitutional rights that need to be brought to mediation or adjudication before the courts.

1.3 “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

1.4 “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 Bill’s definitions are also 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.

1.5 “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.

1.6 “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 means and authorises.

1.7 “property” means property as contemplated in Section 25 of the Constitution, except where property is expropriated in ‘the public interest’, in which event 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 therefore be confined to land and/or natural resources, as there is no constitutional authority for expropriating property of other kinds ‘in the public interest’.

1.8 “service” in relation to a notice as contemplated in Section 24(1) means to serve by delivering that notice by hand to an owner or rights holder who must acknowledge receipt in writing, or to serve in accordance with the direction of a court, and “serve” has a corresponding meaning’ [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. Such owners have therefore had no knowledge of the expropriations affecting them, or that their properties have already been registered in the Deeds Office in the names of the relevant expropriating authorities. Since this is inconsistent with many of the rights guaranteed by the Constitution, the Bill must make every effort to avoid any repeat of such situations.

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, 15, 16, 18, 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 relevant notice to the property, or through repeated and prominent publication in local newspapers) may suffice. In addition, as set out in the amended Clause 7(7)(b) below, 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, the compensation payable, or other relevant issues, and must seek a prior court order authorising it to proceed with the expropriation, as set out in the amended Clause 8 of this Bill.

2 All provisions to be taken into account

Clause 2: Application of the Act

The particular sub-clause that needs to be amended is set out below:

2.1 Clause 2(4): 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(4)]**

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.

3 Minister's expropriation powers

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

3.1 Chapter 2 should be deleted in its entirety.

The powers of expropriation 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.

Particularly noteworthy, too, is the fact 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. However, no reference is made 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'), and Chapter 7 ('Urgent 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, the compensation payable, or the legality of his or her eviction from a home without a prior court order, 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 her own and seemingly different expropriation powers, the whole of Chapter 2 should be deleted.

4 Notices of intention to expropriate

Clause 7: Notice of intention to expropriate

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

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

(h)(ii) a written statement stipulating the amount claimed by him or her as just and equitable compensation, together with such further details as are contemplated in Clause 14;

4.2 Clause 7 (4): Subject to section 25, an owner or holder of an unregistered right 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, deliver to the expropriating authority a written statement indicating –

(aa) 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, and, if the property to be expropriated includes a person’s home, also those contained in Section 26(3) of the Constitution;

(a) the amount claimed by him or her as just and equitable compensation, should his or her property be expropriated....

4.3 Clause 7 (7)(a): If no agreement on the validity of the expropriation or on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right 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 21 before it issues a notice of expropriation.

4.4 Clause 7(7)(b): If the owner or rights holder has not confirmed his or her receipt of the notice of intention to expropriate that is supposed to have been served on him or her, the expropriating authority must, if it wishes to proceed with the expropriation, first comply with the provisions of Clause 21 before it issues a notice of expropriation. [delete existing Clause 7(7)(b), (i) to (iii), see rather new Clause 21]

It is inconsistent with Section 25 and other constitutional rights and 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 eThekweni Municipality and others, [2011] ZACC 28.

It is also vital that the expropriated authority should ensure that its notice of intention to expropriate has been received by the owner or rights holder. That owner or holder may otherwise be assumed to have no objection to the intended expropriation when he or she would in fact want to dispute it, if he or she was aware of what the expropriating authority intends. The new clause 7(7)(b) gives the expropriating authority an incentive to ensure proper delivery and receipt of its notice of intention to expropriate. It so does by obliging it, in the absence of an acknowledgement of receipt, to assume that a dispute exists – rather than to assume there is agreement – and therefore to seek a court confirming the validity of its proposed expropriation.

5 Notices of expropriation

Clause 8: Notice of expropriation

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

5.1 Clause 8 (1): If, having complied with the provisions of Clause 21, the expropriating authority decides to expropriate a property, it must cause a notice of expropriation to be served on the owner and the known holders of unregistered rights, as the case may be, whose rights in the property are to be expropriated and must do within the periods contemplated in clauses 21(7), 21(8), and/or 21(9).

5.2 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 21, while a copy of this agreement or court order must be appended to the notice of expropriation;

(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;

(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 in 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;

(g): except in the case of an urgent expropriation contemplated in Clause 22, the amount of compensation payable, either as agreed or as decided or approved by a court under the provisions of Clause 21;

(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 and if the owner or rights holder has thereby been unjustly enriched by the payment of compensation under sub-clause 8(ee), then the owner or rights holder 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.

5.3 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), but retain other sub-clauses in Clause 8(4)

[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 21; [delete the existing provision]

5.5 Clause 8(5) (a): Rights in a property may be expropriated from different owners and holders of unregistered rights in the same notice of expropriation, provided that the expropriating authority must comply with the provisions of Clause 21 in relation to each owner or holder .

5.6 Clause 8(5)(b): The just and equitable compensation payable to each owner or holder, as agreed or as decided by a court under the provisions of Clause 21, must be stated in the notice of expropriation contemplated in paragraph (a). [delete the existing provision]

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.

6 Vesting of ownership and possession

Clause 9: Vesting and possession of expropriated property

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

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

(a) 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 (c) 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) 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);

[This provision is currently found in Clause 9(1)(b) and now becomes Clause 9(1)(c), without any change in the wording of this provision]

6.2 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....

6.3 Clause 9(6): If the property expropriated is land –

- (a) the expropriated owner must deliver or cause to be delivered to the expropriating authority, subject to Section 25, within 30 days of the expropriating authority requesting the title deed to such land, or if it is not in his or her possession or under his or her control, written particulars of the name and address of the person in whose possession or under whose control the title deed is; and
- (b) the person referred to in paragraph (a), in whose possession the title deed may be, must deliver or cause to be delivered the title deed in question to the expropriating authority within 20 days of the expropriating authority requesting it, subject to Section 25.

[This provision is currently found in Clause 14(2), but no longer belongs there, so it has been shifted to Clause 9, but without any change in the wording]

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.

For the rest, provisions which fit more logically here are moved from elsewhere to form part of this section, but without any changes to the wording of these clauses.

7 Expropriation of unregistered rights

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

The particular sub-section that needs amendment is noted below

7.1 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, either as agreed or as decided or approved by a court under the provisions of Clause 21.

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.

8 Compensation on expropriation

Clause 12: Compensation for expropriation

The additional sub-clause needed is noted below:

8.1 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; and
- (f) an amount to make good any actual financial loss caused by the expropriation of the property.

*Para (f) is based on 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 holders of unregistered rights, such as tenants of residential and business premises. Their (now terminated) leases will have limited market value, so these individuals are likely to receive very little compensation under the current formula. The additional clause is also particularly important for the 2.8 million or so people who currently have unregistered rights of residence on commercial farms. Again, these (now terminated) residence rights have limited market value, which may leave farm residents with very 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 direct 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.*

8.2 Clause 12(3) of the Bill, providing for ‘nil’ compensation to be paid on the expropriation of land in circumstances that are ‘not limited’ to those listed

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, that are ‘not limited’ to the ones listed. 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.

9 Interest on compensation

Clause 13: Interest on compensation

9.1 Clause 13 provides for the payment of interest on compensation in a complex set of uncertain circumstances, as determined by various other clauses in the Bill. **Clause 13 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.

10 Claims regarding compensation

Clause 14: Compensation claims

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

10.1 Clause 14 (1): An owner or holder of an unregistered right who receives a notice of intention to expropriate in terms of Clause 7(1) must, subject to Section 25, within 30 days from the date on which that notice was served on that owner or holder, deliver or cause to be delivered to the expropriating authority a written statement –

- (a) confirming that the compensation offered in the notice of intention to expropriate is agreed; or
- (b) if no compensation was offered, as in the case of an urgent expropriation in terms of Clause 22, or if the owner or holder proposes a different amount, indicating the amount claimed by the owner or holder as just and equitable compensation; and
- (c) furnishing full particulars as to how the amount contemplated in paragraph (b) is made up, including a copy of a valuation, other professional report or other document that forms the basis of the compensation claimed...

The current Clause 14(2) should be deleted and moved to Clause 9, where it becomes Clause 9 (6), see para 6.3 above.

*It is inconsistent with Section 25 and other guaranteed rights to allow an expropriating authority to proceed with a disputed expropriation which may not in fact be valid because the compensation offered is not truly just and equitable in all the circumstances. This amendment thus makes it clear that an owner or rights holder must have the right to object to the compensation offered when he receives a notice **of intention** to expropriate and before a notice of expropriation has been served on him.*

11 Compensation offers

Clause 15: Offers of compensation

The sub-clauses requiring amendment are set out below:

11.1 Clause 15(2): **This clause should be deleted in its entirety**

Section 14(1) now applies to the amount of compensation offered in a notice of intention to expropriate, while a notice of expropriation could not have been served at this point in the process.

11.2 Clause 15(3): The provisions of Clause 21 shall apply if –

- (a) an owner or holder of an unregistered right does not deliver a statement in terms of Clause 14(1); or
- (b) the claimant does not accept the validity of the expropriation or the offer of compensation contemplated in subsection (1), by written reply within 20 days or within such additional term as may be permitted under Section 25; or

- (c) the property to be expropriated includes a person's home and the expropriation will result in the eviction of that person from his or her home.

It is inconsistent with Section 25, 26, and 34 of the Constitution, among other things, for the Bill to seek to confine the disputes that must be referred to court to disputes over the amount of compensation payable on expropriation. These amendments make it clear that disputes over the validity of an expropriation (for example, whether it is really in the public interest) and over the need for court authorisation for any eviction of a person from his or her home must also be referred to the courts in advance of any expropriation.

12 Payment of compensation

Clause 17: Payment of [~~delete: amount offered as~~] compensation

The amount of compensation cannot be the amount earlier offered by the expropriating authority in its notice of intention to expropriate, but is rather the amount decided by a court under Clause 21. Hence, this heading should be reworded as shown.

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.

12.1 Clause 17 (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 17(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.

12.2 Clause 17(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 17(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 17(2), which should be deleted.

12.3 Clause 17(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.

12.4 Clause 17(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 and if the owner has thereby been unjustly enriched by the payment of compensation, then the owner 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.

12.5 Clause 17(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, and if the holder has thereby been unjustly enriched by the payment of compensation, then the holder 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.

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 17(3) will help to prevent any unauthorised sale or other disposal of the property or rights in question, while sub-clauses 17(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.

12.6 **Delete Clause 17(3) and Clause 17(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, which have in any event been replaced by new Clauses 17(3) and (4), should be deleted.

12.7 **Delete Clause 17(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 17(5), is not needed and should be deleted.

12.8 Clause 17(6): The 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.

Under the proposed amendments, 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.

13 Property subject to mortgage or sale

Clause 18: Property subject to mortgage or deed of sale

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

13.1 Clause 18(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).

13.2 Clause 18(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.

13.3 Clause 18(3): If the owner and the mortgagee, and the owner and the buyer, as the case may be, fail to provide the expropriating authority with a written copy of their agreement, as required by subsection (2), the expropriation should nevertheless proceed as set out in the notice of expropriation, and 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).

13.4 Delete existing Clause 18

As soon as the owner receives a notice of intention to expropriate, it 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.

14 Mediation and litigation

Clause 21: Mediation and determination by court

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

14.1 Clause 21(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 of 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.

14.2 Clause 21(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.

14.3 Clause 21(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 and/or the amount of compensation payable to a competent court.

14.4 Clause 21(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 is in keeping with all the factors identified in Clause 12 and is 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.

14.5 Clause 21(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.

14.6 Clause 21(6): If the court fails to grant the order contemplated in sub-clause (5), the expropriating authority may not proceed with the expropriation.

14.7 Clause 21(7): If the court grants the order contemplated in sub-clause (5), the expropriating authority 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.

14.8 Clause 21(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).

14.9 Clause 21(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.

14.10 Delete all the current provisions of Clause 21

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 21 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, which is 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 within that same period.

15 Urgent and temporary expropriations

Clause 22: Urgent and temporary expropriation

This addition to the heading of this clause emphasises the temporary duration of any expropriation under this clause in the Bill.

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

15.1 Clause 22 (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.

16 Service of documents and language to be used

Clause 24: Service and publication of documents and language used therein

The amendments needed are shown below:

16.1 Clause 24(1): Whenever a notice in terms of sections 7, 8, 11, 15, 16, 18, 22, or 23 **[delete 7(1), 8(1), 11(2) or 12(3)(a) or a notice of withdrawal in terms of section 23(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 addressee 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)]**

16.2 Clause 24(3)(b): to any owner, holder of an unregistered right, person who has lodged an objection or submission contemplated in section 7(2)(g), expropriated owner and expropriated holder, at the physical address, e-mail address, or mobile telephone number **[delete: address or facsimile number]** appointed by such person in terms of this Act, or in the absence thereof –

- (i) at an address supplied in respect of such person in terms of this Act;
- (ii) at the residential **[delete: or postal]** address of such person, if known to the expropriating authority; or
- (iii) if no address of such person is known or readily ascertainable by the expropriating authority, by publication in the manner contemplated in subsection (2)(a)...

As earlier set out in para 8.1, 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. Such owners have therefore had no knowledge of the expropriations affecting them, or that their properties have already been registered in the Deeds Office in the names of the relevant expropriating authorities. Since this is inconsistent with many of the rights guaranteed by the Constitution, the Bill must make every effort to avoid any repeat of such situations.

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, 15, 16, 18, 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 relevant notice to the property, or through repeated and prominent publication in local newspapers) may suffice.

17 Defective regulations, notices, and other documents

Clause 29: Regulations, legal documents and steps valid under certain circumstances

17.1 Delete entire Clause 29

Clause 29 is a new provision which has not been included in earlier versions of the Bill. It allows an expropriating authority to bypass important procedural requirements set out in the Bill on the vague basis that its derogations from these rules are 'not material' or 'do not prejudice any person'.

This introduces an impermissible level of uncertainty as to the binding effect of the procedures set out in the Bill. In addition, where required procedures are not followed, substantive protections may also be undermined. The clause thus undermines the supremacy of the rule of law, which is guaranteed by Section 1 of the Constitution, and is contrary to various guaranteed rights in the Bill of Rights.

This clause must therefore be deleted. Any regulation, notice, or other document which is issued in a procedurally defective manner must instead be re-issued in keeping with all the relevant procedural rules that should have been followed in the first instance.

South African Institute of Race Relations NPC

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