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

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Introduction

The portfolio committee on public works and infrastructure (the committee) has invited interested people and stakeholders to submit written comments on the Expropriation Bill of 2020 [B23-2020] (the Bill) to the committee by an amended deadline of 28th February 2021.

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

2 Background to the Bill

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

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

Under Section 25, compensation on expropriation must be 'just and equitable' in the light of all the relevant circumstances. Factors expressly listed as relevant include both market value and the four 'discount' factors, which are:[1]

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

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

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

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

However, since the final Constitution took effect in 1997, South Africa has had the benefit of an entrenched Bill of Rights. This lays down binding criteria for a valid expropriation, guarantees that administrative action will be reasonable and procedurally fair, gives everyone

a right of access to the courts, requires judicial authorisation before people can be evicted from their homes, reinforces the principle of equality before the law, and guarantees the supremacy of the rule of law.

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

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

The Bill's list of preliminary steps is longer than that in the Act, and often reflects the impact of the Bill of Rights. However, these increased safeguards matter little because no equivalent protections apply at the point of expropriation. Yet this is when safeguards matter most – and when the requirements in the Bill of Rights must undoubtedly be met if an expropriation is to comply with the Constitution.

3 Key features of the Bill

3.1 Various flawed definitions in Clause 1 of the Bill

3.1.1 A narrow definition of 'disputing party'

The Bill defines a 'disputing party' as 'an owner, holder of a right, expropriated owner, or expropriated holder who does not accept the amount of compensation offered in terms of Clause 14(1) and 15(1)'.

This definition is too narrow, for it seeks to prevent those who object to the validity of an expropriation, or to their unauthorised eviction from their homes, from being included in the meaning of 'disputing party'.[2] This definition, along with various others, must therefore be amended, as set out in the IRR's alternative expropriation bill in *Appendix 1*.

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

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

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

This case began when a company, Sebenza (Pty) Ltd, found it lacked the funds needed to convert an unused 'old-order' mining right it had bought in 2001 for R1m into a 'new-order' mining right under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. This Act, which took effect in 2004, vested all mineral resources in the 'custodianship' of the state. It also required all unused old-order rights to be converted within a year, failing

which they would 'cease to exist'. Since Sebenza could not afford the application fee for this conversion, the mining right for which it had paid R1m duly came to an end, prompting it to sue for compensation. Agri SA, a lobby group for commercial farmers, many of whom had earlier owned unused old-order rights to the minerals beneath their land, took over the claim and brought it before the Pretoria High Court.[3]

The High Court found that Sebenza had lost all the competencies of ownership it had previously enjoyed, while the MPRDA had given the mining minister substantially similar rights. The state had thus acquired 'the substance of the property rights' that Sebenza had previously owned, and it made no difference that the state's competencies were termed 'custodianship' rather than 'ownership'. Expropriation had indeed occurred and compensation of R750 000 was payable.[4]

However, this ruling was in time taken on appeal to the Constitutional Court, which overturned it. The main judgment was penned by Chief Justice Mogoeng Mogoeng, who agreed that Sebenza had suffered a 'compulsory deprivation' of its mining right and that the 'custodianship' of this resource was now vested in the state. However, 'the assumption of custodianship' did not amount to expropriation because it did not make the state the owner of the right in issue. Stated the chief justice: 'Whatever "custodian" might mean, it does not mean that the state has acquired and thus become the owner of the rights concerned.' No expropriation had thus occurred, and this meant that no compensation was payable.[5] What the Pretoria High Court had seen as a meaningless distinction between the state's powers as 'owner' or 'custodian' thus became, in the main judgment at least, an issue of major legal and monetary importance.

But Chief Justice Mogoeng also stressed that his ruling was based solely on the particular facts before him, before going on to say: 'A one-size-fits-all determination of what acquisition entails is not only elusive but also inappropriate… A case-by-case determination of whether acquisition has in fact taken place presents itself as the more appropriate way of dealing with these matters,…[as] acquisition is likely to assume many variations.' He further emphasised that 'it would…be inappropriate to decide definitively that expropriation is, in terms of the MPRDA, incapable of ever being established…. I accept that a case could be properly pleaded and argued to demonstrate that expropriation did take place. That avenue…must be left open, particularly when regard is had to the express provision made for expropriation in item 12 of Schedule II to the MPRDA' (which deals with the compensation that would then be payable).[6]

In a separate concurring judgment, two of the Constitutional Court judges in the case cautioned against the approach taken by Chief Justice Mogoeng. In this ruling (handed down by Judge Johan Froneman), the two noted that the Constitutional Court had never before had to grapple with 'the nature of the change brought about by vesting the natural resources of the country in the state as custodian of those resources'. Nor had the main judgment 'addressed the issue squarely'. Earlier relevant Constitutional Court rulings had 'laid down no requirement of state acquisition as an inflexible requirement for expropriation' and 'it would

be inadvisable to extrapolate an inflexible general rule of state acquisition as a necessary requirement'. Such an approach would also be at odds with 'foreign jurisprudence, [which] recognises that expropriation may take place even if the [relevant] rights or property have not been acquired by the state'.[7]

Added Judge Froneman: 'If private ownership of minerals can be abolished without just and equitable compensation – by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights – what prevents the abolition of private property of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer from existing private property holders to others, if done by the state as custodian of the country's resources, from being recognised as expropriation. This is done without a thorough examination of what the entirely new legal concept of state custodianship holds for our law, or whether the transfer will be just and equitable. In that way, one of the crucial aspects of our historical compromise, the equitable balancing between the protection of existing property rights and the public interest under Section 25, is bypassed. I find that unfortunate.'[8]

Another Constitutional Court judge in the case, Judge Edwin Cameron, also handed down a separate concurring ruling, in which he 'shared the caution' expressed by Judge Froneman. Stated Judge Cameron: 'Acquisition by the state is, in my view, a general hallmark of expropriation. But not necessarily and inevitably so. Whether an expropriation contemplated by Section 25 has occurred is – as the main judgment finds – a context-based inquiry demanding a case-by-case approach. I therefore agree with [Judge] Froneman that it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement for all cases.' [9]

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

The Bill's definition is also in conflict with the customary international law meaning of expropriation, which does not always require state acquisition. Yet customary international law must be taken into account in interpreting the Bill of Rights,[10] and cannot simply be ignored by Parliament in adopting a contradictory definition.

At the very least, the current definition in the Bill should be omitted. If a definition is to be included – which may now be important to remove doubts and provide legal certainty – it should be worded in a comprehensive way, as set out in *Appendix 1*.

3.1.3 An extended definition of 'expropriating authority'

The Expropriation Act of 1975 confers the power to expropriate on the minister of public works alone (though municipalities that have expropriation powers under other laws are

expected to comply with the 1975 statute too).[11] The Bill, however, extends the power to expropriate to any 'expropriating authority'. It defines such an authority very widely as an 'organ of state or person…empowered…to acquire property through expropriation', under either the Bill itself or 'any other legislation'.[12] This is impermissibly vague and seems to give a blank cheque to any number of state entities to start exercising the very broad expropriation powers reflected in the Bill.

'Organ of state' is defined in the Bill in the same way as it is in Section 239 of the Constitution. 'Any department of state or administration in the national, provincial or local sphere of government' is thus included. So too is 'any other functionary or institution' which is either 'exercising a [public] power or performing a [public] function' under the Constitution or 'any legislation'.[13]

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

3.2 Preliminary requirements for expropriation

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

3.2.1 Negotiations for purchase on reasonable terms

First, the expropriating authority must negotiate with the owner and try to buy the property from him or her 'on reasonable terms'.[14] However, what the expropriating authority regards as 'reasonable' may be different from what others would think. At minimum, thus, the Bill should be reworded to make it clear that an objective test of reasonableness is to be applied.

3.2.2 Investigation and consultation

If negotiations fail to produce agreement, the expropriating authority must investigate the suitability of the property for the purposes it has in mind, consult with any relevant municipality or government department, and find out what unregistered rights tenants and other third parties might have in the property.[15] (The matter of third-party rights is further examined below.)

In the course of its investigation, an expropriating authority may send suitably skilled inspectors to examine the property and, if necessary, 'survey, dig, or bore into it'. However, these inspectors may not enter the property without either the consent of the owner or an order of court.[16]

The Bill thus recognises that an order of court is required for the relatively small matter of empowering an inspector to enter the property. Yet it simultaneously denies that a prior order of court is needed for the far more harmful step of implementing a permanent expropriation. This unconstitutional contradiction in the Bill's provisions must be cured by requiring an expropriating authority, in the event of a dispute on the validity of a proposed expropriation – which would include a dispute on the adequacy of the compensation to be paid – to obtain a court order confirming the validity of its proposed taking *before* it serves a notice of expropriation on the owner (see the amendments proposed in *Appendix 1*).

3.2.3 Notice of intention to expropriate

Once it has finished its investigation, the expropriating authority may decide if it still wants to expropriate the property. If it does, it must serve a notice of intention to expropriate on the owner (and on any known holder of a right in the property). This notice must identify the property, explain the purpose of the expropriation, and set out the intended dates on which the expropriating authority will take ownership and possession. The notice must also invite 'any person who may be affected by the intended expropriation' to send in any objections or other submissions within 30 days. The expropriating authority must consider such objections, but is not obliged by the Bill to respond to them (other than by acknowledging their receipt) or to give reasons for rejecting them. This is contrary to the right to just administrative action set out in the Constitution, which requires all administrative action to be 'procedurally fair'.[17]

The notice of intention to expropriate must further include 'a directive' to the owner to state, also within 30 days, what amount he would claim as 'just and equitable compensation' if the expropriation were to proceed. The expropriating authority must thereafter inform the owner, in writing and within 20 days, if it accepts his claim. If it does not, it must set out what amount of compensation it would offer instead and provide 'full details and supporting documents' in this regard.[18]

3.2.4 Deciding to proceed with an expropriation

If no agreement on compensation is reached within another 20 days of this counter offer to the owner, the expropriating authority may then 'proceed with the expropriation' and must do so 'within a reasonable time'.[19] However, for the expropriation to 'proceed' in these circumstances conflicts with the Constitution's requirement that compensation must – in the absence of a compelling emergency – *have been* determined, either by agreement between the parties or by the decision of a court, *before* an expropriation may take place (see *Section 3.4* of this submission, below).

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

- it is not in fact for public purposes or in the public interest;[20]
- the compensation offered is not truly just and equitable in all the relevant circumstances;[21]

- the compensation payable, along with the 'time and manner of its payment', have not yet been agreed, or 'decided or approved by a court', as is required in all but emergency situations;[22]
- the property to be expropriated includes a person's home and a court order authorising his or her eviction has not been obtained;[23] or
- other relevant constitutional requirements, ranging from the rights to equality, dignity, and administrative justice, have not been met.[24]

To ensure compliance with these provisions in the Bill of Rights, the expropriating authority must seek and obtain a court order confirming that a proposed expropriation meets all relevant constitutional requirements *before* it issues a notice of expropriation. Allowing the state to expropriate before it has obtained such a court order, as the Bill seeks to do, makes a mockery of guaranteed constitutional protections. Various amendments to the Bill are thus needed to bring its provisions into line with the Constitution, as set out in *Appendix 1*.

3.3 Notice of expropriation

According to the Bill, once an expropriating authority has completed these preliminary steps, it may serve a notice of expropriation on the owner (and also on all 'known holders of unregistered rights'). This notice must describe the property, explain the purpose of the expropriation, give reasons for taking the particular property, and state the amount of compensation offered.[25]

'If the amount of compensation is disputed', the notice must also include a statement to the effect that the expropriated owner 'may institute proceedings in a competent court to dispute the amount of compensation or request the expropriating authority to commence such court proceedings'. These proceedings must be brought within 180 days of the 'date of expropriation', this being the date (as further explained below) on which ownership passes to the expropriating authority.[26]

The notice of expropriation must further specify the 'date of expropriation' – this being the date on which 'the ownership of the property described in the notice…vests in the expropriating authority'. On this specified date, and regardless of any dispute on the compensation payable, ownership of the property passes to the state automatically and by operation of law.[27]

The notice of expropriation must further stipulate 'the date on which the right to possession of the property will pass to the expropriating authority'. On this date, the expropriating authority will automatically acquire the right to possess the property, again irrespective of the owner's objections. The expropriated owner is entitled to the use and income from the property until possession passes, but must also take care of it and prevent its value deteriorating.[28]

According to the Bill, the date of expropriation 'must not be earlier' than the date the notice of expropriation was served on the owner. However, since no other time period is stipulated, there is nothing in the Bill to prevent ownership passing to the state on the day *after* the service of this notice. Nor is there anything in the Bill to prevent the passing of possession very soon after the transfer of ownership. Hence, if the notice of expropriation is served on the owner on the first day of a particular month, ownership could pass on the seventh day of that month (or even earlier) and possession on the fourteenth day (or earlier still).[29]

These provisions in the Bill are inconsistent with Section 25 of the Constitution. This requires the expropriating authority to show that all the requirements for a valid expropriation have been met *before* it takes ownership of the property (as further explained in *Section 5* of this submission). These clauses also contradict:[30]

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

Where the expropriated property includes a person's home, these provisions also contravene Section 26(3) of the Constitution, which says that 'no one may be evicted from their home without an order of court made after considering all the relevant circumstances'.[31]

To cure the unconstitutionality of these clauses, the Bill must be amended to state that an expropriating authority, in the event of an unresolved dispute, must obtain a court order authorising the expropriation, and any eviction of people from their homes, *before* it serves a notice of expropriation on the owner or others. The necessary wording is set out in *Appendix 1*.

3.4 Determination of compensation prior to expropriation

In *Haffejee NO and others* v *eThekwini Municipality and others*, the Constitutional Court was asked to rule of the meaning of Section 25(2)(b). This says that 'property may be expropriated only in terms of law of general application…[and] subject to compensation, the amount of which and the time and manner of payment of which *have been* agreed by those affected or decided or approved by a court'.[32]

This wording in Section 25 indicates that the determination of compensation, whether by agreement or through the intervention of the courts, must *always* precede any expropriation. In the *Haffejee* case, Judge Johan Froneman (writing for a unanimous court) declined to interpret the provision in quite so categorical a way. He recognised that there could be exceptional circumstances – 'urgent expropriation in the face of natural disaster is one example' – in which it would be 'difficult, if not impossible, to determine just and equitable compensation' prior to expropriation. As a general rule, however, he stated, 'the determination of compensation…*before* expropriation will be just and equitable'. Moreover,

in those few cases where there was no choice but to determine compensation only after expropriation, this would have to be done 'as soon as reasonably possible'.[33]

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

3.5 Amount of compensation

The Bill echoes Section 25(3) of the Constitution in stating that the compensation payable must:[34]

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

3.5.1 'Just and equitable' compensation

What compensation is 'just and equitable' depends on all the 'relevant circumstances'. Those circumstances start with the five expressly listed in both the Bill and the Constitution: these being market value and the four 'discount' factors earlier described (see *Background to the Bill*, above). However, many of the discount factors – for example, the 'current use of the property' and 'the history of its acquisition' – are inherently vague and difficult to quantify. There is also no objective way of putting a monetary value on these criteria.

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

This greatly increases the risk that the expropriated owner who goes to court to contest the amount of compensation offered (see ***Mediation and determination by a court,*** below) will fail to discharge the onus resting on him. This in turn is likely to cost him heavily, as he will then have to pay not only his own substantial legal expenses but also many of the legal costs incurred by the expropriating authority in contesting the case. This is neither just nor equitable. Nor is it likely to result in the necessary 'equitable balance' between competing public and individual interests.

3.5.2 An 'equitable balance'

The Bill (like the Constitution) also requires that 'an equitable balance' should be struck between the public interest and the interests of the affected owner. This criterion

acknowledges that expropriation is a drastic measure that places an inordinately heavy burden on the shoulders of particular individuals in the nation's attempt to redress past societal wrongs. The losses suffered by expropriated owners must therefore be taking into proper account and carefully weighed against society's interest in land reform.

The need for an 'equitable balance' between individual and societal interests is in keeping with international best practice: and also with the 2009 guidelines of the United Nations' Food and Agricultural Organisation (FAO). These FAO guidelines emphasise the principle of 'equivalence', which aims to ensure that the expropriated owner is 'neither enriched nor impoverished' through expropriation, but rather placed in essentially the same position as he was before. What this means in practice, says the FAO, is that expropriated owners should generally receive compensation based on the value of their property, plus an amount to make good the additional direct losses they have suffered from the loss of 'their homes, their land, and at times their means of livelihood'.[35]

This approach already applies in South Africa under the current Expropriation Act of 1975. As earlier noted, the Act allows damages for all direct losses resulting from an expropriation, including moving costs and loss of income. There is no sound reason for excluding a similar clause from the Bill, but this is nevertheless what the Bill provides.

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

If justice is to be done to expropriated owners, the full extent of their consequential losses must be taken into account, not disregarded. This can be achieved by amending Clause 12 of the Bill so as to entitle the expropriated owner (or other rights holder) to 'an amount to make good any actual financial loss caused by the expropriation'. The necessary change to Clause 12 is set out in *Appendix 1*.

3.6 'Nil' compensation provisions

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

a) where the land is 'not being used' and the owner's 'main purpose is not to develop the land or use it to generate an income but [rather] to benefit from appreciation of its market value';[36]
b) where land is owned by an organ of state which is not using it for its core functions, is unlikely to use it for its future activities, acquired it 'for no consideration' and consents to its expropriation;[37]
c) where 'an owner has abandoned the land by failing to exercise control over it', even though it is still registered in his name under the Deeds Registries Act;[38]

d) where 'the market value of the land is equivalent to or less than the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land';[39] and
e) when 'the nature or condition of the property [not land, in this sub-clause] is such that it poses a health, safety, or physical risk to persons or other property'.[40]

In addition, under Clause 12(4) of the Bill, where 'a court or arbitrator determines the amount of compensation under Section 23 of the Land Reform (Labour Tenants) Act, 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances'.[41]

3.6.1 An open-ended list

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

This invitation to contradictory and unequal decision-making on 'nil' compensation contradicts the guarantee of equality before the law in Section 9 of the Constitution. It is also inconsistent with what the Constitutional Court describes as 'the doctrine against vagueness of laws'. Under this doctrine, says the court, 'laws must be written in a clear and accessible manner'. Legislation is *not* sufficiently clear if different administrative officials could give the same provision different meanings, all of which would be plausible.[42]

The open list in Clause 12(3) of the Bill generates precisely this problem. This makes the clause too vague to pass constitutional muster. The uncertainty inherent in Clause 12(3) also puts it in breach of the rule of law, and hence with Section 1 of the Constitution. This founding provision guarantees the 'supremacy' of the rule of law and so requires that this be upheld at all times.[43]

3.6.2 The vagueness of the wording used

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

In addition, the prevalence of land invasions in South Africa makes sub-clause 12(3)(c) particularly unjust and inimical to the rule of law. Take, for example, the case of William and

Walter Mnyandu, who had their homes (located within a former Lutheran mission in Ekuthuleni) burnt down in 2014. This arson attack was allegedly carried out by an *impi* under the local chief's command. The police were present when the Mnyandus were threatened and driven out of their homes, which were then set ablaze. However, the police did not defend the Mnyandus, but rather helped escort them out. Nor did they intervene when the Mnyandus were told they would be killed if they tried to return home. William was still in hiding, thus, at the time of his death, while Walter found that the title deed he had finally obtained meant nothing in practice.[44]

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

3.6.3 No need for Clause 12(3)

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

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

'Equivalence' is what is needed to strike an equitable balance between the public interest and the interests of those affected by an expropriation. The 'nil' compensation provisions in Clause 12(3) should thus be removed. All expropriated owners and rights holders should be provided with 'just and equitable' compensation – which must include damages for all resulting loss if the necessary 'equitable balance' is to be struck. As earlier noted, the necessary wording to bring Clause 12 into line with the Constitution is set out in *Appendix 1*.

3.7 Compensation claims

According to Clause 14 of the Bill, if the owner does not accept the amount of compensation offered in the expropriation notice, he must write to the expropriating authority within 20 days to explain what amount he claims instead. The expropriating authority then has 20 days to respond by offering a different (or the same) amount of compensation.[45]

3.8 Mediation and determination by a court

3.8.1 Disputes over compensation

According to Clause 21, 'if the expropriating authority and the expropriated owner…do not agree on the amount of compensation, they may attempt to settle the dispute by mediation', which may be initiated by either party. However, says the Bill: 'If the expropriating authority and the disputing party do not settle the dispute by consensus or mediation, either party may, within 180 days of the date of the notice of expropriation, institute proceedings in a competent court for the court to decide or approve the amount of just and equitable compensation.'[46]

The time period within which proceedings must be brought, as set out in this clause, is different from the time period set out in sub-clause 8(3)(h). Clause 21(2) requires proceedings to be brought within 180 days of 'the *date of the notice of* expropriation'. Sub-clause 8(3)(h) puts this time limit at '180 days of the *date of expropriation'*.[47] This conflict must be resolved. However, the best way to address this problem – and also to bring the Bill into line with the Constitution – is to adopt the relevant wording set out in the IRR's alternative bill, see *Appendix 1*.

According to the Bill, if the disputing party does not wish to institute these court proceedings, he may – within 90 days of the date of the notice of expropriation – request the expropriating party to institute the proceedings, provided this is done within the overall 180-day time limit. Under Clause 21(5), however, 'the onus of proof is not affected by whether it is the expropriating authority or the disputing party which institutes the proceedings'.[48]

Clause 21(5) thus seeks to shift the onus of proof from where it belongs – on the expropriating authority who has initiated the expropriation process – to the disputing party (ie the expropriated owner), who will be expected to prove that the amount of compensation he has been offered is not in keeping with the wording in the Bill and is thus not an appropriate amount. If the expropriated owner fails to discharge this onus, he will lose the case. He will then have to pay not only his own substantial legal costs, but also many of the legal expenses incurred by the expropriating authority. This is a major risk.

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

Or take the example of Bheki Dlamini, whose 3 000 hectares of land in the Groutville area of KwaZulu-Natal were expropriated from him in 2013 and then registered in the name of the KwaDukuza Municipality, which wanted the land for a new housing development. This expropriation should not have proceeded, as the necessary notice of expropriation was never

served on him (see *Disputes on the validity of the expropriation* below). For present purposes, however, the key question is what Mr Dlamini would need to do in contesting the compensation offered him – assuming that his 3 000 hectares were to be expropriated from him in the future and under the terms of the Bill.

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

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

In addition, Clause 21(8) compounds the burden on the expropriated owner by stating that 'a dispute on the amount of compensation alone does not preclude the operation of Section 9'.[49] Section 9 is the section providing for the automatic transfer of both ownership and the right to possess the property on the dates stipulated in the notice of expropriation. As earlier noted, those dates could be set for very soon after the service of the notice as there is nothing in the wording of the Bill to prevent this. Hence, ownership could pass to the expropriating authority within a week of the service of the notice, while the right to possession could pass to it within another week (see ***Notice of expropriation*** above).

In other words, even though the owner has 180 days from the date of the notice of expropriation (or from the date of expropriation, under sub-clause 8(3)(h)) to embark on litigation, ownership and the right to possess his property will in any event pass to the expropriating authority on the specified dates. This will happen irrespective of the fact that the dispute over compensation has yet to be brought before the courts for adjudication.

What the wording of Clause 21(8) also indicates, however, is that ownership and possession cannot pass automatically if the expropriated owner contests not only the amount of compensation but also the validity of the expropriation (see Section 3.8.2, below). However, the expropriated owner will also bear the onus of proving that the expropriation is not really 'in the public interest' – and this too may be difficult and costly in practice to do.

3.8.2 Disputes on the validity of the expropriation

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

As earlier described, Clause 21(2) gives the disputing party 180 days to litigate on 'the amount of just and equitable compensation'. But Clause 21(6) adds that this wording 'does not preclude a person from approaching a court on any matter relating to the application' of the Bill.[50] This wording is broad enough to cover disputes on validity as well as other issues: for example, whether an expropriated owner can be evicted from his or her home without a prior court order, as required by Section 26(3) of the Constitution.

The Bill nevertheless seems intent on encouraging people to believe that it is only disputes over compensation that can be taken to the courts. Most of the provisions in Clause 21 focus solely on disputes over compensation. The definitions section of the Bill (Clause 1) reinforces this narrow focus by defining 'a disputing party' as an owner or rights holder who 'does not accept the amount of compensation offered'. This definition leaves out the possibility that the owner may also reject the validity of the expropriation, or the expropriating authority's capacity to evict him without prior court authorisation.[51]

This narrow definition of 'disputing party' is also inconsistent with Section 34, which gives everyone the right to have legal disputes (including disputes as to the validity of expropriations) decided by the courts after a fair and public hearing. It further infringes on Section 33 of the Constitution (the right to just administrative action), because it effectively allows an expropriating authority to act as judge and jury in its own cause in deciding for itself on the validity of an expropriation and in carrying out an unauthorised eviction. The definition of disputing party should therefore be changed, as set out in *Appendix 1*.

Clauses 21(2) and (3) also indicate that any process of adjudication will generally begin only *after* a notice of expropriation has been served – and at a time when ownership and the right to possess the property may already have passed to the expropriating authority. In these circumstances, however, most people will be too financially and emotionally stressed to embark on litigation. The Bill's provisions putting the onus of proof on them in any court proceedings will also make the risks and likely costs of doing so inordinately high.

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

exceptional instances – *before* the expropriation may proceed (see *Determination of compensation prior to expropriation*, above).

Clauses 21(2), (5) and (8) of the Bill are thus in breach of Sections 34, 25, and 33 of the Constitution. Moreover, if the expropriated property includes a person's home, then these provisions are also inconsistent with Section 26(3) of the Constitution. Clause 21 of the Bill thus needs to be amended to comply with all relevant constitutional provisions. The wording required is set out in *Appendix 1*.

3.9 Date of payment of compensation

According to the Bill, 'the expropriated owner (or holder) is entitled to payment of compensation by no later than the date on which the right to possession passes to the expropriating authority'. However, another clause in the Bill allows the expropriating authority to avoid this obligation through the simple expedient of 'proposing a later date or dates' for payment.[52]

In these circumstances, the owner must either agree to this later date, or the matter must be referred to the courts for decision.[53] But if the expropriating authority has stipulated a later date for payment and is waiting for a court to authorise this date – a process which, given clogged court rolls, could take months or years – the authority is unlikely in practice to pay on the date it takes possession. Given the costs and time involved in litigation, most owners (or rights holders) will again have little choice but to agree to payment being deferred.

Worse still, the Bill also expressly states that 'any delay in making payment…will not prevent the passing of the right to possession to the expropriating authority…unless a court orders otherwise'. This means that the expropriating authority will generally suffer no penalty for failing to pay on time and will have no incentive to avoid late payment. The interest provisions in the Bill provide no such incentive either, as few owners or rights holders are likely to receive any interest on outstanding amounts under these poorly phrased clauses. These provisions are so skewed against the owner or rights holder that they cannot be accepted as 'just and equitable', as Section 25 of the Constitution requires.[54]

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

To ensure that payment is indeed made timeously, an effective sanction against late payment is needed. The Bill should therefore make it clear that any notice of expropriation will fall away and become invalid if the compensation is not paid in full ten days before the intended

date of expropriation. The amendments needed to bring about these changes are set out in *Appendix 1*.

3.10 The rights of third parties

Since that third parties may have rights in property targeted for expropriation, the Bill allows an expropriating authority to expropriate not only the owner but also the holders of such third-party rights. The expropriating authority may carry out all these takings by means of a single notice of expropriation. This notice must, however, be served on all relevant rights holders and must make each of them a separate offer of 'just and equitable' compensation.[55]

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

3.10.1 Mortgage rights

If the expropriated property is mortgaged to a bank, the mortgage will automatically be terminated on the date of expropriation stated in the notice of expropriation. On that date, ownership passes to the expropriating authority free from any mortgage debt, while any registered mortgage automatically comes to an end.[56]

In this situation, the compensation payable must be paid out in accordance with an agreement reached between the expropriated owner and the bank to which the debt is owed as to how the compensation is to be apportioned between them. If no such agreement has been reached, the expropriating authority may deposit the compensation payable with the Master of the High Court, who will in time pay out the money in keeping with any relevant court order.[57]

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

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

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

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

3.10.2 Mining and prospecting rights

A mining or prospecting right will not automatically be expropriated at the same time as the mining land itself. However, there is little in the Bill to prevent an expropriating authority from expressly expropriating any such mining or prospecting right in the same notice of expropriation. All that is needed under the Bill is that this notice is served on the relevant rights holder as well, and that if offers that holder what the expropriating authority identifies as 'just and equitable' compensation.[58]

Though this compensation will in time have to be paid to the rights holder, the prospect that mining companies could have both their mining land and their mining rights expropriated for inadequate compensation and without a prior court order will add to the insecurity of mining titles in South Africa. This could further undermine the sustainability of a mining industry already under great pressure from other onerous policies and a challenging operating environment characterised by costly and unreliable electricity supply, deteriorating rail and port infrastructure, and a significant increase in illegal mining.

3.10.3 Other registered rights

A servitude, such as a right of way to an adjoining property, will continue to exist if it has been registered against the title deeds of the expropriated land. Again, however, there is nothing to prevent an expropriating authority from expropriating the servitude as well and doing so under the same notice of expropriation. Again, this notice must be served on the holder of the servitude, who is entitled to just and equitable compensation.[59]

3.10.4 Unregistered rights

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

Under the Bill, all unregistered rights are 'simultaneously expropriated' on the date that ownership passes to the expropriating authority. The expropriating authority may allow a

lease to continue in force, but the tenant has no right to this. If its continuation is permitted, the tenant must pay rent to the owner until the date that possession passes. Thereafter, he must pay rent to the expropriating authority.[60]

Under the Bill, an unregistered rights holder such as a tenant is entitled to 'just and equitable' compensation. This must be based on market value, less the four discount factors, as stated in Clause 12 of the Bill.[61] But how is the market value of an expropriated lease to a residential flat or to business premises (a take-away food outlet on a busy main road, for example) to be quantified? In addition, the market value of such a lease is likely to be limited and could easily be reduced by the discount factors, including 'the purpose of the expropriation'.

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

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

The same will apply to farm workers or other farm residents, all of whose unregistered rights of residence on a commercial farm will automatically be expropriated when ownership of that farm passes to the expropriating authority. Farm residents will also lose their rights to possess their farm homes when possession of the farm passes to the expropriating authority. Though farm residents will supposedly have rights to compensation under Clause 12, in practice the formula in that clause will again provide them with only small amounts.

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

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

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

The Bill must thus be amended to allow both expropriated rights holders and owners to claim for resulting losses. The relevant wording is set out in *Appendix 1*.

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

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

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

The holders of registered and unregistered rights must thus also have the protection of an amended Clause 21, as set out in *Appendix 1*.

3.11 Expropriation by the minister of public works

Chapter 2 of the Bill deals with expropriation by the minister of public works and infrastructure (the minister). The Bill gives the minister the power to expropriate either for a public purpose or in the public interest. It also gives her the power to expropriate 'upon the written request' of an organ of state 'other than an expropriating authority', provided that this organ of state satisfies her that it needs 'particular property for a public purpose or in the public interest'.[62]

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

According to Chapter 2, the minister may expropriate only 'property which is connected to the provision and management of the accommodation, land and infrastructure needs of an organ of state'. The minister's power to expropriate is expressly made 'subject to the provisions of Chapter 5' of the Bill, which deals with the amount of compensation and the time when it must be paid. This wording raises doubts as to whether ministerial expropriations are subject to the other chapters in the Bill, particularly Chapter 3 ('Investigation and valuation of property'), Chapter 4 ('Intention to expropriate and expropriation of property'), Chapter 6 ('Mediation and determination by court'), and Chapter 7 ('Urgent expropriation'). [63]

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

Since there is little need for the minister to have her own and seemingly different expropriation powers, Chapter Two should simply be deleted, as shown in *Appendix 1*.

3.12 Condonation for procedural defects

A new clause in the Bill (not found in earlier versions of the measure) states that a regulation, notice of expropriation, or other document which does not comply with a relevant procedural requirement is nevertheless valid 'if the non-compliance is not material and does not prejudice any person'.[64]

In the same way, if the expropriating authority fails to take any step which is a prerequisite for a decision or action (for example, issuing a notice of intention to expropriate which complies with Clause 7 of the Bill) 'does not invalidate the decision or action if the failure (a) is not material, (b) does not prejudice any person, and (c) is not procedurally unfair'.[65]

This provision seems relatively harmless, but could add yet further to the burden on the expropriated owner. A notice of expropriation might state, for example, that the amount of compensation offered is based on the valuation provided to the expropriating authority by the Valuer General, but give no further supporting details, as required by sub-clause 8(4)(d) of the Bill.

The Valuer General is an official appointed by the minister of agriculture, land reform, and rural development under the Property Valuation Act of 2014. His job is to value all land and accompanying movables that have been 'identified for land reform'. In doing so, he uses a formula which was laid down in regulations in November 2018 – and will generally result in a valuation which is about half of market value and could at times be zero. The minister has previously asserted that such a valuation is definitive of the amount of compensation to be

paid on expropriation – though the Durban Land Claims court rejected this in the Melmoth case in 2019 on the basis that the courts must remain the final arbiter of the compensation payab*le.*[66]

The expropriated owner could object that a bare statement of the value assigned to the property by the Valuer General is not enough to meet the requirements of sub-clause 8(4)(d). He could also claim that this defect in the notice of expropriation cannot be condoned under Clause 29 of the Bill as it is a material one which prejudices him and is procedurally unfair. But the onus will then lie on the expropriated owner to prove the truth of these assertions and so prevent these defects being condoned. Again, the effect is to skew the procedural rules in the Bill in favour of the state and against the expropriated owner.

3.13 Trumping effect of the Bill

Part of the Bill's purpose (as the Memorandum on its Objects makes clear) is to 'ensure uniformity in the way that organs of state undertake expropriation'. This is important, the memorandum adds, because there is such an 'array of authorities within all spheres of government which have the power to expropriate through various pieces of legislation'. The Bill is thus intended to ensure a 'uniformity of procedure' for all expropriations, 'without interfering with the powers of expropriating authorities'.[67]

The Bill thus has several trumping provisions. It recognises in Clause 2(4) that an expropriating authority may expropriate property under 'any law of general application', but stresses that any such expropriation must nevertheless be carried out in compliance with its own core provisions. The Bill also requires that any existing law dealing with expropriation must be 'interpreted in a manner consistent with its terms', particularly as regards the compensation payable. To reinforce this point, the Bill further states that its provisions must 'prevail in the event of a conflict' between it and any other law dealing with expropriation.[68]

The Bill claims that this will ensure not only uniformity in procedures but also that all expropriations are 'consistent with the spirit and provisions of the Constitution'.[69] However, since the Bill contradicts the Constitution in all the ways outlined above (and further summarised below), all expropriations carried out in keeping with the Bill will also be unconstitutional and invalid. Any safeguards currently contained in other legislation against the abuse of the power to expropriate will also fall away. This makes it all the more important to ensure that all of the Bill's provisions are brought fully into line with the Constitution. This is vital to prevent a host of unconstitutional takings being implemented under a variety of other expropriation statutes.

4 Likely socio-economic consequences of the Bill

The Bill empowers all expropriating authorities, at every level of government, to expropriate land and other property whenever they consider this to be 'for public purposes' or 'in the public interest'. Since such authorities will rarely find their expropriations challenged in the courts, many financially stressed, inefficient (and sometimes even corrupt) municipalities,

government departments, and parastatals may be tempted to use the Bill to further their own narrow economic and/or political or factional interests.

4.1 No advance for land reform

The government claims that the Bill is needed to speed up land reform, but this is a tired and unconvincing justification that brushes over many inconvenient truths. In fact, only 4.2% of black South Africans see 'more land reform' as the best way to improve their lives.[70] In addition, at least 70% of land reform projects have failed, with previously successful farms soon failing to produce. Over the past 26 years, the government has thus spent billions of rands on taking hundreds of farms out of production with little benefit to anyone. Such pointless waste must stop, not be given further impetus.

In addition, the government has little intention of transferring individual ownership of the land it acquires to emergent black farmers. Instead, it is determined to confine them to leasehold tenure, as stated in the State Land Lease and Disposal Policy (SLLDP) of 2013. Moreover, though President Cyril Ramaphosa and other ministers have recently put huge emphasis on skewed land ownership as the primary reason for poverty and inequality, the budget for land reform has long been set at less than 1% of total budgeted expenditure. In 2020, moreover, as in several earlier years, less was budgeted for land reform and restitution grants than was allocated for the protection of VIPs and dignitaries.[71]

In the 2020/21 financial year, roughly R3bn has been allocated to land redistribution,[72] which is only about 10% of the R29bn budget set aside for agriculture, land reform, and rural development in the *Medium Term Budget Policy Statement* of October 2020. The entire R29bn budget of this department is also a mere 1.4% of total consolidated expenditure for the year, amounting to some R2 trillion.[73] If the government is serious about land reform, it should begin by greatly increasing the budget for this, transferring individual ownership of land to emergent farmers, and taking effective measures to help them succeed as commercial producers.

4.2 The Bill extends far beyond farming land

Though the government has successfully punted the Bill as a land reform measure, its ambit extends far beyond farming land. This is clear from the definition of the 'property' subject to the Bill, which is expressly defined as 'not limited to land'.[74]

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

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

4.3 A flawed definition of 'expropriation'

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

4.3.1 Custodianship of all land

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

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

Once the state has taken custodianship of all land, moreover, farmers who currently own their land will find that their 'right to farm' has become subject to ministerial regulation. Such regulation could require them to obtain land-use leases from the government and comply with further conditions in order to do so. Such a situation would turn former owners, like their emergent counterparts under the State Land Lease and Disposal Policy of 2013, into perpetual tenants of the state.

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

The National Water Act vests all water resources in the state as 'public trustee'. The MPRDA, as earlier noted, vests all mineral resources in the state as 'custodian'. A National Land Act along similar lines is likely, thus, to vest all land in the custodianship of the state. Once the state has taken custodianship of all land, 'every title deed will be meaningless' (as Julius Malema of the Economic Freedom Fighters has put it). Yet former land owners will be barred from claiming any compensation under the Bill's restrictive definition of 'expropriation'.

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

4.3.1 Many uncompensated 'regulatory' takings too

Under the Bill's definition of 'expropriation', indirect or regulatory expropriations, which do not vest the ownership of assets in the government, will not count as expropriations either. This could prompt the government to introduce 51% indigenisation requirements for all foreign businesses, along with 51% BEE ownership requirements for all local firms. Again, the government would be able to do this without having to compensate owners either for the loss of majority control over these firms, or for the depressed prices likely to result from a plethora of forced sales.

4.4 Overall economic ramifications of the Bill

The overall economic ramifications of the Bill are impossible to foresee because the measure trumps all existing laws touching on expropriation and seeks to prevent a host of custodial takings and regulatory expropriations from counting as expropriations at all. Inevitably, the Bill will have many consequences that cannot be anticipated. However, the threat to property rights implicit in the Bill will clearly:

- deter investment, growth, and job creation;
- contradict the National Development Plan (NDP), still supposedly the government's 'overriding' policy blueprint;
- encourage yet more businesses to shift investment away from South Africa; and
- make it harder still to recover from the economic crisis arising from the prolonged Covid-19 lockdown of the past year.

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

4.4.1 Economic growth

Even before the Covid-19 crisis, the country's growth rate had virtually ground to a halt, with growth of 0.8% of GDP recorded in 2018 and an even more meagre growth rate (0.2% of GDP) evident in 2019. In 2020, after many months of lockdown restrictions, the economy is estimated to have contracted by a staggering 7.2% of GDP. Though growth is expected to rebound off this low base to 3.3% of GDP in 2021, in 2022 and 2023 growth will decline to 1.9% of GDP, according to the National Treasury's projections in the February 2021 Budget Review.[75]

However, the Treasury's projections have consistently overstated the growth rates the country has actually achieved. Going back to 2010, in fact, projected growth figures from the National Treasury overestimated actual growth by a staggering 235%.[76] What seems more likely, thus, is that growth will decline to around 1.5% of GDP, which is its long-term average.

This is very much less than the growth rates in other emerging markets. It also means it will take until about 2028 for the economy to get back to where it was in 2019 – so resulting in eight 'lost years' of effectively zero growth.[77] Recovery from the Covid-19 lockdown blow will also be hampered by a slow vaccine rollout, which the Budget Review sees as taking place over two to three years.[78]

With the South African economy already in such enormous crisis, the last thing the country needs is to enact a Bill which will greatly reduce investment and make it harder still to restore the economy even to its 2019 levels.

4.4.2 Debt and downgrades

In 2008, gross loan debt stood at R630bn or 26% of GDP. In 2020, however, it is expected to reach R3.95 trillion (80% of GDP), before rising further to R5.23 trillion (87% of GDP) in 2023. This is an enormous increase over a relatively short period. Debt service costs thus absorb some 20% of all tax revenues collected and amount to some 4.7% of GDP, which is more than the country spends on health care and social security. By 2023, debt service costs will have risen to close on R340bn, or 5.6% of GDP, and will increasingly be crowding out spending on other healthcare, social services, and other essentials. [79]

The tax shortfall in 2020 was R213bn and would have been worse still without a major increase in global commodity prices. Compared to the 2020 budget, public spending (on non-interest expenditure) will have to be cut by some R265bn over the next three years so as to prevent gross loan debt from spiraling even further out of control. According to the *2021 Budget Review*, this is to be achieved by limiting further increases in the public sector wage bill, reducing spending on other goods and services, and holding down increases in social grants to below the inflation rate (now 3.2%).[80]

The best way to close what finance minister Tito Mboweni has called 'the jaws of the hippo' – in other words, the yawning gap between tax revenues and state spending – is to increase the growth rate to 5% of GDP or more and so expand the tax take. But the Bill will make it very much more difficult to achieve these goals. This will leave spending cuts of the kind mooted in the 2021 budget as the sole remaining option. This will harm all South Africans heavily dependent on the state for a wide range of essential goods and services.

4.4.3 Rand:dollar exchange rate

In 2009 the rand:dollar exchange rate stood at R8.44 to the dollar. In February 2021, it stands at some R14.95 to the dollar and would be worse still if the US currency had not weakened significantly in recent months. South Africa's high ratio of public debt to GDP – which far exceeds the emerging market norm of some 60% of GDP – makes it particularly vulnerable to global risk aversion or other negative sentiment.

South Africa has already been downgraded to sub-investment or junk status by all international ratings agencies, two of which have the country on negative watch. If further downgrades are triggered in response to this Bill, the pending constitutional amendment bill aimed at achieving expropriation without compensation (EWC), and other threats to property rights, the rand's value could in time slip to R20 or even R25 to the dollar.

4.4.4 Inflation

As the exchange rate deteriorates, inflation is likely to soar. If farming is disrupted by major farm expropriations, or by the taking of 'custodianship' of all agricultural land, food inflation is likely to be particularly severe. Food inflation could then more than double, rising from its current rate of 5.4% a year[81] to rates of 11% or more.

4.4.5 Unemployment

On the narrow definition of unemployment, which counts only those actively looking for work – and so overlooks millions of people too discouraged to keep searching for jobs – the number of unemployed South Africans has gone up from 1.98 million in 1994 to 7.2 million in the last quarter of 2020. The unemployment rate (on this same official definition) has gone up from 20% in 1994 to 32.5%, the worst it has been since 1994. The youth unemployment rate, among people aged 15 to 24, has long been far worse and stood at 63% at the end of 2020.[82]

Unemployment has long been at crisis levels and has been driven even higher in 2020 by the Covid-19 lockdown. Under the malign impact of the Bill, however, the official unemployment rate could easily rise to 35% or more within the population as a whole and to 70% among young people.

4.4.6 A vicious cycle

The economy was in a much stronger position in 2008, when an initial version of the Bill was put forward and then withdrawn. Since then, however, economic conditions have deteriorated very sharply.

The Covid-19 lockdown has enormously compounded the damage of the last decade and is likely in itself to continue hobbling investment, growth, and employment for another two to three years. The government's most urgent task at this juncture is therefore to embark on the structural policy reforms needed to restore business confidence, attract investment, increase growth, and help generate the millions more jobs needed to liberate the poor.

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

5 No satisfactory SEIAS assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[83]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[84]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. A particularly important need, moreover, is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[85]

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

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

According to Paragraph 6 of the Memorandum, the state will have to pay just and equitable compensation to 'persons affected by expropriation'.[86] However, it makes no attempt to quantify what the costs of such compensation might be.

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

The Memorandum adds that the Bill's introduction of uniform procedures for expropriation should not in itself 'have a significant impact on the staff structures of expropriating authorities'.[87] This is probably correct, but it misses all the essential points about the likely wider costs of the Bill.

The Memorandum further notes that the Department of Public Works and Infrastructure will have to increase its spending to cope with two needs: providing guidance on the Bill's uniform procedures to all expropriating authorities; and developing and maintaining a register of all expropriations, which will 'require the development of a database accessible to the public and dedicated personnel'.[88] These additional costs could be significant, especially in the government's straitened financial circumstances. However, to highlight these costs alone – while ignoring the wider economic ramifications of the Bill for the prosperity of the country and all its people – underscores how urgently a proper SEIAS is necessary to help guide the public's understanding of the Bill and enhance the committee's understanding of its likely costs and consequences.

6 The unconstitutionality of the Bill

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

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

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

The Bill thus empowers an expropriating authority to take property by notice to the owner – and leaves it to those stripped of ownership and possession to contest this in the courts thereafter, if they can afford to do so. The Bill also seeks to put the onus of proof on the expropriated owner (or rights holder), who will have to pay the expropriating authority's legal costs, as well as his own, if he fails to discharge this onus.

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

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

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

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

authority wishes to extend a temporary expropriation (from 12 months to a maximum of 18 months) that authority must first obtain a court order allowing this.[89]

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

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

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

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

If the Bill is to be brought into compliance with the Constitution, it must therefore be amended in various important ways. If an expropriating authority issues a notice of intention to expropriate particular property and the owner then rejects either the compensation offered or the overall validity of the proposed expropriation, the expropriating authority must *then* go to court on the matter. It must seek and obtain a court order which confirms the validity of the expropriation, decides what compensation is just and equitable in all the circumstances, and rules on when that compensation must be paid. The onus of proof in such proceedings must

lie on the expropriating authority, which must satisfy the court that the proposed expropriation meets all relevant constitutional requirements, including rights to equality, dignity, and administrative justice. Moreover, if the proposed expropriation will result in the eviction of anybody from their home, then the expropriation authority must also satisfy the court that this eviction should be authorised in all the circumstances.

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

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

Also important is Section 34 of the Constitution, which gives everyone the right to have any legal dispute decided in a fair public hearing before a court. This provision is obviously aimed at allowing legal disputes to be resolved by the courts, through the application of the relevant legal principles to the facts of the particular case.

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

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

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

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

In seeking to allow such uncompensated takings, this definition is clearly contrary to Section 25 of the Constitution and the careful balance this clause was intended to strike between upholding existing property rights and allowing redress for past injustice. It is also inconsistent with the usual meaning of expropriation under international law, the content of which is supposed to be taken fully into account in interpreting the Bill of Rights.[90]

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

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

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

The Constitution's founding provisions clearly state that the Constitution is 'the supreme law of the Republic', and that it must be respected and upheld at all times by all branches of the government. The Department is thus barred from putting the Bill forward for enactment while so many of its provisions contradict the Constitution.

7 Necessary amendments at the Bill

It is clear that the 1975 Act needs to be replaced by a constitutional alternative. To meet this need, the Department must bring the Bill into line with what the Constitution requires. To assist the Department in this task, the IRR has drawn up a list of necessary amendments to specific clauses in the Bill. This list is attached as *Appendix 1*. The purpose of these amendments is primarily to:

a) bring the definition of expropriation into line with the Constitution;
b) put the onus on an expropriating authority to prove that an intended expropriation complies with all relevant constitutional provisions;
c) require an expropriating authority, whenever a dispute arises, to obtain a prior court order confirming the constitutionality of a proposed expropriation *before* it issues a notice of expropriation;

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

8 The vital importance of private property rights

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

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

Significant progress towards that goal is now evident. Helped by major redistribution from via the budget, black property ownership has been growing steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year leasehold, and then in 1986 by freehold rights. Today, some 7.8 million black South Africans own their homes, as do close on 1 million so-called 'coloured' and Indian people – and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 4.4 million hectares of rural land on the open market, without the intervention of the state.[91]

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

homelands need individual title to the plots they occupy, which again would help to bring this dead capital to life.

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

Both the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) openly describe the NDR as providing 'the most direct path' to a socialist and then communist future. Though the ANC is more circumspect about overtly embracing this goal, it has nevertheless recommitted itself to the NDR at every one of its five-yearly national conferences. In pursuing the NDR, one of the ANC's key objectives, also regularly reaffirmed, is to bring about the 'elimination of apartheid property relations'. However, the word 'apartheid' is essentially a red herring. Replace it with the word 'existing' and the real meaning of this goal becomes apparent.

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

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

In 2018, the most recent year for which this comparative data is available, nations in the top quartile of economic freedom had average GDP per capita of $44 198, compared to $5 754 for nations in the bottom quartile (PPP constant 2017, international$). In the top quartile, moreover, the average income of the poorest 10% was $12 293, as opposed to $1 558 in the bottom quartile. Hence, the average incomes of the poorest 10% of people in the most free

countries were almost eight times greater than the equivalent incomes in the least free countries. Extreme poverty (US$1.90) a day is far more prevalent in the least free countries, with 31.5% of people in these nations suffering in this way. By contrast, only 1.7% of people in the most free countries are extremely poor. Life expectancy is also far greater in the most free countries (at 80.3 years) than in the least free nations (at 65.6 years).[92]

The importance of property rights is further confirmed by the experience of both Zimbabwe and Venezuela. In Zimbabwe, the expropriation of white farms has led to economic collapse, increasing hunger, hyperinflation, a 90% unemployment rate, and the flight of millions of impoverished people. Much the same is true in Venezuela, where the economy shrank by some 80% between 2015 and 2020, hunger is widespread, inflation has spiralled out of control, and some 5.4 million people, or 18% of the population, have been forced to flee.[93]

9 The way forward

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

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

For this reason too, the committee should fundamentally rethink and then recast this Bill. At the very least, the committee needs to bring the Bill into line with the Constitution by adopting the amendments set out in *Appendix 1*. All these changes are needed to cure the inconsistencies between the Bill and the Constitution. They will also help promote the investment, growth and jobs that offer the best means of overcoming unemployment, poverty, and inequality and giving South Africans the realistic prospect of a better life for all.

South African Institute of Race Relations NPC **26th February 2021**

[1] Section 25(3), Constitution of the Republic of South Africa, 1996 (Constitution)
[2] Clause 1, Bill
[3] *Agri South Africa v Minister of Minerals and Energy and Another* (55896/07) [2011] ZAGPPHC 62; [2011] 3 All SA 296 (GNP); 2012 (1) SA 171 (GNP); 2012 (1) BCLR 16 (GNP) (28 April 2011)
[4] *Business Day* 4 May 2011; Pretoria High Court judgment, supra, para 96

[5] *Agri South Africa* v *Minister of Minerals and Energy*, CCT/51/12, 18 April 2013, paras 71, 72
[6] Ibid, paras 64,72, 75
[7] Ibid, paras 101, 102, 103
[8] Ibid, para 105
[9] Ibid, para 78
[10] Section 39(1), Constitution; *Haffejee NO and others* v *Ethekwini Municipality and others*, [2011] ZACC 28, para 29
[11] Section 5, Expropriation Act of 1975
[12] Clause 1, Bill
[13] Clause 1, Bill; Section 239, Constitution
[14] Clause 2(3), Bill
[15] Clause 5, Bill
[16] Clauses 5 (2) (3), Bill
[17] Clause 7(1), (2), Bill, Clause 7(1)(g), Bill; Clause 7(5), Bill;Section 33(1), Constitution
[18] Clause 7(1), (h) Bill, Clause 7(6), Bill
[19] Clause 7 (7), Bill
[20] Section 25(2)(a), Constitution of the Republic of South Africa, 1996
[21] Section 25(3), Constitution
[22] Section 25(2)(b), Constitution
[23] Section 26(3), Constitution
[24] See sections 9, 11, 33 and 34, Constitution, among others
[25] Clause 8(3), Bill
[26] Clause 8(3), Bill
[27] Clauses 8(3)(e), 9 (1), Bill] [Clause 21(8), Bill
[28] Clause 8(3)(f), Bill, Clause 9(2), Bill, Clause 9 (3) to (5), Bill
[29] Clause 1, Bill
[30] Sections 34, 33, 1996 Constitution
[31] Section 26(3), 1996 Constitution
[32] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28; Section 25(2)(b), Constitution, emphasis supplied by the IRR
[33] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28, paras 39, 40, 43(b) and (c), emphasis supplied by the IRR
[34] Clause 12, Bill
[35] See Agri SA, 'Agri SA Comments on Draft Expropriation Bill, 2019', pp13-14
[36] Clause 12(3)(a), Bill
[37] Clause 12(3)(b) read together with Clause 2(2), Bill
[38] Clause 12(3)(c), Bill
[39] Clause 12(3)(d), Bill
[40] Clause 12(3)(e), Bill
[41] Clause 12(4), Bill
[42] *Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108
[43] Section 1(c), Constitution
[44] Gabriel Crouse, 'Expropriation Bill: The devil lies in the details', *Politicsweb.co.za*, 5 November 2020
[45] Clause 14(1), Bill; Clause 15(1), Bill
[46] Clause 21(1), Bill; [Clause 21(2), Bill
[47] Clauses 21(2), 8(3)(f), Bill, emphasis supplied by the IRR
[48] Clause 21(2),(3), (5), Bill.
[49] Clause 21(8), Bill
[50] Clause 21(6), Bill
[51] Clause 21(2), (6) read together with Clause 1, Bill
[52] Clause 17(1), 17(4), Bill
[53] Clause 17(4), Bill
[54] Clause [17(3), Bill; Clause 13, read together with Clause 17, Bill
[55] Clause 8(5)(a) and (b), Bill
[56] Clause 9(1)(a), (d), Bill

[57] Clause 18, Bill
[58] Clauses 9(1)(d), 8(5), Bill
[59] Clause 9(1)(d), Bill];Clause 8(5), Bill
[60] Clauses 9(1)(b), 8(5), 11, 12, Bill, Clause 11(1), (4), Bill
[61] Clause 12(1), Bill
[62] Clause 3(1), Bill; Clause 3(2), Bill
[63] Clause 3(3), 3(1) Bill
[64] Clause 29(1), Bill
[65] Clause 29(1) and (2), Bill
[66] *Emakhasaneni Community* v *Minister of Rural Development and Land Reform* and others, Land Claims Court of South Africa, Durban, LCC 03/2009, September 2019
[67] Para 1.3, Memorandum on the Objects of the Expropriation Bill (Memorandum), 2020
[68] Clauses 2(4), 30(1)(2), Bill
[69] Para 1.2, 1.3, Memorandum
[70] IRR, December 2020 opinion poll, forthcoming
[71] http://www.treasury.gov.za/documents/national%20budget/2020/ene/FullENE.pd, pp421, 426
[72] http://www.treasury.gov.za/documents/national%20budget/2020S/review/FullSBR.pdf p. 84
[73] National Treasury, *Medium Term Budget Policy Statement*, October 2020, p37
[74] Clause 1, Bill
[75] National Treasury, *2021 Budget Review*, pp1-2
[76] Ivo Vegter, The aloe ferox is dead, *The Daily Friend*, IRR, 26 February 2021]
[77] Vegter, ibid]
[78] https://www.dailymaverick.co.za/article/2021-02-24-south-africas-2021-budget-in-a-box/
[79] IRR, 2020 South Africa Survey, p214],National Treasury, 2021 Budget Review, p9
[80] https://mg.co.za/business/2021-02-24-snip-snip-mboweni-eyes-wage-bill-other-future-spending-cuts/; https://www.dailymaverick.co.za/article/2021-02-24-south-africas-2021-budget-in-a-box/; IRR, Fast Stats, February 2021, p3
[81] IRR, Fast Stats, February 2021, p3
[82] https://www.news24.com/fin24/economy/sas-jobless-grows-to-72-million-as-unemployment-rate-breaches-new-record-20210223
[83] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015
[84] *SEIAS Guidelines* p7
[85] *SEIAS Guidelines*, p11
[86] Para 6.1, Memorandum on the Objects of the Expropriation Bill, 2020
[87] Para 6.2, Memorandum
[88] Para 6.3, Memorandum
[89] Clauses 5(3), 22(2), Clause 22(7),Bill]
[90] Section 39(1), Constitution; *Business Day* 6 February 2019
[91] IRR, *2020 South Africa Survey*, p377; Agri SA, 'Land Audit: A Transactions Approach', *Politicsweb.co.za*, 1 November 2017, p9
[92] Fraser Institute, Economic Freedom of the World: 2020 Annual Report, 10 September 2020, exhibits 1.5, 1.6, 1.9, 1.10
[93] https://www.economist.com/the-americas/2021/02/13/cuba-and-venezuela-open-up-hesitantly-to-the-market?/; https://www.politicsweb.co.za/opinion/ewc-ramaphosa-is-following-mugabes-script-on-land; https://www.statista.com/statistics/370937/gross-domestic-product-gdp-in-venezuela/; https://www.statista.com/statistics/371895/inflation-rate-in-venezuela/; https://www.worldvision.org/disaster-relief-news-stories/venezuela-crisis-facts