

South African Institute of Race Relations NPC (IRR)
Submission to the
Department of Public Works regarding the
Draft Expropriation Bill of 2019
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SYNOPSIS

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1 How the Expropriation Bill will work in practice

To see how the draft Expropriation Bill of 2019 (the Bill) will work in practice, let us take the example of KwaNdengezi, a settlement near Pinetown in the vicinity of Durban. Here, there is a high demand for land for housing, with houses often selling for between R500 000 and R900 000. However, much of the land in the area is currently held in communal tenure by the local chief (iNkosi) and allocated in plots to community members. Only some community members have 'permission to occupy' documents, but the customary land-use rights of all residents are recognised within the community. The area is spacious and many people have used their plots to build formal houses, some with five rooms or more.

However, the land also falls within the jurisdiction of the eThekweni metropolitan authority, which may seek to expropriate those parts of KwaNdengezi that are closest to Pinetown, so as to increase densification and counter apartheid spatial geography. If the Bill is adopted in its current form, the metro will have important new expropriation powers and could use these to obtain this land on the cheap.

Under the Bill, the metro must start by negotiating with the chief and community members for the purchase of the land at, say, 60% of its market value. If no agreement is reached, the metro – after inviting and then rejecting their written objections (which it will be able to do

without giving reasons) – will be able to serve notices of expropriation on the chief and all community members.

If these notices are served on 1st July, ownership of the land will automatically pass to the metro on the date of expropriation stated in the notice. This date could be set very soon: say, as 8th July. The unregistered land-use rights of all community members will automatically be expropriated as well on 8th July. Thereafter, the rights of community members to possess their plots and homes will pass automatically to the metro on the date of possession specified in the notice of expropriation. This too could be set very soon: say, as 15th July. When the right to possession is transferred, residents will no longer have the right to live in their homes and can be evicted from them.

In return, the metro could offer community members, say, 60% of the market value of their customary land-use rights (which are likely to be worth less than the land itself). If community members object to this amount of compensation, the metro may attempt to resolve this dispute by mediation. If this fails, or if community members reject the mediation option, the metro must then refer the matter either to the High Court in Durban or to the local magistrate's court.

However, under the current wording of the Bill, the onus of proof in these proceedings will lie on the community members, who will have to convince the court that the higher amount of compensation they wish to claim is just and equitable in all the circumstances. If they fail to persuade the court of this, they will have to pay not only their own (substantial) legal costs, but also those of the metro. In practice, few community members will be able to risk such litigation. In addition, if they have already lost both their customary land-use rights and the right to possess their plots and homes, most will be too busy trying to find alternative housing and means of livelihood to have the time and energy for litigation.

Yet this expropriation may not in fact be valid, as it may not really be 'in the public interest', as the Constitution requires, for these customary plots to be expropriated to facilitate denser housing. However, the community members will also find it difficult to contest the validity of the expropriation before the courts. Again, the financial risks in doing so will be great. In addition, the Bill has clauses that seek to limit litigation to disputes over compensation.

If community members are evicted from their homes without a court order authorising this, this will clearly be contrary to Section 26(3) of the Bill of Rights. Again, however, community members may in practice find it difficult to seek redress for this injustice.

Community members could also suffer further harm from the Bill's provisions regarding the timing of payment. According to the Bill, the metro is supposed to pay the full amount of compensation when it takes possession, ie on 15th July. However, the metro can also propose a later date for payment (say 15th December) in its notice of expropriation. Though this later date must then either be agreed or approved by a court, in practice the metro is unlikely to pay on 15th July if it is waiting for court approval of the later date (15th December) it has

proposed. Moreover, since the right to possess the plots and homes will pass to the metro on 15th July irrespective of whether it has paid the compensation or not, there will be no incentive for it to avoid late payment.

Even if the metro agrees to pay when it takes possession on 15th July, it may not in fact fulfil this obligation. Some 60% of South Africa's municipalities currently face major financial difficulties, while many state entities are notoriously slow in paying their bills, even when the money is available to them. President Cyril Ramaphosa and the National Treasury have thus repeatedly urged all state entities to pay their bills within the 30-day period required by the Treasury. But despite the pressure on them to fulfil this obligation, many state entities fail to pay on time and often leave people waiting for payment for long periods.

Bearing in mind this pattern of late payment, how long might community members have to wait to be paid? Yet how will they cope with late payment when they have already lost their land-use rights and the possession of their homes? Where are they to live while they wait for compensation? How are they to replace the spaza shops or other businesses they might have been running from their homes? And is it 'just and equitable' that expropriated community members should confront such hardship?

The suffering the Bill could bring to community members in the KwaNdengezi area is likely to be replicated right across the country – for expropriating authorities at all tiers of government will find it remarkably easy to carry out expropriations once the Bill becomes law. They will have to start with the simple preliminary steps outlined above, but will then be entitled to serve notices of expropriation on owners and other rights holders. Ownership and possession will then pass quickly and automatically to these state entities, often in return for less than adequate compensation. Expropriated owners and rights holders will generally battle to bring disputes over compensation or the validity of expropriations before the courts. Hence, most expropriations will proceed unchallenged, even when they are not in fact in keeping with what the Constitution requires.

2 The core provisions of the Bill

The Bill is a 'law of general application', which is intended to supplement the expropriation without compensation (EWC) amendment soon to be made to the Constitution. The Bill deals with three key issues.

First, the Bill sets out some of the circumstances in which 'nil' compensation will be paid on a 'direct' expropriation: one in which the state takes ownership of the property in question. *Second*, it describes the procedures to be followed by municipalities and other organs of state in carrying out direct expropriations, whether these are for nil compensation or more. *Third*, it includes a 'definition' of expropriation which has been carefully crafted to look harmless on the surface. However, this definition will also allow 'nil' compensation for a host of 'indirect' expropriations: ones in which the state does not take ownership, but people nevertheless suffer significant losses.

2.1 *'Nil' compensation on expropriation*

Under Clause 12(3) of the Bill, 'it may be just and equitable for nil compensation to be paid' for land which is expropriated in the public interest, 'having regard to all relevant circumstances'. Land for which nil compensation may be paid will 'include but not [be] limited to' land which: [Clause 12(3), read with Clause 2(2), Bill]

- is occupied or used by a labour tenant;
- has been 'abandoned' by its owner;
- is held 'for purely speculative purposes';
- is worth less than the state subsidies from which it has benefited; or
- is owned by a state-owned entity which consents to the expropriation.

This list, with its five examples, is intended to reassure South Africans that EWC will be sparingly used and justifiably applied. However, the circumstances in which EWC may be deployed are expressly 'not limited' to those set out in Clause 12(3). They may thus extend far beyond this short list.

This open list of circumstances in which nil compensation may be paid contradicts 'the doctrine against vagueness of laws'. This doctrine arises from the founding provisions of the Constitution, which recognise 'the supremacy' of 'the rule of law' as a core value of the new order. [Section 1(c), Constitution] Legislation must thus be clear and certain, so that people know what their rights and obligations are and can act accordingly.

The Constitutional Court has also stressed that 'laws must be written in a clear and accessible manner'. [*Affordable Medicines Trust and others v Minister of Health and others*, 2005 BCLR 529 (CC) at para 108] According to the court, legislation is not sufficiently clear if administrative officials can give the same provision different meanings, all of which are plausible. The open list in the Bill is vague in precisely this way, for expropriating authorities can expand the list in many different ways, all of which will plausibly fit within Clause 12(3).

The clause as a whole is too vague to pass constitutional muster. The same considerations also apply to many of its sub-clauses. In particular, its references to land held 'solely for speculative purposes' and land which has been 'abandoned' are also impermissibly vague. Further uncertainty and confusion will arise from the Bill's 'nil' compensation provisions for land occupied by labour tenants, for land of this kind is already subject to a different set of regulations under the Land Reform (Labour Tenants) Act of 1996.

The 'nil' compensation clause is thus unconstitutional and must be deleted. It is also unnecessary to include this provision as the courts already have the power to decide that 'just and equitable' compensation may be set at nil in appropriate circumstances.

2.2 *Procedures to be followed in expropriating property*

The Bill empowers all organs of state that have 'expropriating powers' (whether under the Bill itself or under a range of other statutes) to expropriate property by following a set of

specified procedures. [Clauses 1, 2, 29, Bill] These compulsory procedures are heavily skewed against the owner and in favour of the government.

2.2.1 Negotiation and investigation

A metropolitan authority which wants to expropriate residential or other land – say, to increase densification and counter apartheid’s spatial geography – must begin by negotiating with the owner for its purchase ‘on reasonable terms’. [Clause 2(3), Bill] What the metro puts forward as ‘reasonable’ may not, however, be acceptable to the affected owner. If no agreement is reached, the metro may then investigate and inspect the property with a view to its expropriation. [Clause 5, Bill]

2.2.2 Notice of intention to expropriate

Once these steps have been taken, the metro may issue a notice of its intention to expropriate. In this document, it must invite representations against the proposed expropriation. It must also ask the owner to set out the amount he/she would like to claim as ‘just and equitable’ compensation. The metro is obliged to ‘consider’ any representations that it receives, but it need not respond to them or give reasons for rejecting them. [Clause 7, Bill]

2.2.3 Notice of expropriation

Having taken these simple preliminary steps, the metro may then issue a notice of expropriation. This notice must set out the reason for the expropriation, the amount of the ‘just and equitable’ compensation offered – which could be ‘nil’ under Clause 12(3), as set out above – and the date (or dates) on which the metro proposes to pay the compensation, if any. [Clauses 8, 12 Bill]

2.2.4 Transfer to the municipality of ownership and possession

Both ownership and the right to possess the property will automatically pass to the metro on the relevant dates stipulated in the notice. [Clause 8, Bill] The date for the transfer of ownership could be a mere week (or a mere day) after the service of the notice, as the only time limit set out in the Bill is that this date ‘must not be earlier than the date of service’ of the notice. [Clause 1, definitions]

The right to possess the property could pass to the metro within another week (or another day), as there is nothing in the wording of the Bill to prevent this.

2.2.5 When compensation must be determined

According to Section 25(2)(b) of the Constitution, property may be expropriated once key aspects of the compensation payable (amount, timing and manner of payment) ‘have been’ determined, either by agreement between the parties or by the courts.

In *Haffjee NO and others v eThekweni Municipality and others*, the Constitutional Court noted that there may be compelling circumstances (a natural disaster, for example) in which it is not possible for the determination of compensation to precede an expropriation. In general, however, said the court, it is ‘just and equitable’ for this determination to take place ‘before

expropriation’. [Section 25(2)(b); *Haffejee NO and others v eThekweni Municipality and others*, [2011] ZACC 28, at paras 39, 40, 43(b) and (c)]

By contrast, the Bill allows all expropriations to proceed without compensation first having been determined. However, this is permissible only in the ‘natural disaster’ type of example cited by the Constitutional Court in the *Haffejee* case. All provisions of the Bill that conflict with the *Haffejee* ruling are thus unconstitutional.

2.2.6 *When compensation must be paid*

According to the Bill, the compensation offered by the metro is supposed to be paid before it takes possession of the property. However, the metro can circumvent this by proposing a later date for payment, which is then supposed to be confirmed by a court order. [Clauses 17(1)(4), Bill] In practice, this last requirement is unlikely to count much, as earlier described.

Moreover, even if compensation has not yet been paid, the Bill still allows the metro to take ownership and possession on the stipulated dates (unless the owner has managed to obtain a court order preventing this). [Clause 17(3), Bill] Again, however, allowing expropriations to proceed before compensation has been paid is inconsistent with the spirit of the Constitutional Court ruling in the *Haffejee* case.

2.2.7 *Putting a value on property needed for ‘land reform’*

In deciding what compensation is ‘just and equitable’, a key question will be whether the metro has identified the property as necessary for ‘land reform’. This could certainly apply in the example mooted here, where the metro is seeking to overcome apartheid spatial geography.

In this situation, a valuation ‘formula’, as set out in regulations gazetted in November 2018 under the Property Valuation Act of 2014, will apply. Under this formula, the market value of a house must be added to its ‘current use value’, which is defined as the difference between cash inflows and cash outflows on the date the valuation is carried out. The total thus computed must then be divided by two.

However, most homes have few cash inflows on any date, so this formula will generally result in a valuation which is half of market value. This valuation is then likely to be used in deciding what ‘just and equitable’ compensation is needed under the Bill. [‘Regulations under the Property Valuation Act of 2014’, *Government Gazette*, No 42064, 30 November 2018]

2.2.8 *Challenging an expropriation in court*

The owner of the house may seek mediation, or apply directly to the courts, to challenge the validity of the expropriation (whether it is really ‘in the public interest’) and/or the amount of compensation offered (whether this is truly sufficient). [Clause 21(1)(2) (3), Bill]

In all cases – including those where ‘nil’ compensation is provided under Clause 12(3), or half of market value is offered under the valuation formula set out above – the compensation payable is supposed to be ‘just and equitable’. It is also supposed to ‘strike an equitable balance between the public interest and the interests of the expropriated owner’. [Clause 12(1), Bill]

However, these paper rights are likely to prove meaningless in practice. Most people will lack the means to mount legal challenges to the validity of the expropriation or the compensation offered. They will find such litigation particularly difficult to afford if they have already lost ownership and possession of their homes or other key assets.

Owners will also be entitled to seek relief in the courts if the compensation remains unpaid for months (or years) after ownership and possession have passed to the municipality. [Clause 17, Bill] They will also be able to raise administrative justice objections, under the Promotion of Administrative Justice Act (PAJA) of 2000, if the time between the service of the expropriation notice and the passing of ownership and possession is unreasonably short. In practice, however, most people will again lack the means for such litigation.

Legal challenges may also be mounted if the limited procedural safeguards set out in the Bill are ignored. Based on some current examples, this could easily occur. In the Stanger area of KwaZulu-Natal, for instance, Bhekie Dlamini is currently fighting for the return of the 31 350 hectares of land the KwaDukuza Local Municipality expropriated from him without his knowledge – and without his having any opportunity to contest this taking.

In Mpumalanga, the owner of the Akkerland Boerdery, which is under competing claim from different communities, was given seven days (most of them over the 2018 Easter weekend) to ‘hand over the farm’s keys to the state’. Little respect for PAJA or the constitutional right to just administrative action was evident here.

Both these expropriations are currently being fought in the courts with the help of civil society organisations (CSOs). However, the more expropriations accelerate under the Bill, the harder it will be for CSOs to help all affected owners to resist unlawful takings.

2.3 A damaging definition of expropriation

As earlier noted, the Bill’s definition of ‘expropriation’ looks harmless on the surface. In fact, however, it will exclude the payment of any compensation for both ‘custodial’ and ‘regulatory’ takings.

2.3.1 The difference between ‘direct’ and ‘indirect’ expropriation

To understand the significance of the Bill’s definition, the difference between ‘direct’ and ‘indirect’ expropriation needs to be unpacked. A ‘direct’ expropriation arises where the state takes ownership of property. An ‘indirect’ expropriation does not involve the acquisition of ownership by the state, and could take the form of either a ‘custodial’ taking or a ‘regulatory’ expropriation.

A ‘custodial’ taking arises where the state takes custodianship of property – as it has already done as regards all water and mineral resources (under the National Water Act of 1998 and the Mineral and Petroleum Resources Development Act or MPRDA of 2002, respectively). A ‘regulatory’ expropriation arises when the state, for instance, imposes price controls on a product, thereby preventing its owner from selling at market value. In this situation, the state does not acquire ownership of the product, but its regulations result in a loss to the owner.

2.3.2 *International law covers ‘indirect’ expropriations*

Under customary international law, as well as most bilateral investment treaties (BITs), expropriation is defined in a broad way to include both ‘direct’ and ‘indirect’ expropriations. In South Africa, Section 25 of the Constitution (the property clause) does not define what ‘expropriation’ means. However, the Bill of Rights must be interpreted with due regard to international law. This means that the word ‘expropriation’ in the property clause must be given its usual wide meaning. [Section 39(1) Constitution; *Business Day* 6 February 2019]

The Constitutional Court’s majority judgment in the *Agri SA* case in 2013 has nevertheless tried to narrow this international law meaning. In this case, Chief Justice Mogoeng Mogoeng ruled that expropriation requires the acquisition of ownership by the state. This meant that the state’s ‘assumption of custodianship’ over an unused mining right – the issue before him – did not qualify as an expropriation or merit the payment of any compensation. This narrow interpretation was flawed in various ways – including its failure to take account of international law – and was criticised by three of the judges in the case. [*Agri South Africa v Minister of Minerals and Energy*, CCT/51/12, 18 April 2013, paras 71, 72, 101-105, 78]

On Mogoeng’s approach, further custodial takings by the state would not qualify as expropriations or merit compensation. Regulatory expropriations would be treated the same way, as these also do not transfer ownership of affected assets to the state.

The Bill’s definition of ‘expropriation’ is clearly based on Mogoeng’s ruling. According to the Bill, ‘expropriation’ means the ‘compulsory acquisition’ of property by the state. On this basis, neither custodial takings nor regulatory expropriations will qualify as ‘expropriations’ because they do not transfer ownership to the state. Moreover, where no expropriation has occurred, no compensation will be payable. In addition, none of the Bill’s procedural requirements for an expropriation – from negotiating on its purchase to the issuing of a statement of intent – will be relevant or applicable.

2.3.3 *Further likely custodial takings under the Bill*

If no compensation is payable for custodial takings, this will encourage the state to take custodianship of all rural land, as the Preservation and Development of Agricultural Land Framework Bill of 2014 earlier envisaged. The government could also take custodianship of all other land – whether residential, mining, commercial or industrial – as the 2017 state land audit proposed and as the EFF constantly demands.

That this is what the government in fact plans to do has recently been confirmed by a senior manager in the Department of Rural Development and Land Reform, Masiphula Mbongwa. Responding to a question about EWC at the World Economic Forum's recent meeting at Davos (Switzerland), Mr Mbongwa said that the government planned to introduce a 'National Land Act' that would be similar to the 1998 National Water Act and the MPRDA. Such a statute would vest all land in the custodianship of the state. [Dave Steward, e-mail to the IRR, 11 February 2019]

Once the state has custodianship of all land, as EFF leader Julius Malema has said, 'every title deed will be meaningless' – and anyone needing land will have to obtain a 'land-use licence' from the state. These licences might generally last for 25 years, but will be vulnerable to early termination if the state decides that this is in the public interest. These rules will apply not only to individuals but also to 'private corporations', which will find it difficult to borrow or invest when they have so little security of tenure over the land needed for their businesses. This is likely to hobble growth and worsen the unemployment crisis.

2.3.4 Many more regulatory expropriations as well

Under the Bill's definition, a host of regulatory expropriations will also be able to proceed without compensation having to be paid. These takings will extend way beyond land – for both the Bill [Clause 1, Bill] and Section 25 of the Constitution expressly define 'property' as 'not limited to land'. (Based on this wording, the Constitutional Court has already ruled that a grocer's licence to sell wine is a form of 'property'.) [*Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and others*, CCT/216/14, 30 June 2015]

On this basis, BEE ownership targets could be pushed up to 51%, without any compensation having to be paid for resulting forced sales of equities at prices below market value. This is also what the 2017 mining charter proposed for new prospecting rights, though the requirement has been dropped (for the time being) from the 2018 document.

Similarly, foreign security companies operating in South Africa could be subjected to a 51% 'indigenisation' requirement, again without any compensation being payable, as the Private Security Industry Regulation Amendment (PSIRA) Bill of 2012 already provides.

In addition:

- export and price controls could be placed on coal and all other minerals identified as 'strategic' by the government (as the 2013 MPRDA Amendment Bill envisaged);
- price controls could be imposed on all health services, medicines, medical devices, and other health-care goods under the National Health Insurance (NHI) system (as the NHI Bill of 2018 proposes);
- medical schemes could be confined to providing a single package of health services in return for monthly contributions effectively decided by the state (as the Medical Schemes Amendment Bill of 2018 provides); and

- ‘prescribed assets’ could be introduced for pension funds, as the ANC’s 2019 election manifesto suggests, thereby compelling them to invest in Eskom and other failing state-owned enterprises unlikely to deliver an adequate return on these investments.

As indicated, all these regulatory expropriations are already either in the policy pipeline or under investigation by the ANC. If they proceed, many companies and other owners will suffer major losses, but will receive ‘nil’ compensation under the Expropriation Bill. Moreover, once Section 25 has been amended to allow ‘nil’ compensation in ‘appropriate’ (but no doubt unspecified) circumstances, any legal challenge to the constitutionality of these uncompensated losses will be difficult to mount.

3 Unconstitutionality of the Expropriation Bill

The Bill’s procedures for implementing a direct expropriation – one in which the state takes ownership of property in return for ‘just’ or ‘nil’ compensation – are contrary to the Constitution in various ways. The Bill’s definition of ‘expropriation’ is also unconstitutional.

3.1 Constitutionally defective procedures

That the procedures to be followed in expropriating property are inconsistent with the Constitution becomes very clear when the procedural rights accorded criminals are compared with those allowed to law-abiding home-owners under the Bill.

Take the example of criminals illegally using a warehouse they own to store heroin and other drugs. Though the warehouse may be seized by the state under asset forfeiture legislation, this can be done only *after* its use for criminal purposes has been proved and a court order for its confiscation has been obtained.

By contrast, a home can be expropriated by a metropolitan authority by following the simple steps set out above. (As described, these move from negotiation to investigation, a statement of intent, and then the service of a legally binding notice of expropriation.) The metro can thus take ownership and possession of the home without ever having to prove to a court that the expropriation is really in the public interest or that the promised compensation is truly just and equitable.

Perversely, the Bill acknowledges the need for a prior court order before a metro can enter on to property it wants to investigate with a view to subsequently expropriating it. It also says that a temporary expropriation cannot generally be granted, and certainly cannot be extended, without a prior court order. But when it comes to the far more serious matter of a permanent expropriation, the Bill excludes the need for a prior court order.

Allowing metros and other organs of state to expropriate property in this way is clearly unconstitutional. By excluding the need for a prior court order authorising a disputed permanent expropriation, the Bill contradicts:

- Section 25 of the Constitution, which lays down the criteria that every expropriation must fulfil;

- Section 34, which gives everyone a right of access to court; and
- Section 33, which guarantees people the right to administrative justice.

Where the property expropriated includes a person's home, the Bill also contradicts Section 26 of the Constitution, which requires a prior court order before an eviction can occur.

3.2 A constitutionally defective definition

As earlier described, 'expropriation' has a wide meaning in international law, which defines the term as including both direct and indirect expropriations. South Africa's courts are obliged to take this international law meaning into account in interpreting the word 'expropriation' in the property clause of the Constitution. [Section 39(1), Constitution]

Mogoeng thus erred in the *Agri SA* judgment when he ruled that a custodial taking was not an expropriation. No binding precedent can emerge from this defective decision. In addition, Mogoeng stressed that his ruling was based solely on the facts of the particular case before him. Mogoeng's narrow ruling cannot thus be turned into a general principle of law in the way the Bill seeks to do.

The Department of Public Works (the Department) has repeatedly pointed out that the current Expropriation Act of 1975 is inconsistent with the Constitution and must therefore be replaced. However, the Bill it has put forward is just as unconstitutional as the existing statute and cannot lawfully be enacted by Parliament.

4 Ramifications of the Bill

The ramifications of the Bill are so wide-ranging that they cannot easily be identified or quantified. The Bill's provisions on direct expropriation are likely to be hugely damaging in themselves. In addition, its definition of expropriation – by implicitly authorising a host of uncompensated custodial and regulatory takings – is likely to have even greater adverse repercussions.

4.1 Direct expropriation provisions

The Bill's provisions on direct expropriation have enormous ramifications for the 1 million whites and the 8.5 million black, so-called 'coloured' and Indian South Africans who currently own their homes (even though many lack proper title deeds to them). They also threaten the well-being of the roughly 17m black people who currently have informal land-use rights to plots held in customary tenure.

All these individuals will be vulnerable to expropriation by a host of state entities. Most of these people will not be able to resist these takings, irrespective of whether they are constitutional or not.

Black South Africans, in particular, will once again find themselves debarred from enjoying secure property rights, which are the essential foundation for prosperity and upward mobility. Having been prohibited from owning homes and land in much of 'white' South Africa in the

apartheid past, they will find themselves constantly at risk of losing their homes and other assets to the state, in return for limited or nil compensation. Instead of being able to build or improve their homes and then bequeath these assets to their children, they will never know when the next organ of state will expropriate the houses or customary plots they have worked so hard to acquire and develop. Moreover, as the Constitutional Court noted in the *Haffejee* case, ‘no real transformation can be achieved if newly empowered property owners are at the same risk of being dispossessed as they would have been in the absence of the Constitution’. [*Haffejee v eThekweni Municipality*, [2011] ZACC, 28, at para 20]

4.2 Custodial takings and regulatory expropriations

If the government uses the definition in the Bill to vest custodianship of all land in the state under a National Land Act, all title deeds to land will effectively be negated. Everyone will need a land-use lease from the state, which will be vulnerable to early termination, irrespective of what contrary assurances may be provided from time to time.

Banks will find it difficult to accept land as collateral for loans. Individuals will have more reason to resist putting money into houses or farms they could lose to the state’s preferred tenants. Businesses will increasingly decline to invest in fixed property. Traditional leaders will lose their current rights of control over land. Access to land will become a key patronage tool for the ruling party. It will be used by the ANC to buttress the state’s coffers (through the rent that everyone will have to pay) and to shore up its own flagging electoral support (by warning people that those who vote against it could have their land-use leases terminated).

Regulatory expropriations of the kind earlier outlined will further damage both individuals and businesses. Firms unwilling or unable to enter into 51% BEE or indigenisation deals may close down, retrenching many thousands of workers. Mines unable to break even at the ‘developmental prices’ set by the state for the minerals they extract could shutter many shafts, costing further jobs in the industry and the wider economy.

Depending on how prices are set, private hospitals could become unprofitable too. So too could many of the other enterprises that currently supply medicines, medical devices, and a host of other health-care goods and services. Doctors and other health professionals might decide to emigrate, rather than accept the state’s unrealistic limits on their fees.

Financially crippled medical schemes will cease to exist over time, leaving South Africa (as the health minister has mooted) with only one remaining medical aid: the state-run NHI Fund. The resulting state monopoly over health care is likely to be just as inefficient and corrupt as existing state monopolies over electricity (Eskom) and rail transport (Transnet and Prasa).

Pensioners and people saving for their retirement are likely to find their pension benefits much reduced. The compulsory loans that pension funds will have to make to Eskom and other failing SOEs are unlikely to generate the healthy returns that people need for a comfortable retirement.

The overall damage to the economy is likely to be incalculable. Incentives to invest, already limited, will diminish further. So too will growth and employment. Poverty will worsen, public debt will rapidly increase, inflation will spiral upwards, and people with skills in demand in other countries will see increasing reason to emigrate. Tax revenues will decline still further, making it even harder for the government to afford social grants and the public sector wage bill.

5 Proposed amendments to the Bill

The 1975 Expropriation Act needs to be replaced by a constitutional alternative. To meet this need, the Department of Public Works must bring the Bill into line with the Constitution. To assist the department in this task, the IRR has drawn up a list of proposed amendments to specific clauses in the Bill (as set out in *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) 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’;
- e) ensure that those expropriated receive the compensation due to them before ownership passes to the expropriating authority; and
- f) remove the unnecessary, contradictory, and unconstitutional powers of expropriation specifically conferred on the minister of public works in Chapter 2 of the Bill.

6 The way forward

The Department, together with the rest of the government, has a responsibility to all 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 economic growth and the highest average levels of GDP per head. Moreover, these benefits extend to the poorest 10% of their populations, greatly helping to raise their incomes, living standards, and life expectancy.

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

For this reason too, the Department should avoid proposing the enactment of the Bill in its current form. At the very least, it needs to bring the Bill into line with the Constitution, and

can achieve this by adopting the amendments outlined above. 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

19th February 2019