

SUBMISSION ON THE EXPROPRIATION BILL 2020



By the Centre for Development and Enterprise
To the Portfolio Committee on Public Works and Infrastructure
Friday 26 February, 2021

Introduction

The Centre for Development and Enterprise (CDE), an independent policy analysis and advocacy organisation, is one of South Africa's leading development think tanks. Since its establishment in 1995, CDE has been gathering evidence and produced analyses about issues critical to SA's future. CDE is widely recognised for the practical policy recommendations we formulate, outlining ways in which South Africa can tackle major social and economic challenges.

We focus on policy areas critical for inclusive economic growth: investment and jobs, youth unemployment, business and markets, education and skills, cities, migration, land reform and strengthening democracy.

CDE's interest in the Expropriation Bill extends from the considerable work we have done over many years on land reform policy and the critical role of both the state and the private sector in helping SA to achieve its land reform goals. We are also focussed on the policy choices essential for SA to achieve faster and more inclusive economic growth. Both of these critical national goals are affected by the Bill – the former directly, and the latter indirectly – and it is important that SA gets the legal provisions right to ensure that the goal of faster land reform is not achieved at the expense of faster and more inclusive growth.

In this regard, our assessment of the Bill is premised on an assessment of the extent to which its provisions differ materially from those of the Expropriation Act (1975), which it seeks to replace. In our view, while there are some important differences (notably in relation to the guidance provided to courts as to the circumstances in which nil compensation would be deemed just and equitable), the Bill is broadly similar to the Act it repeals and does not represent as significant a set of changes as some of its critics have implied.

Having said that, one of the challenges in responding to the Bill is that the quality of governance has declined dramatically over the past decade, and there are far too many cases of power and authority being abused for personal gain or for purposes that are not in the public interest. In the circumstances, it is hard not to worry that the powers conferred on expropriating authorities by this Bill, however similar they are to those contained in the 1975 Act, could be misused or abused on a significant scale. This would be a tragedy: it would set back land reform and it would undermine growth. This risk is, however, inherent in the nature of these powers (and, in any event, existed under the 1975 Act), so it will be up to the Courts and Parliament to ensure that abuses – which are, sadly, inevitable – are minimised and the culprits are punished.

Overall, we think that the Bill achieves a reasonable balance between the competing imperatives. However, as we show below, we also think that some important amendments would strengthen the Bill, reduce some of the risks, and improve its overall impact.

At the outset we believe it is worth setting out how we understand the legal position with regard to expropriation that would exist should both this Bill and the Constitutional amendment Bill be passed.

The legal position of expropriation

Should both the Constitution Eighteenth Amendment Bill and the Expropriation Bill be passed in their current forms, this is what SA's expropriation regime would look like:

1. An "expropriation authority" – i.e. an organ of state on whom the power to expropriate property has been conferred by statute – will be able to expropriate the kind of property they are empowered to expropriate provided the expropriation -
 - a. is done for a public purpose or in the public interest (s25(2)(a) of the Constitution and s2(1) of the Bill);
 - b. is not done arbitrarily (s2(1)); and
 - c. has been preceded by an unsuccessful attempt to reach agreement with the owner or holder of a right in the property for its acquisition on reasonable terms (s 2(3)).
2. Compensation must be paid, with its quantum to be either agreed between the parties or determined by a court (s25(2)(b) of the Constitution and s2(3) of the Bill)
3. When a court determines the quantum of compensation to be paid, its decision is guided by the rule that compensation must be "just and equitable", "reflecting an equitable balance between the public interest and the interests of those affected", with a number of circumstances being used in this calculation (s25(3) of the Constitution and s12(1) and s12(2) of the Bill). All relevant circumstances, not just those expressly listed in s25(3), must be considered.
4. Nil compensation can be paid pursuant to an expropriation, but only where such expropriation is being undertaken for the purposes of land reform (s25(b) of the Constitution, after the passage of the Constitution Eighteenth Amendment Bill)
5. The circumstances in which nil compensation can be paid for land expropriated for the purposes of land reform are left to national legislation (s25(3A) of the Constitution after the amendment) and are set out in s12(3) of the Bill.
6. There are set procedures, accompanied by appropriate powers, that expropriating authorities must use in effecting expropriation (s5 to s11 in the Bill), which are broadly similar to those set out in the 1975 Act.

As can be seen from the above, expropriation is, in effect, the forced sale of property to the state. That sale can only be undertaken for a public purpose or in the public interest, and there is a requirement to either reach agreement with the owner on the price or for the courts to determine a "just and equitable" amount. Nil compensation might be payable, but only for land to be used for land reform and only in the kinds of circumstances envisaged in s12(3) of the Bill, although these are not to be treated as the totality of the circumstances justifying nil compensation.

Two issues that immediately arise, and which Parliament should consider relate to:

- The extent to which the definition of "land reform" is sufficiently clear to govern the extraordinary power to expropriate for nil compensation; and
- The desirability of leaving the circumstances in which nil compensation can be deemed just and equitable to ordinary legislation.

We will return to these issues below. Before doing so, we offer some more general comments.

Property rights and economic development

CDE's starting point in relation to the Expropriation Bill is that there is overwhelming evidence that societies that respect property rights grow more quickly and more inclusively than societies that do not. This does not mean that no intrusion into any property right is ever desirable.

CDE does not share the views of some to the effect that existing property rights must always be absolutely respected. Not only would this have the effect of making it impossible to change the distribution of ownership over assets, but it would also make it extremely difficult for society to address any number of social and economic challenges. Abolishing the system of riparian rights that governed the use of water in the country's rivers, for example, was a necessary and desirable intrusion into existing property rights that made possible a much more sensible and equitable approach to the management of these increasingly stressed resources. Finding an appropriate balance between these imperatives is far from easy, especially in a country in which historical injustice has left most land and immovable property in the hands of a minority.

However, our belief that property rights cannot be treated as completely sacrosanct and that they need to be allowed to evolve, does not minimise our concerns about how society deals with and protects property rights.

The rights to security of one's ownership and use of one's property are fundamentally important institutions, which, if weakened, will result in many adverse effects, however unintended those might be. It is hard to persuade people to invest in their homes and businesses, for example, if they worry that government might seize their assets or the fruits of their labour.

Property rights are, in other words, crucial to development, but they are also not sacrosanct. Squaring this circle, we would suggest, means that society should uphold property rights rigorously and vigorously, and that intrusions into these rights should be fair, legal and rare.

The main reason that expropriating powers must be used only rarely is obvious: over-use of these powers will undermine the confidence individuals, households and firms have in their ability to enjoy the fruits of their investment in their assets and will, as a result, lead to much less investment and much less growth. Thus, while any particular act of expropriation might meet the requirement that it is, indeed, for a public purpose or in the public interest when these terms are interpreted solely in relation to the specifics of the particular act of expropriation seen in isolation, it is also very much in the public interest that expropriation remains rare because if it is not, the economy will grow more slowly and fewer jobs will be created. Thus, while there may be many expropriations which, looked at in isolation, might qualify as being "for a public purpose or in the public interest", collectively they will be actively harmful to the other factor in which the public has an interest: economic growth.

Expropriation must be fair and legal. It must also be rare.

In our view, "fair, legal and rare" should be the guiding principles for all intrusions into property rights, and that the more serious the contemplated intrusion, the more careful government must be to conform to them and to use them only when it is strictly necessary to do so.

The principal protection against excessive and over-frequent use of powers of expropriation is the requirement to either agree the value of compensation to be paid with the owner or for a court to impose a "just and equitable" level of compensation on the expropriating authority. This means, inevitably, that organs of state cannot overuse their powers of expropriation because they are simply unable to afford to do so.

This is precisely why one of the principal goals of the Bill – to specify the circumstances in which the "just and equitable" level of compensation might be zero – needs to be engaged with seriously. If a budget constraint no longer inhibits expropriating authorities from using their powers, then the public interest in the reservation of the use of these powers only to exceptional and rare circumstances is weakened.

Thus, the circumstances in which nil compensation is deemed just and equitable need to be defined as carefully and narrowly as possible to ensure that it is done only when absolutely necessary and to ensure that that is rarely.

It is also critical that the procedures followed in these cases need to be carefully framed to ensure that the process is as fair as possible. Indeed, given the extent of the intrusion entailed, the legislature ought to err on the side of even greater attention to considerations of fairness than it might normally apply.

The importance of this requirement is reinforced by the fact that there are likely to be expropriating authorities who interpret the passage of the Bill to be a signal that expropriation is to be used more frequently and more aggressively, and that the Bill could, therefore, signal the inauguration of a period of much more frequent use of the powers of expropriation in circumstances where it is neither desirable nor necessary to do so. If this is indeed the case, the impact of the Bill is likely to be markedly negative for the country and its prospects for faster and more inclusive growth.

Another factor that needs to be considered seriously is that under the Constitution, any governmental action is potentially subject to review by the courts. Expropriations often attract judicial review proceedings. Nil compensation cases will invariably end up in the courts. The result will be that the intended beneficiaries of land reform will suffer the worst impact - delay. Experience on the ground tells us that this is already happening as a result of the regulations under the Property Valuation Act. This is tragic. The victims of forced removals are now elderly people. Many have waited for two and a half decades for land restitution or labour tenant land awards, with nothing to show for it. Many have died without seeing the result of their claims. Further delays will compound this tragedy. It will also create a serious inequality. Land claimants and land reform beneficiaries whose land is expropriated for compensation will, because of litigation delays, receive their land much faster than those whose land is expropriated for nil compensation. This is something the land claimants and land reform beneficiaries negatively affected will have no control over as their fate is in the hands of officialdom and its election to seek nil compensation or not to do so.

Nil compensation and the Constitution

The most important change in the law introduced by the Bill relates to the explicit statement that expropriation for nil compensation will be just and equitable in some circumstances. This is, we believe already the case under the existing legal regime, but the guidance provided in s12(3) as to the kinds of factors that might be considered in determining whether nil compensation is just and equitable is important.

As it is drafted at the moment, s12(3) of the Bill does not contain the same language as the proposed insertion into s25(2) of the Constitution that nil compensation is potentially just and equitable in the context of an expropriation effected in pursuit of the goal of land reform. To the extent that s12(3) creates the impression that the expropriation for nil compensation may be effected in other cases of expropriation, this is misleading, and its wording should be changed accordingly. In any event, there seems no prospect that s12(3) would be constitutional in other circumstances, making the change we suggest useful in that it will (a) prevent it from being ruled unconstitutional and (b) ensure that there are fewer misunderstandings among either property owners or expropriating authorities.

Adjusting the Bill so that it conforms with the limitations that are contained in the proposed amendment to the Constitution is important. Equally important is the question of whether and to what extent the proposed amendment to the constitution is itself well formulated.

Given the foundational role of the Constitution and, in particular, of the Bill of Rights, changes to these sections need to be considered with exceptional care. And, as noted earlier, two issues concern us about the proposed constitutional amendment:

- Is the language of the amendment, which limits nil compensation awards to expropriations for the purposes of land reform (and then only in some circumstances) formulated with sufficient precision and care?
- Is it appropriate for the Constitution that the guidance to be provided in relation to the circumstances in which nil compensation might be payable be contained in ordinary legislation, or should these be themselves contained in the Constitution? Imagine a situation at some future time with a different

government in which additional legislation is proposed which contains a more extreme approach to when nil compensation can be payable? Surely this issue needs to be constrained in the founding document i.e. the constitution, and not subject to the vagaries of present or future legislation?

Underlying both of these issues is the concern that, precisely because the Constitution and Bill of Rights are so central to SA's social contract, and because it is the Constitution that sets the limits on what the legislature might do, it is critical that any changes be not just necessary, but unambiguous and not subject to frequent change. The proposed amendments to the Constitution do not really meet this standard because there is no precise definition of "land reform" and the circumstances under which courts might award nil compensation can be expanded and changed through ordinary legislation. This is not how intrusions into fundamental rights should be managed.

In light of this, we submit that nil compensation should be limited to expropriations intended to address the injustices visited on individuals and communities through restitution or redress. Expropriation for nil compensation should, therefore, be limited to expropriations effected in the course of land reform envisaged in the Constitution: s25(7), which provides for the restitution of land to communities "dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices" and in s25(6) which envisages the action to protect tenure rights of those whose tenure is "legally insecure as a result of past racially discriminatory laws or practices."

We do not think the nil compensation regime should be extended to s25(5) of the constitution, which envisages the state taking access to ensure equitable access to land. This is an essential function of government especially in the context of extreme inequality, but, precisely because the range of potential actions enabled by s25(5) is extremely broad and not limited to addressing specific acts of historical injustice, we do not think the nil compensation regime should be available to expropriating authorities. Thus, both the amendment to s25 of the Constitution and the Bill should explicitly limit nil compensation to land reform as contemplated in s25(6) and s25(7) of the Constitution.

Section 12(3) and the circumstances in which nil compensation may be fair

In relation to the circumstances in which nil compensation will be just and equitable as envisaged in s12(3) of the Bill, our view is that, while it is possible to conceive hypothetical circumstances in which any of these factors would be a poor guide to the question of whether nil compensation was fair, the broad thrust of most of them is not unreasonable. The one exception to this is s12(3)(a), which provides that nil compensation may be fair "where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value."

Holding land in anticipation of future increases in its value is an entirely legitimate and useful economic function. It is true that a municipality, for example, might prefer to see a particular piece of land developed while its owner might prefer to hold on to it until it appreciates even more, but in these circumstances there ought to be no reason why an agreement to purchase the land could not be secured. And, if the owner refuses to part with it at a reasonable price expropriation may be effected on the basis of a court-determined "fair and equitable" value that is not zero. There is no reason to think that the fair outcome in this kind of case is for the owner to receive no compensation, and we do not think the courts would conclude that it is. Still, the provision should be excised.

Finally, we would suggest that s12(2) – which sets out factors that a court should not consider when evaluating the quantum of compensation – should be supplemented with an additional clause to the effect that a court, in evaluating the fairness or otherwise of the quantum of compensation being offered in an expropriation, cannot consider the expropriating authority's budget and whether or not a particular level of compensation is affordable to it. The fairness of the compensation award, in other words, is determined strictly in relation to what the land is worth to the current owner and for the public good contemplated by the expropriating authority, not whether or not that authority has sufficient funds to accommodate a larger quantum of compensation. This is our understanding of the existing legal position, but inserting it into the Bill would create a greater level of certainty for property owners and investors.

The Expropriation Bill will be abused

While over-frequent and excessive use of the power of expropriation is a serious risk, another is that those powers will be abused. Sadly, the state of governance in SA lends real credence to the fear that, apart from the excessive use of expropriation powers, those powers will be deployed for illegitimate ends. It is easy to imagine that attempts will be made to expropriate properties for reasons that are not legitimate public purposes or not legitimately in the public interest (eg to enrich a political crony). It is equally easy to imagine that an expropriation effected under the guise of a legitimate public goal will be "hijacked" and the property will not be used for its stated purpose or for the benefit of the supposed beneficiaries.

Precisely because the power to expropriate is so intrusive, abuses of it are exceptionally problematic: not only do they result in the destruction of value and unjust enrichment, they will also cast a shadow over the legitimacy of the whole programme (and, indeed, of government).

The risk of abuse can be minimised, in our view, by strengthening s27 of the Bill by criminalising acts or omissions by officials of an expropriating authority should they either misrepresent purposes of an expropriation or who transfer the expropriated land to any party other than the intended beneficiary. Such officials, and the expropriating authority, should also be required to compensate the expropriated party should the expropriation turn out to have been effected for illegitimate reasons or on the basis of misrepresentations.

The nature of property that may be expropriated under the Bill

Confusion has emerged about whether and to what extent the provisions of the Bill would apply for the expropriation of movable and intangible property. On the one hand, the term "property" is defined in s(1) as having the same meaning as the term in s25 of the Constitution, which explicitly states that property is "not limited to land". On the other hand, the Bill itself provides that the Minister can expropriate only accommodation, land and infrastructure, and the vast majority of the Bill's provisions are written in such a way as to imply an applicability to land and other immovable property rather than to other kinds of property. Finally, as noted above, the possibility that nil compensation will be deemed fair and equitable applies, in terms of the draft amendments to s25 of the Constitution, only to expropriations effected in the cause of land reform, but the Bill is less clear in this regard.

In light both of the confusion that has arisen and the fact that the Bill itself is evidently written with a view to the expropriation of immovable property, the Bill should explicitly state that its provisions apply only to immovable property, including particular rights in immovable property. This would provide some assurance to those who believe that the Bill might be used to expropriate all forms of property. It would also ensure that any attempt to empower an institution to expropriate intangible and moveable property would have to develop its own set of procedures that were just and fair, and about which there could be proper consultation and engagement.

Compensation for financial costs of expropriation

A deficiency of the Bill in comparison to the 1975 Act is that the latter, at s12(1)(a)(ii) provided that the expropriating authority must compensate the owner of an expropriated property for the costs incurred as a direct result of the expropriation. These might include the costs of a new house and of moving, the loss of profits as a result of the expropriation. Since imposing these costs is a decision of the state, it is only fair and equitable that the property owner be compensated. This should be explicitly provided for in the Bill.

Proposed amendments to the Bill

In light of the comments above, we propose the following changes to the Bill:

Section	Rationale	Proposed amendment
s12(3)	<p>Clarify that nil compensation can be just and equitable only in cases of land reform as per the proposed amendment to the Constitution.</p> <p>Clarify that “land reform” is defined by the provisions of s25(6) and s25(7) of the Constitution</p>	<p>Insertions:</p> <p>s12(3): It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest <u>for the purposes of land reform as envisaged in s25(6) and s25(7) of the Constitution</u>, having regard to all relevant circumstances, including but not limited to:-</p> <p>s25(2)(b) in the constitutional amendment: “subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform <u>as envisaged in sections 25(6) and 25(7)</u>, determine that the amount of compensation is nil.”;</p>
s12(3)(a)	<p>Holding land in anticipation of changes in its value should not be considered as grounds for the payment of nil compensation</p>	<p>Delete s12(3)(a):</p> <p>“where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;</p>
s12(2)	<p>The allocation and size of the budget made available to an expropriating authority cannot be considered by a court in assessing what level of compensation is just and equitable</p>	<p>Insert s12(2)(g):</p> <p><u>“the availability or otherwise of funding for the purposes of effecting expropriation and paying just and equitable compensation”</u></p>

Section	Rationale	Proposed amendment
s27	Officials involved in abuses of an expropriating authority's powers of expropriation are guilty of a criminal offense and are civilly liable for damages incurred	<p>Insert s27(6)</p> <p>"A person who, being an official in the employ of an expropriating authority, wilfully furnishes false or misleading information in any written instrument in the course of effecting an expropriation, is guilty of an offence and liable on conviction to be punished as if he or she had been convicted of fraud."</p> <p>Insert s27(7)</p> <p>"A person who, being an official in the employ of an expropriating authority, wilfully furnishes false or misleading information in any written instrument in the course of effecting an expropriation, shall be civilly liable for damages suffered by the expropriated party."</p>
s1	The Bill's provisions should apply only to immovable property	<p>Amend s1:</p> <p>"property" means <u>immovable</u> property or any right in immovable property as contemplated in section 25 of the Constitution</p>
s12(1)	Explicit inclusion in the Bill of a provision that "just and equitable" compensation should include an amount to the value of the financial costs of an expropriation to the owner.	<p>Amend s12(1):</p> <p>"The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including—</p> <p><u>(f) the financial costs of expropriation."</u></p>

Concluding remarks

While there has been a great deal of debate about the merits of the proposed changes to the legal regime governing expropriation in SA, much of that has been ill-informed and disconnected to the substance of the proposed changes.

The fears among property owners and those who worry about the impact of expropriation on SA's reputation as an economy open for investment, should be understood, however, in the context of legitimate concerns about the country's current quality of governance and the risk that these powers will be abused. We think that neither the existing law nor the proposed changes are as profound and undesirable as some of their opponents insist, but we, nevertheless, share the concerns about abuses and some potentially important lack of clarity with respect to the Constitutional amendment and the draft Bill.

The Expropriation Bill is, in our view, a workable attempt to balance the competing interests, but only if expropriation is fair, legal and rare, and if expropriation for nil compensation is rarer still.

The proposed amendments in our submission seek, in good faith, to mitigate some of the risks, but we are concerned that there will be far too many officials in far too many expropriating authorities who will see the passage of this Bill as a licence to embark on widescale expropriation. It is critical that government and the courts prevent this from happening if these powers are not to fundamentally undermine the country's prospects for effective and sustainable land reform as well as investment and growth.

Centre for Development and Enterprise

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