SUBMISSION ON THE PROPOSED AMENDMENT OF S25 OF THE CONSTITUTION

By the Centre for Development and Enterprise

To the Ad Hoc Committee to Amend Section 25 of the Constitution

13 August 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 proposed amendment to s25 of the Constitution 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 achieve its land reform goals. We are also focussed on the policy choices essential to accelerate economic growth and make the economy more inclusive. These goals are affected by the proposed constitutional amendment, and it is vital to ensure that the goal of faster land reform is not achieved at the expense of faster and more inclusive growth.

The starting point of this submission is that land reform is essential for building an inclusive, just and prosperous SA. The injustices of the past and the extremely unequal distribution of wealth and assets must be addressed if SA is to overcome its past and build a better future. In this regard, land reform is often touted as a means to transfer wealth back to the dispossessed majority. Our view, in this regard, is that land reform is, indeed, needed, the extent to which the transfer of land would transfer wealth and opportunities can be exaggerated: as societies become richer, the contribution of land and agriculture to GDP, and the extent to which this creates employment, falls steadily. We do not believe, in other words, that ownership of and access to small parcels of rural land will greatly improve poor households' prospects. In any event, the extent to which the land reform programme initiated in the 1990s has failed is often overstated in terms of land redistribution. This was apparent in a recent report of the Bureau of Economic Research that shows that SA has achieved about two-thirds of the land reform goals set for 2030 in the National Development Plan.

It is also our view that, to the extent that more rapid and successful land reform has not been achieved, this has nothing to do with any supposed deficits of the constitution, and everything to do with state incapacity – both in relation to the many weaknesses in the administration and implementation of land reform, and in the choice not to provide more resources to this programme despite its obvious necessity and importance. In our view, this comment includes the question of the constitutional permissibility of expropriation without compensation, something that has never been tested in the courts, but which most constitutional scholars and lawyers believe would pass constitutional muster without necessitating an amendment of the constitution.

In light of these comments, it is, our view that the urge to amend the constitution is a diversion from the real

issues holding back land reform and that doing so, has the potential to cause great and lasting harm to the economy and to our constitutional order.

We do recognise, however, that not all constitutional scholars agree that the current constitution permits the payment of nil compensation, and, therefore, that some feel it is desirable to ensure clarity on this and to make it explicit in the constitution. Nevertheless, in our view, an amendment to a clause of the bill of rights (the portion of the document that is most central to our constitutional order) would only be worth contemplating if, and only if, this is absolutely essential. This has not yet been demonstrated, and, for this reason alone, we think that the proposed amendment should be withdrawn. Alternatively, if an amendment is to be contemplated, the starting point has to be that it provides only the necessary clarity in relation to the question of the constitutional permissibility of the payment of nil compensation. The proposed amendment does not do this, and, in our view, introduces all manner of additional problems and uncertainties.

SA needs stability in our property rights regime and we need faster and more effective land reform. Neither of these objectives is served by the amendment as proposed. In this regard, the issue of state custodianship is particularly disruptive and destructive of property rights and, in our view, must be withdrawn.

It's a bad idea to change the constitution unless absolutely necessary

CDE's starting point in relation to the constitutional amendment is that there is overwhelming evidence that economic growth is faster and achieved in a more inclusive manner in societies that respect property rights than in societies that do not.

This does not mean that no intrusion into any existing property right is ever desirable or appropriate, but 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. For this reason, changes to property rights, because they reshape the incentives of economic agents, can be very disruptive and costly, and should be contemplated only when absolutely necessary. And, when changes are made, they should be as modest as possible to minimise any unexpected and unintended effects on the decisions made to invest and trade. Changes need to be fit-for-purpose, as modest as possible and deeply considered. In this regard, there is also a fundamental difference between the regulation of property and its expropriation, with the latter necessitating fair and equitable compensation except in exceptional circumstances such as when the original acquisition of property by its current owner was itself unlawful.

This is especially true when the contemplated change relates to the state's power to expropriate property. This power is necessary for development and redistribution, but its over-use has the potential to dramatically undermine the confidence individuals, households and firms have in their ability to enjoy the fruits of their investment in their assets. Changes to the manner in which powers of expropriation can be used can lead to much less investment by all kinds of businesses (farms, property developers, factory owners) and ordinary households who might want to build on or improve their property for their own enjoyment or as a legacy for future generations. This is true for all property owners, including the beneficiaries of land reform, whose property rights would also not be secure in a legal regime in which expropriation were not fair, rare and governed by norms of fairness relating to compensation. If expropriation is common and if it is not accompanied by fair compensation, the inevitable result will be devastating: considerably less) investment and very much slower growth.

This is why, and without derogating from the general principle that states need to have the power to expropriate, it is essential that such power must be used rarely and only in the public interest. In this regard the requirement that just and equitable compensation be paid exists not only to ensure fairness to all interested parties (which is essential), but also because it limits the number of expropriations that a state will undertake. Softening this requirement by allowing a state to pay no compensation to landowners when an expropriation is effected, however

restrictive the conditions that must obtain for this to be legal, is bound to have a chilling effect on investment. Firms and households would make decisions about investing in their properties aware of the possibility that the state will engage in more expropriations than it had done previously and that in some of these, at least, no compensation will be paid to the expropriated party. The mere possibility of this happening is, therefore, likely to slow investment and, therefore, economic growth.

The negative effect of making an unnecessary change to the constitution that also has the predictable effect of reducing the incentive for firms and households to invest would be a mistake at the best of times. In the current circumstances, where an already-weak economy has been battered by Covid-19 and faces an difficult and uncertain path forward, the proposed change is nothing less than a catastrophic miscalculation. This is another reason why the proposed amendment should be withdrawn.

Why it is unnecessary to change the constitution

As already noted most experts think that the constitution already permits expropriation for nil compensation. Obviously, this has not been tested and, for that reason, there is no clarity about what kind of circumstances would have to obtain for nil compensation to be considered by a court to be just and equitable. In a constitutional system, the law ought to be allowed to develop through application of constitutional principles to real facts and cases, not through amendments to fundament rights. This creates much greater stability and predictability, and much less uncertainty about the relevant principles and their interpretation. An approach to the question of the permissibility of nil compensation, and the circumstances in which this equitable, through case law would conform much more closely to the norms of legality and the rule of law that frame the constitution.

Nor is it necessary to amend the constitution to pass legislation that permits expropriation for nil compensation. Section 36 of the Constitution exists because no right (including the right to property) is deemed absolute, and all rights can be limited through legislation if the limitation is defined in "a law of general application" and is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into account all relevant factors such as the nature of the right, the importance and necessity of the limitation, and whether or not other, less restrictive ways could be found to obtain the same result. The current Expropriation Act of 1975 meets these requirements, and it is hard to see why the Expropriation Bill, which sets out the conditions in which expropriation for nil compensation might be permissible, should not be tested against the provisions of s36.

In this regard, it is worth pointing out that CDE made a submission in relation to the Expropriation Bill in April 2021 (annexure 1, attached), that concluded that, while some amendments were needed, the draft seemed to conform broadly to the constitution. Having said that, we also expressed concern that there was a very high likelihood that, once enacted, the provisions of the Bill would be applied both excessively and in pursuit of corrupt goals, and would, therefore, lead to a great deal of uncertainty and cost, while also failing to achieve the objective of faster and more inclusive land reform.

Having said that, the submission made in April on the Expropriation Bill was premised on a reading of the proposed amendment of s25 that was then being considered. The new version of the proposed constitutional amendment is, in our view, significantly more problematic than the old one, and this, too, motivates our call for its withdrawal.

Difficulties of the present draft amendment

Compared to the previous version of the proposed amendment of s25, the current draft introduces two very significant problems:

- The proposed insertion of subsection 4A – "The land is the common heritage of all citizens that the state must safeguard for future generations."
- And the proposed insertion of the underlined words into subsection 5 – "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship

of certain land in order for citizens to gain access to land on an equitable basis."

Subsection 4A: the land is the common heritage of all citizens that the state must safeguard for future generations

Subsection 4A introduces the idea of "safeguarding" the land as a common heritage for future generations. The language is abstract and ambiguous, and we would caution against including abstract generalities of this kind in the Bill of Rights because it will be very uncertain how case law will develop. Critically, should it be inserted into s25, the effect of 4A might be to introduce a great deal of legal uncertainty in the use of land.

If the state is to "safeguard" the land for future generations, does that mean it has a duty to stop development that might derogate from the use that future generations might obtain from it? Whether or not that is the intention, we would anticipate all manner of legal challenges to the use of land that can only delay and frustrate both land reform and development, adding uncertainty and costs. Nor would it be private landowners alone who would face increased uncertainty and cost: the state, too, would face pressure from a vast array of potential litigants who would insist that it was failing to deliver on the obligations implicit in 4A.

The implications of the subsection appear to us not to have been thought through adequately, and the proposal should be withdrawn. This conclusion is only reinforced by our concerns relating to the proposed insertions into subsection 5.

Subsection 5: Enabling state custodianship of certain land

The proposed insertion of the words "which enable state custodianship of certain land in order" in the existing subsection can be criticised from many different and divergent points of view.

One of these is that the new language to be inserted into the s25 would actually limit the state's freedom of action in relation to land reform: whereas the constitution currently enjoins the state to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis", after the passage of the amendment, those actions will be confined to enabling "state custodianship of certain land". The reduction of the state's freedom of action in this domain is, on its face, undesirable, and risks rendering other approaches to enabling citizens to gain access to land unconstitutional.

This concern is greatly reinforced by another consideration: that if the only constitutionally permissible approach to enabling greater access to land is through "state custodianship", it will mean that beneficiaries of land reform will, in effect, be treated as second-class citizens as they would be denied the right to full, unencumbered ownership that other landowners enjoy. This contradicts the stance of the ANC during the constitutional negotiations, which was premised on the idea that, if there was going to be a property clause in the constitution, it had to ensure that those discriminated against in the past would be able to gain equal property rights to those that had benefitted from colonialism and apartheid.

A deeper and more profound concern with the proposed insertion into subsection 5 is that it is very unclear what "state custodianship in certain land" actually means. This idea must be contrasted with the notion of custodianship as embodied in the Mineral and Petroleum Resource Development Act (MPRDA), which provides that all the relevant resources are "the common heritage of all the people of South Africa and the State is the custodian thereof". In the case of the proposed amendment to s25, state custodianship would be limited to "certain land". But what does this mean? When the state owns land, it has all the ordinary rights and obligations of a landowner, which, surely, include any and all conceivable rights that a custodian of land might enjoy. This means that, in relation to land owned by the state (including land expropriated from previous owners) the idea of custodianship is empty and redundant.

If the idea of state custodianship of land it owns is empty, then an even more troubling possibility exists: that what is contemplated in the proposed insertion into subsection 5, particularly when read with the proposed subsection 4A, is that the state will have custodianship of "certain land" that it does not itself own.

If this is, in fact the idea driving the amendment to subsection 5, and that what is implicit in the redrafted s25 is that the state is contemplating legislation that will grant it custodianship of land that it does not own, the effect is very serious and deeply problematic. Indeed, this is so evidently true that we cannot see how a court would fail to construe an attempt by the state to assume custodianship of land it does not own as anything other than an expropriation by sleight of hand. In our view, denuding a landowner or a group of landowners of any rights traditionally accorded an owner of land is, in effect, expropriation and would have to be treated as such by the courts. This, it should be repeated, is different from the position created by the MRPDA, which created state custodianship of all the relevant assets, and, therefore, treated all those who previously owned these assets equally: here, what may be being contemplated is that some landowners (those who are the owners of the "certain land") will give up rights in land they own to a custodian. We cannot see how this idea could do anything but introduce unnecessary and deeply damaging uncertainty into property relations in the country.

The case against state custodianship of all land

State custodianship of all land is not explicitly envisaged in the proposed amendment of s25, but it has been proposed by the EFF and it is, therefore, worth setting out the reasons why this would be catastrophic idea. The need for this is made more apparent by the inclusion of the idea of custodianship in "certain land" in the draft of subsection 5, especially when read with the proposed language of subsection 4A, which would create an obligation on the state to safeguard all land, deemed the common heritage of all South Africans.

State custodianship of all land, along the lines of the MRPDA's treatment of mineral resources, would, in our view and the view of most experts, have devastating consequences for SA's property rights regime and would lead to a reduction of investment by locals and foreigners alike. Moreover, it would also have devastating effects on the solvency of households and of SA's banks.

As contemplated by the EFF, the idea of state custodianship of the land is that government would own all land and that individuals would be granted the right to occupy land, or to use it in some other fashion, through some kind of permitting/licensing procedure. Occupiers/users of the land would not have traditional rights of ownership, but would be empowered to do only what their licence/permit allowed. This is a fundamental change in property rights and would dramatically change the legal relationship between people and the land, with the most obvious implication being that, in the absence of a legal right of ownership, occupiers/users of the land could never sell their land. Nor could their dependents inherit it from them when they died. Nor could a bank lend them money using land as collateral, since the bank would not be able to take ownership of the land and/or sell it in the event that a lender defaulted.

Custodianship, in other words, may give people access to land, but their rights are those, effectively, of a tenant, not an owner. This has enormous implications for how the land is used because tenants, unlike owners, do not invest in their property in the expectation of raising its value. Nor do they make other improvements for the benefit of their heirs. Nor, indeed, do they maintain it with a view to its long-term value in the same way that an owner might. This fact was pithily captured by Larry Summers, then Bill Clinton's Treasury Secretary, who observed that, "in the whole history of the world, no-one has washed a rented car."

Critically, the state simply does not have the resources to play the role of landlord to a nation full of tenants. It lacks both the financial means and the organisational capabilities required to assess, approve, finance, supervise and implement tens of thousands of investments in land and immovable property. As a result, these activities would either all cease or the state would have to concede more and more rights similar to those of ownership to occupiers/users of the land in the hope that they would once again begin to invest in projects to use, upgrade and develop the land. Even then, the weakening of these rights relative to a constitutionally enforceable right of ownership would mean that even in a best case scenario, there would be much, much less investment and development in the land by farms, firms and families, and that this reduction in investment would be permanent.

Nor are the extremely serious consequences of custodianship for the development of land in the long-term the only issues to be concerned about: in the short-term, the imposition of a state-custodianship regime on SA's land

would have devastating consequences for households, businesses and banks, all or whom would, at a stroke, have to write down the value of all land and immovable property on their respective balance sheets. Because no-one would own his/her land any longer, none of these assets would have any monetary value, necessitating a write-down of epic proportions. Given that debt – including mortgages linked to immovable property – would not be written-down simultaneously, balance sheets would be catastrophically weakened across the whole economy: households, firms, farms and banks.

The consequences of this would be dramatic: economic agents would all be substantially poorer and, as a result, would be forced to scale back spending, reducing aggregate demand and generating an immediate recession. In addition, banks would have to dramatically scale back all lending, not just mortgage lending, in the face of the much weaker financial position of clients whose land has suddenly been rendered valueless. This would reinforce the recession created by the scaling back of consumption as a result of the balance sheet shock that custodianship would generate. All of this would reduce tax revenues, weakening even further the state's parlous financial position. Not only would custodianship of all SA's land reduce long-run growth, in other words, it would immediately result in a massive recession and enormous job losses.

The country simply cannot afford to experiment with this kind of radical reframing of property rights.

Concluding remarks

CDE believes that the proposed amendment to s25 of the constitution should be withdrawn.

It is, in our view, not required if its only purpose were to clarify the question of whether nil compensation is constitutionally permissible. In practice, however, the proposed amendment does much more than introduce the clarity supposedly lacking in the existing provisions; it creates much more uncertainty and ambiguity than currently exists, and does so in a way that is guaranteed to create undue and unnecessary uncertainty about the security of property rights.

This would be a very serious disincentive to investment. Given the parlous state of our economy, now would be the very worst time for SA to make itself less investible.

We also need to start tackling youth unemployment on as many fronts as possible, by reforming the education system, improving the way young people are trained for potential jobs, bringing in skills from all over the world and removing all the structural constraints on growth. We need to do whatever is possible to get as many young people as we can into formal jobs.

South Africa has a growing youth population. This should be a resource we can tap into that generates growth and contributes to development – what economists call a 'demographic dividend'. If we do not alter the course of our economy, however, we will reap a demographic disaster instead.

Annexure 1

CDE submission on the Expropriation Bill
26 February 2021

Introduction

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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)	Clarify that nil compensation can be just and equitable only in cases of land reform as per the proposed amendment to the Constitution. Clarify that "land reform" is defined by the provisions of s25(6) and s25(7) of the Constitution	Insertions: s12(3): It may be just and equitable for nil compensation to be paid where land is expropriated ~~in the public interest~~ for the purposes of land reform as envisaged in s25(6) and s25(7) of the Constitution, having regard to all relevant circumstances, including but not limited to:- 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 as envisaged in sections 25(6) and 25(7), determine that the amount of compensation is nil.'';"
s12(3)(a)	Holding land in anticipation of changes in its value should not be considered as grounds for the payment of nil compensation	Delete s12(3)(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 income, but to benefit from appreciation of its market value~~;
s12(2)	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	Insert s12(2)(g): "the availability or otherwise of funding for the purposes of effecting expropriation and paying just and equitable compensation"

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	Insert s27(6) "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." Insert s27(7) "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."
s1	The Bill's provisions should apply only to immovable property	Amend s1: ''property'' means <u>immovable</u> property or any right in immovable property ~~as contemplated in section 25 of the Constitution~~
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.	Amend s12(1): "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— <u>(f) the financial costs of expropriation."</u>

Section	Rationale	Proposed amendment
s12(3)	Clarify that nil compensation can be just and equitable only in cases of land reform as per the proposed amendment to the Constitution. Clarify that "land reform" is defined by the provisions of s25(6) and s25(7) of the Constitution	Insertions: s12(3): It may be just and equitable for nil compensation to be paid where land is expropriated ~~in the public interest~~ for the purposes of land reform as envisaged in s25(6) and s25(7) of the Constitution, having regard to all relevant circumstances, including but not limited to:- 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 as envisaged in sections 25(6) and 25(7), determine that the amount of compensation is nil.'';'
s12(3)(a)	Holding land in anticipation of changes in its value should not be considered as grounds for the payment of nil compensation	Delete s12(3)(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 income, but to benefit from appreciation of its market value~~;
s12(2)	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	Insert s12(2)(g): "the availability or otherwise of funding for the purposes of effecting expropriation and paying just and equitable compensation"

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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	Insert s27(6) "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." Insert s27(7) "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."
s1	The Bill's provisions should apply only to immovable property	Amend s1: ''property'' means <u>immovable</u> property or any right in immovable property ~~as contemplated in section 25 of the Constitution~~
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.	Amend s12(1): "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— <u>(f) the financial costs of expropriation."</u>

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.

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