SERI
socio-economic rights institute
of south africa

NOTE ON EXPROPRIATION

1 The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit company, registered as a public interest law centre. We conduct research, advocacy and litigation to assist the communities and individuals who approach us seeking to enforce their socio-economic rights.

2 This note sets out SERI's initial position on the emerging discussions on the use of expropriation, with our without compensation, as a means of achieving land redistribution.

Expropriation and Urban Land

3 SERI's primary interest in the evolving debate on expropriation as a policy tool for the implementation of land reform lies in the use of expropriation to widen access to urban land for poor people who are locked out of urban land markets.

4 By sheer numbers, the vast majority of SERI's clients are residents of urban informal settlements and abandoned or poorly maintained buildings in South Africa's major metropolitan areas. For example, we act for approximately 60 000 people living in the Marikana informal settlement in Philippi, Cape Town, in a case currently before the High Court in which our clients seek to resist an application for their eviction and compel the City of Cape Town to secure their tenure expropriating the land they live on. We act for a further 10 000 people living in the Slovo Park informal settlement in Johannesburg, who sued the City of Johannesburg to upgrade their informal settlement *in situ.* We are working with the Slovo Park community in its efforts to enforce the High Court order directing the implementation of an upgrading project. We act for the social movement Abahlali baseMjondolo ("Abahlali") in a number of cases involving access to land for its members. Abahlali has several thousand members across 25 settlements in Durban alone. We also act for several thousand occupants of at least 15 inner

city buildings in Johannesburg, who face eviction from their homes in order to make way for inner city regeneration.

5 All of our clients have one thing in common: they are unable to purchase land or housing, whether to rent or to buy, on the open market. They badly need state assistance to do so, and live illegally in inner city buildings and informal settlements, often in very poor conditions, and under the continuing threat of eviction, because neither the state nor the market offers them meaningful, dignified and affordable access to land.

6 One of the reasons often given for the fact that the state has not made significant inroads into the demand for land and housing in urban areas is so-called “land scarcity”. But land scarcity is not a natural phenomenon. It is a construction of urban land markets, which are characterised in part by companies and high-net worth individuals that hold large tracts of land on a speculative basis, often while putting the land to no productive use. In addition, in the urban core, many buildings were abandoned by their owners during the collapse in inner city property prices in the late 1990s and have not been reclaimed. This situation is at its most serious in the Johannesburg inner city.

7 As a result, current land owners tend either to refuse to sell land to the state for housing developments because they wish to retain it for future speculative gain, or because they have future plans for the land which they consider to be incompatible with the provision of low cost housing on or adjacent to it. In the case of abandoned buildings, there is often no extant owner to negotiate a sale with. Where landowners are willing to sell, prices for well-located land are often so high as to encourage the state to seek cheaper, more plentiful land on the urban periphery, at the cost of the eventual occupants’ access to jobs and social services in or near the urban core.

8 A programme of urban land expropriation would assist the state in unlocking speculatively held or abandoned land. It has the potential to assist SERI’s clients in two ways. First, it could be used as an effective tool to secure our clients’

tenure where they currently live. When the state expropriates land or a building that currently accommodates poor people, it can act to stave off their eviction, provide a basic level of services, and secure their residency until the state is able to find a longer term solution for them. Second, expropriation could enable the state to acquire vacant land and buildings which could then be used for the provision of permanent housing.

9 Existing law already permits the state to expropriate land for the provision of land in urban areas. Section 9 (3) of the Housing Act 107 of 1997 provides as follows –

> (3) (a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if-
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> (i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;
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> (ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Provincial Gazette; and
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> (iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.

10 This mechanism is seldom, if ever, used by municipalities to acquire land, even though existing policies, such as the City of Cape Town's Built Environment Performance Plan, specifically provide for expropriation as a way of securing tenure for people who live in informal settlements.

11 In *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC), the High Court ordered the City of Cape Town Municipality to deploy the process set out in section 9 (3) of the Housing Act in order to expropriate land occupied by the residents of the Marikana informal settlement. That decision is currently subject to appeal, but the level of resistance encountered to the use of expropriation – even though statutorily required in some circumstances – in that case signals how seldom existing statutory levers of acquiring land are resorted to by local authorities.

12 Section 9 (3) is not just a potentially effective tool to enable the state to acquire land. It also creates a statutory framework within which expropriation itself can be supervised and the use of the land after expropriation can be controlled. Expropriation requires the consent of the provincial government. It can only take place for the purposes of implementing a national housing programme.

13 The various national housing programmes are contained in the National Housing Code, 2009. They provide a wide variety of instruments for ensuring that poor people are given access to land - whether in the form of ownership of a low cost house; access to serviced land; subsidised rental of a state-owned unit; or the upgrading of tenure rights and services in an existing informal settlement.

14 In requiring that expropriation take place only where land is required to implement one of these programmes, section 9 (3) could help target expropriation to ensure that it reaches those who need the benefit of it the most.

Expropriation, the Constitution and Existing Law

15 In recent debates on expropriation, two separate, but related, positions have been advanced by those who consider that constitutional or statutory amendments are necessary to ensure that a pro-poor programme of urban land expropriation can be implemented. First, it has been said that the principle of "willing buyer, willing seller" is constitutionally entrenched, in the sense that the state can only acquire land from a person willing to sell it. Second, it is suggested that the Constitution protects an expropriated owner's right to compensation to the extent that an owner is, in substance, entitled to the market value of his land on expropriation. This, so the argument goes, hamstrings the state, and means that no meaningful land reform can take place until there is constitutional and statutory provision made for expropriation "without compensation".

16 Neither of these propositions is sound. In the first place, neither the Constitution, nor any other law, entrenches the principle of "willing buyer, willing seller". The concept of expropriation, for which section 25 of the Constitution specifically

provides is itself antithetical to "willing buyer, willing seller". The principle of "willing buyer, willing seller" was in fact a policy restriction under which previous governments had placed themselves, primarily as a political imperative, or as a way of re-assuring international financial markets and investors. It was never a legal requirement. Nor was it ever absolute. In the implementation of the Land Reform (Labour Tenants) Act 3 of 1996, the state has in fact quietly expropriated property to implement land reform.[1] Garden variety expropriation for the purposes of implementing public works is also commonplace.[2]

17 Secondly, to suggest that the Constitution, or the statutory framework governing expropriation is deficient because it does not provide for compensation-free compulsory acquisition of land by the state is to put the cart before the horse.

18 It is true that the Constitution requires that "just and equitable compensation" to be paid in all cases of expropriation. But there are so few decisions on what this means that we cannot know whether the requirement that compensation be paid is a significant barrier to land reform. It is perfectly possible that, on a given set of facts, "just and equitable" compensation may be significantly below market value, or as little as one rand. The state would be perfectly justified in offering well below market value to a large company that holds large tracts of unused land on a speculative basis where that land is urgently needed for housing the poor, and the state is not in a position to pay the full market value of the land. Until section 25 of the Constitution is tested in that sort of situation, we simply do not know whether it is in need of amendment.

19 Section 25 of the Constitution provides a list of context sensitive factors which allow the courts significant latitude in giving meaning to just and equitable compensation. While it has been decided, in some cases,[3] that the starting point

[1] See, for example, Uys N.O and Another v Msiza and Others (1222/2016) [2017] ZASCA 130 (29 September 2017).
[2] Haffejee NO and Others v eThekwini Municipality and Others 2011 (6) SA 134 (CC).
[3] Uys N.O and Another v Msiza and Others (1222/2016) [2017] ZASCA 130 (29 September 2017).

for a section 25 enquiry into just and equitable compensation is the market value of the land, the courts have made clear that this will not always be so.[4]

20 It remains to be seen whether section 25 of the Constitution is sufficiently flexible instrument to drive meaningful land redistribution in urban and rural contexts. SERI's conjecture is that section 25 has the required flexibility, but much depends on the willingness of the state to pursue expropriation as a policy instrument to bring about widespread land reform, and the policies and practices it adopts, within existing laws, to give effect to the constitutional requirement of just and equitable compensation.

21 Much will depend on whether the Expropriation Bill is promulgated in its current form, and what statutory and policy form, if any, the state chooses to give expression to the requirement of just and equitable compensation, the circumstances under which the state chooses to expropriate, and what happens – and is seen to happen – to expropriated land after expropriation takes place.

22 What is clear is that the state could, within existing laws, take a much more proactive approach to expropriation, by employing the existing instruments at its disposal to bring about meaningful land reform. Only once those efforts have been tested and found wanting will it be possible to consider whether constitutional and statutory amendments are necessary or desirable.

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[4] Du Toit v Minister of Transport 2006 (1) SA 297 (CC), para 37.