

# RESPONSE TO SIX KEY PROPOSED AMENDMENTS TO EXPROPRIATION BILL 2020

## Introduction

1. The Portfolio Committee on Public Works (**‘Committee’**) has requested the Department of Public Works (**‘Department’**) to respond to six key issues in the Expropriation Bill 2020 (**‘Bill’**), following the public consultations held in 2021.
2. The six key proposed amendments concern the following topics in the Bill:<sup>1</sup>
  - 2.1. The inclusion of Chapter 5 in its entirety;
  - 2.2. The definition of *‘expropriation’*;
  - 2.3. The definition of *‘property’*;
  - 2.4. The inclusion of mineral and water rights;
  - 2.5. Expropriation “without” compensation; and
  - 2.6. The nil compensation clauses, 12(3) and 12(4) in the Bill.

## Criticism of Chapter 5

3. The Committee produced a report summarising the submissions received during the public consultation processes in each province from April to August 2021. At page 41 of the report, one of the issues that emerged as significant during the public consultation in Mpumalanga was the following:

‘3.2.2.5. *Key issues and themes*

...

*b. Compensation*

*A number of speakers were of the view that Chapter 5: Compensation for Expropriation of the Expropriation Bill is contrary to what people understood as the Bill enabling expropriation without compensation.*

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<sup>1</sup> They were summarized in slide 34 of the Committee’s presentation on the public consultations, dated 17 November 2021.

*As with some of the presentations in Limpopo, the speakers in Mpumalanga were of the opinion that Chapter 5: Compensation for Expropriation be removed in its entirety from the Bill. Chapter 5 – Compensation for Expropriation, with all its nine sub-clauses. These sub-clauses are: 12(1) to (4) Determination of compensation; 13(a) to (d) Interest on compensation; 14(1) to (2) Compensation claims; 15(1) to (3) Offers of Compensation; 16(1) to (3) Requests for particulars and offers; 17(1) to (6) payment of amount offered as compensation; 18(1) to (3) Property subject to mortgage or deed of sale; 19(1) to (4) Payment of municipal property rates, taxes, and other charges out of compensation money and 20(1) to (4) Deposit of compensation money with the Master.*

*The inclusion of the above section was viewed as a means of paying compensation, while many of the speakers indicated that the Bill should ensure that expropriation is undertaken without paying any compensation.'*

4. This reveals a misconception among members of the public in Mpumalanga (and Limpopo) about the amendment of the Bill. It is, indeed, an object of amending the Bill to provide in express terms that nil compensation for an expropriation may be permissible in appropriate circumstances. To that end, the amendment seeks—
  - 4.1. to acknowledge that section 25(2)(b) of the Constitution *requires* that all expropriations be subject to payment of compensation in an amount that is just and equitable;
  - 4.2. to accept that section 25(3) of the Constitution *requires* various factors to be considered and weighed up, in order to ascertain what amount of compensation will satisfy the requirements of justice and equity;
  - 4.3. to clarify that, in certain circumstances, an equitable balance between the public interest and the interests of those affected by the expropriation *may* be struck in paying an amount of compensation equal to nil;
  - 4.4. to explain that each case must be evaluated on its own merits and that there is no one-size-fits all approach that can be adopted; and
  - 4.5. to highlight six circumstances which Parliament regards as potentially fitting for the payment of nil compensation, provided that all relevant factors, on balance, support that conclusion in the interests of justice and equity.
5. It was never the Bill's intention to depart from section 25(2)(b) and (3) of the Constitution. The deletion of chapter 5 of the Bill would be inconsistent with sections

25(2)(b) and (3) of the Constitution. A blanket limitation of this kind would not be permissible under section 36, the general limitations clause.

6. Expropriation may be used as a tool for land, water and related reform, to redress past racial discrimination. Section 25(8) explicitly states that any ‘departure’ from the provisions of section 25 must be in accordance with section 36. What this means is that it must be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.
7. The deletion of chapter 5 would leave other mechanisms in the Bill untethered. For instance, the valuation of the property, engagements with owners and holders of unregistered rights, and consultations with mortgagees and municipalities would largely become pointless.
8. The proposal for the deletion of chapter 5 is ill-founded and should not be accepted.

#### Definition of ‘expropriation’

9. The Bill defines ‘*expropriation*’ as ‘*the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and “expropriate” has a corresponding meaning*’.
10. First, the public comments have been useful in identifying that the definition is under-inclusive, as it does not include compulsory acquisition of land by third-party beneficiaries for land reform purposes as an expropriation.
11. This must be corrected by expanding the definition to include situations where third-party beneficiaries (who are not organs of state) acquire property for a public purpose or in the public interest through an expropriating authority. An amendment of that kind would cover land, water and related reforms.
12. Secondly, the definition is over-expansive in that it does not link the ‘acquisition’ of property to a public purpose or public interest.
13. The definition of ‘*expropriation*’ could be interpreted as inadvertently applying to *all* situations where the state acquires property in terms of legislation, including asset forfeiture, taxation and other mechanisms. Those mechanisms are designed to serve

ends that are different from acquiring property for use by the public or a section of the public, or by individuals in the public interest.

14. This must be remedied by linking expropriation to acquisition for a public purpose or in the public interest and to *use* of the property by the public or third parties in the public interest.

#### Definition of 'property'

15. The Bill currently defines 'property' with reference to section 25 of the Constitution.
16. This was a deliberate choice. The notion of 'property' in terms of section 25 of the Constitution is constantly being developed by the Courts. It is impossible to adopt a detailed definition of property in the Bill because it needs to be decided incrementally, on a case-by-case basis. The Constitutional Court is already doing this.
17. A definition in the Bill would create the risk that the Bill restricts the definition of property. There may indeed be circumstances where property that falls outside a restrictive definition needs to be expropriated.

#### Inclusion of mineral and water rights

18. The Bill does not expressly include mineral and water rights as types of property that are capable of expropriation. These rights constitute '*property*'. That is implicitly recognised by sections 25(4) and 25(8) of the Constitution.
19. If the mineral and water rights are registered, the person in whose favour the rights operate will be an '*owner*' for the purposes of the Bill. If they are unregistered, the person in whose favour they operate will be a '*holder*' for the purposes of the Bill. In both instances, the Bill offers protections to those persons.
20. However, the Bill expressly excludes unregistered mineral rights, recognised under the Mineral and Petroleum Resources Development Act 28 of 2002, from acquisition by an expropriating authority, in terms of clause 9(1)(b)(ii).

### Expropriation “without” compensation

21. We have explained above that section 25 of the Constitution does not permit generalised expropriation without compensation. However, there may be circumstances in which the Constitution permits expropriation for an amount of compensation equal to nil, provided that doing so is just and equitable.
22. The Constitution requires that a balancing exercise be undertaken to ensure that the amount of compensation results in a just and equitable balance between the public interest and the interests of those who are affected. In some cases, the just and equitable amount of compensation will be nil.
23. The Constitution and the Bill do not provide for expropriation “without” compensation. They provide for just and equitable compensation, which in some cases will be nil.

### Nil compensation clauses, 12(3) and (4)

24. Clause 12(3) and (4) both relate to expropriation of land in the public interest, which includes land, water and related reform.
25. There are two subsections because, for the Land Reform (Labour Tenants) Act 3 of 1996 provides that under that Act, it is the *court* – and not an expropriating authority – that determines the amount of compensation. The Bill refers to expropriations under that Act in clause 12(4). All other expropriations of land in the public interest by expropriating authorities are subject to clause 12(3).
26. It should be emphasised that clause 12(3) does not list circumstances in which it will *always* be just and equitable to expropriate for nil compensation. It expressly provides that, ‘*having regard to all relevant circumstances*’, *including* the five listed circumstances, it *may* be just and equitable to expropriate for nil compensation. Whether it would be just and equitable must depend on the facts of each case.
27. The same applies to clause 12(4). It is a legislative signal to Courts exercising powers under the Labour Tenants Act that it would be *permissible* for – and not obligatory upon – them to order expropriation for nil compensation. This does not fetter their judicial discretion, which must be exercised in terms of that Act and the Constitution.

28. The circumstances listed in clause 12(3) attempt to identify pressing examples, ripe for land reform:
- 28.1. Paragraph (a) seeks to inhibit arable land or other land that could be used for a socially productive purpose (such as housing) from being used and held solely for investment purposes. It encourages making effective use of all land.
  - 28.2. There is force in the criticism that there is nothing immoral about holding land for investment purposes *per se*, and that if it were to be expropriated in the public interest, it should not be for nil compensation.
  - 28.3. A possible alternative approach would be to modify paragraph (a) to make it clear that the Bill is not targeting land held purely for investment purposes, but is instead aimed at expropriating land that is being held for no reason other than to obtain a profit from an expropriation.
  - 28.4. Paragraph (b) aims to prevent land owned by an organ of state from lying unused. If the organ of state holding the land is not using it for the intended purpose, and if it acquired the land for free, this would be a material factor in favour of expropriating the land for nil compensation.
  - 28.5. Paragraph (c) seeks to ensure that where an owner, with the ability to control and safeguard her land, fails to do so and physically abandons the land, which could be put to a productive social use, it may be just and equitable to expropriate that land in the public interest for nil compensation.
  - 28.6. Because there is no mechanism in our law for abandoning ownership of immovable property that has been registered in an owner's name, it is necessary for the Bill to state that, for its purposes, the test for 'abandonment' includes the objective element – i.e. it depends on whether the owner has not exercised physical control of the property – and a subjective element – i.e. despite having the ability to do so, the owner chooses not to do so.
  - 28.7. The Department has formulated a proposed amendment in this regard.
  - 28.8. Paragraph (d) endeavours to leave the state in no worse-off financial position, if it expropriates property in the public interest. In other words, if the state has

already invested in, or subsidised, property, it should ordinarily not have to pay anything more, if the market value is equal to or less than the amount already paid.

28.9. Paragraph (e) is related to paragraph (c) in that it has in mind derelict and dangerous abandoned properties in areas (including urban areas) that may be suited for housing purposes.

28.10. There are arguments in favour of tightening the language of this provision. If the object of the provision is to restore the property to a safe state, then at least in some cases, other measures regulating its use may be more appropriate.

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