

Ex parte

DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE

In re:

EXPROPRIATION BILL, 2020

MEMORANDUM FOR THE NATIONAL COUNCIL OF PROVINCES

U K NAIDOO
9 February 2023
Chambers, Cape Town

INTRODUCTION

1. My colleague Adv Budlender SC and I have advised the Department of Public Works and Infrastructure (**Department**) on aspects of the Expropriation Bill, 2020 [B23—2020] (**Bill**). Many of our memoranda were presented to the National Assembly's Portfolio Committee on Public Works and Infrastructure (**Portfolio Committee**).
2. Due to prior court commitments, my leader has not had an opportunity to consider this memorandum before its submission to the Department and presentation to the NCOP. These views are my own, and are offered subject to his further input.
3. The Bill was passed by the National Assembly in September 2022. The NCOP must now consider the Bill. This presentation aims to orientate the Members of the NCOP, who will be considering the Bill for the first time. It sketches an outline of the constitutional background to the Bill, its aim and contents. It will also highlight some legal issues that require consideration and correction.

OVERVIEW OF THE BILL

4. The Expropriation Act, 1975 is old order legislation that still has the force of law by virtue of the transitional provisions in Schedule 6 to the Constitution.
5. Courts have interpreted the Expropriation Act consonantly with those parts of section 25 of the Constitution (**property clause**) relevant to expropriation. But the Expropriation Act is not a statute enacted *pursuant* to the property clause; the Bill, on the other hand, is meant to be just that.
6. The Bill should seamlessly fit with the property clause and regulate the substantive and procedural aspects of expropriation law in conformity with the Constitution.
7. The Bill governs only administrative and judicial expropriations. It does not cover expropriations that could occur by enacting legislation. Administrative decisions to expropriate property are subject to administrative law. There is only one type of

judicial expropriation—it concerns land for labour tenants, which is governed by a particular statute.¹ Most decisions to expropriate property under the Bill will be administrative in nature.

8. The Bill thus aims to incorporate administrative law principles and rules.
 - 8.1. Decisions must be procedurally fair and rational. People whose rights might be affected by a decision should be heard before the decision is taken. And their representations should be considered during the decision-making process.
 - 8.2. Decisions must be reasonable, taking into account all relevant factors and considering all affected interests to reach an outcome.
 - 8.3. Lastly, decisions must be authorised by law of general application. An expropriating authority may not, for instance, expropriate property for a purpose not authorised by the legislation that gives it the power to take private property.
9. The Constitution allows for expropriation of property only for a public purpose or in the public interest. These two variables constrain the power of expropriation. This is reflected in the Bill.
10. Expropriations for a public purpose typically entail the acquisition of property by the state, for a legislatively authorised use or object, either directly by the public or indirectly for their benefit. For example, land could be expropriated to build a dam, a road or a hospital.
11. Expropriations in the public interest includes the state's commitment to land reform and reforms to bring about equitable access to natural resources. Land could therefore be expropriated from an owner and transferred to another person, if it is in the public interest, as sanctioned by the Constitution.
12. The Bill sets the framework for expropriations for a public purpose and in the public interest.

¹ Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996).

13. Other legislation is still needed for functionalities to expropriate property for purposes relevant to their empowering legislation. The Bill creates a framework and mechanism for exercising that power. For instance, if an MEC for Education wanted to expropriate land for a public school, the power to do so would need to be sourced in legislation on education, while the mechanism for exercising that power will be in the Bill.
14. The Bill empowers the Minister responsible for public works to expropriate property for public works-related purposes (clause 3). It does not purport to vest powers of expropriation on other expropriating authorities, which must derive those powers from their own governing legislation.
15. The Bill spells out a more detailed method for expropriation than the Expropriation Act, which is consistent with property clause:
 - 15.1. First, an expropriating authority must identify whether it needs property for a public purpose or in the public interest, in terms of its empowering legislation. Once it has established a need, it must find suitable property to meet it.
 - 15.2. The Bill therefore requires an expropriating authority to investigate the suitability of property for the identified need. The investigation process is spelled out in clause 5.
 - 15.3. Once property has been identified, the expropriating authority must determine what rights attach to that property and to whose benefit they inure. Who is the owner? Who has other rights in the property, like registered servitudes or life-rights? Are there other competing interests like land restitution claims over the property?
 - 15.4. These kinds of questions must be answered to be satisfied that the property is suitable for expropriation. The expropriating authority will need to know who will be affected by an expropriation of that property and how.

- 15.5. The characteristics of the property will also be relevant. If the property is land, the expropriating authority must be satisfied that it will be appropriate for the intended project. Inspectors and valuers, therefore, need to be engaged.
- 15.6. During the investigation phase, the owner or occupier's privacy must be respected. They should be engaged to obtain information about that property, which relate to its suitability for expropriation. For example, there may be persons with unregistered rights in the property, whom the expropriating authority is unaware of.
- 15.7. The municipality should also be engaged, in the case of land, to find out about the property's zoning, outstanding municipal property rates or other charges relating to the property, and the availability of services. The municipality may have other plans for the property that may clash with the purpose of the intended expropriation. This information will also help the expropriating authority decide whether it can use the property for the intended purpose.
- 15.8. Some immovable property may be subject to a mortgage. The expropriating authority will need to know who the mortgagee is and how much is outstanding on the bond.
- 15.9. Secondly, if the expropriating authority considers the property to be suitable for expropriation, it must calculate the amount of compensation it thinks will be just and equitable, having regard to the factors in the property clause, which are replicated in clause 12. With this done, it can make a decision on whether it wants to expropriate.
- 15.10. If the expropriating authority considers the property suitable for expropriation, it must give notice of its intention to expropriate to everyone who has an interest in the property (clause 7).
- 15.11. The notice of intention to expropriate invites interested parties to accept the offer of compensation, to request further information or to dispute the offer of compensation.

- 15.12. Since expropriation is not consensual—it is the compulsory acquisition of property for a public purpose or in the public interest—the intention to expropriate is not an invitation to purchase. But because the property clause says that the amount of compensation may either be agreed on or decided or approved by a court, the notice of intention to expropriate needs to give the person who will be expropriated the chance to agree to an amount of compensation.
- 15.13. If there is no agreement at that stage, then the expropriating authority and the party to be expropriated can mediate their dispute on compensation. If that does not work or is not likely to work, a court must decide whether the offer of compensation is just and equitable. Clause 19 regulates disputes on the amount of compensation.
- 15.14. Thirdly, once there is agreement or a decision on the amount of compensation, the expropriation can proceed under clause 8. The expropriating authority must issue a notice of expropriation. The notice of expropriate says when ownership passes. It also identifies the date on which the right to possession passes. The property can be taken physically only when the right to possession passes, and that date can only be after the date of expropriation.
- 15.15. Issuing the notice of expropriation will give the expropriating authority the right to claim proof of ownership, like the title deed.
- 15.16. Fourthly, even after ownership passes, the expropriated person can keep possession of the property and use it until the date on which the right to possession passes. In the meanwhile, the expropriated person will be responsible for paying municipal rates and charges on the property and maintaining the property.
- 15.17. Fifthly, the expropriating authority must pay the compensation to the expropriated person before the date on which the right to possession passes.

- 15.18. Sixthly, if anyone belatedly claims, and proves, to have had a right in the expropriated property, the expropriating authority may, if appropriate, reduce the amount of compensation agreed or decided by a court to pay the late claimant.
- 15.19. Seventhly, if there is a dispute about who is entitled to receive compensation, the expropriating authority may deposit the compensation with the Master, who will pay the relevant party to the dispute after its resolution. That way, the expropriating authority can avoid becoming tied up in a dispute over payment.
- 15.20. Eighthly, some expropriations cannot wait for the ordinary process to run its course because they are inherently urgent. The state may need property in an emergency for temporary use, like requisitioning vehicles during a disaster or buildings in times of war. The Bill caters for urgent expropriations in clause 20.
- 15.21. The urgent expropriation process short-circuits the longer route, but allows property to be used temporarily only, for no more than a year. Compensation must be calculated and offered as soon as reasonably possible, but within 30 days from the date of expropriation. The amount can be disputed, which will need to be resolved by mediation or court decision.
- 15.22. The expropriating authority may commence with expropriation of ownership of the property (not just temporary use) at any time.
- 15.23. Ninthly, in very rare cases, it may be necessary to reverse the expropriation. The Bill regulates this in clause 21. It must be just and equitable to do so. It could arise if the property is no longer required for the intended purpose. But the power to withdraw an expropriation can be exercised only within a narrow three-month window and subject to other riders.
- 15.24. Tenthly, all expropriations must be recorded in an expropriation register, which is open to the public.

16. The Bill also deals with formal matters, like delivering and publishing notices, the language of communications, electronic communications, extending time periods for steps in the expropriation process, consequences for non-compliance with the Act, and transitions from the old legislation to the new.

ISSUES IDENTIFIED FOR CONSIDERATION

17. The NCOP is a separate House of Parliament and has its special place and function in the constitutional order. It applies its mind independently to bills, and will receive public input on the Bill to help decide whether to adopt it and, if so, in what terms.
18. On reading the version of the Bill that is before the NCOP, it appears that there are some irregularities that remain, even after the process in the National Assembly.

First error: clause 12 and the past tense

19. Clause 12 still uses an earlier formulation, when the Bill provided for the calculation, agreement or court decision on the amount of compensation *after* expropriation. This does not fit with the rest of the Bill, which abandoned that option in favour of finalisation of the amount of compensation before expropriation occurs.
20. This drafting inconsistency can be picked up in the language of clause 12. It refers to an ‘expropriated owner’ and ‘expropriated holder’ in the past tense. But if the expropriating authority must offer an amount of compensation in the notice of intention to expropriate, and a decision to expropriate can be taken only after that offer has been accepted or decided by a court, then the interests to weigh in the balance under clause 12 must be that of a *potential* expropriatee only.
21. Clause 12, therefore, needs to be recast into the correct tense.
 - 21.1. The words ‘expropriated owner’ should become ‘owner’ in clause 12(1).
 - 21.2. The words ‘expropriated holder’ should become ‘holder’ in clause 12(1).

- 21.3. The fact that the property ‘has been taken’ should become ‘would be taken’, to reflect potentiality of a future event, in clause 12(2)(a).
- 21.4. Any improvements made to the property after service of the notice expropriation could not feature in the computation of compensation, as clause 12(2)(d) provides, since the amount of compensation must be decided before service of that notice.
- 21.5. The same temporal consideration applies to clause 12(2)(f).
22. The only instance in which expropriation can precede acceptance or a decision on compensation is when property is taken for temporary use in urgent circumstances under clause 20. Clause 12 should account for that fact in a separate subsection, which provides for the past tense only in respect of urgent expropriations.
23. This is an obvious drafting error that crept into the Bill because the change to the sequence of investigation, intention to expropriate, agreement or decision on compensation, expropriation and possession came late in the process before the Portfolio Committee.
24. The NCOP can and should fix it.

Second error: clause 12 and inadvertent omission of other interested persons

25. The preamble quotes the property clause in full. Section 25(3) of the Constitution prescribes how the amount of compensation for expropriation should be calculated. It says that the amount must be just and equitable, ‘reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances’.
26. In contrast clause 12 of the Bill says that the amount of compensation ‘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’.

27. I have already addressed the incorrect use of the past tense for ordinary expropriations. What is significant about clause 12 is that the interests of only owners and holders are narrower than the ‘interests of those affected’. The latter is much broader. Clause 12 is thus more limited than section 25(3) of the Constitution, which is a problem.
28. My leader and I previously advised the Portfolio Committee that mortgagees are neither owners nor holders of rights in property under the Bill. Yet their interests would be affected by an expropriation. Under section 25(3) of the Constitution, their interests must be considered when computing an amount of just and equitable compensation; but under clause 12 of the Bill, they would be inadvertently excluded. That cannot be correct.
29. There may also be other interested parties, whose interests would be affected by an expropriation. There is no reason in principle to exclude those interests in calculating the amount of compensation. Doing so may even be unjust and inequitable.
30. The prudent course is to keep the language of clause 12(1) consistent with section 25(3) of the Constitution. Other clauses in the Bill concern the timing and manner of payment of compensation, while clause 12 deals with the amount. The interests to be considered when arriving at that amount should be those of all interested persons, not merely owners and holders of rights. The text should reflect that.
31. This too the NCOP can and should correct.

Other errors: technical drafting errors and substantive errors

32. There are other technical and legal errors in the draft, which can be addressed in due course. The purpose of this memorandum, I am instructed, is to give the NCOP an overview of the Bill, but it was necessary to discuss the first to errors which are significant and substantive.
33. Some examples of the remaining errors, however, are references—
 - 33.1. to persons other than valuers (registered under the Property Valuers Profession Act, 2000) to value property in clause 5(10);

- 33.2. to an accounting concept of 'depreciation' instead of 'reduction in value' in clause 9(3)(b);
- 33.3. to 'discharge' a mortgage instead of 'terminate' the mortgage in clause 21(3).

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