



## NEGOTIATING MANDATE

**TO:** The Chairperson of the Select Committee Transport, Public Service and Administration, Public Works and Infrastructure

Hon MK Mmoiemang

**NAME OF BILL:** Expropriation Bill

**NUMBER OF BILL:** [B23 B-2020]

**DATE OF DELIBERATION:** 22 September 2023

### **VOTE OF THE LEGISLATURE:**

The Gauteng Provincial Legislature votes **in favour** of the subject to the following amendments being considered:

### **PROPOSED AMENDMENTS**

*Definition: "Court"*

This definition has a reference to "intangible property" in sub-clause (c). Intangible property is not clearly defined and this should be facilitated either by introducing its own definition or the definition of property must be amended to exclude intangible property.

*Definition: "Disputing Party"*

In earlier versions of the Bill, the definition of disputing party contained reference to a "counter-offer". This has been removed in the final version of the Bill and should be added back.

*Definition: “Holder of right”*

The definition of holder of right should also include a registered right in addition to an unregistered right.

*Definition: “expropriation”*

It is unclear whether the definition of expropriation includes temporary expropriation.

*Definition: “Compulsory acquisition of property”*

The words “compulsory acquisition of property” should be replaced by “the curtailment of rights of an owner in property”, and the addition of “through (i) compulsory acquisition of property as a form of direct expropriation and (ii) custodial taking or regulatory taking of property in the case of indirect expropriation.

*Definition: “Public purpose”*

The definition of public purpose is vague and must be amended to make it clearer.

*Definition: “Valuer”*

The definition of “valuer” is vague and must be amended particularly in respect of “suitably qualified”.

*Clause 3(3)*

Clause 3(3) is redundant as it is covered by 3(2) and is contrary to the purpose of the Bill as it does not directly relate to “public purpose” or “public interest”.

*Clause 3(5) (a)*

Clause 3(5)(a) should be amended such that payment of compensation should be a pre-requisite of vesting.

“The ownership of the property vest in the relevant organ of state on the date on which transfer of ownership of the property is registered by the relevant deeds registry office in terms of the Deeds Registries Act (1937);”

The words “of expropriation” should be deleted.

*Clause 3(5)(b)*

Possession should only be given on transfer of ownership to the relevant organ of state and not prior to that.

Proposed amendment:

“Possession of the property will vest in the relevant organ of state on the date of registration of transfer of ownership of the property in the name of the State.”

*Clause 5(1)*

Clause 5(1) must be amended so that is not only objective assessments are considered when determining value but also subjective factors such as financial and sentimental value. This is necessary since land is an emotive issue and, in this scenario, the owner is being ‘forced’ to give up their land.

*Clause 5(5)*

It is recommended that longer timeframes be included throughout the Bill that are more realistic than the commonly referenced ‘20-day period’.

*Clause 5(7)*

Greater specificity is required in terms of the standards of damage and the quantum of damages. A “reasonable standard” is also not sufficient. Any damage should be repaired as close to the original state as possible, which indicates that a prior assessment of the property should be done prior to work commencing. Damage should not only apply to tangible assets but should include elements such as impacts on livestock and ability to farm.

“If the property in question is damaged through an act contemplated in subsection (2), an affected person may deliver written demand to the expropriating authority and the expropriating authority must confirm within 15 days receipt as well as the acceptance of notification. If the expropriating authority has accepted the written demand, the expropriating authority must repair and/or restore the property to the state it was in prior to the damage taking place within the confines of the National

Environmental Management Act (1998) and any other environmental legislation with similar requirements or compensate the owner to repair and/or restore the property to the state it was in prior to the damage taking place or compensate for the damage within 90 days after the above notification date.”

*Clause 6(3)*

The Bill should be amended to include clear consequences should the municipal manager fail to adhere to the 20-day timeframe provided for response.

*Clause 7(2)(h)(i)*

Clause 7(2)(h)(i) and (2) should be amended to clarify that the objections lodged via this clause carry weight in terms of the final decision to expropriate and are not provided merely for consideration. It is suggested that this provision should be included in the investigation phase, as it will have more impact there.

*Clause 7(3)*

Expropriation of land has additional specific requirements e.g., sending the notice of expropriation to additional government departments. This is not the case for assets other than land and this should be included.

*Clause 9*

Date of vesting of the property should be upon payment of compensation and not just the date of expropriation.

*Clause 12*

Clause 12(3) provides for 5 specific circumstances under which expropriation can take place without compensation. This is not a complete and exhaustive list, because the caveat “but not limited to” appears before the 5 circumstances and opens the door for any other circumstances that can be justified by the expropriating authority. This clause is also *ultra vires* the requirement specified in section 25(2)(b) of the Constitution that the time and manner of compensation must have been approved by a court. This clause eliminates this consensus and usurps the authority of the judiciary as it pre-determines the amount of compensation to be nil. Clause 12(3)(a)

amounts to interference by the state in private property rights in that it prevents owners of land from speculating in their asset, which is no different from speculating in the stock-market.

- The wording of section 25 of the Constitution does not allow for expropriation without compensation. It reads that “property may be expropriated only in terms of law of general application, for a public purpose or in the public interest; and subject to compensation” (own emphasis) which is agreed upon or decided by a court. It does not require extensive interpretive logic to conclude that the use of the word and in section 25 requires the expropriation of property to comply with the qualification for public purpose or interest, and compensation payable.
- No construction of section 25 can ignore the meaning of the word “**and**”, which makes payment of compensation a peremptory requirement for expropriation to be constitutionally permissible.

Section 12(3) of the Bill is unconstitutional and should be removed

*Clause 12(1)*

This clause provides for the factors to be considered when determining compensation. Clause 12(1)(d) refers to “the market value of the property”. The term “market value” is not defined in this Bill.

It is recommended that “**market value**” as defined in the Property Valuation Act (2014) be used and that this section of the Bill should specifically detail that the Office of the Valuer General is responsible for determining the market value of property intended for land reform as envisaged by s12(1)(a) of the Property Valuation Act. In keeping with this objective, stakeholders should be able to challenge the valuation especially if the land parcel is mortgaged.

*Clause 12(3)(c)*

This cannot be sufficient cause because the failure to exercise control over an asset may not be the fault of the owner. This will encourage land invasion.

*Clause 12(3)(d)*

There is concern that this clause could result in perpetual expropriation where the beneficiary of expropriation/land reform could subsequently have their land expropriated for nil compensation.

*Clause 12(3)(e)*

This is not sufficient cause to expropriate without compensation. Risks or hazards can be rectified without having to resort to expropriation.

*Clauses 12(3)(a) – (e)*

A proposed amendment to this clause is as follows: Clauses 12(3)(a) – (e) be removed and replaced by:

- (a) Where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
- (b) Where previously expropriated property is expropriated for a new purpose from an organ of state or state department and compensation has already been paid.

*Clause 12(5)*

Section 12(5) be amended to at least include that the state must consider outstanding balances due to mortgage holders when determining the amount of compensation. It is not fair to leave citizens with debt for properties that they no longer own.

*Clause 13 (general comment)*

The clause provides that interest will accrue from the date the expropriating authority, or the person whose behalf the property was expropriated, takes possession of the expropriated property. It is recommended that interest shall accrue from the date a Notice of expropriation is published or a decision to expropriate is taken and communicated to affected persons.

It is recommended that the compensation payable must include damages for all losses resulting from the expropriation. Such damages would include moving costs, any loss of income, and any outstanding balance on a mortgage bond which the compensation paid would otherwise not be

enough to cover. The finance interest rate should be that levied by the mortgagee and not that of the PFMA.

Consider amending this clause to include the underlined wording:

Interest, at the rate determined from time to time in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999) or at the rate determined from time to time on such terms that have been agreed upon between the expropriated owner or expropriated holder and the mortgagee, from the date the expropriating authority, or the person on whose behalf the property was expropriated, takes possession of the expropriated property, accrues on any outstanding portion of the amount of compensation payable in accordance with section 12 and becomes payable in the manner contemplated in section 15.

*Clause 13(a)*

If there is a dispute on the amount payable, the expropriated owner or expropriated holder cannot issue a VAT invoice. It would be iniquitous to deprive it of the ability to recover interest if the claim were resolved in its favour. It is recommended that clause 13(a) be amended to include the underlined wording:

“... is not regarded as an outstanding amount, provided that if the expropriated owner or expropriated holder disputes the amount of compensation it shall be entitled to issue a provisional tax invoice for the amount of compensation offered without prejudice to its right to dispute the amount of compensation offered by the expropriating authority”

*Clause 13(b)*

With the issuing and the acceptance/collection of cheques having ceased, effective from 31 December 2020, how is payment by prepaid registered post expected to be effected? It is proposed that payment via electronic funds transfer (EFT) would minimise opportunities for fraud given the obligation on banks in terms of the Financial Intelligence Centre Act, 2001 etc. It is recommended that:

The words “[prepaid registered post]” be deleted from clause 13(b).

### *Clause 14(1)*

Earlier versions of the Bill included the option of a counter-offer. This has been removed from the final version and should be added back.

- (1) may request the expropriating authority, in writing, to provide **[reasonable]** full and further particulars about the offer of compensation and the reason for the intended expropriation of that particular property and particulars so requested

### *Clause 14(2)*

More support should be provided to the claimant in requesting particulars of the offer of compensation from the expropriating authority. It is costly for the claimant to approach a court and a more affordable mechanism should be provided.

### *Clause 15(3)*

Possession of an expropriated property can pass to the expropriating authority before consensus is reached on compensation. This clause is heavily weighted in favour of the State and should be amended.

The right to possession must take place simultaneously with payment of compensation or at least on receipt of sufficient undertakings securing payment of compensation. The Constitutional Court has held that compensation is not a pre-requisite to expropriation. The Constitutional Court has also held that eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision. In order to protect the rights of all parties, we propose that the right to possession must take place on receipt of sufficient undertakings securing payment of compensation. This will still meet the Constitutional Court's findings of not unduly burdening the State but also provide a level of protection to the expropriated owner/holder or the holders of registered rights that that compensation will be paid

This clause should be deleted or modified to indicate that if payment has not been agreed to or paid prior to the passing of possession, then the right to possession can only take place on receipt of sufficient undertakings securing payment of compensation.



*Clause 16(1)*

There is no guarantee that the mortgage will be settled, and a scenario could exist where the compensation paid is insufficient to extinguish the mortgage. Banks wield financial power and could secure their portion before the balance is allocated to the owners. This could leave the owners with nothing.

Recommendation:

Amend s16(1) and s16(2) to include the underlined wording and delete the wording indicated by strikethrough:

(1) ... immediately prior to the date of expropriation, encumbered by a registered mortgage in favour of a secured creditor or, if the property is land, subject to a deed of ~~[sale]~~ alienation as contemplated in the Alienation of Land Act, 1982 (No. 68 of 1981), the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant or the expropriated owner or expropriated holder and the mortgagee or buyer has notified the expropriating authority of the agreement.

(2) The claimant or the expropriated owner or expropriated holder or the mortgagee or buyer, as the case may be, must notify the expropriating authority.

*Clause 17(4)(a)*

This clause is in contravention of the Deeds Registries Act (1937) as there is no mention of the need to obtain a clearance certificate. The expropriated owner will therefore be unfairly prejudiced if there is failure on the part of the municipality to accurately calculate this amount. It is recommended that a clearance certificate should be obtained.

*Clause 17(4)(b)*

This contradicts subsection (c) as it states the owner will only be liable up to date of possession, and this section states that the owner will be liable up to registration/transfer.

The use of language be consistent to avoid confusion and misinterpretation.

*Clause 17(4)(c)*

If the date of possession is later than the expropriation date, the Municipality may hold the former owner responsible for municipal costs. This is patently unfair.

*Clause 18*

For the stable functionality of the property mortgage market (to the benefit of borrowers and lenders), it is imperative that there are clear provisions in the Bill indicating that mortgagees will be compensated in full in relation to the outstanding amount owed and set out in a statement of outstanding balance, regardless of the amount of compensation to be paid to the owner of the property who is not the mortgagee and without the need to conclude an agreement between the mortgagee and the expropriated owner.

It is proposed that if the amount of compensation offered to the owner, who is not a mortgagee or buyer, is lower than the outstanding amount owed to the mortgagee or buyer, the expropriating authority ought to make good the difference.

*Clause 19(8)*

Any dispute of lack of finality as to the amount of compensation should halt the expropriation process until finalised.

Clause 19(8) of the Bill is unconstitutional insofar as it allows for expropriation before the amount of compensation is either agreed upon or determined in a court of law, as it amounts to an unconstitutional form of “self-help” by the state to take property without judicial oversight.

### *Clause 20*

Clause 20 of the Bill gives government the power to expropriate property on an urgent basis, which suspends the operation of the procedural requirements of sections 5, 6 and 7 of the Bill. Clause 20 shortens the process by allowing government to exercise the right to expropriate and offer compensation within 30 days of giving notice.

The first problem with clause 20 of the Bill is the proviso that if the expropriated owner disputes either the expropriation or the compensation tendered by government, the dispute is resolved in terms of section 19 of the Bill. This is the “expropriate now, argue later” aspect of the Bill which is, in our view, unconstitutional. The same argument can be used to declare section 20(5) unconstitutional.

It is important to note the use of the word or in clause 20(2) in that only the second ground makes provision for judicial oversight. The logical inference is that section 20(2)(a) – urgent expropriation in a national disaster – requires no judicial oversight. The same concerns as above regarding the lack of judicial oversight.

Clause 20(2)(a) is also of concern, given that South Africa was in a national state of disaster for over 750 days since it was declared on 15 March 2020.<sup>34</sup> It recently entered into a new state of disaster, which is still ongoing. If this Bill were an act, government would have had unchecked expropriation powers for almost one calendar year, without seeking judicial oversight in the expropriation of citizens’ property and without complying with the procedures set out in sections 5, 6 and 7 of the Bill. The experience of states of disaster in our recent past shows that these can be extended multiple times, and there is a great risk that these powers might be abused.

### *Clause 20(9)*

If the expropriating authority determines that it wants to proceed with a permanent expropriation, the process should begin anew once the possession has been restored. This will ensure that the owner is not prejudiced and the State not placed in a superior bargaining position.

*Clause 20(10)*

Greater specificity is required in terms of who determines the standard and quantum of damage to the property.

The inclusion of payment as an alternative to repair is welcomed, however, only were initiated by the owner by way of a letter of demand. Owners will be better protected if the provision is updated to dictate that ‘the Expropriating Authority may either repair or compensate’.

*Clause 21(1)*

Public interest is too vague. The purpose of withdrawal must be extremely important and there should be a very specific set of circumstances in which withdrawal can take place.

*Clause 21(3)(a)*

This clause appears to be a contradiction of clause 2(b) since ownership only takes place when property is registered. So, clause 2(b) applies and 3(a) is superfluous. If a mortgage is revived because of withdrawal, the prevailing market price may be different from the original mortgage. It would be prejudicial to the owner who might have to pay a higher mortgage than what he originally paid.

*Clause 22(3)*

The inclusion of email as a form of communication has been omitted and reliance is placed on post, hand delivery or facsimile. Email must be included.

*Clause 25(2)*

It is concerning that in terms of clause 26(1)(d), the Minister may determine the quantum of the final penalty. This leaves too much discretion to the Minister and the value of the penalty should either be defined in the Bill or alternately be defined in a separate framework.

*Clause 27*

Who decides whether a breach is material or immaterial? The onus should be on the party that did not follow the correct procedure to seek condonation. If the owner thinks something is a material aspect and the authority disagrees, then the matter should go to court and the party who did not comply must initiate the court process.

It is recommended that if the parties are unable to reach agreement, the matter should be determined by a court, with the onus being on the non-compliant party to initiate the court process.

*Clause 27(1)(ii)*

A technical amendment is proposed where the words “rights and duties” are amended to “rights, interests or duties”. This circumvents the need for both rights and duties to be affected for this provision to allow for changes to be made.

*General Comment*

Proposals to remedy this Bill should include at an absolute minimum, the distinction between direct and indirect expropriation, as well as the removal of the possibility of nil compensation being paid in the case of expropriation of private property. If nil compensation is to be approved, it should be applicable only to government owned land that is not required for service delivery and for which no compensation has been paid. The other category of property that should be subject to nil compensation is property that has previously been expropriated, which is then expropriated for a new purpose and compensation has been paid. In addition, amendments need to be considered to the other matters raised in this document.



Date: 22 September 2023

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**HON. M MODISE**

CHAIRPERSON: INFRASTRUCTURE DEVELOPMENT AND PROPERTY  
MANAGEMENT PORTFOLIO COMMITTEE

GAUTENG PROVINCIAL LEGISLATURE