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Hon M C Ramaphosa
President of the Republic of South Africa
The Union Buildings
Pretoria

5th April 2024

Unconstitutionality of the Expropriation Bill of 2020 [B23D-2020]

Dear President Ramaphosa,

The South African Institute of Race Relations NPC (the IRR) has closely followed the passage of the Expropriation Bill of 2020 [B23D-2020] (the Bill) through the National Assembly and the National Council of Provinces. The Bill is seemingly now ready for your assent.

However, under Section 79 of the Constitution, the President may not assent to a bill passed by Parliament if he 'has reservations about its constitutionality'. Instead, he 'must' refer such a bill 'back to the National Assembly for reconsideration'.

In adopting the Expropriation Bill of 2020 [B23D-2020] (the Bill), Parliament failed adequately to 'facilitate public involvement in the legislative process', as required by Sections 59, 72, and 118 of the Constitution. In addition, many of the Bill's provisions are inconsistent with the Constitution. The Bill is thus unconstitutional on both procedural and substantive grounds.

Procedural defects include a failure to take some 15 000 written and emailed submissions into account; a focus solely on clause-specific comments in another 120 000 emailed submissions, thereby excluding consideration of major economic and other problems with the Bill; flawed provincial public hearings in which many commentators confused the Expropriation Bill with the draft 18th Constitutional Amendment Bill; a truncated deadline for written submissions to the select committee in the National Council of Provinces (NCOP); the select committee's limitation on comments to clause-specific ones (via a mandatory Google form not previously used); a constricted number of oral presentations to both the portfolio committee and the select committee; and a failure by five provinces to obtain or submit proper final voting mandates from their provincial legislatures, which meant the remaining four provinces could not command the five-province majority needed for the NCOP's adoption of the Bill. In addition, the 2019 Socio-Economic Impact Assessment report on this 2020 Bill was outdated, superficial, and misleading. It thus failed to provide people with the information they required to 'know about' the Bill and make informed comments on it during the public consultation process.

Moreover, what amounts to an expanded definition of expropriation, was inserted into the Bill after public consultation had ended. This expanded definition was included via the stratagem of adding sub-clause 2(3) to the Application clause, as outlined below. The new sub-clause has major economic and other ramifications, which the public was never invited to consider. This has further undermined the public

consultation process, as confirmed by the judgment of the Constitutional Court in *South African Iron and Steel Institute and others* v *Speaker of the National Assembly and others* in 2023.

Substantively, many provisions in the Bill are inconsistent with the Constitution. Under sub-clause 8(3)(g), a notice of expropriation 'must contain…the amount of compensation agreed upon or approved or decided by a court under section 19'. Yet the right to approach a court under clause 19 arises only after mediation on a dispute regarding compensation has been attempted and has failed – and within a 180-day period from '*the date of the notice of expropriation'*. In addition, a notice of expropriation is incomplete and invalid if it does not contain both the date of expropriation and the amount of compensation to be paid – and neither can be determined until a court has approved or decided the compensation under section 19. This fatally flawed wording prevents compliance with Section 25(2)(b) and makes the Bill unconstitutional.

To ensure compliance with the Constitution, it is also not enough for an expropriating authority to obtain a prior court order dealing solely with the amount, time, and manner of payment of compensation. This prior court order must also confirm that the proposed expropriation is for a public purpose or in the public interest; that it does not infringe the rights to equality, human dignity, and/or administrative justice; and that any eviction of people from their homes as a result of an expropriation has been authorised under section 26(3) of the Constitution.

Many clauses in the Bill conflict with the doctrine against vagueness of laws. These include the open-ended list in sub-clause 12(3), the uncertain terms of sub-clauses 12(3)(a) and (c), and the question whether the 'land' for which nil compensation may be paid includes any improvements thereon. The common law presumes that such improvements are included, but the draft 18th Constitutional Amendment Bill of 2021 found it necessary to express this in so many words – and the Bill does not follow its example. In addition, improvements are not 'natural resources' in which there is a public interest in more equitable access.

Also inconsistent with the Constitution is the definition of 'expropriation' in Clause 1 of the Bill. This definition is clearly intended to empower the government to jettison all constitutional requirements for a valid expropriation when it takes custodianship, rather than ownership, of land. This definition of expropriation has its origins in the *Agri SA* case in 2013. However, that judgment is inconsistent with international law and was handed down without reference to this important body of law. In addition, as Chief Justice Mogoeng Mogoeng took pains to stress, his majority judgment was based solely on the facts of the case and did not purport to lay down a general rule. It also erred in assuming that custodianship was in issue, when the matter concerned an old-order mining right rather than the mineral resources vested in state custodianship by the Mineral and Petroleum Resources Development Act of 2002.

In addition, the D version of the Bill has effectively introduced an expanded definition of expropriation, different from that provided in the *Agri SA* case. As earlier noted, this expanded definition has been inserted into the Application clause, via a new sub-clause 2(3), as part of a stratagem to avoid conflict with the *Agri*

SA ruling. Sub-clause 2(3) nevertheless changes the definition of expropriation by authorising two types of expropriation: that which transfers ownership to the state and that which transfers ownership directly to third parties.

This change is prima facie unconstitutional, while its ramifications are extensive but difficult to evaluate. Sub-clause 2(3) is also intrinsically vague, for it contains no guiding parameters as to what direct transfers to third-party beneficiaries might be sanctioned or what magnitude these transfers might have. An untrammelled discretion of this kind undermines the rule of law, as the Constitutional Court has previously stressed. In addition, the uncertain wording used is sure to be interpreted in different ways at different times by different officials, which contradicts the doctrine against vagueness of laws.

The Constitution is 'the supreme law of the Republic' and must be respected and upheld by all branches of the government, including the legislature. Since the content of the Bill and the process of its adoption are often inconsistent with the Constitution, Parliament breached its constitutional obligations in choosing to adopt it. In addition, the President has an over-arching obligation to 'uphold, defend and respect the Constitution as the supreme law'. Hence, if he 'has reservations about the constitutionality' of a bill, he is obliged, under Section 79(1) of the Constitution, to 'refer it back to National Assembly for reconsideration', rather than give his assent to it.

The IRR thus respectfully petitions you to use your powers under Section 79(1) to refer the Bill back to the National Assembly. This is necessary so that all procedural requirements for proper public consultation can in future be fulfilled. In addition, the many clauses in the Bill which are inconsistent with guaranteed rights need to be removed and redrafted, so as to ensure the Bill's substantive compliance with the Constitution.

To assist in this process, the IRR has drawn up an alternative expropriation bill that is fully in keeping with the Constitution and illustrates the changes the National Assembly needs to make. At minimum, the National Assembly should:

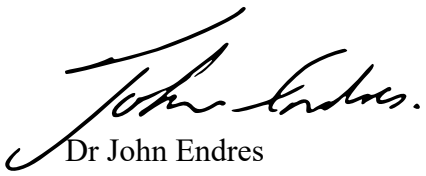
a) bring the definition of expropriation in Clause 1 into line with international law and the Bill of Rights;
b) remove sub-clause 2(3) with its expanded and unconstitutional definition of expropriation;
c) oblige an expropriating authority (when a dispute arises) to obtain a prior court order approving or deciding the compensation payable and confirming that the proposed expropriation complies in full with Section 25 and all other relevant constitutional provisions;
d) remove the vague and uncertain 'nil' compensation provisions in sub-clause 12(3);
e) allow expropriated owners and rights holders to obtain compensation for actual direct losses resulting from expropriations (such as moving costs and loss of income), as such compensation is fully in line with sub-section 25(3) of the Constitution and is necessary to bring about 'an equitable balance between the public interest and the interests of those affected';
f) require that expropriated owners and rights holders receive the compensation due to them ten days before the date of expropriation in the notice of expropriation;
g) make the transfer of ownership or other rights conditional on full payment having been made on due date, failing which the relevant expropriation notices will become null and void; and

h) require that all relevant notices are delivered by hand to the owner or rights holder, with delivery confirmed via acknowledgement of receipt (and with court directions for service to apply where owners or rights holders cannot be located).

The IRR's analysis of the procedural and substantive unconstitutionality of the Bill are more fully explained in the comprehensive *Petition* attached. Also attached is an *Appendix* which identifies the most important amendments that need to be made to the Bill and proposes some appropriate wording.

Should you have any questions or require any further information, please do not hesitate to contact me. South Africa needs to replace the flawed Expropriation Act of 1975 with an expropriation statute that is constitutionally compliant – and the IRR would like to do all it can to assist in achieving this.

Yours sincerely,



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