South African Institute of Race Relations NPC

PETITION

to the President of the Republic of South Africa

regarding the

Expropriation Bill of 2020 [B23D-2020]

Johannesburg

5th April 2024

Contents **Page**

1	**Introduction**	**2**
2	**Inadequate public consultation, contrary to the Constitution**	**2**
2.1	***Public participation in the National Assembly process***	***3***
2.2	***Public participation in the National Council of Provinces process***	***5***
2.3	***Guidelines for the Socio-Economic Impact Assessment System, 2015***	***7***
2.4	***National Policy Development Framework, 2020***	***9***
3	**The substantive unconstitutionality of the Bill**	**11**
3.1	***The need for a prior court order in the absence of agreement***	***11***
3.2	***The vague meaning of many provisions***	***14***
3.2.1	*Vague rules regarding late payment and the passing of the right to possession*	*15*
3.2.2	*Uncertainty as to the circumstances in which 'nil' compensation may be paid*	*16*
3.2.3	*An open-ended list*	*16*
3.2.4	*The vagueness of the criteria laid down*	*16*
3.2.5	*Uncertainty as to whether 'land' includes the 'improvements thereon'*	*17*
3.3	***Other unconstitutional provisions***	***18***
3.3.1	*Prior court orders must deal with all constitutional requirements*	*18*
3.3.2	*An unconstitutional limit on the right of access to court*	*20*
3.3.3	*An unconstitutional exclusion of compensation for 'actual financial loss'*	*21*
3.3.4	*Unconstitutional and conflicting definitions of 'expropriation'*	*23*
4	**Conclusion**	**26**

1 Introduction

This petition to the President of the Republic of South Africa is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

Under Section 79 of the Constitution, the President may not give his assent to a bill which has been passed by the National Assembly and the National Council of Provinces (NCOP) if he 'has reservations about its constitutionality'. Instead, he 'must' refer such a bill 'back to the National Assembly for reconsideration'.[1]

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.[2] In addition, the content of the Bill is inconsistent with the Constitution in many important ways. The Bill is therefore unconstitutional on both procedural and substantive grounds.

The founding provisions of the Constitution clearly state that the Constitution is 'the supreme law of the Republic' and must always be respected and upheld by all branches of the government. In addition, any law or conduct inconsistent with the Constitution 'is invalid' by virtue of this inconsistency.[3]

The obligation to uphold the Constitution is binding on both Parliament and the President. As the Constitutional Court stressed in the *Certification* case in 1996: 'Under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament… Parliament "must act in accordance with, and within the limits of, the Constitution"'.[4] In addition, the President has an over-arching obligation to 'uphold, defend and respect the Constitution as the supreme law of the Republic'.[5]

Parliament should therefore not have adopted the Bill in its present form, while the President cannot lawfully give his assent to it. The IRR thus respectfully petitions the President to refer the Bill back to the National Assembly for reconsideration, as Section 79(1) of the Constitution requires.

2 Inadequate public consultation, contrary to the Constitution

The Bill's adoption has been marred by a major procedural defect in that Parliament has failed adequately to 'facilitate public involvement in the legislative process', as the Constitution requires.

---

[1] Section 79(1), Constitution of the Republic of South Africa, 1996
[2] Sections 59(1), 72(1), 118(1), 1996 Constitution
[3] Sections 1, 2, 1996 Constitution
[4] *Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC), at para 109
[5] Section 83(b), 1996 Constitution

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning well over a decade. These include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*, *Doctors for Life International* v *Speaker of the National Assembly and others*, *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, and *Mogale and others* v *Speaker of the National Assembly and others.*[6]

The key constitutional provisions in this regard are Sections 59, 72, and 118. All these sections are similarly worded and require, in essence, that the National Assembly, the National Council of Provinces (NCOP) and the nine provincial legislatures 'must facilitate public involvement in the legislative…process'. In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: 'What matters is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say'. This passage was quoted with approval in *Doctors for Life*, the *Land Access* case, and the *Mogale* judgment in 2023.[7]

2.1 Public participation in the National Assembly process

According to Committee Secretary Ms Nola Matinise and Committee Content Advisor Mr Shuaib Denyssen, the Portfolio Committee on Public Works and Infrastructure received some 6 200 written submissions on the Bill by the deadline of 28th February 2021, while 6 000 submissions came in after the due date. A total of 129 127 email submissions were received, of which some 119 000 were captured for further consideration. This meant that 92.7% of the written submissions were reviewed, while 'the views that were repeated were not included'.[8]

In analysing these 120 000 or so submissions, committee staff focused on whether 'submitters supported the Bill or not' and 'then isolated the clauses that were highlighted as problematic and the clauses that were supported'.[9] Yet many of the most telling problems with the Bill are not reflected in its wording. All comments that were not clause-specific were nevertheless brushed aside. These comments included important warnings about the likely economic damage from the Bill, the risks to democracy in facilitating expropriation without compensation (EWC), and the Bill's inability to address the most important problems impeding land reform. Those problems, as identified in 2017 by the High Level Panel of Parliament under the chairmanship of former president Kgalema Motlanthe, include the

[6] (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); [2016] ZACC 22; [2023] ZACC 14

[7] Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59; *Mogale* judgment, at para 34

[8] https://pmg.org.za/committee-meeting/33832/

[9] https://pmg.org.za/committee-meeting/33832/

government's policy of denying land ownership to emergent farmers, a lack of training and capacity, corruption, and 'the diversion of land reform budgets to elites'.[10]

Questions also remain as to how many of the people and organisations that sent in written submissions were invited to make oral presentations to the portfolio committee in support of their written documents. The general rule is that anyone who provides a written submission and asks to make an oral presentation should be given the chance to do so. To what extent this was done on the Bill remains uncertain as the committee report provides no information in this regard. However, the committee invited a mere 21 organisations and individuals to make oral presentations on 24th and 25th March 2021, a scant three weeks after a total of some 135 000 written and emailed submissions had been sent in. Though another 12 oral presentations were later allowed, many of those requesting to make oral presentations must nevertheless have been left out.[11] In addition, the committee's brief opportunity for oral presentations in March 2021 coincided with the short period similarly (and seemingly reluctantly) allowed by the Ad Hoc Committee charged with drafting an EWC constitutional amendment bill (formally, the Draft Constitution Eighteenth Amendment Bill of 2021).[12] This overlap between two different legislative processes naturally caused great confusion among the public, as Ms Matinise's report acknowledges.[13]

Public hearings were also held on the Bill, four in each of the nine provinces. Ms Matinise's report provides very little detail of how these hearings were conducted, including the notice periods given, the adequacy of the information provided regarding the Bill, and the extent to which people were bussed in to support the ruling party's perspective. As she (briefly) describes the public hearings: 'There was confusion between the Expropriation Bill and the process of the amendment of section 25 of the Constitution. Some speakers viewed title deeds as unnecessary. A number of speakers claimed that the land should be expropriated without compensation. Although some speakers showed support for the Bill, this support was conditional. The Khoi San chiefs strongly voiced their opinion about the legality of the bill and emphasised that land should be given back to them as the First Indigenous Nation of South Africa (FINSA). During these public hearings, 42% were in support of the Bill, 27% were not in support of the Bill, and 31% were unsure.'[14]

In the end, despite a significant volume of argument and evidence against the many damaging and unconstitutional provisions in the Bill, only limited changes were made by the National Assembly in adopting a 'B' version of the Bill on 27th September 2022. The Committee nevertheless claimed that the B version was 'infused with the views of the public' and was 'the product of [the Committee's work in] facilitating public involvement in the legislative

---

[10] https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf p300

[11] IRR letter to Ms Nola Matinise, Secretary, Portfolio Committee on Public Works and Infrastructure, 18 March 2021; see also https://pmg.org.za/committee-meeting/32657/; https://pmg.org.za/committee-meeting/32662/; and https://pmg.org.za/committee-meeting/33577/

[12] IRR, Press Release, EWC Consultation Reset, 17 March 2021; see also https://dailyfriend.co.za/2021/03/24/irr-writes-to-committee-on-flawed-ewc-process/

[13] https://pmg.org.za/committee-meeting/33832/

[14] Ibid

process'. The Committee also noted that the amendments reflected 'the legal expertise of the Department [of Public Works and Infrastructure], Parliament and the State Law Advisors'[15] – without which some important changes would clearly not have been made, irrespective of the public's concerns.

One of the key recommendations made by the legal experts was that the Bill should provide, in the absence of agreement between the parties, for a court order approving or deciding the amount of compensation prior to expropriation, as required by sub-section 25(2)(b) of the Constitution.[16] However, the resulting amendment to the B version (unchanged since then) is couched in language that is difficult to understand and practically unworkable. This means that the unconstitutionality highlighted by the legal experts had not been adequately addressed. The Bill was nevertheless then sent to the National Council of Provinces (NCOP) to be adopted by it under the process set out in Section 76 of the Constitution for 'ordinary bills affecting the provinces'.

2.2 Public participation in the National Council of Provinces process

The Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure in the NCOP ('the NCOP committee') invited public input on the B version of the Bill on 6th February 2023. The deadline for public submissions was 6th March 2023, which meant the public was given fewer than 30 days to comment on the Bill. Given the importance of the Bill, its major economic and other costs, and the unconstitutionality of many of its provisions, setting aside such a brief period for public comment was clearly inadequate.

The Constitutional Court has also emphasised that sufficient time must be allowed for the public consultation process. In *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*,[17] for instance, the Court stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the NCOP – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.[18] The Court continued:

> 'In drawing a timetable that includes allowing the public to participate in the legislative process, [Parliament] cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue.'[19]

[15] https://pmg.org.za/committee-meeting/35551/

[16] https://pmg.org.za/committee-meeting/37797/; https://pmg.org.za/committee-meeting/34721/

[17] [2016] ZACC 22

[18] Ibid, paras 61, 67

[19] Ibid, para 70

In addition, the NCOP committee called for all written submissions to be made to it via a Google Forms facility. This form asked respondents whether they supported or opposed the Bill and whether they wished to make oral presentations. Thereafter, they were asked to submit specific comments on each of the Bill's 31 clauses, but were given no opportunity at all to raise concerns beyond this clause-specific sphere. The IRR inquired from the NCOP committee whether using this form was compulsory or optional, but received no response by the time the deadline for public comment expired. To what extent this insistence on the use of this Google form deterred the public from commenting on the Bill is impossible to say.

However, the Google form was clearly unsuitable for people wanting to provide reasoned argument and evidence on issues extending beyond the wording of particular clauses. Restricting public comments in this way was inherently unreasonable, since it prevented the public from having their say on many of the most important issues raised by the Bill. In addition, for the NCOP committee to insist on a different and restrictive format half-way through the overall legislative process was confusing and disruptive to public participation.

The NCOP committee has failed to provide information on how many written submissions or Google forms were sent in to it. It has also failed to provide details of the public hearings on the Bill that were held in each of the nine provinces. A mere 15 organisations were permitted to make oral presentations: seven on 27th September 2023[20] and another eight on 11th October 2023.[21] How many other individuals or organisations might have asked to make oral presentations – and were nevertheless denied the opportunity to do so – is unclear.

Doubts have also arisen as to whether four of the provinces that supported the Bill in the NCOP Committee on 13th March 2024 had obtained proper final voting mandates from their provincial legislatures. According to Tim Brauteseth MP (Democratic Alliance), and a member of the NCOP committee, four provinces (the Eastern Cape, Gauteng, Limpopo, and the Western Cape) had failed to do so, as none of these provinces had put the Final Mandate Committee Report before their legislatures. In addition, though the North West province had properly secured its final mandate, it had not yet submitted it. In these circumstances, the remaining four provinces could not command the five-province majority needed for the adoption of the Bill. This cast doubt on the validity of the NCOP committee's decision to endorse the Bill on 13th March 2024,[22] as well as the NCOP's subsequent adoption of it on 19th March 2024.

The NCOP made only a few changes to the 'D' version of the Bill which has since been approved by the National Assembly and sent to the President for his assent. These changes were prompted not by public concerns but by the recommendations of legal experts seeking to extend the ambit of expropriation, as further described below. They were introduced at the last minute, depriving the public of any opportunity to 'know about' the issues that these

[20] https://pmg.org.za/committee-meeting/37588/
[21] https://pmg.org.za/committee-meeting/37646/
[22] https://pmg.org.za/committee-meeting/38599/

amendments raise, or to have 'an adequate say' on the rules which are now to govern them.[23] This too has undermined the public participation process – and further confirmed that the NCOP failed to facilitate public involvement in its legislative processes on the Bill, as required by Sections 72(1) and 118 of the Constitution.

Striking too is the way in which the government has ignored its own 2015 and 2020 policy documents on what public consultation requires. These policy documents reflect the government's commitments regarding public consultation and are also fully in line with what the Constitution requires. Yet these policy documents were also brushed aside in the consultation process on the Bill.

2.3 Guidelines for the Socio-Economic Impact Assessment System, 2015

All new legislation in South Africa is supposed to be subjected to a comprehensive 'socio-economic impact assessment' before it is adopted. The relevant requirements are set out in *Guidelines for the Socio-Economic Impact Assessment System (SEIAS)*, which were developed by the Department of Planning, Monitoring, and Evaluation in May 2015 and took effect in September that year. The aim of the SEIA system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[24]

According to the *Guidelines*, the SEIA system must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[25]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. A particularly important need is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[26]

The Bill is likely to trigger precisely such 'excessive costs': in the form of both disinvestment and emigration. It will also deter investment, limit growth, reduce employment, add to poverty, and make it still harder for the economy to recover from a series of recent major blows, including the prolonged Covid-19 lockdown that began in March 2020, the July 2021

---

[23] *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 63; *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC), Media Summary, p2; *South African Iron and Steel Institute and others* v *Speaker of the National Assembly and others* [2023] ZACC 18

[24] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

[25] *SEIAS Guidelines* p7

[26] *SEIAS Guidelines*, p11

riots, and extraordinarily high levels of loadshedding in 2022 and 2023. Yet no proper SEIA assessment of the Bill has been carried out, while no final SEIA report was appended to the Bill to help inform the public about its content or its likely economic and other ramifications.

Instead, the Memorandum on the Objects of the Bill vastly understates the likely 'financial implications' of the Bill. Instead of trying to assess its negative impact on the entire economy and the wider society, the document focuses solely on whether the Bill will result in any increased implementation costs for the state.

According to Paragraph 6 of the Memorandum, the state will have to pay just and equitable compensation to 'persons affected by expropriation'.[27] However, it makes no attempt to quantify what the costs of such compensation might be.

If these costs are to be minimal – because most expropriations will be carried out for nil or minimal compensation – the resulting blow to the economy will be enormous and could easily set in motion the economic implosions evident in both Zimbabwe and Venezuela. If, by contrast, the internationally recognised principle of 'equivalence' is to be followed, then the compensation payable on anything but a very small number of state takings is likely to be substantial. Yet South Africa's public debt is already so unsustainably high that this could help trigger a sovereign debt default, with similarly devastating consequences.

A SEIA report on the 2019 version of the Bill[28] – which was signed off by the Presidency in May 2020 – was finally released in June 2021 after AfriBusiness, a lobby group for small firms, applied for this under the Promotion of Access to Information Act (PAIA). This outdated SEIA report, which has still not been replaced by an updated and more balanced assessment, is calculated to mislead rather than inform the public about the current Bill.

The SEIA report praises the 2019 Bill for giving the state 'extraordinary authority to compulsorily take immovable property from persons and corporations for use in the public interest'. It assumes, without citing any evidence, that such takings – sometimes for 'nil' compensation – will have nothing but positive effects, for they will 'facilitate access to land' and so help 'reduce unemployment, poverty, homelessness, criminality, and morbidity'. This, it claims, will also 'promote entrepreneurship, food security, and the productivity of the nation in general'.

This flatly contradicts international experience in Zimbabwe, Venezuela, and many other countries too. It also ignores the fact that some 70% of the land transferred for land reform purposes has subsequently fallen out of production, costing many farm workers their jobs while bringing little or no gain to intended land reform beneficiaries. Also brushed over is the fact that the Bill defines property (as does Section 25(4) of the Constitution) as 'not limited to land'.[29] This will open the door to many expropriations outside the land reform context.

---

[27] Para 6.1, Memorandum on the Objects of the Expropriation Bill, 2020

[28] Socio-Economic Impact Assessment System (SEIAS), revised (2019): Final impact assessment template – phase 2, Name of the proposal: Expropriation Bill [B-2019], Final approval, 2020/05/29

[29] Terence Corrigan, 'Opening up the tickbox', *Daily Friend*, 25 June 2021

Having briefly acknowledged that 'government officials might abuse the powers in the legislation', the report swiftly brushes this concern aside on the basis that 'there are sufficient checks and balances in both government policy and different legislations (sic) to keep the issue in check'. This turns a deliberately blind eye to pervasive state capture both before and after the Zuma administration – and long years of rampant and unchecked corruption in procurement and elsewhere. It also ignores a 2021 admission by the Minister of Agriculture, Land Reform and Rural Development, Thoko Didiza, that 'what [land administration systems] have in large measure are individuals who may not have the requisite skills'.[30]

The report further claims that investors have no concerns about the risk of wide-ranging expropriation for nil or inadequate compensation, because South Africa has long offered 'a stable and safe investment environment'. In addition, there is 'no empirical evidence' of an adverse investment impact from the Bill at this point, it says.

However, this ignores salient warnings from both Agri SA and the Banking Association of South Africa (BASA) about the adverse consequences that are already evident. According to Agri SA: 'Most commercial farmers are no longer willing to invest on [sic] land due to fear of expropriation without compensation. Banks no longer view farming as safe for lending money due to the uncertainty created by the proposal.' BASA adds: 'Reluctance to invest further by commercial farmers is causing many business ventures to collapse. In turn the financial sector is suffering a real and potential financial loss which may not be recoverable.'[31]

The 2019 SEIA report on the Bill is thus far too superficial – and far too misleading – to provide people with the information they need to 'know about' the Bill and make informed comments on it. In addition, the 2019 report has not been updated to take account of the economic impact of the prolonged Covid-19 lockdown, the Russia-Ukraine and Hamas-Israel conflicts, and the growing risk of 'stagflation' in South Africa as growth diminishes further and inflation stays high. Again, the effect is to undermine the public consultation process and further breach the Constitution's requirements in this regard.

2.4 National Policy Development Framework, 2020

The *National Policy Development Framework* (the *Framework*) was approved by the Cabinet in December 2020, and is intended to help give effect to the *National Development Plan: Vision 2030*. Towards this end, the *Framework* seeks to improve policy development by 'ensuring meaningful participation' and 'inculcating a culture of evidence-based policy making'.[32]

In a section dedicated to 'Stakeholder Engagement in Policy Making', the *Framework* states: 'Chapter 10 of the Constitution prescribes that people's needs must be responded to, and the public must be encouraged to participate in policy making. Therefore, the involvement of the

[30] Terence Corrigan, 'Opening up the tickbox', *Daily Friend*, 25 June 2021
[31] Ibid
[32] National Policy Development Framework, 2020, p3

public in policy-making is a constitutional obligation that government institutions must respect and institutionalise.'[33]

The *Framework* goes on to list some of the key requirements for proper public participation. 'Consultation with stakeholders should commence as early as possible,' it says. All relevant stakeholders should be identified, including 'those who will benefit when [existing] problems are addressed' and 'those who will bear the cost of implementation of the proposed intervention'. Policy-makers must also identify and counter all 'barriers to active participation' and ensure that 'consultation is infused in all aspects of the policy-making cycle'.[34]

According to the *Framework*, adequate thought must be given to 'which policy solutions would best achieve the public policy objective' and 'how best' the proposed policy solution can be implemented. Policy-makers must 'inform and engage stakeholders' on 'the nature and magnitude of a policy issue', along with its likely 'impacts and risks'. These assessments must be 'informed by the best available evidence, data, and knowledge'.[35]

In addition, policy-makers must be willing to adjust their proposals in the light of the evidence provided. 'Policy-makers must not impose their preconceived ideas…and pre-empt the outcome of the policy consultation process. They need to be willing to be persuaded and acknowledge the input of stakeholders with a view to creating a win-win policy outcome'. They must also avoid any impression that 'the consultation process is staged, managed, cosmetic, token and a mere compliance issue'. Instead, they must 'strive to produce an outcome based on bargaining, negotiation, and compromise'.[36]

Policy-makers, the *Framework* adds, must also provide adequate feedback to those who have submitted comments. Such feedback must include 'rational reasons' as to why 'submissions and comments…were not consolidated into the final policy document'. In addition, policy-makers must 'report in the SEIAS (final impact assessment: consultation section) on the results of their early engagement with stakeholders'. They must explain 'what stakeholders viewed as possible solutions, benefits, and costs and how these influenced the selection of the proposed policy solution'.[37]

All these important instructions to policy-makers have been disregarded in the consultation process on the Bill. Evidence-based analysis and sound alternative solutions have been rejected out of hand, along with any meaningful opportunity for the public to influence the policy decisions being made. Far from relying on 'the best available…data and knowledge', as the *Framework* requires, ANC MPs have instead 'imposed their pre-conceived ideas'

[33] Ibid, p19
[34] Ibid, pp19-20
[35] Ibid, p20
[36] Ibid
[37] Ibid

about the (supposed) benefits of widespread expropriation for nil or inadequate compensation on all South Africans, regardless of the great damage this is likely to unleash.[38]

3 The substantive unconstitutionality of the Bill

As earlier noted, the SEIA report claimed that investors have no concerns about the Bill, partly because of South Africa's 'stable and safe' investment environment and also because their main 'interest is in whether the Bill complies with the Constitution'. The report implies that the Bill is not only fully compliant with the Constitution, but also reflects 'South Africa's strong adherence to the Rule of Law principle'.[39] However, this unsubstantiated and partisan assessment is inaccurate and misleading, for the Bill still contains many clauses which are inconsistent with the Constitution.

3.1 The need for a prior court order in the absence of agreement

As legal experts advised during the deliberations on the Bill, the original version of the Bill assumed that an expropriating authority could serve a notice of expropriation under which it could take ownership of the property and decide on the compensation to be paid, without a prior court order. However, further reflection had shown this to be flawed.

Advocate Uday Naidoo put it thus in addressing the NCOP Committee on 25th October 2023 '[Under] the first draft, it was an expropriating authority that not only determined the amount of compensation but also decided to expropriate a property, before the courts [became involved]. The idea was that an administrative decision would be taken and the affected person could take the matter to judicial review. Under the "judicial review mechanism", a court could approve or decide the amount of compensation. On reflection, [however], it was clear that this was not the right method, and the Bill was changed so that it is more consistent with Section 25(2)(b) of the Constitution'.[40]

Advocate Naidoo's analysis is in line with the Constitution and the Constitutional Court's ruling in *Haffejee NO and others* v *eThekwini Municipality and others*. Here, the Constitutional Court was asked to rule of the meaning of Section 25(2)(b), which states that 'property may be expropriated only in terms of law of general application…[and] subject to compensation, the amount of which and the time and manner of payment of which *have…been* agreed by those affected or decided or approved by a court'.[41]

This wording indicates that the determination of compensation, whether by agreement or through the intervention of the courts, must *always* precede an expropriation. In the *Haffejee* case, Judge Johan Froneman (writing for a unanimous court) declined to interpret the provision in quite so categorical a way. He recognised that there could be exceptional circumstances – 'urgent expropriation in the face of natural disaster is one example' – in

[38] Ibid
[39] Terence Corrigan, 'Opening up the tickbox', *Daily Friend*, 25 June 2021
[40] https://pmg.org.za/committee-meeting/37797/

[41] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28; Section 25(2)(b), Constitution, emphasis supplied by the IRR

which it would be 'difficult, if not impossible, to determine just and equitable compensation' prior to expropriation. As a general rule, however, he stated, 'the determination of compensation…*before* expropriation will be just and equitable'. Moreover, in those few cases where there was no choice but to determine compensation only after expropriation, this would have to be done 'as soon as reasonably possible'.[42]

As this Constitutional Court judgment makes clear, it is only in exceptional and particularly challenging circumstance that the general rule need not be followed. And the general rule is that both the amount of compensation, and the time and manner of its payment, must either be agreed by the parties, or decided by a court, *prior* to expropriation. The *Haffejee* ruling thus further confirms that an expropriating authority cannot simply forge ahead with the taking of ownership under a notice of expropriation before these crucial steps have been taken.

However, in an earlier portfolio committee meeting on the Bill on 30th March 2022, Ms Phumelele Ngema, Parliamentary Legal Advisor, Constitutional and Legal Services Office, had questioned Adv Naidoo's interpretation, saying 'she still believed that there were instances where, in terms of section 25(2)(b), even the expropriating authority may determine or decide on the compensation'.[43] Said Adv Naidoo in response: 'If the Constitution had meant that a court could only approve and nothing more, then it would relegate the court to the role of a rubberstamping authority. This would be inconsistent with various other provisions of the Constitution, which [empower] the courts to determine rights. "Approved" implies that the court was satisfied with the offer [of compensation] made [by the expropriating authority] and did not alter it. "Decided" signifies that the court might not approve but might make a decision that varied from the offer.'[44]

In addition, 'if [it] was correct that the expropriating authority may make a decision, then it would be unnecessary to state, as the Constitution does, that the expropriating authority may agree. If it had the power to determine, then consensus would be immaterial'. Moreover, 'if the theory put to him was correct, then a court may only approve and not decide, because the decision is reserved for an administrative body. That would run into tension with the notion that an administrative body may agree, and secondly it would signify that all a court may do is to say that the administrator was right but nothing else. That could not be correct. Courts were there to make independent decisions about rights and obligations'.[45]

In a further portfolio committee meeting on 19th April 2022, Advocate Geoff Budlender SC elaborated on these points, saying:[46]

> There are two ways in which the amount [of compensation] can be fixed. It can be fixed either by agreement by those affected, or it can be decided or approved by a

[42] *Haffejee NO and others* v *eThekwini Municipality and others*, [2011] ZACC 28, paras 39, 40, 43(b) and (c), emphasis supplied by the IRR
[43] https://pmg.org.za/committee-meeting/34699/
[44] Ibid
[45] Ibid
[46] https://pmg.org.za/committee-meeting/34721/

court. There is no provision anywhere in the Constitution, which says it can be decided by the expropriating authority. The Constitution does not permit that...

A court may set the amount and timing and manner of payment by deciding it or by approving. 'Approving it' implies that the court had been given a proposal, which the court found compatible with justice and equity. The court would then say that it approves it. The offer would usually have been made by the expropriating authority. When it says approved by a court, it meant a proposal had been made or a provisional decision had been made by somebody else, and the court had to approve it.

'Decision' meant something other than 'approval'. 'Decision' meant that the court itself decided the amount of compensation, based on the evidence before it. That was the way it usually happened. The parties would appear before the court, they would all state their views as to what the expropriation would be and then the court decided on it.

Courts exist for the resolution of disputes. Decision or approval by a court is unnecessary if those affected agree with the expropriator on the amount of compensation, its timing and manner of payment…

If the administrative expropriating authority could decide the amount of compensation and time and manner of payment, excluding a court, then there would be nothing left for the courts to do. That would be inconsistent with the Constitution. Section 172 of the Constitution stated that the judicial authority of the Republic is vested in the courts. Judicial authority was about making decisions about, amongst other things, disputes about rights. It was only the courts which could decide disputes about rights. Section 34 provided that disputes that could be decided by the application of law were to be decided by the courts or by any other independent tribunals.

For all of these reasons, the legal advisors did not think that section 25(2)(b) of the Constitution meant that anyone other than a court could decide the amount of compensation and the timing and manner of its payment if those affected did not agree on those matters. He had not seen any academic writing which suggested that the expropriating authority could decide the amount of compensation. All the commentaries that he had seen agreed that this was for the courts. That was in accordance with what the Constitution required.

This legal advice underpins the decision made by the portfolio committee to amend the B version of the Bill by inserting a new sub-clause 8(3)(g). This states, in wording unchanged in the current D version, that (except in instances of urgent temporary expropriation or where the parties have reached agreement), a notice of expropriation 'must contain…the amount of compensation agreed upon or approved or decided by a court under section 19'. Moreover, as *Haffejee* has confirmed, this court decision must be made before expropriation occurs in all but the most exceptional circumstances. This in turn means the court's decision must precede the 'date of expropriation' contained in a notice of expropriation served on the owner – for it is on that date that ownership will automatically pass to the expropriating authority and expropriation will occur.

However, the wording of sub-clause 8(3)(g) has not provided the clarity necessary for constitutional compliance. The problem is that the necessary court order approving or deciding the amount of compensation is to be obtained under clause 19. And sub-clause 19(2) gives either the expropriating authority or a disputing party – if they have not 'settled the dispute by consensus or mediation' under sub-clause 19(1) – the right, 'within 180 days of *the date of the notice of expropriation*, [to] institute proceedings in a competent court to decide or approve the amount, time and manner of payment of just and equitable compensation'.[47]

These provisions are prima facie contradictory. Sub-clause 8(3) states that the notice of expropriation 'must contain' both the date of expropriation and the amount of compensation that has either been agreed or 'approved or decided by a court under section 19'. Yet the right to approach a court under section 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'. Moreover, 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.

The wording used is thus fatally flawed. Unless there is agreement between the parties, sub-clause 8(3)(g) requires a prior court order on the amount of compensation, as Advocates Budlender and Naidoo have repeatedly advised. But no court order can be sought and obtained 'under section 19' until after 'the date of the notice of expropriation'. And no valid notice of expropriation can be issued until the amount of compensation has been approved or decided by a court and a subsequent date of expropriation can then be set and included in the notice.

This fatally flawed wording prevents compliance with Section 25(2)(b) of the Constitution and makes the Bill unconstitutional. The current wording of sub-clause 8(3)(g) is also insufficient, for it requires a prior court order solely on the amount of compensation and not also on 'the time and manner' of its payment. This too is inconsistent with Section 25(2)(b). It is also at odds with the revised D wording of the Bill. This recognises the need for 'the time and manner' of payment, as well as its amount, as agreed or approved/decided by a court, to be reflected in a notice of intention to expropriate under sub-clause 6(a); included in an attempt at mediation under sub-clause 19(1); and included also in what must be approved/decided by a court under sub-clause 19(2).

Moreover, to ensure compliance with the Constitution, it is 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

[47] Sub-clause 19(2), emphasis supplied by the IRR

people from their homes as a result of an expropriation has been authorised under section 26(3) of the Constitution (as further outlined in section 3.3.1 of this *Petition*).

3.2 The vague meaning of many provisions

The Constitutional Court has previously struck down legislation which contravenes 'the doctrine against vagueness of laws'. Under this doctrine, as the court has pointed out, 'laws must be written in a clear and accessible manner'. Legislation is *not* sufficiently clear if different administrative officials could give the same provision different meanings, all of which would be plausible.[48]

Many provisions in the Bill are in conflict with this doctrine, including those dealing with the effect of late payment on the transfer of the right to possession, and the circumstances in which nil compensation may be paid for land expropriated for land reform purposes.

3.2.1 Vague rules regarding late payment and the passing of the right to possession

Under the current D version of sub-clause 15(1) of the Bill, the expropriated owner is entitled to 'payment of compensation on the date and in the manner as agreed to by the parties or as decided or approved by a court in terms of section 19'. This wording is itself prima facie unconstitutional, as it makes no reference to the 'amount' of compensation. It is also inconsistent with many other clauses in the Bill, as identified above.

Sub-clause 15(3) of the Bill goes on to state that 'any delay in payment of compensation' to the expropriated owner 'by virtue of any other dispute arising after the expropriating authority has decided to expropriate will not prevent the passing of the right to possession to the expropriating authority unless a court orders otherwise'.

However, the present wording of sub-clause 15(3) overlooks the recent changes made to sub-clause 15(1). What is to happen if a court has ordered the payment of compensation ten days before the date on which the right to possession is to pass to the expropriating authority – and the authority fails to pay at that time? The expropriating authority is then in contempt of the court's order and should be punished accordingly. But will the right to possession still pass to the authority under sub-clause 15(3)? It seems not, for the sub-clause allows the passing of the right to possession, notwithstanding late payment, in only one relevant instance: where payment to the expropriated owner is late because of a dispute that has arisen regarding the expropriation.

A failure to pay as ordered by a court does not constitute a dispute, though it amounts to contempt of court on the part of the expropriating authority. Hence, the condition in sub-clause 15(3) is not met and the right to possession does not pass.

What if the date of payment had been agreed by the parties, under sub-section 15(1), rather than decided or approved by a court? In this instance, late payment contrary to the agreement reached would indeed generate a dispute. But is the late payment 'by virtue' of this dispute? Or does the dispute arise because the payment is late? The second option is the more likely

[48] *Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108

one. In this instance, then, the right to possession will also not pass to the expropriating authority, as the conditions set out in sub-clause 15(3) have not been met.

However, that the wording of sub-clause 15(3) does not take account of the revised wording of sub-clause 15(1) creates confusion and the likelihood of differing interpretations by different officials at different times. So too does the difficulty of determining when late payment is 'by virtue' of a dispute, in which case the late payment will not prevent the passing of the right to possession. The resulting uncertainty contradicts the doctrine against vagueness of laws and undermines the 'supremacy of the rule of law', as guaranteed by Section 1(c) of the Constitution.

3.2.2 Uncertainty as to the circumstances in which 'nil' compensation may be paid

According to sub-clause 12(3) of the Bill, 'it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest having regard to all relevant circumstances'. Such circumstances 'include, but [are] not limited to':

a) where the land is 'not being used' and the owner's 'main purpose is not to develop the land or use it to generate an income but to benefit from appreciation of its market value';[49]
b) where land is owned by an organ of state which is not using it for its core functions, is unlikely to use it for its future activities, and acquired it 'for no consideration';[50]
c) where 'an owner has abandoned the land by failing to exercise control over it, despite being reasonably capable of doing so', even though it is still registered in his name under the Deeds Registries Act;[51] and
d) where 'the market value of the land is equivalent to or less than the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land'.[52]

In addition, under sub-clause 12(4) of the Bill, where 'a court or arbitrator determines the amount of compensation under Section 23 of the Land Reform (Labour Tenants) Act, 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances'.[53]

3.2.3 An open-ended list

Since the list of four relevant circumstances in sub-clause 12(3) is expressly not a closed one, it follows that 'nil' compensation may be payable in many other instances too. This open-ended wording will allow a host of expropriating authorities to expand the scope for 'nil' compensation far beyond the circumstances listed in the Bill – and in ways that are unlikely to be uniform.

[49] Clause 12(3)(a), Bill
[50] Clause 12(3)(b), Bill
[51] Clause 12(3)(c), Bill
[52] Clause 12(3)(d), Bill
[53] Clause 12(4), Bill

This invitation to contradictory and unequal bureaucratic decision-making on 'nil' compensation contradicts the guarantee of equality before the law in Section 9 of the Constitution. It is also inconsistent with 'the doctrine against vagueness of laws' and in conflict with the rule of law.

3.2.4 The vagueness of the criteria laid down

The wording used in sub-clauses 12(3) and 12(4) is often also impermissibly vague. Take, for example, sub-clause 12(3)(a), with its reference to whether a landowner's 'main' purpose is to 'develop the land' or 'benefit from appreciation of its market value'. What if the owner hopes to develop the land for housing purposes once rising land prices confirm the demand for accommodation in the area, provided he can then obtain approval for the project and afford the necessary expenditure, which will depend on interest rates and building costs, among other things. Is his 'main' purpose then to develop the land in the future and to keep holding it until such time as this process becomes feasible? Does this 'main' purpose change if he also knows he might sell it when land prices rise if this seems the most sensible option at the time? The wording used in the sub-sections sets no clear parameters and is open to many different interpretations.

Take also sub-clause 12(3)(c), with its reference to land which has been 'abandoned' by an owner who is 'failing to exercise control over it, despite being reasonably capable of doing so'. If the owner of an inner-city building has stopped trying to obtain a court order for the eviction of illegal occupiers because he can no longer afford the costs of litigation, has he 'abandoned' the building within the meaning of this clause, despite his plans to recover it as soon as possible? What if he stands ready to act but needs the help of the over-burdened police, who fail in practice to intervene? Different officials in different expropriating authorities are sure to interpret this criterion in different ways at different times. The sub-clause is thus too vague to comply with the rule of law and the Constitution.

Take also sub-clause 12(4), which says that nil compensation for labour tenant claims may be just and equitable 'having regard to all relevant circumstances'. This provides no guiding parameters at all. The unfettered discretion thus given to officials is inconsistent with the rule of law and the Constitution.

3.2.5 Uncertainty as to whether 'land' includes the 'improvements thereon'

Under sub-clause 12(3), 'it may be just and equitable for nil compensation to be paid where *land* is expropriated *in the public interest*'.[54] This wording indicates that nil compensation will apply solely to expropriated land and not to any improvements thereon, which could range from houses to factories, office blocks, and shopping centres.

Yet, according to Advocate Naidoo, 'there is a presumption that Parliament knows what the common law is when it enacts legislation. "Land" at common law includes all the

[54] Sub-clause 12(3), Bill, emphasis supplied by the IRR

appurtenances which accede to the land…Everything attached to the land becomes part of the land. That would include physical structures, like a house or a barn or a pool'.[55]

However, it cannot be 'just and equitable', as the Constitution requires, for nil compensation to be paid for improvements. Unlike land, homes and other buildings are not natural resources, in which there is a public interest in more equitable access. Rather, they are the products of human creativity, labour, and financial resources. And even where people may have been dispossessed of land under racial laws from July 1913 onwards, they cannot also have been dispossessed of improvements made or enhanced thereafter.

Relevant too is the fact that the draft 18th Constitutional Amendment Bill of 2021 (the 2021 bill) expressly sought to amend the Constitution to permit nil compensation for both land and 'any improvements thereon'. However, the 2021 Bill failed to secure the necessary special majority and the proposed constitutional amendment was not made. Yet no equivalent reference to land and 'any improvements thereon' was included in the Bill, even after the failure of the constitutional amendment became apparent. That the phrase was included in the 2021 bill but excluded from the current Expropriation Bill – both of which deal with land expropriation without compensation – further confirms, under the *expressio unius est exclusio alterius* principle of statutory interpretation, that Parliament did not intend that improvements, as well as land, should be subject to nil compensation. That, of course, is also what the unamended wording of the Constitution requires.

It follows that nil compensation under sub-clause 12(3) does not extend to improvements – the value of which can always be separately computed and for which just and equitable compensation must thus be paid. Yet the presumption to which Advocate Naidoo refers – that Parliament intends land to have its common law meaning and so include all the appurtenances that accede to it – has not expressly been excluded. The wording of the Bill is thus calculated to cause great uncertainty and is likely to be interpreted in different ways at different times by different officials. The current wording is thus contrary to the doctrine against vagueness of law and is unconstitutional.

3.3 Other unconstitutional provisions

3.3.1 Prior court orders must deal with all constitutional requirements

The Bill is intended to cure the unconstitutionality of the present Expropriation Act, which was adopted in 1975 when the country lacked a Bill of Rights and the principle of parliamentary sovereignty applied. However, the Bill ignores almost all the relevant safeguards introduced by the 1996 Constitution and authorises expropriation via essentially the same procedures as under the 1975 Act. This makes it just as unconstitutional as the current Act.

When the 1975 Act was adopted, there was no legal principle that prevented the government from empowering the minister of public works to expropriate property via the following procedures:

[55] https://pmg.org.za/committee-meeting/34699/

a) by completing certain preliminary steps, and then
b) serving a notice of expropriation on the owner, under which both the ownership of the property and the right to possess it would automatically vest in the minister on the dates specified in the notice.

However, since the Constitution took effect in 1997, South Africa has had the benefit of an entrenched Bill of Rights. This lays down binding criteria for a valid expropriation, guarantees that administrative action will be reasonable and procedurally fair, gives everyone a right of access to the courts, requires judicial authorisation before people can be evicted from their homes, reinforces the principle of equality before the law, and guarantees the supremacy of the rule of law.

The Bill bypasses all these constitutional guarantees by giving all expropriating authorities the power to expropriate by following the same procedures as under the 1975 Act, ie:

a) by completing certain preliminary steps, and then
b) serving a notice of expropriation on the owner, under which both ownership and the right to possess the property will automatically vest in the expropriating authority on the specified dates.

The Bill's list of preliminary steps is longer than that in the Act, and often reflects the impact of the Bill of Rights. However, these increased safeguards matter little because few equivalent protections apply at the point of expropriation. Yet this is when safeguards matter most – and when the requirements in the Bill of Rights must undoubtedly be met if an expropriation is to comply with the Constitution.

At no point in the preliminary processes set out in the Bill is the expropriating authority called upon to demonstrate to the owner – let alone the courts – that the proposed expropriation is constitutional. Yet an expropriation cannot pass constitutional muster if:

- it is not in fact for public purposes or in the public interest;[56]
- the compensation offered does not 'reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances';[57]
- the property to be expropriated includes a person's home and a court order authorising his or her eviction has not been obtained;[58] or
- other relevant constitutional requirements, ranging from the rights to equality, human dignity, administrative justice, and access to the courts have not been met.[59]

To ensure compliance with these provisions in the Bill of Rights, the expropriating authority must seek and obtain a court order confirming that a proposed and disputed expropriation meets all these constitutional requirements *before* it serves a notice of expropriation or seeks

[56] Section 25(2)(a), Constitution of the Republic of South Africa, 1996
[57] Section 25(3), Constitution
[58] Section 26(3), Constitution
[59] See sections 9, 11, 33 and 34, Constitution, among others

to take ownership and possession of the property in issue. Though sub-clause 8(3)(g) of the Bill now requires that the notice of expropriation 'must contain…the amount of compensation agreed upon or approved or decided by a court under section 19', there are many problems with this wording, as earlier outlined. In addition, sub-section 25(2)(b) of the Constitution is not the only relevant constitutional provision. Allowing the state to expropriate before it has obtained a court order confirming compliance with *all* constitutional requirements, as the Bill seeks to do, makes a mockery of many guaranteed constitutional rights. This defect must thus be corrected to bring the Bill into line with the Constitution.

3.3.2 An unconstitutional limit on the right of access to court

In October 2023, in advising the NCOP committee on whether it would be fair for an owner seeking to contest the compensation offered or the validity of an expropriation to bear the process and other costs of litigation, Advocate Naidoo said that proceedings could be brought under the Bill in one of two ways:[60]

> One, the affected person could approach the court directly, in which case that person bears the onus to prove that the amount of compensation is not just and equitable and that a different amount would be equitable. They would also bear the duty to initiate the process.
>
> Concerns were raised on whether placing that kind of administrative procedural and financial burden on an individual was fair, and to address this, the Bill has a special mechanism under Clause 19 (3). This mechanism allows the affected person to ask the expropriating authority… to initiate court proceedings. In this instance, the expropriating authority would have to bear the legal costs and the practical burdens of engaging the court's procedural mechanisms.
>
> However, during the course of the proceedings, if the judge is of the view that the expropriating authority's offer is indeed just and equitable and that the bases on which the affected party disputed the amount offered were vexatious, then the court can make a cost order which is in its view appropriate.

However, what Advocate Naidoo describes as the just and constitutional approach is not included in the Bill. Sub-clause 19(3) does indeed allow the disputing party to request the expropriating authority to institute court proceedings on the amount of compensation and 'any other matter relating to the application' of the Bill. But this does not mean that the expropriating authority will then 'bear the legal costs and practical burdens' of litigation, as Advocate Naidoo recommends. Instead, sub-clause 19(5) states that 'The onus or burden of proof is not affected by whether it is the expropriating authority or the disputing party which institutes the proceedings referred to in this section'.

In addition, though Advocate Naidoo suggests that a disputing party will suffer an adverse costs order solely for bringing a 'vexatious' claim, again the Bill does not include such a

[60] https://pmg.org.za/committee-meeting/37797/

provision. Instead, it merely says in sub-clause 19(9), that 'a court may make any order as to costs that it considers just and equitable' in such proceedings. This provision simply restates the general principle regarding the award of costs. Hence, it may not assist the disputing party who is not vexatious but cannot adequately substantiate his claim that the expropriating authority has erred in putting a monetary value on, say, 'the purpose of the expropriation' in computing the compensation payable.

In other words, provisions that Advocate Naidoo saw as important in protecting a disputing party against an adverse costs order have not been included in the Bill. So long as the Bill remains skewed against the disputing party in these ways, it will deter many people from seeking redress in the courts. Yet this is contrary to the guaranteed right of access to the courts in Section 34 of the Constitution. This limitation on a guaranteed right is also not justifiable under sub-section 36(1) of the Constitution, as it could easily have been avoided by inserting the wording recommended by Advocate Naidoo into the Bill.

3.3.3 An unconstitutional exclusion of compensation for 'actual financial loss'

Under the current Expropriation Act of 1975, the expropriated owner is entitled to compensation based on the market value of the property 'and an amount to make good any actual financial loss caused by the expropriation'.[61] Under the Bill, by contrast, there is no equivalent reference to compensation for 'any actual financial loss' resulting from expropriation. This difference in wording between the Act and the Bill indicates, under the *expressio unius est exclusio alterius* principle, that compensation for actual financial losses is excluded from the measure of the compensation payable under the Bill.

Yet sub-section 25(3) of the Constitution requires compensation to be just and equitable 'having regard to all circumstances, *including*' those it expressly lists.[62] In addition, the exclusion of compensation for such losses will often result in an amount which is not 'just and equitable' and fails to 'reflect an equitable balance between the public interest and the interests of those affected', as required by sub-section 25(3) of the Constitution.

The Bill's exclusion of compensation for 'actual financial loss' will commonly result in unjust and inequitable compensation for many holders of unregistered rights. Such unregistered rights include the rights of tenants to occupy residential and business premises under lease agreements and the rights of farm workers and other farm residents to live on farms belonging to others.

Under the Bill, all unregistered rights are 'simultaneously expropriated' on the date that ownership passes to the expropriating authority.[63] Under sub-clause 12(1) of the Bill, an unregistered rights holder such as a tenant is entitled to 'just and equitable' compensation based on market value, plus four other listed factors. Two of these factors are generally irrelevant to tenants: these being the 'history of the acquisition of the property' and the capital

[61] Sub-section 12(1)(a), Expropriation Act of 1975
[62] Sub-section 25(3), Constitution, emphasis supplied by the IRR
[63] Clause 9(1)(b), Bill

subsidies the state has previously provided for its purchase or improvement.[64] In addition, it will be difficult to assign a monetary value to any of the three remaining factors: not only 'the current use of the property' and 'the purpose of the expropriation' but also the 'market value' of the property expropriated. In this instance, the property expropriated is the tenant's unregistered right to occupy the property for the remaining period of the lease, which has no easily discernible 'market value'.

These complexities explain why the 1975 Act entitles the expropriated holder of a 'right to use property', such as a tenant, to 'an amount to make good any actual financial loss caused by the expropriation or the taking of the right'.[65] This is the only satisfactory way to compensate the expropriated tenant, who is likely to suffer significant financial losses as a result of the expropriation. Among other things, she will have to lease alternative premises, perhaps at a higher rental, and pay the costs of moving there. Moreover, if she used her former leased premises in whole or part for business purposes, she will not be able to earn her normal income until she can find new premises and start up afresh. In addition, if her new premises are not as convenient to her customers, she may lose much of her existing clientele.

Under the Bill, however, no compensation will be available to tenants for major financial losses of this kind because they do not fit the formula in sub-clause 12(1) of the Bill. This is neither just nor equitable. Nor does it 'reflect an equitable balance between the public interest and the interests of those affected'. The Bill's exclusion of compensation for actual financial losses thus breaches Section 25 of the Constitution which, as earlier noted, requires compensation to be just and equitable 'having regard to all relevant circumstances, *including*' the five it expressly lists.

The same considerations apply to farm workers or other farm residents, all of whose unregistered rights of residence on a farm will 'simultaneously' be expropriated when ownership of that farm passes to the expropriating authority.[66] Though these farm residents will have rights to compensation under sub-clause 12(1) of the Bill, in practice the formula provided by the Bill will again yield small and inadequate amounts.

The market value of an unregistered right to reside on a farm is again difficult to quantify. However, it is likely to be limited and may be reduced by the other four listed factors, including the 'purpose of the expropriation'. Yet farm residents who lose their unregistered rights to reside on an expropriated farm will face major financial losses. They will have to find new homes and perhaps new means of livelihood. They will have to pay moving costs. They could suffer other losses, such as the value of livestock they can no longer keep. Farm residents should thus also be entitled to an amount to make good all actual financial losses resulting from the farm's expropriation. But sub-clause 12(1), with its deliberate omission of the equivalent measure of compensation found in the 1975 Act, excludes such compensation and is thus unconstitutional.

[64] Clause 12(1), Bill
[65] Sub-section12(1)(b), Expropriation Act of 1975
[66] Clause 9(1)(b), Bill

Take also the example of property which is subject to a mortgage bond. If such property is expropriated under the Bill, the mortgage will automatically end on the date of expropriation, when ownership passes to the expropriating authority.[67] The compensation payable must then be apportioned between the expropriated owner and the creditor bank, either as agreed by them or as decided by a court.[68]

Many of these provisions in the Bill echo the current Expropriation Act, which also provides for the automatic termination of any mortgage bond when ownership of the property passes to the state. Under the 1975 Act, however, there is little danger that the amount of compensation due – market value, plus an amount to make good all actual financial loss resulting from the expropriation – will be less than the amount owing to the bank. The situation under the Bill is different. Since compensation will generally be less than market value and will sometimes be 'nil' under sub-clause 12(3), the amount payable could well be far less than the outstanding loan. The expropriated owner, even though he or she no longer owns the property, will nevertheless still be liable to pay off the outstanding mortgage loan. This will impose an extraordinarily heavy burden on the expropriated owner, who could well be pushed into bankruptcy by the obligation to repay this loan, coupled with the likely need to purchase or lease a replacement house, farm, shop, factory, or other asset.

If compensation is to be 'just and equitable' – and to 'reflect an equitable balance between the public interest and the interests of the affected owner', as required by sub-section 25(3) of the Constitution – it must thus include an amount 'to make good the actual financial loss' the owner will suffer in paying off this loan. The Bill's exclusion of this measure of compensation is unjust, inequitable, and clearly unconstitutional.

3.3.4 Unconstitutional and conflicting definitions of 'expropriation'

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 and other requirements for a valid expropriation whenever it:

- takes custodianship, rather than ownership, of land; and/or
- introduces regulations giving rise to indirect or 'constructive' expropriations, where the owner is left with formal but 'empty' title and loses many or most of the overall 'bundle of rights' making up the ownership right.[69]

In seeking to allow such uncompensated takings, this definition is clearly contrary to Section 25 of the Constitution and the careful balance it is intended to strike between upholding existing property rights and allowing redress for past injustice. It is also inconsistent with the usual meaning of expropriation under international law, the content of which is supposed to be taken fully into account in interpreting the Bill of Rights.[70]

---

[67] Clause 9(1) (d), Bill
[68] Clause 16, Bill
[69] https://pmg.org.za/committee-meeting/34721/
[70] Section 39(1), Constitution; *Business Day* 6 February 2019

The Bill's definition of expropriation has its origins in Chief Justice Mogoeng Mogoeng's majority ruling in the *Agri SA* case in 2013.[71] However, that judgment is inconsistent with international law, and was handed down without regard to this important body of law. In addition, as Chief Justice Mogoeng took pains to stress, his majority judgment was confined to the particular facts of the case before the court and was not intended to lay down a general rule.[72] It also inferred that 'the assumption of custodianship' was what was in issue, as opposed to the 'compulsory acquisition' of ownership by the state. Yet the *Agri SA* case concerned an old-order mining right, not the mineral resources which had been vested in state custodianship under the Mineral and Petroleum Development Act (MPRDA) of 2002. The *Agri SA* judgment thus cannot suffice to give constitutional validity to a restricted definition of expropriation which contradicts the established international law meaning of the term.

In addition, the D version of the Bill has effectively introduced another definition of expropriation, different from that articulated by the Constitutional Court in the *Agri SA* case. In March 2022 Advocate Naidoo recommended that the definition of expropriation be changed to 'the compulsory acquisition of property by an expropriating authority or a third-party beneficiary for a public purpose or in the public interest'. Third-party beneficiaries might include successful land restitution claimants or organs of state lacking expropriation powers. The amended definition would 'facilitate direct transfers to be made to those third-party beneficiaries, without the state having to become the owner itself and then transfer the land to the third-party beneficiary'. This changed definition was also necessary to protect owners whose property was taken via 'third-party transfers in the public interest' – who would not qualify for just and equitable compensation under the existing definition.[73]

In April 2022 Advocate Budlender SC made similar points. In the land reform context, for example, the minister might think it sensible that, where 'a property was going to be expropriated for the benefit of a third party,…it should pass directly from the existing owner to the third party'. Similar situations might arise with water rights so that, when expropriation took place, it [the water right] went directly from the existing owner to the new owner: for example, the land reform beneficiary'. However, the Constitutional Court (in the *Agri SA* case) had defined 'expropriation' as meaning 'the compulsory acquisition of property by the state'. Hence, 'the Constitutional Court's definition of expropriation did not include cases where the property went directly to the third party'.[74]

According to Advocate Budlender SC, 'This was clearly a problem… because transfers of that kind, where transfers went from an owner to a third party, were no less expropriatory than where the acquisition of property was by the state itself, for a public purpose or in the public interest. People who had been deprived of property by state action should receive the constitutional guarantee of just and equitable compensation, whether the property went to the state or whether the property went to a third party. Hence,…the definition of expropriation

[71] *Agri South Africa* v *Minister of Minerals and Energy*, CCT/51/12, 18 April 2013, at paras 59, 68. 71, 72
[72] Ibid, at paras 64, 72, 75
[73] https://pmg.org.za/committee-meeting/34699/
[74] https://pmg.org.za/committee-meeting/34721/

should be amended to provide that expropriation means "the compulsory acquisition of property by an expropriating authority or a third-party beneficiary, for a public purpose or in the public interest"'.[75]

At the same time, Advocate Budlender SC went on, 'the Office of the Chief State Law Adviser and the Parliamentary Legal Adviser…were concerned that, if the Constitutional Court had defined the word "expropriation" [as] limited to a particular category of cases, then it would be very confusing if [the Bill] gave another interpretation'.[76]

To accommodate these concerns, Advocate Budlender SC proposed 'the insertion of a new sub-clause in the Application clause, clause 2'. This new clause would read, 'The provisions of this Act apply to the compulsory acquisition of property directly or indirectly by third party beneficiaries in the public interest through an expropriating authority, including as contemplated in sections 25(4) to (8) of the Constitution.'[77]

This proposal, he added, was 'a means of making sure that the Bill covered all compulsory taking, whether the property went directly to the state or whether it went directly to the third-party beneficiary'. It was 'essential' that the Bill cover 'two sorts of things'. The first was 'an expropriation of the kind which was mentioned by the Constitutional Court, [which] was when the state acquired itself'. The second was where 'there was…a compulsory acquisition by a third party'.[78]

This new clause was duly inserted into the D version of the Bill as sub-clause 2(3). Its effect, as Advocate Budlender SC had urged, is to authorise two types of expropriation: that which transfers ownership to the state and that which transfers ownership directly to third parties. In practice, the definition of expropriation has thus been expanded. This has been done by means of an obvious stratagem and in a manner inconsistent with the *Agri SA* judgment.

The ramifications of the change are extensive, but difficult to evaluate. Some of the examples provided of third-party beneficiaries of land and water reform may seem straightforward enough, but the Bill is (worryingly) silent as to the scope of the transfers envisaged. Advocate Budlender SC also provided a disturbing example in suggesting that his proposed amendments might help 'Parliament to pass a law that created a state monopoly in a particular industry'.[79]

If expropriation of this magnitude is be facilitated via the new sub-clause 2(3), then proper public consultation is necessary. Yet sub-clause 2(3) was added by the NCOP only after the public consultation process had ended and without giving the public the opportunity to 'know about the issues' which it raises or to 'have their say' on this important matter.

This is a major procedural defect which cannot simply be ignored. This is evident, among other things, from the Constitutional Court's 2023 judgment in *South African Iron and Steel Institute and others* v *Speaker of the National Assembly and others*.[80] Here, the apex court

[75] https://pmg.org.za/committee-meeting/34721/
[76] https://pmg.org.za/committee-meeting/34721/
[77] https://pmg.org.za/committee-meeting/34721/
[78] https://pmg.org.za/committee-meeting/34721/
[79] https://pmg.org.za/committee-meeting/34721/
[80] *South African Iron and Steel Institute and others* v *Speaker of the National Assembly and others* [2023] ZACC 18, at paras

struck down new definitions of 'waste' and other concepts introduced into amendment legislation at a late stage and without public consultation on the wide-ranging ramifications of the change.[81]

The wording of 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. Giving an untrammelled discretion of this kind to all expropriating authorities is contrary to 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. Yet this is inconsistent with the doctrine against vagueness of laws and is also unconstitutional.

4 Conclusion

Many written submissions have warned that the Bill is unconstitutional on both substantive and procedural grounds. Despite (and sometimes because of) the changes made by the National Assembly and the National Council of Provinces, the Bill nevertheless remains inconsistent with Section 25 of the Constitution as well as other guaranteed rights. At the same time, the public consultation process provided by Parliament has fallen far short of what the Constitution requires.

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, both houses of Parliament breached their 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.[82]

The IRR thus respectfully petitions the President to use his 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.

The IRR has proposed 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 into line with international law and the Bill of Rights;
b) remove sub-clause 2(3) with its expanded and unconstitutional definition of expropriation;

[81] *South African Iron and Steel Institute and others* v *Speaker of the National Assembly and others* [2023] ZACC 18, at paras 45-50, especially at para 46
[82] Sections 1(c), 83(b), 79(1), 1996 Constitution

c) require an expropriating authority (whenever 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 set out 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).

South African Institute of Race Relations NPC **5th April 2024**