



AfriForum's submission to the

Portfolio Committee on Public Works and Infrastructure on the Expropriation Bill of 2020 [B23-2020]

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Content

1. Introduction	3
2. The unlimited power of the Minister to expropriate any property.....	3
3. Expropriate now, argue later.....	7
4. The issue of expropriation without compensation	10
5. The plight of homeowners.....	12
6. Urgent expropriations.....	15
7. Conclusion.....	16

1. Introduction

- 1.1 We submit our submissions on the Expropriation Bill B 23-2020 (the Bill) with this document.
- 1.2 We submit that this Bill should not be adopted as an act of Parliament under the broad consideration that its adoption will have a devastating impact on all South Africans' lives in the contexts of homeownership, food security and economic devastation.
- 1.3 We will also demonstrate that various sections of the Bill are unconstitutional and could be successfully challenged in the courts if the Bill is not revised before its adoption.

2. The unlimited power of the Minister to expropriate any property

- 2.1 The Bill defines *property* as the definition contemplated in Section 25 of the Constitution. Notably, Section 25 does not exactly define property, except to note that government's expropriation powers are not limited to the expropriation of land.¹ It stands to reason that the Bill's purpose in defining property as such is to also include movable and intellectual property.
- 2.2 Various constructions in the Bill support this interpretation; for example, Section 5(1) of the Bill compels government to investigate the proposed expropriated property's suitability before issuing an expropriation notice. Section 5(2) then proceeds with a proviso that states that, "if the property is land", government must appoint a valuator. The inclusion of this proviso supports the interpretation that the Bill will give government the power to expropriate any form of property.²

¹ See Section 25(4)(b) of the Constitution.

² A similar construction is used in Section 7 of the Bill.

- 2.3 Section 3(1) gives the Minister of Public Works and Infrastructure (the Minister) the power to expropriate property for itself, or at the behest of another organ of state if this expropriation is “for a public purpose” or in “public interest”.
- 2.4 According to Section 1 of the Bill, *public interest* is defined as “the nation’s commitment to land reform, and to reforms to bring about equitable access to all South African’s natural resources to redress the results of past racial discriminatory laws or practices”.
- 2.5 *Public purpose* is defined as that it “includes any purposes connected with the administration of the provisions of any law by an organ of state”.
- 2.6 Section 3(3) of the Bill states that the property to be expropriated applies to property connected to “the provision and management of the accommodation, land and infrastructure needs of an organ of state, in terms of the Minister’s mandate”.
- 2.7 This is an ambiguity in the Bill. On the one hand, the definition of *public interest* includes government’s redistributive policies, and *public purpose* includes administering any law by an organ of the state. However, on the other hand, expropriation is limited to property falling within the Minister’s mandate. We accept that this implies procurement of land and buildings for state organs and maintaining these buildings.
- 2.8 The definitions are broad enough to encompass wholesale expropriation of any property, albeit immovable, movable or intellectual property. However, the Minister is limited to its mandate as provided in Section 3(3) of the Bill. Notably, the Bill does not define what the Minister’s mandate is, nor does it refer to any empowering provision where the scope of the Minister’s mandate is explained. For purposes of this commentary, we assume that government’s power to expropriate is the wide powers explained below.
- 2.9 Notably, Section 2(1) of the Bill prohibits any arbitrary expropriation or expropriation that is not in public interest or is not for a public purpose. This limitation has no value, as both definitions are broad enough to encompass any redistributive policy and the

administration of any law by any organ of the state. For example, the redistributive policies include the vesting of mineral rights in the state,³ the administration of the extensive social grants system,⁴ the proposed national health insurance scheme⁵ and land reform policies.⁶ This Bill will give government the power to expropriate any property in pursuance of administering these various laws, to name but a few.

- 2.10 At first glance it may seem an overstatement; however, government suggested in the past to seize pension funds to fund infrastructure development,⁷ and the ANC stated in their 2019 election manifesto that government would investigate and consider using so-called “prescribed assets on financial institutions” to fund social and economic development.⁸ At least, government has a concerning interest to access large pools of funds held in the private sector to fund its policies, which makes the broad definition of *public interest* in the Bill a cause for concern.
- 2.11 For example, consider the urgent expropriation powers granted in terms of Section 22 of the Bill. If we hypothesise that this Bill was an Act in the current national state of disaster (due to the COVID-19 pandemic),⁹ this section of the Bill would allow government to urgently expropriate any property in the case of a national state of disaster.¹⁰ Under the broad powers to expropriate under this Bill, government could unilaterally expropriate any personal protective equipment produced by manufacturers, vaccines and – under the broad definition of property – the patents for and intellectual property of these vaccines.
- 2.12 The culmination of the above considerations leads us to conclude that the broad power to expropriate, not only the form land redistribution policies but also

³ Section 3(1) of the Minerals and Petroleum Resources Development Act 28 of 2002.

⁴ Social Assistance Act 13 of 2004 as administered in terms of the South African Social Security Agency Act 9 of 2004 (SASSA).

⁵ National Health Insurance Bill B 11-2019.

⁶ Land Reform (Labour Tenants) Act 3 of 1996.

⁷ *BusinessTech*. 2019. Government’s plan to go after pension funds could financially ruin South Africans. 11 September. Available at <https://businesstech.co.za/news/finance/340085/governments-plan-to-go-after-pension-funds-could-financially-ruin-south-africans/>

⁸ African National Congress. 2019. *Let’s grow South Africa together*. 2019 election manifesto. Available at https://cisp.cachefly.net/assets/articles/attachments/77065_6140_anc_manifesto_booklet_a5_digital.pdf.

⁹ GG43096, number 313 dated 15 March 2020.

¹⁰ S22(2)(a) of the Bill. We will deal with s22 of the Bill at length later in these comments.

wholesale redistribution policies of government, this Bill poses a threat to property rights.

- 2.13 It is also submitted that giving the Minister such a broad scope of power to expropriate property renders Section 3(1) of the Bill unconstitutional. *Arbitrariness* has been interpreted before by our courts to mean that there is no rational connection between the purpose of the expropriation and the expropriation.¹¹ The broad powers under granted by the Bill do not clearly define what circumstance would qualify as “public interest” or “public purpose” to a minimal degree of certainty to apply a cohesive rationality test. As explained above, there are countless administrators of countless acts of Parliament by government departments and agencies. Such a low bar of scrutiny, we submit, will not pass the limitation requirements of Section 36 of the Constitution.
- 2.14 The currently overbroad description of the Minister’s powers does not allow us to scrutinise the limitation, the relation between the limitation and its purpose or to assess any restrictive means to achieve the purpose as set out in Section 36(1) of the Constitution.
- 2.15 An instructive passage on this point comes from the judgment of *Case and Another v Minister of Safety and Security*, which stated, in determining overbreadth that it considers “the virtually unlimited range of unconstitutional potential application of the Act [to overwhelm] whatever permissible proscription might be identified”.¹² We submit the Bill is subject to the same objection, the potential unconstitutional applications overwhelm the few, possible, justifiable instances.
- 2.16 With such a broad range of powers, citizens are left with a judicial review of an administrative act, namely the decision to expropriate property in terms of the

¹¹ See:

- *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002);
- *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) and *Bisst v Buffalo City Municipality* 2005 (1) SA 530.

¹² *Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at par. 77.

Promotion of Administrative Justice Act 3 of 2000, which does not offer citizens sufficient protection, as argued in the following section.

3. Expropriate now, argue later

- 3.1 The Bill sets out the rights of the “expropriated owner” to dispute the various steps taken in the expropriation process; Section 21(8) of the Bill provides that if any dispute is pending concerning the determination of just and equitable compensation which must be paid in terms of Section 12, the lodging of the dispute does not preclude the operation of Section 9.
- 3.2 Section 9 provides for the transfer of ownership from the expropriated owner to the expropriating authority. The effective date of this expropriation is the date that the expropriating authority unilaterally determines.¹³
- 3.3 Although the Bill allows the aggrieved owner to participate in the process, at no step during the expropriation process does lodging a dispute, reviewing the process under the Promotion of Administrative Justice Act 3 of 2000 or disputing the compensation amount (including the decision to pay nil compensation) halt government to unilaterally and effectively expropriate any property, without substantive judicial oversight. Akin to Section 164 of the Tax Administration Act 28 of 2011, which provides that a tax obligation remains due to the South African Revenue Service pending any objection or appeal (colloquially referred to as “pay now, argue later”), the Bill creates a similar mechanism through which property can still be expropriated effectively, despite a pending review or judgment.
- 3.4 This aspect of the Bill is manifestly unjust. *Expropriate now, argue later* is a complete consolidation of government power to confiscate property without judicial oversight.

¹³ Section 8(3)(e) of the Bill.

- 3.5 We also submit that Section 21(8) of the Bill is unconstitutional, as it is tantamount to an unconstitutional form of self-help by government to take property without judicial oversight.
- 3.6 From the outset, it is unconstitutional when considering the wording of Section 25(2)(b) of the Constitution: “... subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.” A cursory reading of this section logically implies that the determination of compensation, either agreed to or ordered by the court, is the precondition for expropriation. On this basic construction of Section 25(2)(b) of the Constitution, Section 21(8) of the Bill stand to be declared unconstitutional.
- 3.7 Section 21(8) of the Bill is also unconstitutional if one considers the judicial sentiment that reigns in our courts. In the case of *University of Stellenbosch Legal Aid Clinic v Minister of Justice*,¹⁴ the Constitutional Court declared Sections 65J(2)(a) and (b)(i) of the Magistrates Court Act 32 of 1944 – which allows for the issuing of emoluments attachment orders without judicial oversight – unconstitutional. The majority judgment, penned by Cameron J, held (in the context of executing judgment in attachment) as follows:¹⁵

It has been established in the jurisprudence of this court that execution of court orders is part of the judicial process. It requires judicial oversight. Though previous cases dealt with debtors’ homes, the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription of self-help flowing from the s34 right of access to courts apply, with equal force to the execution process.

- 3.8 Even though the ratio of the judgment applies to citizens horizontally, Section 8 of the Constitution guarantees that any right in the Bill of Rights is enforceable against the state, and this includes a vertical application of the right of citizens to have a

¹⁴ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC).

¹⁵ *University of Stellenbosch*-case at par 129.

dispute in terms of the expropriation of their property to be decided in a court of law. The Constitutional Court has consistently applied this principle in judgments such as *Gundwana v Steko Development and Others*,¹⁶ *Chief Lesapo v North West Agricultural Bank and Another*,¹⁷ and *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others*.¹⁸

- 3.9 In the context of criminal procedures, Section 21 of the Criminal Procedure Act 51 of 1977 provides that someone's property may only be seized with judicial oversight in the form of a search warrant issued by either a magistrate or a judge. Of course, Section 22 of the same act – which only applies in limited circumstances – does not require oversight. Still, that limitation is justified in exceptional circumstances in terms of Section 36 of the Constitution and is the exception rather than the rule.
- 3.10 Preservation of property in terms Section 163 of the Tax Administration Act 28 of 2011, provides for SARS to attach property if it suspects that it would be disposed of to frustrate the collections of taxes, but only once authorised to do so by order of the High Court upon finalisation of an *ex parte* application.
- 3.11 Prohibiting the state and government of summarily expropriating its citizens' property, without lawful cause and the oversight of an independent judicial officer strikes the core of a republic governed by the rule of law.
- 3.12 Kriegler J held in the judgment in *Phoebus Apollo Aviation CC v Minister of Safety and Security*¹⁹ that the protection of property in the Constitution is “aimed at protecting private property rights against governmental action...” Any act which runs incongruent with this basic purpose of Section 25 of the Constitution cannot pass constitutional muster; it axiomatically runs against the purpose of this right.
- 3.13 In *Premier, Eastern Cape v Cekeshe*, Madlanga J held the following in respect of Section 25 of the Constitution:²⁰

¹⁶ *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).

¹⁷ *Chief Lesapo v North West Agricultural Bank and Another* 200 (1) SA 409 (CC).

¹⁸ *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC).

¹⁹ *Phoebus Apollo Aviation v Minister of Safety and Security* 2003 (2) SA 34 (CC) at par 4.

²⁰ *Premier, Eastern Cape and Others v Cekeshe and Others* 199 (3) SA 56 (Tk).

In my view, this section call for more careful consideration of all relevant factors before the relevant administrative functionary take a decision adversely affecting the property rights of an individual as a failure to do so may result, not only in a violation of the *audi alterem partem* rule but also in the violation of the right entrenched in s25.

3.14 On a preponderance of the relevant available authority and judicial sentiment related to the rights entrenched in Section 25 of the Constitution, it overwhelmingly supports the submission that the self-help provision in Section 21(8) of the Bill is not constitutionally sound.

4. The issue of expropriation without compensation

4.1 Section 12 of the Bill provides that compensation for expropriation must be just and equitable, balancing public interest and the expropriated owner's interest. Section 12(3) makes provisions for nil compensation to be paid, subject to certain considerations. We have two separate issues in respect of Section 12 of the Bill: First the existence of the possibility of nil compensation; and second, the limitation of what may be considered when making an offer for compensation.

4.2 **Is there a valid reason for a law that states that government can expropriate citizens' property without compensation?**

4.2.1 The answer is no. There are a myriad of reasons why there is no place for such a law in a society governed under the rule of law, human rights and dignity, equality and freedom.

4.2.2 Domestically, the wording of Section 25 of the Constitution does not allow for expropriation without compensation. It reads that "property may be expropriated only in terms of law of general application, for a public purpose or in the public interest; **and** subject to compensation" (own emphasis) which is agreed upon or decided by a court. It does not require extensive interpretive logic to conclude that the use of the word *and* in Section 25 requires the expropriation of property to comply with the qualification for public purpose or interest, and compensation payable.

4.2.3 No construction of Section 25 can ignore the meaning of the word *and*, which makes payment of compensation a peremptory requirement for expropriation to be constitutionally permissible.

4.2.4 The FNB-judgment²¹ confirmed that all three conditions precedent in Section 25(2) must be complied with collectively, together with the condition set out in Section 25(1), which prohibits government from acting arbitrarily.

4.2.5 Internationally, the preponderance of authority dictates that nil compensation is not a norm applied in the society of nations. What follows is a list of constitutional clauses considered:

4.2.5.1 The Fifth Amendment to the United States of America's Constitution states:²²

... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4.2.5.2 Article 14(3) of the Basic Law for the Federal Republic of Germany states:²³

Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation.

4.2.5.3 S8(1)(b) of the Constitution of Botswana states:²⁴

No property of any description shall be compulsorily taken possession of [...], except where the following conditions are satisfied – [...]

(b) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of adequate compensation.

4.2.5.4 Article 16 of the Namibian Constitution states:²⁵

²¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

²² Available at <https://constitution.congress.gov/constitution/amendment-5/>.

²³ Available at <https://fra.europa.eu/en/law-reference/basic-law-federal-republic-germany-13>.

²⁴ Available at <http://www.commonlii.org/bw/legis/const/1966/1.html>.

²⁵ Available at https://laws.parliament.na/cms_documents/namibian-constitution-e77d13246a.pdf.

The State or competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with the requirement and procedures determined by an act of Parliament.

4.3 Section 12(3) – What is considered when deciding nil compensation?

- 4.3.1 This section provides what considerations may be considered when the expropriating authority elects to offer no compensation.
- 4.3.2 The first matter is the use of the words *not limited to*. In a society governed by the rule of law as required by Section 1 of the Constitution, government cannot be granted a wide discretion on which factors must be considered when expropriating citizens' property and not paying any compensation. Legal certainty as an incidence of the rule of law requires that citizens are entitled to know what government may or may not consider when contemplating to expropriate property.
- 4.3.3 The second matter is that the Bill authorises limitations on citizens' property rights for which no provision is made for in Section 25(3) of the Constitution. For example, Section 12(3)(a) states that nil compensation may be paid if the person is holding the property to only benefit from the appreciation of the property's value. Section 25(3)(a) also states that the use must be considered when considering compensation. The Constitution requires that the use merely be considered in determining the compensation amount. It does not permit "use it or lose it" to become a lawful consideration for government to expropriate its citizens' property without any compensation.

5. The plight of homeowners

- 5.1 Section 18 of the Bill deals with property subject to mortgage as security for loans. Section 9(1)(d) provides that if government expropriates a property subject to a mortgage bond, it is to be expropriated free of the said mortgage bond.
- 5.2 Section 18 of the Bill states that the expropriated owner or the mortgage holder must inform the state of the mortgage bond within 30 days after the notice to

expropriate is given, failing which the compensation is paid to the Master. Section 18(3) states that if there is any dispute regarding a mortgage or deed of sale, the state may deposit the funds with the Master. The expropriated owner and the mortgage holder would then have to approach a court for an order as to who is entitled to the compensation.

- 5.3 This structure is not only arbitrary but is manifestly cruel.
- 5.4 The first matter is that government is absolved from any responsibility to conduct due diligence on the property in question and relies on the mortgagor to notify it of any encumbrances. The Deeds Office has a simple method of checking endorsements against title deeds, which government can readily access during the investigation process required in Chapter 3 of the Bill. Applying the 30 day grace period is unnecessary, but it can also be abused by government officials and leave citizens to litigate amongst each other to claim the compensation. The information is readily available to government.
- 5.6 The second issue is that this construction allows government to expropriate a person's home, deposit the compensation (if any) with the Master, leaving that person destitute and fighting with the mortgage holder by way of litigation to claim the compensation that this person must use to find alternative housing. Government can leave countless citizens destitute by employing this bully tactic, pitting citizens against one another to litigate about the compensation (if any) while their property is expropriated, regardless of any dispute pending in a court of law. The construction proposed in the Bill is unfair and mean spirited. It foresees the resistance from ordinary South Africans. It attempts to give government greater power to coerce citizens into submission.
- 5.7 This section of the Bill is also unconstitutional as it infringes on a citizen's right to housing under Section 26 of the Constitution if this section is applied to residential property. Our positive law is inundated with case law, where it was ruled that attaching or taking a person's residential immovable property should be the last resort and should be subject to judicial oversight. These cases are *Gundwana v Steko*

Development and Others,²⁶ *Chief Lesapo v North West Agricultural Bank and Another*,²⁷ and *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others*.²⁸

- 5.8 It is important to note that the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 states that the court considers an order of eviction. It must consider alternative housing available, the occupier's personal circumstances and so forth. The Bill, however, remains silent on these considerations and does not address the right to housing, which might be infringed upon by exercising these powers.
- 5.9 Last, the impact of this Bill on the commercial banking sector must be considered seriously. Mortgages are the dominant security vessel used by commercial banks to secure their lending. If those security rights are not protected, the banks will become more conservative in granting home loans, which will result in less access to adequate housing for ordinary citizens. It will also damage investor confidence in South Africa.
- 5.10 The Banking Association of South Africa (BASA) highlighted some serious concerns when it commented on the proposed amendment to Section 25 of the Constitution to allow for expropriation with no compensation. The direct cost of such a policy in the banking industry would amount to more than R1,6 billion in direct losses.²⁹ These indirect costs are not specified, but the risk of damaging investor confidence and the banks' balance sheets, as well as liquidity to fund large scale investments pose incalculable risks to the economy.³⁰ A serious concern is that a downturn in land-based properties' value initiated the 2008 economic crisis in the United States.³¹
- 5.11 BASA also warns that any downturn in agricultural activity would result in greater hardship for the 22,3% of South Africans who live with food insecurity, and 11,8% of

²⁶ *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).

²⁷ *Chief Lesapo v North West Agricultural Bank and Another* 200 (1) SA 409 (CC).

²⁸ *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC).

²⁹ Banking Association of South Africa. 30 January 2020. *Comments to the ad hoc committee on the amendment of Section 25 of the Constitution*, p. 14. Available at <https://www.banking.org.za/submissions/>.

³⁰ *Ibid.*, p. 15 onward.

³¹ *Ibid.*, p.3.

South Africans who live in hunger.³² Any increase in these percentages is unacceptable and must be avoided at all costs.

5.12 BASA also warned of the following consequences of expropriation without compensation:

5.12.1 On the assets held in the banking industry, there would be an absolute reduction in property held as collateral; property prices will fall, and the risk of the banks to lend money will increase, will require banks to retain more capital, and will trigger sovereign downgradings.³³

5.12.2 On the banking industry's liability side, there would be a reduction in foreign investment, which currently accounts for R368 billion of funding in the banking industry.³⁴

5.13 All of the above is evidence that this Bill will severely prejudice the South African homeowner by potentially collapsing the banking industry, not only affecting the current homeowners but the young citizens who buy property, pay off debts and use these assets to leverage their way out of poverty, provide education for their offspring and generally work for a better life.

6. Urgent expropriations

6.1 Section 22 of the Bill gives government the power to expropriate property on an urgent basis, which suspends the operation of the procedural requirements of Sections 5, 6 and 7 of the Bill. Section 22 shortens the process by allowing government to exercise the right to expropriate and offer compensation within 30 days of giving notice.

6.2 The first problem with Section 22 of the Bill is the proviso that if the expropriated owner disputes either the expropriation or the compensation tendered by

³² *Ibid.*, p. 12. These are the percentages submitted by BASA on 30 January 2020.

³³ *Ibid.*, p. 15.

³⁴ *Ibid.*, p. 15.

government, the dispute is resolved in terms of Section 21 of the Bill. We refer to this as the “expropriate now, argue later” aspect of the Bill which is, in our view, unconstitutional. We argue that the same argument can be used to declare Section 22(5) unconstitutional.

- 6.3 The second problem is the grounds of urgent expropriation contained in Section 22(2). Urgent expropriations are allowed when government declares a national state of disaster in terms of the Disaster Management Act 57 of 2002, or if the court grants such an order.
- 6.4 It is important to note the use of the word *or* in Section 22(2) in that only the second ground makes provision for judicial oversight. The logical inference is that Section 22(2)(a) – urgent expropriation in a national disaster – requires no judicial oversight. We repeat the same concerns as above regarding the lack of judicial oversight.
- 6.5 Section 22(2)(a) is also of concern, given that South Africa has been in a national state of disaster for over 300 days since it has been declared on 15 March 2020.³⁵ If this Bill were an act, government would have had unchecked expropriation powers for almost one calendar year, without seeking judicial oversight in the expropriation of citizens’ property and without complying with the procedures set out in Sections 5, 6 and 7 of the Bill. The experience of states of disaster in our recent past shows that these can be extended multiple times, and there is a great risk that these powers might be abused.

7. Conclusion

- 7.1 This Bill must not pass. Lawmakers currently have their fingers ready to press a red trigger that will ruin the economy, cruelly deprive citizens of their property without judicial oversight and destabilise the banking industry. The Bill will hurt every citizen of every race, culture and religion.
- 7.2 Our rights to further comment remain reserved.

³⁵ Notice 313 of GG Notice 43096 of 15 March 2020.