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RAADSTEUN
PLENARY SUPPORT
INKXASO YOKUHLALA KWENDLU

NEGOTIATING MANDATE

To: Hon K Mmoiemang, MP
Chairperson: Select Committee on Transport, Public Service and Administration, Public Works, and Infrastructure

Name of Bill: Expropriation Bill

Number of Bill: [B 23B–2020]

Date of deliberation: 14 November 2023

Vote of Legislature: The Standing Committee on Infrastructure, having considered the subject of the Expropriation Bill [B 23B–2020] (NCOP) referred to it in accordance with Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to not support the Bill with the following recommendations.

M. Maseko

Signature

14 November 2023

Date

Ms L M Maseko, MPP
Chairperson: Standing Committee on Infrastructure

Clause	Comment
The Definition of Court	The Definition of Court makes mention in subclause (c) to 'intangible property'. There are a number of considerations around intangible property that would require its own specific guidelines for expropriation. Therefore, we propose that either additional guidelines are brought into the Bill to deal with this or that the definition of property be amended to exclude intangible property.
The Definition of 'disputing party'	The Definition of 'disputing party' includes an owner, mortgage, holder of a right contemplated in clause 20, expropriated owner or expropriated holder who rejects the expropriating authority's offer of compensation. The Committee disagrees with the removal of counteroffer in final version of the Bill.
"Holder of a right"	"Holder of a right" means the holder of an unregistered right in property but excludes an unregistered owner." The Committee proposes that this definition should also include a registered right.
Compulsory acquisition of property	<p>Expropriation is defined as the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority, or an organ of state upon request to an expropriating authority, and 'expropriate' has a corresponding meaning.</p> <p>The Committee proposes that the definition should include the curtailment of rights, such as an inability to use a property for business purposes. Further, it remains unclear if this definition includes temporary expropriation.</p>
'Public Purpose'	<p>'Public Purpose' is defined as any purpose connected to the administration of any law by any organ of state, in terms of which the property concerned will be used for the benefit of the public."</p> <p>The Committee proposes that this definition be amended to provide more clarity.</p>
"Valuer"	"Valuer" means a person who is suitably qualified to value particular property and includes a person registered as a professional valuer or professional associated valuer in terms of section 19 of the Property Valuers Profession Act, 2000 (Act No. 47 of 2000).

	<p>The Committee proposes that this definition be amended to circumscribe “suitably qualified”.</p>
Clause 3(3)	<p>Clause 3(3) is redundant as it will be covered by 3(2).</p> <p>Furthermore, it is contrary to the purposes of the Bill as it does not directly relate to a public purpose or public interest. If such expropriation examples were to meet to the requirement of ‘public purpose’ or ‘public interest’ this subsection would be redundant.</p>
Clause 3(5) (a)	<p><i>3(5)(a) When the Minister expropriates property in terms of subsection (2) – (a) the ownership of the property vests in the relevant organ of state on the date of expropriation.</i></p> <p>The Committee proposes that this provision be amended to make provision for payment of compensation as a pre-requisite for vesting.</p>
Clause 5 (1)	<p>Clause 3(5)(a) should be amended.</p> <p>Land is an emotive issue, and subjective factors can come into play when determining its value. Particularly when an owner is being ‘forced’ to give up their land under an expropriation situation.</p> <p>Consideration to be paid to subjective elements, including financial and sentimental value, rather than a purely objective assessment.</p> <p>Other considerations including the costs of relocating and other costs associated with leaving the property. It is suggested a clause similar to what existed within the preceding Expropriation Act, “(ii) an amount to make good any actual financial loss by the expropriation;” should be included.</p> <p>This consideration can either be included in this clause, or alternatively in clause 12.</p>
Clause 5(5)	<p>It is recommended that longer timeframes be included throughout the Bill that are more realistic than the commonly referenced ‘20 day’ period. For a matter as important as expropriation of property, significant time should be given to all parties to ensure compliance with detailed requirements.</p>
Clause 5(7)	<p>If the property in question is damaged through an act contemplated in subsection (2), an affected person may deliver written demand to the expropriating authority and</p>

	<p>the expropriating authority must repair the damage to a reasonable standard or compensate for the damage without undue delay.</p> <p>The Committee proposes that greater specificity is required in respect of who determines the extent of damage, and the quantum of damages. This may be provided for in the subsequent Regulations. It is suggested that a baseline assessment of the property be conducted prior to any work performed so that an objective assessment of the extent of the damage can be conducted. This will protect both the State and the owner.</p> <p>A ‘reasonable standard’ is also not sufficient. Any damage should be repaired as close to the original state as possible, or sufficient compensation be provided to restore all damage. Furthermore, damage should not be limited to just tangible property. The damage should refer to damage incurred by the owner, which could include negative impacts on livestock or ability to farm as examples.</p>
<p>Clause 6(3)</p>	<p><i>The municipal manager must deliver a written response to the request contemplated in subsection (1) within 20 days of receipt or within a reasonable time to be agreed between the expropriating authority and municipal manager.</i></p> <p>The Committee proposes an amendment as there are no clear consequences outlined should a municipal manager fail to adhere to this timeframe. Given that non-compliance may result in a material delay in the expropriation process, clear consequences and remedies should be outlined.</p>
<p>Clause 7(2)(h)(i) + (ii) - 7(2)(h)(i) + (ii)</p>	<p><i>A notice of intention to expropriate must include –</i> ... <i>(h) an invitation to any person who may be affected by the intended expropriation to lodge with the expropriating authority at a given address within 30 days after the publication of the said notice, subject to section 25 –</i> <i>(i) any objections to the intended expropriation; and</i> <i>(ii) any submissions relating to the intended expropriation.</i></p> <p>The Committee proposes an amendment as it is unclear that these objections are given any weighting or if they must merely be considered. There is a need for the objections and submissions made in clause 7(2)(h)(ii) to be considered and for them to potentially have a material impact upon the final decision to expropriate. This is currently not provided for.</p>

	<p>It is proposed that this provision instead form part of the investigation phase, as this will have more impact and weight in this phase of the process.</p>
Clause 7(3)	<p><i>If the property contemplated in subsection (1) is land, the expropriating authority must also deliver a copy of the notice referred to in subsection (1) to - ...</i></p> <p>There are specific requirements for expropriations involving land, including to send the copy of the notice of intention to expropriate to additional government departments, however for other types of property no such additional requirements are present. The Committee proposes that this provision be considered.</p>
Clause 9	<p>Date of vesting of property should be upon registration and not just the date of expropriation.</p>
Clause 12	<p>Clause 12 of the Bill deals with the determination of compensation. Subsection (1) provides the relevant circumstances to take into account when making the determination. This section does not address encumbrances on the property, particularly with respect to mortgages. Section 18 addresses how the expropriating authority should make payment to the holder of a mortgage, but it is the Committee's contention that a mortgage should form part of the initial assessment of the amount of compensation under Section 12 as it plays a significant role in determining the value of the property.</p> <p>Once again, the assessment should be done by a suitably qualified and registered professional.</p> <p>The Bill also does not provide for any engagement with a bank or holder of a mortgage, despite their significant interest in the property concerned.</p> <p>It should be noted that nil compensation is unconstitutional within the Section 25 framework.</p> <ol style="list-style-type: none"> 1. Given that the 25th Amendment Bill did not pass, the Expropriation Bill needs to be redrafted to be consistent with the Constitution. 2. Insistence to retain the current wording will render the Bill unconstitutional, not only because of the aforesaid inconsistency, but also because it will be an attempt to amend the Constitution through ordinary legislation, rather than through a process that complies with the requirements set out in the Constitution for a constitutional amendment. It cannot be argued that the Bill in its current form does not seek to amend the substance of the constitutional provisions contained in section 25. If it was previously agreed and

	<p>accepted that a constitutional amendment would be necessary to enable 'nil compensation/EWC' then it cannot be enacted through the backdoor by this Bill, given that the constitutional amendment did not pass.</p> <p>3. In light of the fact that public participation on the Expropriation Bill was conducted on the current version of the Bill, as inextricably linked to the now defunct 25th Constitutional Amendment Bill, it will in all probability be necessary to subject this clause to fresh public participation given that the constitutional amendment did not pass. South Africans must be consulted again on the way forward in light of the changed circumstances.</p> <p>4. Section 25(2)(b) states that the amount of compensation, the time and manner of payment thereof must have been approved by a court. This section eliminates this consensus and usurps the authority of the judiciary as it predetermines the amount of compensation to be nil in these defined circumstances.</p>
<p>Clause 12 (3)(a)</p>	<p>This amounts to interference by the state in private property rights. The state should not be in a position to decide whether or not an individual has a right to hold property for any of the reasons cited. This would have a direct effect on property speculation which is no different to speculating on the stock market and not in conflict with any law.</p>
<p>Clause 12 (3)(c)</p>	<p>This cannot be sufficient cause as the failure to exercise control may not be the fault of the owner.</p>
<p>Clause 12 (3)(d)</p>	<p>There is a concern that this clause could result in perpetual expropriation, where the beneficiary of expropriation / land reform could subsequently have their land taken for no compensation.</p>
<p>Clause 12(3)(e)</p>	<p>This is not sufficient cause to warrant an expropriation without compensation. Risks or hazards can be rectified without having to resort to expropriation. This creates a new criteria for expropriation – to eliminate or rectify a risk or hazard</p>
<p>Clause 14(1)</p>	<p><i>The owner, mortgagee and holder of a right may request the expropriating authority, in writing, to provide reasonable particulars about the offer of compensation or the counter-offer, as applicable, and particulars so requested must be furnished within 20 days of such request.</i></p> <p><i>(2) If the expropriating authority fails to provide the requested particulars, the person making such a request in terms of subsection (1) may, on notice, apply to a court</i></p>

	<p><i>for an order directing the expropriating authority to comply with subsection (1) and the court may make such an order.</i></p> <p><i>(3) An offer of just and equitable compensation and a counter offer remains in force until –</i> <i>(a) revised by the expropriating authority;</i> <i>(b) the amount of compensation has been agreed upon or;</i> <i>(c) the compensation has been decided or approved by a court.</i></p> <p>The Committee disagrees with the removal of the counter-offer references.</p> <p>The Committee believes that greater support should be provided to the claimant in making such requests. At present, a court order is required by the claimant to force the expropriating authority to comply. This is costly for an individual and other more affordable mechanisms to enforce compliance should be available.</p>
<p>Clause 15(3)</p>	<p><i>Any delay in payment of compensation to the expropriated owner or expropriated holder by virtue of subsection (2) or any other dispute arising will not prevent the passing of the right to possession to the expropriating authority in terms of section 9(2) or (4) unless a court orders otherwise.</i></p> <p>The Committee opposes clause 15(3) as it is very problematic. The expropriating authority could delay the process, which may unfairly prejudice the owner, with possession passing without consensus on compensation. This clause is therefore heavily weighted in favour of the State.</p>
<p>Clause - 16(1)</p>	<p><i>If the property in terms of this Act was, immediately prior to the date of expropriation, encumbered by a registered mortgage or subject to a deed of sale, the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant has notified the expropriating authority of the agreement.</i></p> <p>There is no guarantee that the mortgage will be settled and a scenario could exist where the compensation paid is insufficient to extinguish the debt on the mortgage which leaves no compensation for the owner of the property.</p>

	<p>Banks also wield more financial power than owners and as such could ensure they secure their portion before the balance is allocated to the owners. This could see owners left with nothing while the banks have had their debts settled.</p>
<p>Clause 17(4)(c)</p>	<p><i>Despite provisions of any other law, the expropriated owner remains liable to the municipality for rates and other charges levied on the property until the right to possession vests in the expropriating authority in terms of section 8(3)(f) or section 9(4).</i></p> <p>The Committee opposes this Clause. If the date of possession is later than the expropriation date, the Municipality may hold the former owner responsible for municipal costs. This clause is patently unfair to the former owner and must be amended.</p> <p>The Committee proposes that it could be amended to read – “or the ownership passes to the expropriation authority, whichever occurs first.”</p>
<p>Clause 19(8)</p>	<p><i>Any appeal against the decision of a court on the amount of compensation will not prevent the expropriating authority from expropriating for the amount approved or decided, unless a court grants an interim interdict based on compelling prospects of success on appeal.</i></p> <p>The Committee opposes this clause, as any dispute or lack of finality relating to compensation should halt the expropriation process until finalised.</p> <ul style="list-style-type: none"> • <i>20(9) – An expropriating authority may at any time during the temporary use of the property, commence with the expropriation of the property and must comply with all relevant provisions of this Act.</i> <p>The Committee opposes this clause. If the expropriating authority determines that it wants to proceed with a permanent expropriation, this process should begin anew once the possession has been restored. Otherwise, this will unfairly prejudice the owner and place the state in a superior bargaining position.</p> <p>When property is taken for a temporary use, there is a realistic expectation that it will be returned. Government should not be allowed to negotiate from a position of already being in possession of the property.</p>

	<ul style="list-style-type: none"> • 20(10) – If the property in question is damaged as a result of the performance of an act contemplated in subsection (1), the expropriating authority must repair to a reasonable standard, or compensate the affected person for that damage after delivery of a written demand by the affected person without undue delay. <p>The Committee proposes that greater specificity is required in respect of who determines the standard of damage, and the quantum of damages.</p>
<p>Clause 21 (1) (a)</p>	<p>Notwithstanding anything to the contrary contained in any law, the expropriating authority may withdraw any expropriation from a date mentioned in a notice of withdrawal, if the withdrawal of that expropriation is in the public interest, or the reason for which the property was expropriated is no longer applicable.</p> <p>“Public interest” is too vague for this section. The purpose for a withdrawal is extremely important.</p> <p>There should be a very limited list of specific circumstances in which withdrawal can happen. The inclusion of this clause supports the need to have a very thorough process of investigation at the outset in order to ensure that there are no mistakes made later that are difficult to rectify.</p>
<p>Clause 21(3)</p>	<p>If an expropriation of property is withdrawn—</p> <p>(a) ownership of the property concerned again vests, from the date contemplated in subsection (1), in the owner from whom it was expropriated, and any mortgage or other rights discharged or expropriated in connection with or as a consequence of the expropriation are fully revived;</p> <p>(b) the Registrar of Deeds or the registrar of any other office at which such expropriated right was registered or recorded must, on receipt of a copy of the notice of withdrawal, cancel any endorsement made in connection with the expropriation in his or her registers and on the title deed in question; and</p> <p>(c) the expropriating authority is liable for all reasonable costs and damages incurred or suffered by a claimant as a result of such withdrawal.</p>
<p>21(3)(a)</p>	<p>The Committee proposes that this clause be reconsidered as it appears to be a contradiction of subsection (2)(b) which states that “where the expropriated property is land, the property has already been registered in the</p>

	<p><i>name of the expropriating authority...".</i> Ownership only takes effect when property is registered, so subsection (2)(b) applies and this clause is superfluous. The Committee believes that this subsection should be removed and that (3)(b) and (c) can be retained.</p> <p>Furthermore, the mortgage would have been paid off and the account closed with the expropriation, so it cannot just be revived. It would be a new application and, in all probability, at the prevailing market price which would be different to the original mortgage. This would be extremely prejudicial to the owner who might have paid a far lower mortgage price for many years and who now has a new mortgage with new terms and conditions.</p>
<p>Clause 22(1)(ii)</p>	<p>In clause 22 (1)(ii) the Bill makes reference <i>to "fidei commissaries" and "fidei commissum".</i> In this regard, and in order to make the Bill more accessible to ordinary people as well as to promote plain language in our legal drafting, the Committee proposes that these abovementioned Latin terms be removed and be replaced with English alternatives/substitutes.</p>
<p>Clause 22(3)</p>	<p><i>Whenever a document must or may be delivered in terms of this Act, it must take place by delivering—</i></p> <p><i>(a) to the owner and holder of an unregistered right in a property known to the expropriating authority, at the address appointed in the notice in terms of section 7(1), the notice of expropriation, the notice in terms of section 11(2) or other document, as the case may be; and</i></p> <p><i>(b) to any owner, holder of an unregistered right, person who has lodged an objection or submission contemplated in section 7(2)(h), expropriated owner and expropriated holder, at the address or facsimile number appointed by such person in terms of this Act, or in the absence thereof—</i></p> <p><i>(i) at an address supplied in respect of such person in terms of this Act;</i></p> <p><i>(ii) at the residential or postal address of such person, if known to the expropriating authority; or</i></p> <p><i>(iii) if no address of such person is known to or readily ascertainable by the expropriating authority, by publication in the manner contemplated in subsection (2)(a).</i></p> <p>A notice, as per subsection (b)(iii) is insufficient and any person whose interests are affected must be properly notified of the expropriation process. This cannot be left to the chance that they see a notice in a local publication</p>

	<p>and more effort must be made to ensure that the person is notified appropriately.</p> <p>The inclusion of email as a form of communication has been omitted and reliance is placed on only post, hand delivery and facsimile as a form of communication. Email, as well the Office of the Sherrif, must be included as a form of communication for the purposes of this clause.</p>
<p>Clause 25(2)</p>	<p><i>A civil court may impose a fine up to a maximum prescribed amount, in favour of the National Revenue Fund, on a person referred to in subsection (1), upon application to the expropriating authority brought on notice to the affected person.</i></p> <p>The Committee is concerned that the Minister is authorised in section 26(1)(d) to determine the final amount. This leaves too much discretion to the Minister. There should instead be a framework or frame of reference for the determination of a suitable fine, or alternatively the Bill (or Regulations) should specify an amount itself.</p>
<p>Clause 26(1)(d)</p>	<p>The Minister is given the power to determine maximum civil penalties, when this could instead be determined within the Bill (or Regulations) itself.</p>
<p>Clause 27(1)(ii)</p>	<p><i>A regulation or notice, or an authorisation document, made or issued in terms of this Act - ...</i> <i>(b) May be amended or replaced without following a procedural requirement of this Act if –</i> ... <i>(ii) the correction does not change the rights and duties of any person materially.</i></p> <p>The Committee proposes a technical amendment to this clause. The use of the word “and” means that both rights and duties must be affected for this provision to allow for changes to be made without following a procedural requirement. It is proposed that “and” be replaced with “or”.</p> <p>It is also proposed that “interests” be included, so that the provision reads as “rights, interests or duties.</p>
<p>General concerns and proposed amendments</p>	
<p>The following amendments were tabled in the National Assembly. It is our recommendation that these be the major focus for the NCOP engagements:</p>	

EXISTING PROVISION CLAUSE 1:	<i>["expropriation" means the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority, or an organ of state upon request to an expropriating authority, and "expropriate" has a corresponding meaning;]</i>
PROPOSED AMENDMENT:	<p>"expropriation" means the curtailment of the rights of an owner in property for a public purpose or in the public interest by an expropriating authority, or an organ of state upon request to an expropriating authority through:</p> <p>(i) compulsory acquisition of immovable property or land as a form of direct expropriation; or</p> <p>(ii) custodial taking or regulatory taking of immovable property or land in the case of indirect expropriation.</p>
EXISTING PROVISION:	<p><i>Determination of compensation</i></p> <p><i>[12 (3) 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, including but not limited to—</i></p> <p><i>(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 income, but to benefit from appreciation of its market value;</i></p> <p><i>(b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;</i></p> <p><i>(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;</i></p> <p><i>(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; and</i></p> <p><i>(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.]</i></p>
PROPOSED AMENDMENT	<p>12 (3) 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 —</p> <p>(a) where an organ of State holds land that it is not using for its core functions and is not reasonably likely to require the land</p>

	for its future activities in that regard, and the organ of State acquired the land for no consideration; (b) where previously expropriated property is expropriated for a new purpose from an organ of State or State department and compensation has already been paid.

General comments

The Committee noted with concern that the timeframe allocated to fully prepare and respond to the clauses of this Bill was insufficient.

This impacted on the legislative process in the following respect:

1. There was insufficient time to engage with communities to conduct public participation on the Bill;
2. The Committee was not availed with the prepared presentations in advance in order to properly sensitise the community; and
3. As a result many submissions from the community were related to land reform but were not relevant to this Bill.

It was against the above background that the Committee requested an extension to conduct additional public hearings but was only afforded one week within which to host the hearings.

M. Maseko

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MS LM MASEKO, MPP
CHAIRPERSON: STANDING COMMITTEE ON INFRASTRUCTURE
WESTERN CAPE PROVINCIAL PARLIAMENT

DATE: 14 November 2023