

## THE EXPROPRIATION BILL 2020

### INTRODUCTION

The Expropriation Bill was first introduced in 2015. Following the usual procedural processes, the Bill was returned to Parliament by the President twice – in 2016 and in 2017. With the decision to appoint a Constitutional Review Committee on Section 25 of the Constitution, the Portfolio Committee determined that it would be best to hold the Bill in abeyance pending the outcome of that process. As that process is nearing completion, it has been decided to reintroduce the Expropriation Bill.

The Bill was published in December 2018 for comment. Around 50 000 submissions were received. The Bill was then referred to legal experts to address the areas of concern raised in the submissions. The second draft was then submitted in October 2019 to the Office of the State Law Advisor for certification. During the next two months, the Minister presented the Bill to a number of committees and it was finally submitted to Cabinet in December 2019 for approval, pending the engagement of NEDLAC which took until June 2020.

The Bill was presented to Cabinet again in September 2020 and was approved for gazetting for public comment, presentation to Parliament pending final certification by the State Law Advisor. This was obtained at the end of September and the Bill was gazette and submitted to Parliament at the beginning of October 2020.

On 10 December 2020 the Bill was advertised for public comment for a period of 60 days which ends on 10 February 2021. The Committee can decide to extend the period. And concerned citizens and organisations can, after making written representations, request the opportunity to make oral submissions to the Committee.

### AREAS OF CONCERN

The Bill has been drafted to repeal the Expropriation Act of 1975 and to bring expropriation of property in line with Constitution. At first glance, it appears the Bill is fairly innocuous. However, there are certain areas of concern that need to be highlighted.

- Section 1 deals with Definitions. Under “court” in subsection (c), reference is made to cases around intangible property. This is the only time that this is addressed in the entire Bill. While many references are made to land and the requirements for addressing the expropriation, determination of compensation and occupation of land, there are no specific references made to intangible property. In particular, the determination of the value of compensation would require specialist knowledge and issues such as patents and copyright would surely also come into play here. Either this category of property should not be referenced at all in the Bill or it should be very clearly identified and addressed.
- Section 2(2) addresses the expropriation of state-owned land and provides that it can only be expropriated if there is concurrence from the Executive Authority of that specific Department or entity. This allows government the opportunity to refuse to accede to expropriation while private individuals do not have the same right. In a Constitutional democracy, the rights of individuals should not be less than those of government.

- Section 5(7) of the Bill relates to damage that might be caused during the survey of property. The Bill requires that any damage caused must be repaired to a “reasonable standard”. Who determines such standard? And why should it not be repaired as close to the original state as possible? We must demand that such a standard must be set by an appropriately qualified built environment specialist who is registered with the professional body governing his/her area of expertise. Any assessments throughout the process should be undertaken by such a professional.
- Section 6(3) requires that a Municipal Manager of a municipality in which area a property has been earmarked for expropriation MUST (own emphasis) respond to a request for information within a specified number of days. There is no clarity as to what recourse the expropriation body has should the Municipal Manager fail to adhere to the requisite timeline.
- Section 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 my 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.

Once again, the assessment should be done by a suitably qualified and registered professional.

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.

- Section 12(3) is the most contentious of all the clauses as it relates to expropriation without compensation. It lists 5 circumstances in which nil compensation can be paid of which two are particularly worrisome. But of even more concern is that it leaves a door open for other circumstances by stating that these circumstances are “including but not limited to...”. This open-ended phrase would allow government the freedom to concoct any reason on the basis of public interest to expropriate property. Either a more complete list of circumstances must be drawn up or the 5 listed must be deemed to be sufficient. But that phrase cannot be allowed to remain in the final Act.
- Section 12(3)(a) provides that nil compensation can be paid for land that is not being used by the owner, is not being developed and is merely used for investment purposes. This clause prejudices investors and will dissuade people from investing in property for speculation purposes. In addition, it impinges on a person’s rights to own land because investment property becomes a target.
- Section 12(3)(c) also impacts directly on the rights of property owners because it places control over land above the rights of holders of title deeds. The section determines that irrespective of whether a person is registered as the owner of a property with the title deeds thereof, if the person has “abandoned the land by failing to exercise control over it”, the land can be expropriated without compensation. In essence, this clause could create a fertile ground for land grabs and land invasions because once the land has been invaded by unlawful occupiers, the registered owner can be deemed to have lost control over the land.

It is imperative that the Act provide a definition of what constitutes failure to “exercise control” over the land and that it also provides a detailed process which would be followed, with the requisite evidentiary requirements to determine if there exists a failure to exercise control over the land in question.

- A minor issue is contained in Section 24(4) where a facsimile is deemed to be a suitable method of delivery of notice. Given the obsolete nature of this technology, it might be best to remove that and make use of email.

#### **ADDITIONAL POINTS**

- Written submissions can be sent to [expropriationbill@parliament.gov.za](mailto:expropriationbill@parliament.gov.za) by 10 February 2021
- Requests to make oral submissions to the Committee will be entertained.