

26 February 2021

Chairperson: The Portfolio Committee on Public Works and Infrastructure
Parliament of South Africa
Attention: Hon. N Ntobongwana

Per e-mail to Ms Nola Matinise - expropriationbill@parliament.gov.za

Dear Sir/Madam

COMMENT SUBMISSION: EXPROPRIATION BILL [B23-2020]

We thank you for the opportunity to submit comment on behalf of the Western Cape Property Development Forum (WCPDF).

Much has been written on the potential impact of this Bill on the broad term "property" possibly extending beyond land. For purposes of this submission, we focus on the potential expropriation of cadastral definable land and the associated fixed capital investment attaching to land.

We contextualise our submission within the fact that local authority government, as third sphere of government, depends on a stable property market to generate income through property rates. Should market value is to be undermined through this Bill, it will have direct impact on the viability of local government throughout the country, impacting on every citizen's right to service delivery.

Noting that our membership is engaged and focused on the area of fixed capital investment, i.e., long term investment in the future of South Africa, we share the following as illustration of how the Bill will impact on investment confidence and the unintended consequences that the Bill will generate.

The impact of the Bill in its current form, as explained in our submission, will undermine investment confidence should various highlighted not be clarified and addressed adequately. The unintended consequences of the Bill in its current form will directly impact the fixed capital investment sector, property investment, property

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development, built environment professions, construction and building sectors, and the viability of local government in its current form.

We comment as follows:

1. This Bill has been drafted to repeal and replace the Expropriation Act of 1975 in order to bring this statute in line with the Constitution.
2. Expropriation is traditionally understood as a mechanism whereby government can acquire land owned by private citizens for public purposes such as building roads and railways. The Bill provides for such expropriation for "public purposes". The Bill goes further and provides that property may also be expropriated in the "public interest" which 'includes the nation's commitment to land reform'. According to the Deputy President, this new legislation is "a cogent indication that government is indeed at work to realise, redress and fulfil the aspirations of the people to have an equitable society" and "to address the injustices of the past and restore land rights in a responsible manner".
3. The bill aims to speed up the expropriation process and will enable the state to pay for land "at a just and equitable" rate which may ultimately be determined by a government adjudicator, and then expropriate it for the 'public interest', ending the current willing-buyer, willing-seller approach to land reform.

4. A conceptual problem

The definition of "expropriation" provides that an act will only be an expropriation if the state *acquires* the property. The concern is whether, if the property is expropriated for land reform purposes and transferred to a private beneficiary, it is in fact an expropriation. In sections 9(1)(a), 9(2)(a) and 13, it would appear that the bill envisages the transfer of the expropriated property *directly* from the owner to the 'person on whose behalf the property was expropriated'. The bill seems to suggest that a private beneficiary can therefore also "acquire" the property. The legally correct route would be for the state to first acquire the property and then transfer it to the beneficiary. The language of the bill should reflect this. These actions can happen simultaneously in the Deeds Office and should not delay the transfer.

5. Open-ended nil compensation categories

Section 12(3) of the bill sets out the listed circumstances under which land can be expropriated for nil compensation. The relevant section provides that "*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—*" The use of the words "including, but not limited to" is undesirable and should be deleted. In this regard, the Bill escalates uncertainty and can lead to abuse. Further, the Bill makes mention of five circumstances for expropriation without compensation of private property.

- a. The first reads: "*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*". This provides that if it is shown that a land owner's primary interest in buying land is to sell it later at a profit, then it could be subject to expropriation. It is uncertain what the standards will be to establish

the level of speculation required to trigger this section. Previous media releases required the land acquisition to have been “purely speculative”- it would seem that this requirement has been diluted to the disadvantage of the private citizen. The bill would disincentivize such speculators and neutralise monetary policy as it affects property. For example, in 2020 the South African Reserve Bank cut the repo rate by some 300 basis points in order to create liquidity in the property market. This will have encouraged some people to buy property and resell it later at a profit when the economy recovers. The bill in its current form would punish them even though Government, and thus society, would benefit from the associated Capital Gains Tax that such a process would generate.

- b. The second provision reads: *“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”*. Once again, standards must be provided. For example, what qualifies as “abandoned”? What would happen to land owners who are intimidated into leaving their farms? A title deed will not stop a knife or a bullet. If the only standard of abandoning land is that the owner no longer physically controls it, the concept of a “property right” gives way to the much older idea that “might is right”. If non-response to notices is deemed abandonment, then overseas owners, or parties who cannot easily be contacted, will be severely prejudiced as the bill does not yet make provision for how service and publication of notices should be affected for foreign owners.
- c. The third scenario for expropriation according to the bill is as follows: *“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”*. The apparent rationale behind this provision is that in circumstances where the state has already effectively compensated the owner for the property, it should not have to pay twice. However, to what extent does a piece of land’s value depend on “beneficial capital improvement”? Secondly, what exactly is “beneficial capital improvement”? Unlike direct investment, “beneficial capital improvement” would appear to refer to development elsewhere that improves the value of a specific property- this would include public road and services infrastructure. However, it would take a team of economists substantial time to calculate the total “beneficial capital improvement” of any piece of land. Moreover, this calculation would require several assumptions and many economists would draw different subjective conclusions. Moreover, if the thinking behind this provision is that the state should not have to pay twice, the same principle should be applied to the owner. After all, it is trite that the state is funded by taxes, and the owner may have contributed to the state through rates, taxes and bulk infrastructure works elsewhere. The principle of fairness would dictate that the owner’s historic tax contributions should enter the calculus, yet the bill does not provide for this.
- d. The fourth condition is as follows: *“When the nature or condition of the property poses a health, safety or physical risk to persons or other property.”* On the face of it, this provision appears to be fair. However, the loose language should be tightened up so that it is not open for abuse. For example, it is in the nature of a hospital to pose health risks. Consider the situation of a super-bug

spreading through a private hospital. Another example would be the Listeriosis outbreaks at Enterprise factories, the “condition” of which posed very serious health and safety risks to many people. Laws are already in place to sue, fine and imprison those who pose a blameworthy risk to others. Is expropriation truly the appropriate remedy in these circumstances?

- e. The fifth and final provision reads as follows: “*When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.*” This is the vaguest provision of them all since the relevant section in the Labour Tenants Act provides that “just and equitable compensation” must be understood within the Constitution's ambit, which according to the bill, already makes unlimited allowance for expropriation. This will certainly be of great concern to farmers and deter investment.

6. Foreign owners

Despite the need for equal treatment between foreign and local property owners, the bill is silent on how service and publication of notices is to be effected in respect of foreign-owned property earmarked for expropriation. This will have a negative impact on much-needed foreign investment. The bill should describe the process of due service of relevant notices to property owners residing in foreign jurisdictions.

7. Timing of ownership transfer in the event of dispute

The Bill allows an owner to oppose the expropriation or dispute the value offered but transfer of ownership to the state will still happen on the expropriation date set out in the expropriation notice irrespective of whether the issue has been resolved or not by this date. This means that the owner will be deprived of the asset and the income from it before the issue is resolved. Any expropriation and transfer of assets should never be allowed to happen before the final adjudication by the courts.

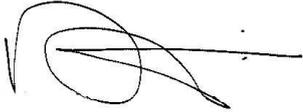
8. Mortgage Bondholders

The bill leaves uncertainty regarding the impact on financial institutions, particularly in their role as the mortgagee of a property intended to be expropriated. Section 18 of the bill does provide that if the expropriated property is subject to a registered mortgage bond, the expropriating authority may not pay out any portion of the compensation money except to such mortgage bondholder and on such terms as may have been agreed upon between the expropriated owner and mortgagee. However, this may be cold comfort for both the mortgagee and the expropriated owner, particularly in circumstances where the compensation is less than the underlying debt secured by the mortgage bond. The balance of the (now unsecured) debt will remain due and payable by the owner. Furthermore, where the owner is financing the loan repayments from the income from the expropriated asset (which is often the case), ownership of which passes on the expropriation date (irrespective of dispute resolution) the owner may not be in a position to make such repayments. Currently there is no clear obligation on the expropriating authority to engage with financial institutions as mortgagees prior to the contemplation of compensation for the property to be expropriated. It may be preferable to provide a clear definition of a financial institution as a right holder insofar as the encumbered property is concerned, requiring due consultation with such institutions from the inception of the expropriation process.

We conclude that although many of the stated intentions of the Bill are laudable, the Bill in its current form continues to create a high level of uncertainty and undermines the stated intentions of the 6th Parliament to create an investment friendly environment that will contribute to desperately needed job creation and economic empowerment of all citizens of South Africa.

We look forward to your consideration of the points highlighted and call on Parliament to consider the Bill with a clear understanding of the un-intended consequences that vagueness will result in, specifically in terms of desperately needed fixed capital investment associated with land.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Deon van Zyl', written over a horizontal line.

DEON VAN ZYL
CHAIRPERSON