

## **IRR Petition to the President regarding the Expropriation Bill of 2020 [B23D-2020]**

### **APPENDIX: Amendments needed for a constitutional expropriation bill, 5<sup>th</sup> April 2024**

The IRR's accompanying Petition to the President respectfully requests him to use his powers under Section 79(1) of the Constitution to refer the current unconstitutional Expropriation Bill of 2020 [B23D-2020] (the Bill) back to the National Assembly for reconsideration. 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. At minimum, the National Assembly needs to amend the current Bill by making the following changes:

***Amend the definition of expropriation in Clause 1***, in line with international law and the Bill of Rights, so that it reads:

“expropriation” means any nationalisation or expropriation, either direct or indirect, by an expropriating authority and any measure(s) having an effect similar to nationalisation or expropriation, either direct or indirect, and “expropriate” has a corresponding meaning’

***Remove sub-clause 2(3)***, with its expanded and unconstitutional definition of expropriation, by deleting the sub-clause and renumbering those which follow.

***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. This can be done by replacing the current Clause 19 with a new Clause 19, worded as follows:

Clause 19: Subject to Clause 20 [dealing with urgent, temporary expropriations]:

(1) if the owner or the holder of a right disputes the validity of an intended expropriation of which he or she has been given notice under Clause 7(1), or if he or she disputes the amount, timing or manner of payment of the compensation offered in that notice of intention to expropriate, the expropriating authority and the owner or holder, as the case may be, may attempt to settle the dispute by mediation, which must be initiated and finalised without undue delay by either party; provided that if such agreement is reached, the expropriating authority should then purchase the property on the terms agreed rather than proceed with an expropriation.

(2) If an intended expropriation will involve the eviction of a person from his or her home, the expropriating authority must obtain an order of court authorising the eviction after considering all the relevant circumstances.

(3) If the expropriating authority and the disputing party are unable to settle the dispute by agreement in the manner contemplated in sub-clause (1), or if the disputing party did not agree to mediation, the expropriating authority must refer the validity of the intended expropriation or any other disputed issue, including the amount, timing and manner of payment of compensation, to a competent high court for decision.

(4) In any court proceedings contemplated in sub-clauses (2) and (3), the expropriating authority bears the onus of satisfying the court, on a balance of probabilities, that:

- (a) the intended expropriation meets all relevant constitutional requirements,
- (b) the compensation offered, as well as the proposed timing and manner of its payment, are in keeping with all the factors identified in Clause 12 and are just and equitable in all the circumstances, and
- (c) the eviction of a person from his or her home as a result of the intended expropriation merits authorisation by the court after considering all the relevant circumstances.

(5) If the court is satisfied on all the points set out in sub-clause (4), it may issue an order authorising the intended expropriation, determining the amount of compensation and the manner in which it must be paid, confirming that the compensation must be paid in full ten days before the date of expropriation, and authorising the eviction of a person from his or her home as a result of the expropriation.

(6) If the court fails to grant any part of the order contemplated in sub-clause (5), the expropriating authority may not proceed with the expropriation.

(7) If the court grants the order contemplated in sub-clause (5), the expropriating must either serve a notice of expropriation on the owner within 21 days, or notify the owner or holder, also within 21 days, that it is not proceeding with the expropriation.

(8) If within the period of 21 days contemplated in sub-clause (7), the owner or holder lodges an appeal against the court order contemplated in sub-clause (5), the expropriating authority may not proceed with the expropriation until the appeals process has been exhausted and the relevant appeal court has either declined to hear the appeal or has dismissed it and so upheld the initial court order authorising the expropriation, as contemplated in sub-clause (5).

(9) Once the expropriating authority has obtained a final court order authorising it to proceed with an expropriation under sub-clauses (5) or (7), it must either serve a notice of expropriation on the owner within 21 days, or notify the owner or holder, also within 21 days, that it is not proceeding with the expropriation.

(10) If the expropriating authority fails to obtain any part of the order sought under Clause 19(5), or if it does not succeed in defeating any appeal lodged by the owner or rights holder under sub-clause (8), the court may order the payment of costs against the expropriating authority.

***Remove the ‘nil’ compensation provisions*** in sub-clause 12(3) by deleting this sub-clause.

***Allow expropriated owners and rights holders to obtain compensation for actual financial losses*** resulting from expropriations, by adding a new sub-clause 12(1)(f) to sub-clause 12(1):

Clause 12(1): The amount of compensation to be paid to an expropriated owner or an expropriated holder must be just and equitable, reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including –

- (a) The current use of the property;
- (b) The history of the acquisition and use of the property;
- (c) The market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; [delete and]
- (e) the purpose of the expropriation; and
- (f) an amount to make good any actual financial loss caused by the expropriation.

***Amend Clause 8 to reflect the amended wording of Clause 19 and require that compensation is paid in full*** to expropriated owners and rights holders before the date of expropriation, by rewording Clause 8 as follows:

Clause 8(1): Subject to Clause 20 [dealing with urgent, temporary expropriations], a notice of expropriation must contain –

- (a) a summary of the court order authorising the expropriation, as obtained under the provisions of Clause 19, while a copy of this order must be appended to the notice of expropriation;
- (b) the date of expropriation, which may not be earlier than 90 days after the date of service of the notice of expropriation;
- (c) the date on which the expropriation authority will pay all the compensation, which must be ten (10) days before the date of expropriation under sub-clause (b);
- (d) the date on which the right to possession will pass to the expropriating authority, which may not be earlier than 60 days after the date of expropriation under sub-clause (b);
- (e) a statement confirming that the property subject to the notice of expropriation may not be sold, mortgaged, or otherwise disposed of without the prior written consent of the expropriating authority and that any sale, mortgage or other disposal of the property which is entered into in breach of this sub-section has no legal force or effect;
- (f) a statement confirming that, if payment is made under sub-clause 8(c) but the expropriation does not proceed, the owner or rights holder is unjustly enriched by the compensation received and must repay this amount in full to the expropriating authority within five working days, together with interest at the prime rate plus two percentage

points on any outstanding balance, until the full amount owing to the expropriation authority has been repaid.

***Make the transfer of ownership or other rights conditional on full payment having been made***, failing which the expropriation notice will become null and void. Clause 9 should therefore read:

Clause 9(1): Subject to clause 20, [dealing with urgent, temporary expropriations] the effect of a valid expropriation is that –

- (a) the ownership of the property described in the notice of expropriation vests in the expropriating authority on the date of expropriation, provided that the compensation payable has been paid in full to the owner within the period required by Clause 8(3)(c);
- (b) if the expropriating authority does not pay the owner the full amount of the compensation within the period required by Clause 8(3)(c), the notice of expropriation becomes invalid and has no further force or effect;
- (c) all unregistered rights in the property described in the notice of expropriation vest in the expropriating authority on the date of expropriation, provided that the compensation payable has been paid in full to the holders of such rights within the period required by Clause 8(3)(c);
- (d) if the expropriating authority does not pay the holders of such rights the full amount of the compensation due to them within the period required by Clause 8(3)(c), the notices of expropriation served on them become invalid and have no further force or effect.

***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). This should be done by amending the definition of ‘service’ and to ‘serve’ in Clause 1 of the Bill, so that it reads:

“‘service’ in relation to a notice contemplated in Sections 7 and 8 means to serve (a) by delivering that notice by hand to an owner or rights holder who must acknowledge receipt in writing, or (b) to serve in accordance with the direction of a court, and “to serve” has a corresponding meaning’.

Various other amendments should also be made to the Bill, as more fully set out in a comprehensive alternative expropriation bill drawn up by the IRR. However, the changes highlighted here are the most important. They also illustrate the type of provisions that need to be included in a new expropriation statute, so that it that protects the property rights of all South Africans and complies in full with the Constitution.