

The Expropriation Bill and a new stratagem to obscure its unconstitutionality

IRR

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The Department of Public Works (the Department), under the leadership of public works minister Thulas Nxesi, has put forward the Expropriation Bill of 2015 (the Nxesi Bill), which allows municipalities and other organs of state to ride roughshod over constitutional requirements in expropriating property of virtually every kind.

The IRR (Institute of Race Relations) has thus proposed an alternative expropriation bill (the IRR Bill), which would allow expropriation where this drastic step is necessary – but would also be fully compliant with the Constitution.

In recent parliamentary hearings on the Nxesi Bill, Jeremy Cronin, deputy minister of public works (and first deputy general secretary of the South African Communist Party), tried to discount the IRR Bill by saying that the Department had recently obtained a legal opinion which:

- confirmed the constitutionality of the Nxesi Bill; and
- found that the IRR Bill was contrary to the Constitution.

In fact, this opinion says nothing about the validity of the Nxesi Bill – an issue which lay outside its brief. The opinion’s criticisms of the IRR Bill are also flawed and unconvincing, for all the reasons set out below. The risk nevertheless remains that, through this stratagem, the Department may succeed in blurring the clear unconstitutionality of the Nxesi Bill, which would help it push the measure through the legislative process.

In this response to the Department and its legal opinion, the IRR sets out the nub of the difference between the Nxesi Bill and its alternative measure. It also outlines the fundamental flaws in the legal opinion the Department has obtained.

The key difference between the Nxesi and IRR Bills

The Nxesi Bill allows a municipality or any other “expropriating authority” to take property by serving a notice of expropriation on the owner. Ownership of the property in question will then pass automatically to the State on the “date of expropriation” identified in the notice, which could be the day after the notice of expropriation has been delivered. The right to possess the property will likewise pass to the State on the stipulated date, which could be a day after the transfer of ownership.

Having taken ownership and possession of property by notice to the erstwhile owners, the Nxesi Bill makes it impossible for them to contest the validity of the expropriation by ousting the jurisdiction of the courts to rule on this key issue. Instead, it allows expropriated owners

to contest only the adequacy of the compensation offered to them by the expropriating authority.

The Nxesi Bill does not say in so many words that the courts may not rule on the validity of an expropriation, but the legal effect of expressly giving the courts the power to rule on the one issue only – the compensation payable – is the same. The relevant principle of legal interpretation is summed up in the Latin phrase, “*inclusio unius est exclusio alterius*”, which means that “the inclusion of the one means the exclusion of the other”. This interpretation is strengthened by the fact that the 2013 version of the expropriation bill expressly allowed the courts to rule, firstly, on the compensation payable and, secondly, on “any other matter”. By contrast, the second clause giving the courts jurisdiction over issues other than compensation has been removed from the Nxesi Bill.

The Nxesi Bill also seeks to limit access to the courts on the compensation issue by giving expropriated owners a mere 60 days in which to sue for additional compensation, failing which they will be “deemed” to have accepted the amounts offered by the State. However, most people will not be able to sue within this period, and especially so when they have already lost ownership and possession of what might have been their sole or key assets.

The Nxesi Bill thus contradicts the Constitution, which requires:

- In Section 25, that expropriations must be rational (not “arbitrary”), that they must also be “in the public interest”, and that they must be accompanied by compensation which is “just and equitable” in all the circumstances, as “decided or approved by the courts”;
- Section 34, which gives everyone a right of access to court on both the validity of an expropriation and the amount and timing of the compensation payable;
- Section 33, which requires administrative decisions to be “reasonable” and “procedurally fair”, and thus bars a municipality (or any other organ of state) from acting as “judge and jury in its own cause” in deciding what it wants to expropriate and on what terms; and
- Section 26, which prevents people from being evicted from their homes without a court order authorising this.

By contrast, the IRR Bill aims to ensure that the executive properly fulfils all relevant constitutional requirements for the expropriation of property. Hence, where the preliminary negotiations and other interactions set out in the IRR Bill result in a dispute as to the constitutional validity of a proposed expropriation, that dispute must be resolved by the courts in favour of the executive before the expropriation may proceed.

The IRR Bill does not seek to fetter the executive or to make expropriation a judicial function rather than an executive or administrative one. The IRR Bill simply seeks to ensure that the courts are able to play their normal judicial role in resolving disputes over the validity of proposed expropriations where these arise. Once the courts have resolved such a dispute in

favour of the executive, the executive is entitled to proceed with the expropriation by serving a notice of expropriation in the usual way.

As the Constitutional Court stressed in the *ITAC* case, “all public power is now subject to the Constitution”. According to this judgment, South Africa’s courts “do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so”. This, of course, is in keeping with the separation of powers and the vital function of the courts in acting as the “ultimate guardians of the Constitution”. [*International Trade Administration Commission (Itac) v Scaw South Africa (Pty) Ltd*, 2012 (4) SA 618 (CC) at para 92, emphasis supplied]

The IRR Bill to ensure that the courts are able to fulfil their constitutional duty, whereas the Nxesi Bill seeks either to oust or to limit the jurisdiction of the courts. That is the nub of the difference between the two.

The Department’s legal opinion and the IRR’s response, in summary

The Department has obtained a legal opinion (from Geoff Budlender SC and junior counsel) on the constitutionality of the IRR Bill. This opinion concludes that “the IRR draft is inconsistent with the approach to property which is reflected in our Constitution”. However, the opinion is based on a host of flawed assumptions, along with various misinterpretations of the IRR Bill.

For ease of reference, the eight key criticisms set out in the opinion, and the IRR’s response to these points, are summarised below.

The opinion claims that the IRR Bill is unconstitutional because:

- 1 The IRR Bill gives primacy to market value, allows damages for consequential losses that may be too “remote” from the expropriation in issue, and overlooks the requirement that compensation must be “just and equitable” overall.

However, the IRR Bill does not give priority to market value, as the opinion itself acknowledges. In addition, the normal principles of causation, as applied by the courts, will exclude losses that are too remote. Moreover, the whole thrust of the IRR Bill – unlike the Nxesi one – is on securing “just and equitable” compensation and “an equitable balance” between the public interest and the interests of expropriated owners.

- 2 The IRR Bill seeks to introduce a system of “judicial” expropriation when expropriation is an executive function. It also aims to give the courts new “administrative” functions.

Again, this is false. The IRR Bill simply seeks to ensure that the courts are able to play their normal judicial role in resolving disputes over the validity of proposed

expropriations where these arise. As earlier noted, the courts have a duty to intervene to “prevent the violation of the Constitution”, as the Constitutional Court stressed in the *ITAC* case. However, once the courts have resolved such a dispute in favour of the executive, the executive is entitled to proceed with the expropriation by serving a notice of expropriation in the normal way.

- 3 The IRR Bill seeks to fetter the executive in the exercise of its functions, both by requiring disputes over validity to be resolved by the courts and by laying down various time periods before the next step in an expropriation may be taken.

These arguments are again unfounded. Instead, the IRR Bill seeks to ensure that the executive, in exercising its functions, acts in accordance with the Constitution (as described at point 2 above). By contrast, the Nxesi Bill seeks to oust the jurisdiction of the courts and so prevent them from acting as the “ultimate guardians of the Constitution”.

In addition, the time periods laid down in the IRR Bill are needed to allow adequate time for negotiations, the assembling of all relevant information, the lodging of objections, and the formulation of full reasons for rejecting them. The longest period proposed (180 days) is in keeping with a Constitutional Court judgment suggesting this as a suitable period in which to prepare for court proceedings. Such proceedings may never transpire, of course, but they might also become necessary to resolve disputes over the validity of a proposed expropriation.

- 4 The IRR Bill erodes the doctrine of the separation of powers by give the courts the power to disallow expropriations that it dislikes.

Again, this is not true. Under the IRR Bill, the courts may rule against a proposed expropriation if it is not in keeping with relevant constitutional criteria – but cannot disallow it simply because they would have preferred a different decision.

- 5 The IRR Bill requires pre-payment of the compensation, prior to the transfer of ownership, when there is no constitutional requirement for this.

The IRR Bill does not claim that early payment is constitutionally required. What it says is that, in a situation where many municipalities and other organs of state are notoriously late in making payments due, it is both wise and equitable to provide for pre-payment – and to include an effective sanction (the expropriation notice falls away) against any failure to fulfil this obligation.

- 6 The IRR Bill requires the provision of suitable alternative accommodation wherever people are evicted from their homes, even where “just and equitable compensation” would suffice.

Where a dispute has arisen over an expropriation that involves the owner's eviction from his home, the IRR Bill requires an expropriating authority to put all relevant information before the court that must decide whether the expropriation is valid and may proceed. This data must include information on the suitable alternative accommodation that the expropriating authority would be able to provide. It is then up to the court to decide if the eviction is justified – and also if suitable alternative accommodation must in fact be made available.

The opinion overlooks the role given to the courts to decide on alternative accommodation. The opinion also seems careless of the fact that monetary compensation – especially when this is likely to be significantly less than market value – may not suffice while the housing backlog (at some 2.1m units) remains so acute. The provisions in the IRR Bill are needed in this situation to help ensure “an equitable balance” between the public interest and the interests of expropriated owners.

- 7 The IRR Bill makes provision for the “indirect” expropriation of property – a situation which arises where the State does not acquire ownership, but erstwhile owners, through the State's regulations, nevertheless lose many of the rights and benefits of ownership.

The opinion says recognition of “indirect” expropriation might be barred by the Constitutional Court's judgment in the *Agri SA* case, which indicated that there is no expropriation unless the State acquires ownership of the property in issue. However, the majority judgment there was expressly confined to the facts of the particular case, which involved an unused mining right which had “ceased to exist” under relevant mining law. The majority judgment also stressed that all future decisions on expropriation must be made on a “case-by-case” basis.

- 8 The IRR Bill seeks to bar Parliament from exercising its legislative powers.

Again, this is unfounded. The IRR Bill bars Parliament from indirectly amending its terms through the simple expedient of adopting conflicting new legislation and then giving the new statute primacy over all earlier expropriation laws. But the IRR Bill does, of course, allow an express amendment or repeal of its terms. Hence, this restriction poses no real constraint on legislative power. The same wording is also already contained in various other statutes previously adopted by Parliament.

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