ISSUE ALERT

THE EXPROPRIATION BILL

ONE WEEK LEFT TO 'KILL THE BILL'

IRR
South African Institute of Race Relations
The power of ideas

February 2021

Published by the South African Institute of Race Relations (IRR)
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ISSN: 2311-7591

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Why it matters

When the Expropriation Bill of 2020 (the Bill) was gazetted in October last year, Deputy President David Mabuza claimed that it would 'address the injustices of the past and restore land rights'. But the Bill is in fact a draconian measure that can be used to strip millions of South Africans of their homes and other assets without the prior court orders, fair procedures, or equitable compensation that the Constitution requires.

The Bill has enormous ramifications for the 1 million white and 8.7 million black South Africans who own houses, the thousands of black South Africans who have bought more than 6 million hectares of urban and rural land since 1991, and the roughly 17 million people with informal rights to plots held in customary tenure. It also threatens companies, both large and small, with the loss of shares, business premises, mining rights, and other property.

South Africans have been encouraged to believe that the Bill deals only with land, and primarily with 'white' farming land. This is not so. Instead, the Bill describes the 'property' subject to its provisions as 'not limited to land'. All asset classes are vulnerable – and so too are all South Africans. You may think yourself immune, but this is unlikely to be so.

Unlimited scope for 'nil' compensation

According to the Bill, 'it may be just and equitable for nil compensation to be paid' for expropriated land which:

- is unused and being held in the hope of its appreciating in value over time;
- has been abandoned through the owner's failure to 'exercise control over it';
- poses a 'health, safety, or physical risk' to others;
- is worth less than the state subsidies provided for its acquisition and capital improvement; or
- is owned by a state-owned entity which acquired it for free, is not using it, and consents to the expropriation.

This list, with its five examples, is intended to reassure South Africans that nil compensation will be sparingly and justifiably applied. However, much of the wording used is vague, making it difficult to predict how it will be interpreted by different officials at different times. Where a building has been hijacked, for example, and the owner is unable to obtain a court order authorising the eviction of the illegal occupiers, will the owner then be vulnerable to expropriation for nil compensation because he cannot 'control' the property?

In addition, the circumstances in which nil compensation may be paid are expressly 'not limited' to those set out in the Bill. In practice, officials will be able to expand the list as they see fit – so nil compensation is likely to apply in many other situations too.

No one knows how the Bill's vague tests will be interpreted, or how widely nil compensation may in

time extend. The legislation leaves the country in the dark on these issues – with none of the certainty the government falsely claims to have provided.

Expropriation procedures skewed in favour of the state

A municipality or other organ of state which has the power to expropriate under the Bill or other legislation is called an 'expropriating authority'. If such an entity wants to expropriate residential or other land (say, for a new housing development), it must begin by investigating the property and negotiating for its purchase with the owner. If no agreement is reached, the municipality may issue a notice of its intention to expropriate. In this document, it must invite the owner to make representations on the proposed expropriation and the compensation to be paid. The municipality is obliged to consider any representations received, but it need not respond to them or give reasons for rejecting them.

Once it has taken these simple preliminary steps, the municipality may issue a notice of expropriation. Under this notice, both ownership and the right to possess the property will automatically pass to it on the dates set out in the notice.

The date for the transfer of ownership could be a mere week after the service of the notice, for the only time limit in the Bill is that this date 'must not be earlier than the date of service' of the notice. The right to possess the property could pass to the municipality within another week.

Effectively, the municipality will be able to act as judge and jury in its own cause. Its real objective may be to help replenish its depleted coffers, but it will nevertheless have the power to decide that the expropriation is 'in the public interest' and that a paltry or 'nil' amount of compensation is 'just and equitable'.

An owner with sufficiently deep pockets may seek mediation or apply directly to the courts to challenge the validity of the expropriation (whether it is really 'in the public interest', for example) and the amount of compensation offered (if it is truly 'just and equitable'). However, most people will lack the necessary resources to mount legal challenges. They will also find this particularly difficult to do if they have already lost ownership and possession of their homes or other key assets.

Expropriated owners will also bear the onus of proving that the expropriation is invalid or the compensation inadequate. Hence, if they fail to convince the courts of what they claim, they will have to pay not only their own legal costs but also many of the state's costs as well. This risk will further deter people from seeking relief through litigation.

Expropriated owners treated worse than criminals

Under the Bill, law-abiding owners of homes and other property will have fewer rights than criminals illegally using a warehouse they own to store heroin and other drugs. Though the warehouse may be seized by the state, this can be done only after its use for criminal purposes has been proved and a court order for its confiscation has been obtained. But a home can be expropriated by a municipality by following the simple steps set out above – and without ever having to prove to a court that the expropriation is really in the public interest or that the compensation is truly just and equitable.

Effectively, this allows an expropriating authority to resort to 'self-help' when it embarks on an expropriation. Yet this is contrary to both common law principles of liberty and the content of the Constitution.

For hundreds of years the common law has laid down special rules to protect the property of the indi-

vidual from the enormous power of the state. The common law thus prevents the police or other officials from entering – let alone seizing – an individual's property without a prior court order in the form of a search-and-seizure warrant.

There are times when the Bill acknowledges the importance of this common-law rule. A municipality wanting to inspect a house, with a view to its expropriation, must thus obtain a court order before it can enter on to it. The Bill also states that a temporary expropriation cannot be extended without a prior court order. But when it comes to the far more serious matter of a permanent expropriation, the Bill ignores the common law rule and excuses the municipality from having to obtain a court order at all.

The Bill also ignores the extent to which common-law protections for property rights have been strengthened by the Constitution. Yet South Africa's founding document now:

- confirms the supremacy of the rule of law (Section 1);
- upholds equality before the law (Section 9);
- lays down a number of requirements for a valid expropriation (Section 25);
- guarantees access to the courts (Section 34);
- gives all South Africans the right to just administrative action (Section 33); and
- prohibits the eviction of individuals from their homes without court authorisation (Section 26).

If these constitutional guarantees are to mean anything in practice, the municipality or other expropriating authority must obtain a court order confirming its compliance with them *before* it proceeds with an expropriation. Leaving it to the expropriated owner to seek relief from the courts after the expropriation has already taken place is simply not good enough – especially as the resulting emotional trauma and economic loss cannot easily be rectified after the event.

A government as cash-strapped and corrupt as South Africa's cannot simply be 'trusted to do the right thing', as some commentators have suggested. Nor can it be expected to use its sweeping new expropriation powers only in rare instances. Experience around the world has repeatedly shown the truth of the saying that 'power corrupts and absolute power corrupts absolutely'. This is why extensive common law and constitutional protections for property rights have been developed – and why they cannot simply be brushed aside.

The proof of constitutional compliance required

To obtain the necessary court order, a municipality (or other expropriating authority) must prove that its proposed expropriation meets all relevant requirements under Sections 1, 9, 25, 26, and 33 of the Constitution. It must therefore provide sufficient evidence to satisfy the court that:

1) the proposed expropriation is not tainted by unfair discrimination on racial, ethnic, or other grounds;
2) the expropriation is truly for a public purpose or in the public interest;
3) the compensation being provided is objectively 'just and equitable';
4) the compensation also reflects 'an equitable balance' between the nation's interest in land reform and the interests of the affected owner, who cannot be expected to shoulder a disproportionate share of the costs of meeting a broad societal need;
5) all circumstances regarding any proposed eviction of a family from their home have been taken into account; and

6) the administrative action involved in the decision to expropriate is 'lawful, reasonable and procedurally fair'.

No expropriation should proceed until the expropriating authority has satisfied the court on all these points and obtained an order authorising the proposed taking. This is clearly what the Constitution requires. It would also provide a practical safeguard against any repeat of the abuses that have already become apparent.

Examples of recent abuses

The current Expropriation Act of 1975 also requires prior investigation of the property in question and the service of a notice of expropriation on the owner. Yet these procedural requirements have at times been ignored.

In 2014, for example, Louis Nathan Langer, a pensioner classified as 'coloured' under apartheid, had his half hectare of land expropriated by the KwaDukuza Municipality in KwaZulu-Natal. In taking this land, the municipality not only ignored Mr Langer's objections but also failed to serve him with the necessary notice of expropriation. Hence, it was only in 2016 that he discovered, to his shock, that the property had been registered in the municipality's name some two years earlier.

Much the same thing happened to Bheki Dlamini, whose 3 000 or so hectares in the Groutville area were likewise expropriated by the KwaDukuza Municipality. He too was dismayed to learn, long after the fact, that his land had been registered in the municipality's name back in 2014. The notice of expropriation required by the Act had never been served on him. Nor did he receive the small amount of compensation the municipality had offered.

These examples underscore the risk that many expropriating authorities will use their extended powers under the Bill to ride roughshod over ordinary people. This further underscores the need for proper safeguards.

State control, not redress

The government has repeatedly claimed that the Bill will help 'return' the land to 'the people'. But land and other assets expropriated for nil or inadequate compensation will in fact be owned or controlled by the state. Nor will such property be transferred into the ownership of black South Africans thereafter. Instead, this property will be held by the state as a patronage tool and used to deepen dependency on the ruling party. That is the fraud at the heart of the Bill.

Where the property expropriated consists of land, people wanting to use that land will be obliged to lease it from the government under the State Land Lease and Disposal Policy (SLLDP) of 2013. The SLLDP makes it clear that subsistence farmers can never obtain ownership and must always remain tenants of the state.

Bigger farmers with some capacity for commercial production, the SLLDP goes on, must lease their farms for 30 years, and then for another 20. Only after five decades can they be granted an option to buy. In the interim, their leases may be terminated at any time for a lack of 'production discipline' (as the document puts it). Any fixed improvements they have made will then go to the government – generally without any compensation being paid.

Though the long leases supposedly on offer under the SLLDP would give bigger black farmers at least some security of tenure, in practice these leases are often not granted. Instead, many black farm-

ers find themselves confined to 'caretaker' agreements that run from month to month and can easily be terminated by officials at their discretion.

No remedy for land reform or housing failures

South Africa is a rapidly urbanising country in which most people wants jobs and houses in the cities and have little wish to farm. Since 1994, the government has nevertheless given black South Africans access to some 10 million hectares of mainly rural land under either its restitution or redistribution programmes. However, this has brought little benefit to anyone. Instead, more than 70% of previously successful farms have fallen out of production, while many agricultural jobs have been lost.

The Bill cannot rectify these failures, which have little to do with land acquisition costs. Many other changes are instead required, ranging from increased bureaucratic efficiency to effective action against corruption and crippling rural crime. Farmers also need secure title so that they can borrow working capital from banks. Instead, however, the Bill will make individual ownership even harder to gain or to sustain.

In urban areas, where some 67% of South Africans now live, the Bill cannot overcome the state's persistent housing delivery failures. Again, these stem not from land acquisition costs, but rather from inefficiency, cadre deployment, corruption, and bad policies. The remedy lies thus in growth, jobs, and income (including tax-funded housing vouchers for the poor), so that people can meet their own housing needs. By contrast, little benefit will come from a Bill that encourages expropriation, deters investment and drives down the value of all housing stock.

The economic damage will be massive

After almost a year of Covid-19 lockdowns, GDP has shrunk by some 8%, almost 2 million people have lost their jobs, and tax revenues have tumbled. Public debt has soared to some 82% of GDP, and is set to rise even higher (to 95% of GDP) by 2025. The government is borrowing roughly R2.2bn a day, mainly to fund consumption spending, and the budget deficit could rise to 15.7% of GDP in this financial year. The country has been downgraded to sub-investment or 'junk' status by all international ratings agencies.

Against this background, South Africa urgently needs an upsurge in foreign and local direct investment to jumpstart growth, expand employment, and quicken economic recovery. But this will not be possible under the Bill, which – contrary to the ANC's own 54th national conference resolution – is sure to destabilise the agricultural sector, endanger food security, and undermine economic growth. It will also erode business confidence, increase the unemployment rate, reduce tax revenues, add to an already unsustainable burden of public debt, and push the economy closer to the brink of collapse.

Despite the enormous damage likely to result from the Bill, its economic consequences have yet to be evaluated, as required by the government's Socio-Economic Impact Assessment System (SEIAS). When the Bill was gazetted for public comment, it should have been accompanied by a comprehensive SEIAS report providing a realistic assessment of its likely costs and consequences – especially in this Covid-19 period. However, this has not been done. This has undermined the public participation process by making it harder for people to understand the Bill's enormous economic ramifications.

ANC cadres will suffer too

The economic collapse triggered by widespread (and often uncompensated) expropriations in both Ven-

ezuela and Zimbabwe should provide a salutary warning to all those in the ANC who hope to profit from the Bill. Many people may believe that their proven party loyalties will give them preferential access to confiscated land, houses, farms, factories, mining rights, and other assets and so increase their wealth.

Instead, most ANC cadres are likely to find themselves engulfed by the negative fall-out from the Bill. The impact will be even worse if the government responds to falling revenue and rising debt by raiding pension funds and printing money – which is sure to send inflation soaring.

In time, millions of well-paid public servants could find – like their counterparts in Venezuela and Zimbabwe – that their earnings have dropped precipitously. Such a decline could even put South Africa's currently pampered bureaucrats into extreme poverty, with incomes below the international poverty line of $1.90 a day.

For the rest of the middle class – to say nothing of the 11.2 million South Africans who are already jobless and destitute – the suffering will be even more acute. Moreover, unlike in Venezuela and Zimbabwe, there will be nowhere else for hungry and desperate South Africans to go.

The importance of private property rights

Private property rights are vital to investment, growth, employment and prosperity. They also promote individual self-reliance by encouraging people to build up the value of their homes and savings. In addition, empirical global studies confirm that countries that uphold private property rights have much higher GDP per capita – even among the poorest 10% of citizens – than those with extensive state ownership and control over land and other assets.

This helps explain why the racially discriminatory laws that earlier barred black South Africans from owning land, houses, and other property in 'white' areas were so unjust. It also clarifies why a key purpose of the anti-apartheid struggle was to extend to black people the private property rights that whites had long enjoyed. It was largely to meet this aim, moreover, that the current property clause was included in the Constitution.

Major progress in expanding black land ownership is now apparent. Helped by considerable redistribution via the budget, black property ownership has grown steadily since 1975, when a 30-year leasehold option for township houses was introduced. This was soon replaced by 99-year leasehold and then, in 1986, by freehold ownership. Today, some 7.7 million black South Africans own their homes, as do close on a million 'coloured' and Indian people and roughly 1 million whites. Since 1991, when the National Party government repealed the notorious Land Acts, black people have also bought an estimated 4.4 million hectares of rural land on the open market. Together with the state, black, coloured and Indian people now own 26.7% of agricultural land in total and much higher proportions in some provinces (73.5% in KwaZulu-Natal, 52% in Limpopo).

Though private property ownership is still racially skewed, black ownership of land, houses, and other assets has been growing steadily for many years. To accelerate this process, the country needs an average annual growth rate of at least 5% of GDP, along with an upsurge in investment and employment. Many black South Africans also need registered title deeds to their houses and customary plots so as to bring their 'dead capital' to life and help unlock the full economic value of their assets. Instead, the prosperity of all South Africans is being threatened via the Bill.

The real aim is to advance the NDR

The ANC's real aim is to help advance the 'national democratic revolution' (NDR) to which it has been

committed for more than 50 years. The NDR is a Soviet-inspired strategy which the ANC's communist allies in the tripartite alliance openly identify as offering the 'most direct' route from South Africa's predominantly free-market system to a socialist and then communist future.

In pursuing the NDR, one of the ANC's main objectives is to bring about the 'elimination of apartheid property relations'. However, the word 'apartheid' is essentially a red herring. Replace it with the word 'existing' and the real meaning of this goal becomes apparent.

This objective is also reflected in the Freedom Charter of 1955, which the ANC often describes as its 'lodestar'. This document, which was drawn up with significant communist input almost 60 years ago, states that 'all the land shall be re-divided among those who work it'. It also urges that 'the mineral wealth beneath the soil, the banks, and monopoly industry be transferred to the ownership of the people as a whole'. According to the SACP, the full implementation of the Freedom Charter is 'an indispensable basis for the advance of our country along non-capitalist lines to a communist and socialist future'.

Putting an end to private property rights is vital to the NDR for various reasons. Socialism and communism demand pervasive state control, which cannot be achieved when the ownership of land and other assets is dispersed among millions of individuals and enterprises. In addition, private property rights are crucial to free markets, which cannot function without them.

Capitalism has been extraordinarily successful in lifting people out of poverty and meeting their needs in innovative and efficient ways, but the ANC nevertheless remains deeply hostile to it. The ANC is also indifferent to the starvation and destitution that expropriation for little or no compensation has triggered in Venezuela, Zimbabwe, and other socialist countries. All that matters to the ruling party is its ideological determination to advance the NDR and thereby achieve a socialist 'nirvana'.

The vital need to 'kill the Bill'

The Bill will rig the rules of the game by bypassing both common law and constitutional protections for property rights. It will deprive the Constitution of much of its vital force, leaving people far more vulnerable to the destructive interventions of an increasingly powerful state.

Over time, the Bill will be used to strip people of their land, homes, business premises, pensions, and other assets – and to vest these in the hands of a powerful political elite intent on pursuing a socialist NDR.

The Bill does nothing to achieve what most people want: jobs, houses, schools, rising prosperity, individual liberty, and respect for the rule of law. Instead, it will scare off investment, weaken and in time destroy businesses, increase unemployment, and stifle the economic recovery the country so badly needs. It will also erode food security and worsen hunger. It could help trigger a sovereign debt default, set hyperinflation spiralling, and 'bring Zimbabwe to South Africa' (as a DA local councillor once warned).

There is no time to waste in mobilising against the measure. South Africans only have until 10th February to kill this bill and protect property rights for everyone, black or white, rich or poor. Add your voice here (https://irr.org.za/campaigns/kill-the-bill-stop-ewc)