



South African Institute of Race Relations

*The power of ideas*

## **The IRR's Alternative Expropriation Amendment Bill: A Framework Document**

### *Outline of key sections*

The Expropriation Bill of 2015, which was released by the minister of public works, Thulas Nxesi, in January this year, is unconstitutional and economically damaging. This Bill should be withdrawn and replaced by a new 'expropriation amendment bill' which is fully compliant with the Constitution and contains adequate safeguards against any abuse of the power to expropriate. The IRR has drawn up the framework for an alternative bill, which should be worded roughly as follows:

#### **1. Definitions**

Many of the relevant definitions would be the same as those in the current Expropriation Act of 1975. Others would need to be added or amended, and these are underlined:

***Constitution*** means the Constitution of the Republic of South Africa, 1996.

***date of expropriation*** means the date on which ownership of the property in question is to pass to the expropriating authority under section 11(4)(b)

***date of notice*** means the date on which a notice of expropriation is served on the owner of the property in question under section 11(2).

***expropriating authority*** means the minister of public works or any organ of state.

***expropriation*** means the direct or indirect expropriation of property by an expropriating authority, either for public purposes or in the public interest.

***Master*** means the Master of the High Court having jurisdiction over the area in which the property in question is situated.

***Minister*** means the minister of public works.

***organ of state*** means an organ of state as defined in section 239 of the Constitution

*owner*, means the person who owns the property or who holds the right in question. [More detailed provisions are also needed to cater for deceased estates, sequestration, trusts, owners subject to legal disability, and the like, but these have not been included in this framework document.]

*property* means movable and immovable property; mining and water rights; mortgages, servitudes, and other registered rights; shares or debentures in companies; and patent and other intellectual property rights.

*public interest* includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

*public purpose* includes any purposes connected with the administration of the provisions of any law by an organ of State.

*notice of expropriation* means a notice contemplated in Section 11.

*serve* means to serve a notice or other document by delivering it by hand or registered post, or in accordance with the directions of the High Court.

## 2 **Power to expropriate**

- (1) The power to expropriate vests in all expropriating authorities, as defined in section 1.
- (2) Expropriating authorities may expropriate property solely for a public purpose or in the public interest, and must comply with all the requirements of this Act, especially (but not limited to) those set out in Sections 3 to 19.

## 3 **Constitutional principles governing expropriation and the possible eviction of people from their homes**

- (1) All constitutional principles governing expropriation must be fulfilled, and must be confirmed by the High Court as having been fulfilled, before any expropriating authority may issue a notice of expropriation.
- (2) The relevant constitutional principles are those contained in Sections 25(1), 25(2), 25(4), 25(5), 25(7) and 25(8) of the Constitution, Section 26(3) of the Constitution, and Section 34 of the Constitution.
- (3) The relevant provisions of Section 25 are as follows:  
Section 25(1): No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.  
Section 25(2): Property may be expropriated only in terms of law of general application –
  - (a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Section 25(4): For the purposes of this section –

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

(b) property is not limited to land.

Section 25(5): The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Section 25(7): A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Section 25(8): No provision of this section may impede the state from taking legislative and other measures to achieve land, water, and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(4) The relevant provisions of Section 26 of the Constitution are as follows:

Section 26(3): No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

(5) The relevant provisions of Section 34 of the Constitution are as follows:

Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, before another independent and impartial tribunal or forum.

#### 4 **Constitutional principles regarding ‘just and equitable’ compensation**

(1) Under this statute, compensation on expropriation must comply with the constitutional principles regarding ‘just and equitable’ compensation contained in Section 25(3) of the Constitution.

(2) Subject to section 13(5) below, compensation on expropriation must be based on:

- (a) the market value of the property, this being the amount the property would have realised if it had been sold on the date of service of the notice of expropriation by a willing seller to a willing buyer;
- (b) the current use of the property;
- (c) the history of the acquisition and use of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property;
- (e) the purpose of the expropriation; and
- (f) an amount to make good all financial losses resulting from the expropriation.

[The words underlined are mainly the ‘discount’ factors listed in Section 25(3), the monetary value of which should generally be deducted from market value. These factors are currently not included in the 1975 Act. Since the list in Section 25(3) is expressly not a closed one, there is no reason not to retain the damages for all resulting financial losses for which the 1975 Act already provides. Section 13(5) says that the value of any suitable alternative accommodation provided to an owner who is evicted from his home as a result of an expropriation should be deducted from the compensation due.]

## **5 Negotiations on the purchase of the property**

- (1) If an expropriating authority is interested in acquiring property for public purposes or in the public interest, it must serve a notification to this effect on the owner and negotiate with him for the purchase of the property on mutually acceptable terms, including a mutually acceptable price.
- (2) The expropriating authority must also inform any holders of registered rights in the property of its interest in acquiring the property, and of the terms of any agreement reached with the owner on its purchase by the authority.

## **6 Notice of possible expropriation**

- (1) If no agreement on the purchase of the property under Section 5 can be reached within 90 days of the date the notification was served on the owner under section 5(1), the expropriating authority may serve a notice of possible expropriation on the owner and on all those with registered rights in the property. [These would include a bank holding a mortgage loan, the holder of a mining right, or the holder of a servitude.]
- (2) This notice must:
  - (a) fully describe the property,
  - (b) explain the reasons for the proposed expropriation, and
  - (c) state that all constitutional requirements for expropriation will be fulfilled and that a High Court order confirming the constitutionality of the expropriation will be sought and obtained before the expropriation proceeds.
- (3) The notice must also invite objections in writing from the owner and all registered rights holders within 90 days.
- (4) The expropriating authority must respond in writing to all objections and must do so within 60 days.
- (5) If the owner’s objections are accepted, the expropriating authority may not proceed with the proposed expropriation.
- (6) If the expropriating authority rejects the objections, it must give full reasons in writing for doing so.
- (7) The expropriating authority must thereafter proceed to:
  - (a) seek further information relevant to the compensation that would be payable in the event of expropriation,

- (b) seek a High Court order confirming the constitutional validity of the proposed expropriation,
- (c) give the owner and all registered rights holders at least 180 days' notice of these court proceedings.

7 **Investigation prior to High Court application**

- (1) The expropriating authority must seek information from the owner and others on issues relevant to the amount of compensation payable for the property.
- (2) It may require the relevant municipality to provide copies of approved plans, zoning by-laws, and similar information.
- (3) A representative of the expropriating authority may also enter and inspect the property, but must have both the prior written authority of the expropriating authority and the prior written consent of the owner to do so.
- (4) Any person who enters the property must carry with him both the written authority of the expropriating authority and the owner's written consent, and may enter only at reasonable hours and by prior written agreement with the owner regarding the time and manner of his access to the property.
- (5) The inspector may not dig into the property, or build weirs and the like, without the additional written permission of the owner.
- (6) The owner may claim compensation for any damage caused during this inspection.

8 **Notice of court hearing and compensation proposed**

- (1) After this investigation has been concluded, if the expropriating authority wishes to proceed with the proposed expropriation, it must serve notice on the owner of its intention to seek judicial confirmation of the constitutionality of the proposed expropriation. It must also provide details of the compensation it proposes to pay. If the proposed expropriation will involve the eviction of the owner from his home, the expropriating authority should, in addition, provide details of the suitable alternative accommodation it proposes to provide.
- (2) At least 180 days' notice of the proposed High Court application must be given to ensure that the owner has adequate time to prepare for the necessary court hearing.

9 **High Court hearing into constitutionality**

- (1) The expropriating authority bears the onus of proving, on a balance of probabilities, that its proposed expropriation meets all the requirements for a valid expropriation under the Constitution.
- (2) The expropriating authority must prove that the proposed expropriation is not arbitrary, that it is authorised by a law of general application, and that it is objectively for a public purpose or in the public interest.
- (3) The expropriating authority must prove that the compensation it proposes to pay is just and equitable in all the circumstances, and complies in full with Section 4 of this Bill.

- (4) If the proposed expropriation will involve the eviction of the owner from his home, the expropriating authority must provide the court with all relevant information, show that the proposed eviction is just and equitable in all the circumstances, and give details of the suitable alternative accommodation it proposes to provide.
- (5) The owner has the right to obtain pleadings and other information in advance, to make representations via legal counsel, to provide his own evidence, and to cross-examine any witnesses called by the expropriating authority.
- (6) The owner may claim from the expropriating authority his reasonable legal costs in preparing for and participating in this High Court hearing, as determined on an attorney-and-client basis.

10 **High Court order confirming or rejecting constitutionality**

- (1) The High Court must decide on the constitutionality or otherwise of the proposed expropriation, the adequacy of the proposed expropriation, and whether the owner may be evicted from his home in all the relevant circumstances. It must also give full reasons in writing for its decision(s).
- (2) If the High Court rejects the constitutionality of the proposed expropriation, the expropriating authority may not proceed with the proposed expropriation (unless the expropriating authority successfully appeals against the court's decision, see below).
- (3) If the High Court confirms the constitutionality of the proposed expropriation, its judgment and accompanying order must cover all relevant issues, including the amount of compensation payable for the property, which must be based on all the factors listed under Section 4 of this Bill. The order must also require payment of all compensation due at least fifteen (15) working days before the date of expropriation on which the expropriating authority is to take ownership of the property.
- (4) Where this is relevant, the High Court order must also authorise the eviction of the owner from his home, failing which any eviction will be unlawful. It may also require the provision of suitable alternative accommodation.
- (5) If either party seeks to appeal against the High Court order, expropriation may not proceed until the appeal has been abandoned or dismissed, or the right to expropriate the property, as well as the compensation payable, and so on, has been confirmed by a higher court.

11 **Notice of expropriation**

- (1) Once a final court order confirming constitutionality has been obtained, the expropriating authority may issue a notice of expropriation. This notice must be fully in keeping with the court order.
- (2) This notice must be served on the owner and the holder of any other registered right. [Examples would include a servitude, a mining right, or a bank with a mortgage bond over the property.]
- (3) The notice must have the court order appended to it.

- (4) The notice must:
  - (a) clearly identify the property;
  - (b) state the date of expropriation on which ownership is to pass to the expropriating authority, which may not be earlier than 90 days from the date of service of the notice, unless the owner agrees to an earlier date in writing;
  - (c) state the date on which the right to possess the property is to pass to the expropriating authority, which may not be earlier than 90 days from the date of expropriation, unless the owner agrees in writing to an earlier date for the passing of possession;
  - (d) promise payment to the owner (and/or a bank holding a mortgage bond over the property, if applicable) of all the compensation due, as set out in the court order, at least fifteen (15) working days before ownership is to pass to the expropriating authority under sub-section (b);
  - (e) where relevant, promise the provision of suitable alternative accommodation, which must be made available to the owner at least fifteen (15) working days before ownership is to pass to the expropriating authority under sub-section (b).
- (5) Neither the expropriation notice nor any transfer of ownership or possession effected under it is valid unless the relevant court order and the provisions of this section, particularly sub-sections (d) and (e), have been fulfilled.
- (6) The owner may seek urgent relief from the court which granted the order if any aspect of its order has not been fulfilled.
- (7) If the court confirms that any aspect of its order authorising the expropriation has not been fulfilled, the expropriation notice is automatically set aside and has no further force and effect.

## 12 **Payment of just and equitable compensation**

- (1) The compensation due to the owner must be provided in money and must comply in full with the court order authorising expropriation.
- (2) The full amount due must be paid to the owner (or to the owner and/or the bondholder under section 16), at least fifteen (15) working days before the expropriating authority is to take ownership of the property under section 11(4)(b).
- (3) If the expropriating authority cannot prove in writing that the full amount of the compensation due has been paid to the owner (or to the owner and/or the bondholder, where applicable), as required by section (11)(4)(d), the notice of expropriation is automatically set aside and has no further force or effect.
- (4) Compensation may generally not include the value of any improvements made to the property after the notice of expropriation was served on the owner, provided this notice was in keeping with and accompanied by a court order confirming the validity of the expropriation.

13 **Court authorisation of eviction and provision of suitable alternative accommodation**

- (1) The owner cannot be evicted from his home except in accordance with the court order issued in terms of section 10(4), which must expressly authorise this, failing which any eviction of the owner is unlawful.
- (2) If this court order requires the provision of suitable alternative accommodation to the owner, the expropriating authority must provide this to the owner at least fifteen (15) working days before ownership of the property is to pass to the expropriating authority under section 11(4)(b).
- (3) If the expropriating authority cannot prove in writing that suitable alternative accommodation has been provided to the owner, as required by section (11)(4)(e), the notice of expropriation is automatically set aside.
- (4) If the alternative accommodation provided is not in fact suitable, the owner may seek urgent court relief. He may not be evicted from his home until suitable alternative accommodation has been provided.
- (5) The provision of suitable alternative accommodation is not a substitute for the just and equitable compensation required on expropriation under Section 4, but its value must be taken into account in computing the amount of compensation due to the owner.

14 **Passing of ownership**

- (1) Provided that the expropriation is carried out in accordance with the court order and the full amount of the compensation due has been paid to the owner (or to the owner and/or the bondholder, where appropriate) under Section 11(4)(d), and any promised suitable alternative accommodation has been made available to the owner under Section 11(4)(e), the transfer of ownership from the owner to the expropriating authority takes place on the date of expropriation specified in the notice of expropriation.
- (2) When ownership is transferred to the expropriating authority under subsection (1), the effect of this transfer is to extinguish the owner's prior right of ownership, but not other registered real rights in the property, except for a registered mortgage bond (see Section 16 below).
- (3) Other registered rights in the property may also be expropriated by the expropriating authority for public purposes or in the public interest, but all requirements for a valid expropriation under sections 3 to 19 of this Bill must be fulfilled in relation to every such right, each of which must separately be expropriated by the expropriating authority. In cases of urgency, the expropriating authority may seek a High Court order allowing ownership and other registered rights to be expropriated in the same notice of expropriation, but all requirements for a valid expropriation under sections 3 to 19 of this Bill must be fulfilled in relation to each owner or rights holder.



15 **Passing of possession**

- (1) If the expropriation is carried out in accordance with the court order and the ownership of the property has been transferred to the expropriating authority under section 14, the right to possess the property passes to the expropriating authority on the relevant date specified in the notice.
- (2) The expropriated owner must take care of the property until possession passes and must compensate the expropriating authority for any significant depreciation in its value.
- (3) The expropriated owner remains entitled to the use of, and income from, the property until possession passes, but (where applicable) must also pay such municipal rates and similar charges on the property as become due before possession passes.

16 **Property subject to a registered mortgage bond**

- (1) If the property is subject to a registered mortgage bond, the expropriating authority must, at least fifteen (15) working days before ownership of the property is due to pass to it under section 11(4)(b), pay the registered bond holder so much of the compensation due the owner as is needed fully to discharge the mortgage debt on the property.
- (2) The expropriating authority must on the same day pay the remaining balance to the owner, as required by section 11(4)(d).
- (3) If the relevant payments have been made in full within the specified period, the bond is extinguished on the date that ownership passes to the expropriating authority under section 14(1).

17 **Outstanding rates and other municipal charges**

If rates or other municipal charges are owing on the property on the date the expropriating authority takes possession of the property, the owner remains liable to the relevant municipality for the rates and taxes outstanding on that date.

18 **Compensation may be paid to the master in certain circumstances**

If the owner cannot be located, or in certain other circumstances (for example, the owner is dead and his will specifies beneficiaries who cannot be identified or found), the expropriating authority must deposit the compensation due with the Master of the High Court.

19 **Withdrawal of notice to expropriate**

- (1) If the expropriating authority decides to withdraw its notice of expropriation, it may do so, unless transfer of the property has already been registered.
- (2) Any person who suffers damage as a result of such a withdrawal may claim compensation.

20 **Regulations**

The minister of public works may make any necessary regulations, but these must be:

- (1) consistent with the provisions of this Bill;
- (2) tabled in Parliament three months in advance; and
- (3) approved by the National Assembly by simple majority.

**21 Precedence over other expropriation laws**

- (1) All existing expropriation laws remain in force but, in the event of conflict between them and this statute, the terms of this Bill prevail.
- (2) The terms of this Bill also prevail over any future expropriation laws, other than one seeking to amend the Constitution or this Bill.

**22 Transitional provisions**

This Bill does not apply to any expropriation effected prior to the date of its commencement. Any dispute over the compensation payable for such an expropriation must be determined as if this Bill had not been passed.

**23 Schedule of laws repealed**

The Expropriation Act of 1975 and all acts amending it (from 1975 to 1992) are repealed when this Bill comes into operation.