

# Expropriation Bill: Status report

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## Background

The current version of the Expropriation Bill (B23/2020) was tabled in Parliament on 15 October 2020. That follows unsuccessful attempts to come up with a new expropriation act in 2008 and 2013. The first briefing on the Bill by the Department to the Portfolio Committee on Public Works and Infrastructure took place in November 2020. Public hearings were held in March 2021 and a further round in September 2021. Public participation reports were then drafted, which were presented to the portfolio committee in November 2021. The portfolio committee met on 23 February 2022 to listen to the responses by the Department and the state law advisers to the public comments that were received. The portfolio committee has sought legal opinion from Adv Geoff Budlender (SC) on some of the points raised during the public hearings, such as the definition of “property”.

## Public participation process

The portfolio committee, as part of its public participation process advertised for written submissions on the Bill to be made in December 2020. The committee received 6216 WhatsApp submissions and 129 127 email submissions by the end of February which was the deadline for written submissions. 99% of written emailed submissions did not support the Expropriation Bill. The portfolio committee also held 36 public hearings in the 9 provinces. National public hearings were also held at which some 22 organisations presented their views on the Bill. This included organisations such as Agbiz, BASA, BUSA, Agri SA, Sakeliga, COSATU and the SA Institute of Valuers. In the oral submission process in the provinces, 56% of people were against the Bill. The portfolio committee was advised that a socio-economic impact assessment was done on the Bill in 2019. Members of the committee however pointed out that the assessment did not consider the economic implications of the Bill at all and stated that it was a mere desktop study.

## Important points raised during public participation

A large number of organisations and individual submitters opposed the R nil compensation clause. There was however broad consensus on the need to redress historical land dispossession. There were also a lot of comments that focussed on the definitions of “expropriation” and “property”. In the legal opinion provided by Adv Budlender to the portfolio committee, it is stated that: “it is neither possible nor advisable to attempt to define property.” At the meeting of 23 February, the main points raised during the public participation process were dealt with in detail by the legal advisers.

## Latest developments

At the meeting of 23 February, the legal advisers from the Parliament, state law advisor and the department of public works made comprehensive presentations on the public comments received. Their advice dealt with the following:

- Definition of expropriation.
- Definition of property,
- Expropriation without compensation,
- Inclusion of mineral and water rights
- Nil compensation clauses.

Adv Geoff Budlender (SC) dealt with each of these points in turn. Regarding the definition of expropriation”, he pointed out that it was quite narrow as it did not provide for third party expropriations but only for expropriations by the state. At the same time, the definition is too wide as it may also allow asset forfeiture and should be linked to a public purpose or public interest. The definition is thus too narrow and too broad. Regarding the definition of “property”, he advised that it would not be wise to try and define property as the definition is constantly being developed by the courts. Regarding the wording of R nil compensation and without compensation, he pointed out that there is a difference and that expropriation without compensation would be unconstitutional, but at R nil compensation it would be constitutional. Just and equitable compensation can in some cases be R nil.

Mineral and water rights are property and can be expropriated. Bill expressly excludes unregistered mineral rights, which is catered for in the Mineral and Petroleum Resources Development Act. On sections 12(3) and (4), Adv Budlender said that a blanket limitation on compensation would be unconstitutional. Any expropriation at R nil compensation must be reasonable and justifiable in an open and democratic society. Section 12(3) still required that the amount of compensation must be determined by the court and must be just and equitable. It is not a closed list. It is an attempt to guide the court as to the kind of land and circumstances that could attract R nil compensation. There is nothing immoral per se to hold land for investment purposes. Possible alternative wording for clause (a) would be to make it clear that the clause targets land that is held for no other purpose than to derive a profit from an expropriation. Regarding subclause (c), which deals with abandoned land, he said that there is no mechanism in our law to expropriate abandoned land. This clause contains a test for abandonment which has both a physical and subjective element. The physical element is physical control, and the subjective element entails that although the owner can exercise control over the land, he or she does not do so.

The legal advisers pointed out that both section 33 (administrative justice) and section 36 (limitations clause) will apply to expropriations. The legal advisers also advised that the Bill should guide the vesting of expropriated property in clause 9, regarding in whom the property will eventually vest. They also indicated that there was a vacuum in clause 9 read with clause 20 regarding certainty for bond holders. The issue of the cost of litigation was also highlighted in the presentation in the sense that the Bill was not clear on who was to bear the cost if a dispute on compensation was referred to the court. Clause 22 (urgent expropriations) was also touched upon as a point of concern. It was suggested that the

clause should stipulate the kind of property that could be expropriated to prevent abuse. These urgent expropriations cannot happen at R nil compensation.

The state law advisers referred to the Agri SA minerals case<sup>1</sup> in dealing with the definition of expropriation and said that the definition in the Bill was in line with that definition. This case held that there may be circumstances where the taking without compensation of property may be justified. Regarding the definition of property, the state law advisor referred to the case of the Law Society v the Minister of Transport<sup>2</sup>, where it was held that the definition of property should neither be too wide nor too narrow. In the FNB decision<sup>3</sup>, it was held that it is virtually impossible to define property.

### **Way forward**

The committee is at the stage where it is considering all the public inputs and will now start deliberating on the Bill clause by clause. Thereafter a report on the committee's deliberations and work will be drafted and the committee will vote on the Bill and the report. The National Council of Provinces process must then still follow.

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<sup>1</sup> Agri South Africa v Minister of Minerals and Energy (Afriforum; Afrisake; Centre for Applied Legal Studies; Pool as Amici Curiae) Case Number: CCT51/12 [2013] ZACC 9

<sup>2</sup> Law Society of South Africa and Others v Minister of Transport and Another: Case Number: CCT38/10 [2010] ZACC 25

<sup>3</sup> First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002)