

Putting the cart before the horse – the potential unconstitutionality of the Expropriation Bill

7 April 2021 6 min read

The Expropriation Bill B3-2020

South Africans have recently been presented with the Expropriation Bill B3-2020 (**“the Bill”**). While the Bill has drawn vociferous criticism from various voices, it is crucial to view the Bill in the broader context of the land reform project. In the author's view, a unified system of expropriation and compensation is to be welcomed, as the compensation mechanisms in the Expropriation Act No. 63 of 1975 (**“the 1975 Act”**) and the Constitution have been inconsistent since the inception of the Constitution.^[1] However, it is likely that the Bill, if passed, will be unconstitutional.

Because the Expropriation Bill goes beyond the ambit of the Constitutional property clause and permits nil compensation in certain circumstances, it deviates from the compensation-based nature of the Constitution. If the Bill is to provide for nil compensation, the Constitutional amendment process must be completed first. The Bill is also far too vague in many respects, most obviously with regards to the circumstances in which nil compensation may be payable.

Neither should the Bill be seen as a ‘silver bullet’ which will conveniently solve all the state's problems with land reform or be construed as an instrument of disaster which will enable the state to grab any land it wants for free and render the affluent homeless.

The state faces many other pressing obstacles to the land reform project. No consistent legislation exists which creates clearly defined goals, methods and rationales for the selection of the beneficiaries of land reform; the post-expropriation obligations of the state and support for recipients of farm-land.

The key aspects of the Expropriation Bill's potential unconstitutionality.

Subsidiarity

- The first problem is the ongoing process to amend section 25 of the Constitution of South Africa, 1996 (**“the Constitution”**) which recommenced on 30 June 2020.
- The Draft Constitution Eighteenth Amendment Bill^[2] proposes to insert a clause into the existing section 25 to the effect that where land is expropriated for the purposes of land reform, a court may determine that the amount of compensation is nil. However, the final wording of section 25 is unclear at this stage and may turn out to be substantially different from the present section 25.
- By introducing the Expropriation Bill before finalising the process of amending section 25, the Department has put the cart before the horse. The principle of subsidiarity dictates that all legislation must flow from the Constitution. If the amendment is ultimately successful and the amended text of section 25 differs substantially enough from the present section 25, it is conceivable that the Expropriation Bill will be inconsistent with the amended text of the Constitution.^[3] If that were to happen, the Bill will need to be amended again. Given that we have, for the past 24 years, had an Act that is inconsistent with the spirit and objects of the Constitution, it seems premature to publish a new Bill while the Constitutional amendment is still pending.

Compensation-based nature of Section 25

- To make matters worse, the Expropriation Bill may also be inconsistent with the current section 25. In its current state, section 25(2)(b) of the Constitution specifically provides that property may only be expropriated *“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 and approved by a court.”*
- Section 25(3) of the Constitution does not necessarily envision the payment of market-value compensation, but rather that the amount of compensation and the time and manner of payment *“must be just and equitable, reflecting an equitable balance between the public interests and the interests of those affected”*. It is therefore arguable that a departure from a market-value compensation approach is justifiable.
- There has been a long-standing academic debate about the meaning of “just and equitable” compensation and whether section 25 implicitly permits nil compensation. Whatever interpretation one is aligned with, there is certainly no academic consensus in this regard. If the Bill is passed, there will inevitably be a flurry of challenges regarding its constitutionality. It would be preferable therefore to first amend the Constitution to obtain clarity on this point.

Vagueness with regards to nil compensation

- Section 12(3) prescribes five circumstances in which it may be just and equitable for nil compensation to be paid, namely where:
 - land is held for speculative purposes;
 - land is held by an organ of state and it not being used for its core functions;
 - land has been abandoned;
 - the market value of land is less than the state investment or subsidy in the acquisition of the land; or
 - the land poses a health, safety or physical risk.
- Some authors have argued that the non-exhaustive nature of this section “creates the opportunity for the state to take *any* land, for free.”^[4] While this is an extreme view, it seems clear that the is suggestive and not peremptory. However, other circumstances may also justify nil compensation.
- The phrasing of this section creates a situation where, instead of limiting the scope of nil compensation, being a deviation from the compensation-based nature of section 25 of the Constitution, section 12(3) is so vague that its precepts may in theory be stretched to apply to any other circumstances in which it is just and equitable to do so. Section 12(3) therefore creates legal uncertainty which will most likely only be settled through crystallisation of judicial interpretation. Hoops argues that the section engenders uncertainty and introduces an excessively wide judicial discretion, adding that the uncertainty might be exploited by the state until such time as a body of jurisprudence has been created by precedent.^[5]
- In conclusion, the Expropriation Bill may be unconstitutional for three reasons, namely that it violates the principle of subsidiarity; it deviates from the compensation-based nature of section 25; and it is vague particularly with regards to nil compensation.

by Thomas Karberg, Candidate Attorney

reviewed by Bulelwa Mabasa, Director and Head of Land Reform Restitution & Tenure Practice

What you need to know about the Expropriation Bill and where it came from, [read more](#).

[1] T Karberg (2019) ‘Weighing the scales – a critical analysis of the ‘equitable balance’ requirement for compensation under the Constitutional property clause. Unpublished LLB dissertation, University of Pretoria.

[2] The Draft Constitution Eighteenth Amendment Bill is available at <https://pmg.org.za/bill/913/>.

[3] POWER Talk: Looking at the newly gazetted land expropriation bill (October 12, 2020) Available at: <https://omny.fm/shows/powertalk-archive/looking-at-the-newly-gazetted-land-expropriation-b>

[4] Viljoen, S “Expropriation without compensation: principled decision-making instead of arbitrariness in the land reform context” 2020 *TSAR* 35.

[5] Hoops, B “Expropriation without compensation: A yawning gap in the justification of expropriation?” 2019 *SALJ* 136.



Bulelwa Mabasa

Head of Land Reform

[View Profile](#)