Policy brief: Expropriation Bill 2020

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The *Expropriation Bill, 2020* (the Bill), along with an explanatory memorandum, was published in the *Government Gazette* by the Department of Public Works and Infrastructure on 9 October this year. This policy brief is aimed at highlighting the context, process, and impact of the proposed legislation.

The rationale for the Bill

The Bill is required to lay down a uniform process and means to calculate just and equitable compensation for all expropriations. These functions are currently performed by the existing *Expropriation Act, 1975 (Act 63 of 1975)* but, because it predates the *Constitution*, the prescribed process would likely no longer be considered administratively fair.

Likewise, *Act 63 of 1975* provides for compensation to be market based, whereas section 25 of the *Constitution* makes provision for "just and equitable" compensation that balances the rights and interests of the individual versus that of the public good.

In this sense, the Bill is what is known as framework legislation since it regulates how multiple state entities must exercise their existing powers of expropriation. The ability to expropriate for a specific purpose must still exist in other dedicated legislation.

There is a common misconception that the Bill will afford the state the powers required to expropriate land for land reform purposes. This is not true. The minister has had the power to expropriate for land reform since the mid-1990s but has seldom used these powers. This is partly because framework legislation to guide the correct procedure and method to calculate compensation, was not in place.

Understandably, media reports have linked the Bill to land reform since the nil compensation provisions are directed at land reform only. However, it is important to remember that the Bill vests with the Department of Public Works and Infrastructure (not Land Reform) and must regulate the procedures and compensation where property of any kind is expropriated for other purposes, such as building infrastructure.

The current process

The latest publication signals the minister's intention to introduce the Bill in Parliament. Once in Parliament, the Portfolio Committee on Public Works and Infrastructure will host public consultations. Once adopted by the National Assembly, the Bill will go to the National Council of Provinces, which may call for public hearings in the provinces before it is finally voted on and assented to and signed by the president. This is a lengthy process and is unlikely to be finalised in 2020.

The Bill has appeared in various versions since 2013, the latest looking substantively the same as the version deliberated on at the National Economic Development and Labour Council (Nedlac) earlier this year.

Analysis of the latest version

The latest version of the Bill still contains the controversial section 12(3) which states that a court 'may' find it just and equitable to award nil compensation for land expropriated under certain circumstances.

It should be emphasised that the following checks and balances are in place:

- The Bill does not state that nil compensation *will* be awarded in the listed instances; it simply states that it *may* be just and equitable to do so after considering all relevant factors. In other words, properties falling under the listed instances are not automatically eligible for nil compensation; it simply states that factors such as abandoned land or labour tenant claims should be a consideration when determining if it will be just and equitable to award nil compensation.
- Notably, the state does not take this decision – the courts do. If the state and the owner/rights holder cannot agree on compensation, mediation must be arranged, after which the courts must decide what is just and equitable. The state must take the matter to court if requested by the owner/rights holder.
- Expropriation is always the last resort:
  - There is a procedural guarantee contained in the Bill which prevents expropriation as the first option. The state can only legally initiate expropriation after negotiations to buy the property on reasonable terms has failed.
  - Expropriation is not a shortcut for the state. The procedural requirements contained in the Bill make expropriation such a cumbersome process for the state, that it will always be quicker, easier, and arguably cheaper for the state to buy property. Expropriation will likely only take place if the owner refuses to sell at reasonable terms.

- Expropriation is but one of many options to obtain land for reform. Both the Presidential Advisory Panel on Land Reform and Agriculture, as well as the minister have emphasised that expropriation is merely one option in the broader land reform toolkit. The bulk of land reform acquisitions are likely to be based on purchase and sale.

Recent developments to finalise the Blended Finance Scheme for land redistribution indicates that government prefers to follow the route of voluntary sales. Moreover, the Land Donations Policy, which is still being drafted, also indicates that government is exploring numerous instruments to drive land reform in South Africa, and is not solely focusing on expropriation.

What is the most significant risk?

The biggest risk is that a landowner/bondholder may have to rely on litigation to receive compensation. It has already been stated that the courts will be the final arbiter of compensation and they have traditionally been reluctant to deviate substantially from market value. Although the Bill makes it possible for a court to award nil compensation, they are likely to only do so under extreme circumstances.

> If the legitimate dangers posed by the nil compensation provisions are sensationalised, it can affect sentiment and the dangers it poses to investor confidence and investment, may become a self-fulfilling prophecy.

To date, the courts have only sanctioned nil compensation where there is no impact on the owner (i.e. where an owner was not compensated for the space used by a farmworker to bury his relatives on the farm where he/she resides) or where the proceeds of crime are forfeited to the state (i.e. the asset forfeiture unit of the SAPS).

The biggest risk is that the state officials implementing the Bill may offer nil compensation if an owner's circumstances resort under section 12(3) and leave it to the owner or bondholder to approach the courts for a determination. This may be costly and cumbersome. Moreover, it may dampen business confidence at a time when investments are desperately needed to rebuild South Africa's economy.

Amending the Constitution

The provisions of the Bill are intended to apply to the *Constitution* as currently drafted and may not be substantially affected, whether the *Constitution* is amended or not. The Bill makes provision for just and equitable compensation to be paid as per section 25(3) of the *Constitution*. The nil compensation clause does not replace just and equitable compensation; it merely states that a court can determine that it is just and equitable to award nil compensation.

Broader land reform strategy

Agbiz has always emphasised that the concept of expropriation without compensation is not the desired path for agricultural development and as an organisation, we do not support it. This Bill, however, goes beyond the nil compensation provisions – it is framework legislation aimed at regulating how multiple state entities must exercise their (existing) powers of expropriation, be it for agricultural purposes, human settlements, or industrial development.

Again, the Bill does not state that nil compensation *will* be awarded in the listed instances; it states that it *may* be just and equitable to do so after having considered all relevant factors. Against this backdrop, we do not think too much emphasis regarding driving land reform should be placed on this Bill, but rather on the various options highlighted by the Presidential Advisory Panel on Land Reform and Agriculture's report, as well as various models from agribusinesses and other agricultural stakeholders.

Managing expectations

While the provisions of the Bill do not pose a great deal of danger from a legal point of view, the political left may unduly raise expectations that the Bill will usher in widespread expropriation at nil compensation. This may pose challenges if the expectations of the landless and political left are not aligned to either the actual provisions or the frequency with which it is likely to be used.

Investor confidence will likely also be affected by sentiment, so there is a duty on agribusinesses and associations to moderate communication relating to the Bill. If the legitimate dangers posed by the nil compensation provisions are sensationalised, it can affect sentiment and the dangers it poses to investor confidence and investment, may become a self-fulfilling prophecy.

In conclusion

The *Expropriation Bill* is a necessary addition to the statute book as *Act 63 of 1975* is outdated and potentially unconstitutional. If the Bill is delayed any further, it could hinder infrastructure projects if the state does not have a constitutionally sound mechanism to acquire property for public purpose/interest where the owner refuses to sell. Practically all governments around the world have legislation that enables expropriation for this reason.

From a legal point of view, the Bill seems to provide for a sound process and contains several checks and balances in favour of landowners and bondholders. The controversy surrounding the Bill, and hence its potential negative effect on investor confidence, stems from the nil compensation provision for land reform. The actual impact of this provision will largely depend on the extent to which the state invokes it and the willingness of the courts to award compensation that deviates markedly from market value.

Expropriation will always remain the last option, so the extent to which it is used will depend on the success or failure of other land reform programmes based on public-private partnerships, which is government's preferred route at present.

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