

**Summary of the EXPROPRIATION BILL as per Webinar hosted
by MM on the 17th October 2022.**

A BACKGROUND:

1. In December 2018 the Bill was very quietly published for public comment, given that it specifically provides for expropriation without compensation. We then saw an amendment to the Bill, and most notably, to section 12, which deals with the particularly thorny question – what land exactly, would Government possibly earmark for expropriation without compensation?
2. After many objections were lodged the Draft Bill saw some changes, notably to the types of land that might be earmarked.
3. We then also saw an attempt by Government to introduce a change to the Constitution Act, in order to try and make expropriation without compensation easier, but that failed.
4. A final draft of the Bill was passed on 28 September 2022.
5. This has now been sent off to the National Council of Provinces for their approval and then the President must sign it into law.
6. Regulations must also still be approved, so we may still be some months (at the least) away from seeing this made law.
7. This Bill must be seen against the background of Section 25 of our Constitution Act which clearly allows for expropriation without compensation already, in that any constitutional right (such as the right not be expropriated without compensation) may be limited if this can be reasonably justified.
8. This includes the right not to be expropriated without compensation.
9. It must also be seen against the background of sections 33 and 34 of the Constitution which guarantee the right to administrative actions and decisions that are fair, and the right to challenge these in court.
10. All that this Bill does is to introduce a mechanism to try and enable Government to deal with expropriation without compensation.
11. Whether however, the Bill (or the Act as it will soon be referred to), will pass the Constitutional muster (i.e., will the Constitutional Court agree that it is drafted in such a manner that it will allow for reasonable and justifiable compensation free expropriations), remains to be seen. Let us have a look.

B BRIEF SUMMARY OF THE BILL:

Property (and that means ANY property, movable or immovable) may only be expropriated if it is

- 1 to the public benefit. (to give effect to administrative needs by organ of state such as roads; schools; public transport etc) or
- 2 in the public interest (to redress the results of past racial discriminatory laws or practices) and if you get compensated.

C PRELIMINARY STEPS

- 1 The expropriating authority **must consider all relevant factors when deciding whether to expropriate property** and must ascertain the suitability of the property for the required purpose; the existence of any rights over or to the property; **and facts relevant to calculating an amount of compensation.**
- 2 It must then **formulate an offer of just and equitable compensation** for each person, who would be affected if the property were expropriated.
- 3 **This includes owners and anyone who has a right to the property otherwise.**
 - 3.1 For example if you stood to inherit the land
 - 3.2 If the land was awarded to you in a divorce
 - 3.3 If you had offered to buy the land but it has not yet transferred
 - 3.4 If you are a builder who has a building lien over the property, but you are not yet paid in full.
- 4 An expropriating authority **may authorise a person with the necessary skills or expertise, to enter upon the property to value it** and also take with him the necessary workers, equipment and vehicles at all reasonable times or **as may be agreed to by the owner or occupier of the property (and if not then a court order must be obtained)**, to survey and determine the area; dig or bore on or into the land; enter upon and go across another property with the necessary workers, equipment and vehicles; and demarcate the boundaries of the property required for the said purpose.
- 5 The persons so authorized may demand to see building plans; copy of the title deeds; zoning certificates

- 6 **If the property in question is damaged during the process** of inspection the owner or any affected person may deliver written demand to the expropriating authority and **the expropriating authority must repair the damage to a** reasonable standard or compensate for the damage without undue delay. (If they can agree on the amount and if not then it must go to court)

D NOTICE OF INTENDED EXPROPRIATION

If an expropriating authority intends to expropriate property, it **must serve a notice** of intention to expropriate on

the owner;
 bond holder;
 any other holder of rights (servitude for example) and publish the notice of intention to expropriate in the Government Gazette.

This **must include**, amongst other things:

- 1 **the reason** for the intended expropriation of that particular property
- 2 **the intended future date of expropriation** and
- 3 **an invitation to any person who may be affected** by the intended expropriation **to lodge** with the expropriating authority within 30 days after the publication of the said notice, **any objections or submissions in response to the intended expropriation.**
- 4 **a directive to the owner to deliver a written list of the names and addresses of any holders of rights.**
- 5 **It must also contain an offer of compensation** which the expropriating authority considers just and equitable and an explanation of how the amount was arrived at with reference to supporting information, if any.

The owner may then:

- 1 **deliver a written statement stating whether he or she accepts the offer of compensation.**
- 2 may **request further particulars,**
- 3 or **dispute the amount** of compensation offered.

Even though the **NOTICE OF INTENTION TO EXPROPRIATE** must allow the person the right to object to the actual decision to intention to expropriate, **Section 7 (4) of the Act does not state that the owner may in his/her response actually take issue with the intended expropriation as such.**
 The landowner may only object to the amount offered.

This clearly breaches sections 33 and 34 of the Constitution which guarantees administrative action that is fair – and this can only be upheld if we are allowed the right to challenge such decisions in court.

MAYBE JUST BAD DRAFTING?

The expropriating authority must consider any objections or submissions lodged in response to a notice in deciding whether to proceed with the expropriation of the property.

The expropriating authority may then decide whether to expropriate the property and the amount offered.

E INTENTION TO EXPROPRIATE

- 1 If the expropriating authority does decide to expropriate (or not), **all affected and known parties must be advised** within a “reasonable time”.
- 2 **This is not defined – stumbling block #2. There will also be a register of all property targeted for expropriation. No doubt the Deeds Office will be furnished with such a copy which means that once property is targeted for expropriation it cannot be sold etc “for a reasonable time”.**

F COMPENSATION FOR EXPROPRIATION

The amount of compensation to be paid must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated having regard to all relevant circumstances, including:

1. the current use of the property;
2. the history of the acquisition and use of the property;
3. the market value of the property;
4. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

5. the purpose of the expropriation.

G NIL COMPENSATION

It may be just and equitable for **nil compensation** to be paid, and **only** where land is expropriated in the **public interest**, (i.e. for land reform) having regard to all relevant circumstances, including but not limited to:

1. where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value (**Obstacle #3 as this appears to be very arbitrary**);
2. where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration.
3. where an owner has abandoned the land by failing to exercise control over it;
4. where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
5. when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

H PROPERTY SUBJECT TO MORTGAGE OR DEED OF SALE

The expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner and the mortgagee or buyer concerned, as the case may be, after the claimant has notified the expropriating authority of the agreement. **Obstacle # 4!**

In other words, if your property is bonded, **you** must negotiate a settlement with the bond holder and if you cannot agree, then the expropriating authority may deposit the compensation money with the Master of the High Court until a Court has ruled on the matter.

This does not appear very administratively fair to me!

I MUNICIPAL CHARGES

If land which has been expropriated is subject to municipal charges, then the municipal manager must, inform the expropriating authority in writing of such

charges, and the expropriating authority must then notify the expropriated owner of any outstanding charges contemplated. If the expropriated owner or expropriated holder does not dispute the outstanding charges the expropriating authority may utilise as much of the compensation money in question as is necessary for the payment, on behalf of the expropriated owner of any outstanding charges.

Any claims for municipal charges then remain between the municipality and the landowner.

J MEDIATION AND DETERMINATION BY COURT

If the expropriating authority and expropriated owner do not agree on the amount of compensation, they may attempt to settle the dispute by mediation.

NB Section the Act only refers to a dispute regarding the amount of compensation and not the decision to expropriate as such, that may be referred to court.

This could present obstacle #5.

The Constitution guarantees the **right to fair administrative action and the right to have any administrative decision taken on review.**

There appears to be an attempt here to circumvent one of the most basic rights our legal system has – the right to challenge a decision.

If the expropriating authority and disputing party do not settle the dispute by consensus or mediation, the affected person may then within a further 90 days demand that the Authority refers the matter to court. The Authority must then refer it to court within 180 days. A court may allow more time.

CONCLUSION

This Bill faces huge challenges on just the few items I have highlighted above, and we are still a long way from seeing this becoming law.

The Constitutional Court is very unlikely to approve of the fact that the expropriating authority may, without challenge, decide on whether to expropriate – it cannot and may not have this exclusive authority as it goes against the grain of the most fundamental right, we all have which is the right to challenge a decision which affects our constitutional rights to fair administrative process.

Please note that this Summary of the EXPROPRIATION BILL is based on our understanding of its provisions as at 17 October 2022.