

Submission on the Draft Expropriation Bill, 2020

Natural Justice: Lawyers for Communities and the Environment
(NJ)

28 February 2021

Contact details:

Sobantu Mzwakali

Senior Programme Officer

Tel: +27 21 426 1633

Email sobantu@naturaljustice.org

Contents

- 1. Introduction**
- 2. Introducing Natural Justice**
- 3. Background and the purpose of the Bill**
- 4. Comments on the draft Bill**
- 5. Recommendations and amendments**
- 6. Conclusion**

1. Introduction

The Minister of Public Works, Patricia de Lille, published, with approval from Cabinet, an invitation for interested parties to comment on the draft Expropriation Bill, 2020. The invitation to comment comes from a revival of the process to draft a new Expropriation Act replacing the Expropriation Act of 1975. A draft Expropriation Act was passed in 2016 but referred back to the President for review. The purpose of the current draft Bill, taken in the context of current debate surrounding land reform, is to replace the Expropriation Act of 1975 with a law that will allow for expropriation without compensation.

Natural Justice: Lawyers for Communities and the Environment (NJ) welcomes the opportunity to make a submission in accordance with the invitation to submit written comments by Patricia de Lille, the Minister of Public Works, for public comment.

NJ has read and considered the implications of the Expropriation Bill of 2019 and submits the following comments and recommendations to the Department of Public Works. NJ's submission sets out a) background to the organisation and its work; b) comments on the draft Bill and c) makes recommendations for amendments – including factoring in climate change in land reform planning.

2. Introducing Natural Justice

Natural Justice: Lawyers for Communities and the Environment is a non-profit organization, registered in South Africa since 2007.

Our vision is the conservation and sustainable use of biodiversity through the self-determination of Indigenous peoples and local communities.

Our mission is to facilitate the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.

Natural Justice work at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected at the broader scales and that gains made in international fora are fully upheld at lower levels.

Given the importance of the Draft Expropriation Bill (the "Bill"), also within the context of land reform and the debate surrounding whether Section 25 of the Constitution needs to be amended to provide for expropriation without compensation, NJ wishes to submit its comments to the Minister and Director-General of the Department of Public Work.

We further express our request to make a verbal submission or participate in any meaningful engagements with the department when an opportunity arises.

3. Background and the purpose of the Bill

The draft Bill presents an opportunity to address gaps in the legislative framework of land reform by introducing a mechanism to meaningfully address the past failures of reform measures.

The Bill brings legislation in line with the requirements of the Constitution of the Republic of South Africa, 108 of 1996. To date, despite the efforts of progressive movements to ensure that expropriation would be provided for in our Bill of Rights, in support of land reform and the redistribution of access to land and other natural resources, our legal framework is still set by the Expropriation Act of 1975. The current Expropriation Act is in contradiction to the requirements and entitlements contained in:

- Section 25(2) of the Constitution, on expropriation in the public interest;
- Section 25(3) on the amount of compensation and the time and manner of its payment; and
- Section 25(4) on the definition of public interest, property and the nation's commitments.

The Expropriation Bill is a welcome affirmation of the state's role in unlocking land for developmental and redistributive purposes. However, NJ considers that more could be done to ensure that the Bill is situated within a more thoroughly worked-out programme of urban land reform, that has appropriate regard to the wealth of already existing regulatory instruments and opportunities to use expropriation to facilitate pro-poor land reform. The particular respects in which the Bill could be enhanced to accelerate urban land reform are set out in this comment.

The draft Bill is a response to the context of the land reform project and the inadequacies of past attempts to redress the unequal distribution of land in South Africa. The High-Level Panel on the Assessment of Legislation and Acceleration of Fundamental Change (the High-Level Panel) of 2018 and the Presidential Advisory Panel on Land Reform and Agriculture (PAP - the expert panel) of 2019 concluded that land reform policy has shifted away from its pro-poor focus and become marked with signs of elite capture. Most notably, no law is currently in place "to give meaning to, or set standards for measuring whether land reform enables citizens to gain access to land on an equitable basis".

The government remains bound by the Expropriation Act of 1975, adopted to protect white farmers whose land was expropriated by the apartheid government for incorporation into the homelands. This old law permits the government to expropriate property to use for public purposes, and requires compensation at the market rate, whereas the current constitution says compensation must be "just and equitable" and sets out five criteria for determining what this is in each case. So, on the face of it, we have a law that contradicts the constitution. A new law is overdue.

4. Comments on the draft Bill

At the outset, it should be noted that Natural Justice notices that the draft Bill closely resembles the previous version of the Expropriation Bill that passed both houses of Parliament in 2016 but was sent back to Parliament by then President Jacob Zuma, because of qualms that the public consultation process was defective. And, republished in 2019. Thus, NJ will be monitoring public participation on this law-making process as embedded in the Constitution.

The draft law spells out in detail how expropriation – mostly with compensation – will work, detailing how valuation should be done, how disputes should be settled, and how money should be paid. No property, including land, may be expropriated arbitrarily or for any reason other than the public interest, the law holds.

The points that NJ would like to raise with the Department of Public Works, elaborated in further detail below, can be summarised as follows:

Climate change and ecological constraint: Factor in climate change in land reform planning

Land reform in South Africa has not fully addressed key questions on climate change and agro-ecological constraints shaping farming in South Africa. South Africa's is largely a dry country with limited arable land. There are no long-term plans to ensure that land reform responds to the threats of climate change.

Land reform has generally been implemented without sufficient support mechanisms, for instance, access to markets, information and extension services. Also, the government has often failed to provide vital resources such as water, seeds and fertilisers. However, in addition to these long-standing shortcomings, new challenges related to climate change have surfaced and become increasingly prominent. Land acquisition and allocation proceeds without appropriately factoring in the increasingly precarious bio-physical conditions under which land reform beneficiaries have to operate. Land is often allocated to farmers without water rights. There is also insufficient infrastructure for irrigation and existing farm practices are not sufficiently adaptive to the increasingly precarious ecological environment.

State willingness to Expropriate

The potential success of any land redistribution programme rests on the willingness of the state to use expropriation as a policy tool to achieve large scale land reform. While the draft Bill will add to the available legislation granting the state authority to expropriate, NJ is concerned that the State has so far exhibited a noticeable absence of the political will to use existing legislation to expropriate in the interest of the poor. The state currently has the authority to expropriate in the public interest under various laws with redistributive components, including the Land Reform Act 3 of 1996 (Labour Tenants Act). However, these powers of expropriation, (which in substance and procedure significantly mirror those of the contemplated Bill) have been legally enforceable since the passing of the aforementioned Act but have been seldom applied.

Expropriation of state-owned land

Section 2(2) states that “[d]espite the provisions of any law to the contrary, an expropriating authority may not expropriate the property of a state-owned corporation or a state-owned entity without the concurrence of the executive authority responsible for that corporation or entity.” “Expropriation” is defined as “the compulsory acquisition of property by an expropriating authority or an organ of state upon request of an expropriating authority”. NJ is concerned that requiring consent removes the “compulsory” aspect of expropriation and shields state owned land from expropriation. State-owned entities and corporations cannot be excluded from the land reform project.

Expropriation must be for all property, not just land.

The stated purpose of the draft Bill is broad but the Bill itself focuses too narrowly on expropriation of land while simultaneously failing to recognise how expropriation, with or without compensation, could be used to redress the history of dispossession in South Africa and its resulting consequences. Section 12(3) of the draft Bill limits “nil compensation” to expropriation of land and section 3 limits the powers of expropriating authority to expropriate property on behalf of an organ of state to instances where that property “is connected to the provision and management of the accommodation, land and infrastructure needs of an organ of state”.

Property is not limited to land but includes all forms of corporeal and incorporeal property, including intellectual property. Under section 25(4) of the Constitution, property is expressly not limited to land. However, section 12(3) of the draft Bill states that nil compensation may be paid in at least five instances where land is expropriated in the public interest. This limitation was in no doubt designed to allay fears about expropriation of other forms of property for nil compensation, but this unnecessarily limits the applicability of the Bill. For example, nil compensation could be valid in the case of access to intellectual property where the state must gain access to a patent to medicines.

As written, section 12 of the draft Bill provides a rigid administrative process which provides a safeguard against arbitrary expropriation and must be followed to determine “just and equitable” compensation, even in the case of nil compensation. These processes should be extended to all property.

State-centred approach to expropriation

The draft Bill defines “expropriating authority” as “an organ of state or a person empowered by this Act or any other legislation to acquire property through expropriation”. In practice, only the Minister of Public Works or an assigned delegate may expropriate property. NJ is concerned that this limitation re-affirms the state-centric approach to expropriation which has been in place since democracy. As such, the only engagement contemplated by the draft Bill is that between property-owner and the state. This definition unduly limits the scope of the draft Bill and the powers of entities such as municipalities, to expropriate. Municipal level change and a more localised process is important for maintaining accountability and for facilitating successful expropriation: proximity to the citizens will allow for closer scrutiny and allow for individuals and communities to advocate on their own behalves. It fails to accommodate any spaces for public involvement, either in the form of individuals, communities, or organisations such as those who act in the public interest, in the expropriation process. The cumulative result of the broad definitions yet narrow scope of the draft Bill serves to effectively exclude the very public that expropriation intends to benefit.

NJ is concerned that without a specific mechanism to allow the poor to influence the expropriation process, the needs and rights of the poor will not be addressed. The process of expropriation should be accessible to the average person, and create room for self-advocacy in light of the national goal of addressing apartheid era policies that disenfranchised millions of people.

Positioning of draft Bill in legislative context

Section 29 requires any law dealing with expropriation prior to the introduction of the Expropriation Act to be read “in a manner consistent with” the Act and that the Act will prevail in the event of any conflict. NJ is concerned that the draft Bill does not locate itself in relation to existing legislation.

Registered and unregistered rights

NJ commends the inclusion and recognition of unregistered rights and the allowances made for the rights of unregistered holders. This is an appropriate step in giving legal effect to the tenure security provisions of the Constitution that is lacking for the urban poor. Currently, close to 60% of the South African population can be categorised as having “unregistered rights” or living outside of the land titling system. This includes 2 million people living on commercial farms, and 17 million people living in communal areas. The recognition of this category of people in the draft Bill shows a recognition of the reality facing millions of South Africans.

NJ is concerned that unregistered rights holders remain vulnerable, especially in the process of expropriation, unless their tenure rights are protected, turned into legally enforceable rights, and are recorded. Failure to record these land rights will result in many South Africans remaining vulnerable to eviction and dispossession.

Expropriation of state-subsidised property for nil compensation

Section 12(3)(e) of the draft Bill states that land can be expropriated in the public interest for nil compensation “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.”

NJ is concerned that, as stated, section 12(3)(e) could result in the expropriation of land purchased through the use of a need-based subsidy. Where an individual or a community has purchased land or capitally improved land using a state subsidy, the land in question could be expropriated as a result of being tied to a subsidy. Since 1994, South Africa has implemented a number of grant and subsidy programs to allow individuals and communities to purchase or improve land. These include the Land Redistribution and Agricultural Development (LRAD) grant which specifically provides support to South Africans for agricultural land acquisition and development or the Individual-Non-Credit Linked subsidy which can be used to purchase an existing house or serviced stand. Given that the purpose of land reform in South Africa is to redress the imbalances of the past, including subsidies aimed at allowing previously disadvantaged people to purchase or develop land seems unwise.

Expropriation register

The draft Bill proposes the introduction of an Expropriation Register under section 26. The register is proposed as a record of “all expropriations that are intended, effected and withdrawn, and of decisions not to proceed with a contemplated expropriation”. This register is intended to ensure transparency by making a record of proposed, completed and abandoned expropriations available to the public. Under section 27, all expropriating authorities must deliver copies of notices of intended, completed or withdrawn expropriations within 20 days of the service or delivery of the notice. In setting out requirements for the notice, sections 7(2)(c) and 7(2)(d) give vague requirements as to the information to be included in the notice, including a “short description of the purpose” for which the property will be expropriated and the reason that a particular property has been selected. Interested parties are provided with an address at which to obtain the particulars of the purpose during business hours.

NJ is concerned that the draft Bill does not indicate how the effectiveness of its implementation will be monitored or how the impact on the “public interest” defined as including “the nation’s commitment to land reform and reforms to bring about equitable access to All South Africa’s natural resources in order to redress the results of past racial discriminatory laws or practices”. As currently phrased in the draft Bill, the proposed register will not provide an adequate measure of whether people with unregistered land rights are gaining access to land on an equitable basis. The registry does not specify how the expropriation will serve the public interest, nor does it provide a mechanism for stakeholders to challenge proposed, or implemented, expropriations.

Monitoring expropriation “in the public interest”

NJ is further concerned that the public will not have the ability to effectively monitor and scrutinise the expropriation process, but also to scrutinise the interests furthered by any act of expropriation. The public must be able to monitor expropriations conducted for economic versus redistributive interests. As discussed above, state actors have traditionally been reluctant to expropriate property,

specifically land, in the interest of the poor, and the process must be monitored to ensure that less scrupulous actors are not able to exploit the powers contained in the Expropriation Act for illegitimate purposes.

Mismanagement of the expropriation process

NJ is further concerned that placing complete faith in state entities to implement expropriation in good faith overlooks the obstacles of mismanagement and inefficiencies already evidenced in land reform endeavours.

Definition of “purely speculative purposes”

The draft Bill specifies five instances in which land can be expropriated in the public interest for “nil compensation”, including abandoned land and land held purely for speculative purposes. NJ applauds the inclusion of abandoned land in this category.

However, NJ is concerned that the draft Bill fails to clearly define how land will be categorised as being held for “purely speculative purposes”. In the context of metropolises such as Johannesburg, land is made “scarce” by companies and individuals holding large tracts of land on a speculative basis, often putting the land to no productive use. Land that would fall under this category must be clearly defined to include land that is held for future speculative gain and should differentiate land purchased for future development and land left unused in the hopes that its value might increase in the future. A clear definition would allow the state to unlock well-located tracts of land and to secure the tenure of millions of people who live on abandoned property or on speculatively held land.

5. Recommendations for amendments

- i) NJ submits that section 2(2) of the draft Bill must be omitted from the Expropriation Act.
- ii) NJ submits that the draft Bill must be amended to include a mechanism through which citizens may directly request for the expropriation of property.
- iii) NJ submits that the draft Bill should specify that property will not be expropriated for nil compensation where the property holder is an individual or community who purchased or capitally improved land using a state subsidy intended to redress past racial discrimination.
- iv) NJ submits that a comprehensive Bill will include provisions to guide the expropriation process. NJ endorses the Land Framework Act proposed by the High-Level Panel to guide expropriation and to evaluate whether expropriation gives people access to the property system and recommends that the draft Bill draw from the proposed Act. The purpose of the Land Redistribution Framework Act would provide a “mechanism to enhance oversight and accountability” and proposes “district-level committees of local stakeholders to ensure more direct participation by people on the ground to balance the power of officials.” This proposed Act also proposes mechanisms to measure delivery and hold decision-makers to account. The adoption of such an Act would help to ascertain whether the goal of equitable access is being attained and help to focus on the reality of the exclusion of most people in South Africa from the property system.
- v) NJ submits that to circumvent the constraints imposed by a lack of political will, an ombudsman-type structure responsible for representing the interests of the public in the expropriation process should be created. An ombudsperson would allow citizens to engage with the process of expropriation without needing the assistance of a lawyer and would provide a mechanism to hold organs of state accountable. For example, the draft Bill contemplates the expropriation of land subject to a land claim but does not provide anywhere to adjudicate the dispute. An ombudsperson could be tasked with adjudication of land claims,

allowing members of the public to challenge proposed expropriations, engaging with unregistered tenants, etc.

- vi) NJ submits that the Expropriation Register suggested in section 26 must: be made available locally in each municipality as opposed to being kept by the national department and made accessible online; include details of the outcome of the expropriation including demographic information on the parties who have benefitted from the expropriation; and include an evaluation of how a proposed expropriation will help redress past discrimination.
- vii) NJ submits that the expropriation process must coincide with a land administration system to record the rights of unregistered occupiers. The recognition of this category of people in the draft Bill shows a recognition of the reality facing millions of South Africans, but these people remain vulnerable unless their tenure rights are protected, turned into legally enforceable rights and are recorded. Failure to record these land rights will result in many South Africans remaining vulnerable to eviction and dispossession. The recording of these rights can be achieved through “an inclusive and robust land administration system that caters for all South Africans across a full spectrum of coexisting land rights.” The recognition of this new land administration system was recognised by the High-Level Panel which also recommended the enactment of a new Land Records Act. The Land Records Act would be a crucial component of a land administration system that provides robust forms of recourse to ordinary people seeking to assert and protect their land rights.

6. Conclusion

In this submission, NJ has highlighted several gaps in the proposed in the Draft Expropriation Bill. NJ’s primary concerns relate to the exclusion of individuals from being able to initiate the expropriation process; limitations on the ability to expropriate state-owned land; the location of the draft Bill in relation to existing legislation; the expropriation of state-subsidised property for nil compensation; the limitations on the ability for citizens to monitor the implementation of the expropriation process; and the definition of “purely speculative purposes”.

NJ has presented recommendations that specific concerns be addressed to ensure the final Bill can serve as a mechanism to meaningfully address the past failures of land reform measures.

NJ welcomes the Bill, and we welcome the inclusion and recognition of unregistered rights holders as equal stakeholders.

