

Expropriation Bill [B 4B-2015]

Presentation to KwaZulu-Natal Legislature 16 March 2015



Expropriation Bill [B 4B-2015]

Introduction

1. Expropriation is recognized as an essential mechanism for the State to acquire property in certain instances (such as essential infrastructure, land reform and conservation) and is thus protected by the Constitution, 1996.
2. The general framework for expropriation is outlined in Section 25 of the Constitution which provides that property may be expropriated only in terms of law of general application, and that no law may permit arbitrary deprivation of property. The Constitution further determines that –
 - ❑ expropriation may only occur for a public purpose or in the public interest and subject to payment of compensation; and
 - ❑ “public interest” includes the nation’s commitment to land reform, reforms to bring about equitable access to all South Africa’s natural resources and other reforms to redress the results of past racial discriminatory laws or practices.

B. Reasons for review of Expropriation Act, 1975

3. The Expropriation Act, 1975 –

- ❑ confers the power to expropriate property for public purposes on the Minister of Public Works; and
- ❑ generally sets out procedures to be followed by an expropriating authority when carrying out an expropriation.

4. The review of the Expropriation Act, 1975 became necessary to ensure consistency with the spirit and provisions of the **Constitution**, in particular –

- ❑ the equality clause (section 9);
- ❑ the property clause (section 25);
- ❑ just administrative action (section 33); as well as
- ❑ extension of the purpose for expropriation to include public interest.



Reasons for review of Expropriation Act, 1975

(Continued)

- 4.1 The Expropriation Act, 1975 limits the payment of compensation to – (a) owners; (b) holders of registered rights; and (c) holders of only certain unregistered rights in expropriated property.
- 4.2 Section 25 of the Constitution, however, permits the expropriation of property, subject to the payment of *just and equitable compensation* to all persons affected by an expropriation.
- ❑ The Constitution therefore extends its protection to both holders of registered and unregistered rights in property.
 - ❑ A holder of a right in property, whether registered or unregistered, is constitutionally entitled to compensation when property is expropriated.



Reasons for review of Expropriation Act, 1975

(Continued)

- 4.3 Compensation in terms of the Expropriation Act, 1975 is determined primarily on the basis of the **market value** of the expropriated property.
- 4.4 The Constitution [section 25(3)] however, requires that **just and equitable compensation** be paid and that such compensation be determined by having regard to **all relevant circumstances**, without placing undue weight to any single or particular factor –

“The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including-

- (a) the current use of the property;*
- (b) the history of the acquisition and use of the property;*
- (c) the market value of the property;*
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
- (e) the purpose of the expropriation.”*

Reasons for review of Expropriation Act, 1975

(Continued)

- 4.5 The Expropriation Act, 1975 does not embody the Constitutional principle of **just administrative action**, such as -
- ❑ providing for notification through publication of an intended expropriation, incorporating the purpose and rationale for such expropriation;
 - ❑ providing for notification to all known affected persons of an intended expropriation, incorporating the purpose and rationale for such expropriation;
 - ❑ affording interested parties an opportunity to raise objections and make representations to the Expropriating Authority before a decision to expropriate is taken; and
 - ❑ requiring the Expropriating Authority to consider all submissions from interested parties, before deciding whether or not to proceed with an expropriation.



Reasons for review of Expropriation Act, 1975

(Continued)

- 4.6 There is an array of authorities within all spheres of government that are empowered to expropriate property, through various pieces of legislation:
- ❑ **National Government:** President and various Ministers;
 - ❑ **Provincial Governments;** Premiers and various MECs;
 - ❑ **Local Government:** All Municipal Councils are so empowered.
- 4.7 Such legislation prescribe varying procedures for expropriation. There is therefore a need to provide certainty to those involved in an expropriation, both for the State, as well as any person affected by an expropriation.
- 4.8 **The Expropriation Bill therefore seeks to ensure consistency with the Constitution and uniformity of procedure of all expropriations, without interfering with the powers of expropriating authorities.**

C. Expropriation Bill [B 4B-2015]

5. In 2013, a draft Expropriation Bill was published for **public comment**. Extensive submissions were received from organised agriculture; commerce and industry; the financial sector; the legal fraternity; the property industry; professional associations; public entities; government departments and members of the public.
6. In the main, the comments were positive, offering wide-ranging proposals towards improving the draft legislation.
7. A revised Expropriation Bill was thereafter submitted to **Nedlac**. A Task Team concluded its deliberations with relatively few areas of disagreement recorded. There were no areas of disagreement where Labour, Community and Business unanimously opposed any provision of the draft Bill. Nedlac adopted the Task Team's report in 2014.

Expropriation Bill [B 4B-2015]

8. The **Expropriation Bill [B4 – 2015]** was introduced in Parliament and referred to the Portfolio Committee on Public Works in February 2015.
9. The Bill was published for public comment and the Portfolio Committee hosted public hearings on the Bill in May/June 2015. Following extensive deliberations, the Portfolio Committee adopted a revised Expropriation Bill on 02 February 2016.
10. The National Assembly subsequently adopted the **revised Expropriation Bill [B 4B-2015]** on 23 February 2016.

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Expropriation Bill [B 4B-2015]

Chapter 1: Definitions and Application of the Act

11. **Clauses 1 and 2** contain definitions and deal with the application of the proposed legislation, determining that an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest.
12. The expropriating authority is obliged to enter into negotiations with the owner of property required for such purposes and attempt to reach an agreement on the acquisition of the property before resorting to expropriation [except in circumstances where the right to use property temporarily is taken on an urgent basis, as provided in Clause 22].
13. The Bill determines that no property may be expropriated unless the prescribed procedures have been followed.

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Chapter 2: Powers of Minister of Public Works to expropriate

14. **Clauses 3 and 4** grant a general power to expropriate to the Minister of Public Works. The Minister is empowered to expropriate property (a) for purposes connected with the execution of his/her mandate; or (b) upon request by an organ of state (other than an expropriating authority) that satisfies the Minister that it requires particular property for a public purpose or in the public interest.
15. The Minister's mandate includes the provision and management of the accommodation, land and infrastructure needs of organs of state.
16. The Minister may delegate or assign his or her powers and duties contained in the Bill to an official of the Department of Public Works, except for the power to –
 - (a) expropriate;
 - (b) expropriate urgently on a temporary basis;
 - (c) withdraw an expropriation; or
 - (d) make regulations.

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Chapter 3: Investigation and valuation of property

17. **Clauses 5 and 6** deal with the pre-expropriation phase and detail various procedures to be followed by an expropriating authority prior to an expropriation. These procedures are used to ascertain the suitability of the property for the purpose for which it is required and to gather information on the existence of registered and unregistered rights in such property and the impact of such rights on the intended use thereof.
18. The Bill also provides that the expropriating authority may authorise persons to enter the property with a view to surveying and valuation, amongst others things.
19. Provision is also made for a person to claim compensation should the property be damaged as a consequence of the evaluation thereof.



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Chapter 3: Investigation and valuation of property (Continued)

20. In gathering information on the property, the expropriating authority is obliged to consult with other organs of state that may be affected by the contemplated expropriation.
21. When contemplating the expropriation of **land**, the expropriating authority must consult –
 - (a) the Departments of Rural Development and Land Reform; Environmental Affairs; Mineral Resources; and Water and Sanitation; as well as any other organ of state whose functions and responsibilities will be materially affected.
 - (b) the Municipality where the property is situated, to ascertain the impact of the contemplated expropriation on municipal planning.



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Chapter 4: Intention to expropriate and expropriation of property

22. **Clauses 7 to 11** deal with the post-investigation phase. At this stage the expropriating authority would have gathered all relevant information and consulted with known parties affected by the contemplated expropriation.
23. Should the expropriating authority intend to proceed, it must serve all affected parties known to him/her with a **notice of intention to expropriate**. This notice will amongst other things, include the –
- (a) the description of the property;
 - (b) the purpose for which the property will be expropriated;
 - (c) the reason for the expropriation of that particular property; and
 - (d) a directive to the owner and holders of rights to furnish particulars of holders of unregistered rights known to them.

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Chapter 4: Intention to expropriate and expropriation of property (Continued)

24. The **notice of intention to expropriate** must also call upon the owner or a holder of a right in affected property to provide a written statement stipulating the amount claimed as just and equitable compensation.
25. All affected parties are given the opportunity to submit written objections within a stipulated period. The expropriating authority must consider all objections and submissions timeously before proceeding with an expropriation.
26. If no agreement on the amount of compensation payable can be reached between the expropriating authority and the owner or holder of a right within a specified period, the expropriating authority must take the decision whether or not to expropriate. Provision is made for further negotiation on compensation with the owner or holder of a right.

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Chapter 4: Intention to expropriate and expropriation of property (Continued)

27. **Clause 8** deals with the **notice of expropriation**. If the expropriating authority decides to expropriate a property, a notice of expropriation must be served on (1) the relevant owner; (2) holder of a registered right; (3) known holder of an unregistered right; and (4) all known affected parties.
28. The notice of expropriation must, amongst others, contain –
- (a) a full description of the property;
 - (b) a description of the purpose for which the property is expropriated;
 - (c) the reason for the expropriation of that particular property;
 - (d) the date of expropriation;
 - (e) the date on which the right to possession of the property will pass to the expropriating authority; and
 - (f) the amount of compensation offered or agreed to.

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Chapter 4: Intention to expropriate and expropriation of property (Continued)

29. The **notice of expropriation** must furthermore be accompanied by documents –
- (a) setting out the date of payment of the compensation;
 - (b) indicating the property by way of a survey diagram or sketch plan;
 - (c) an explanation of what the offer of compensation comprises of;
 - (d) together with supporting documents detailing how the offer of compensation was determined; etc.
30. **Clause 9** states the effect expropriation has on the property concerned, which includes that ownership of the property vests in the expropriating authority on the date of expropriation and that all unregistered rights in the property are simultaneously expropriated, subject to certain exceptions.

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Chapter 4: Intention to expropriate and expropriation of property (Continued)

31. A further effect of expropriation is that the expropriating authority must take possession of the property concerned. Until the date of possession, the expropriated owner or expropriated holder of a right who is still in possession of the property must take care and maintain the property. The expropriated owner or expropriated holder of a right must be compensated for costs necessarily incurred for the maintenance of the property.
32. **Clauses 10 and 11** deal with claims made in respect of unregistered rights in property, which property has already been expropriated. The Bill recognises that the holder of an unregistered right in property that has been expropriated is entitled to compensation. Provision is made for the submission of evidence to the expropriating authority to verify the claim and for the duties of the expropriating authority in this regard.

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Chapter 5: Compensation for expropriation

- 33. Clauses 12 to 20** deal with the determination and payment of compensation to persons whose property or rights in property are expropriated. Section 25(3) of the Constitution determines that the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including the –
- (a) current use of the property;
 - (b) history of the acquisition and use of the property;
 - (c) market value of the property;
 - (d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

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Chapter 5: Compensation for expropriation (Continued)

34. **Clause 12** also deals with factors which must not be taken into account when the amount of compensation is determined. These are –
- (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;
 - (b) special suitability of the property for the purpose it is required, if it is unlikely that it would have been purchased for that purpose in the open market;
 - (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
 - (d) improvements made after the notice of expropriation was served, except where such were agreed on or undertaken in terms of contractual obligations;
 - (e) anything done with the object of obtaining compensation therefor; and
 - (f) any enhancement or depreciation in the value of the property directly attributable to the purpose for which it is required by the state.

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Chapter 5: Compensation for expropriation (Continued)

35. **Clause 13** makes provision for the payment of interest on any outstanding amount of compensation once the expropriating authority has taken possession.
36. **Section 14** deals with certain obligations of an owner or holder of a right who receives a notice of expropriation. The owner or holder must within 20 working days of receiving the notice indicate whether he or she agrees to or rejects the amount of compensation offered.
37. If the offer is rejected, the owner or holder must indicate the amount he or she claims as just and equitable compensation. Provision is made for particulars which the owner or holder must furnish. Provision is also made for the expropriating authority to extend the period of 20 working days.

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Chapter 5: Compensation for expropriation (Continued)

38. **Clause 15** provides that if the expropriating authority rejects the amount claimed by an expropriated owner or expropriated holder of a right, the executing authority must within 20 working days of delivery of the statement containing the amount claimed, make a written offer of just and equitable compensation.
39. The offer of compensation must include full particulars of how the amount is made up and calculated, as well as copies of reports detailing how the offer was determined.
40. **Clause 16** provides that the expropriating authority or an expropriated owner or expropriated holder of a right may from time to time, in writing, request certain particulars regarding the compensation claims and offers of just and equitable compensation.

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Chapter 5: Compensation for expropriation (Continued)

41. **Clause 17** deals with the payment of the amount offered as compensation. In essence, compensation becomes due on the date on which possession of the expropriated property passes to the expropriating authority.
42. **Clause 18** deals with instances where expropriated property is subject to a mortgage or a deed of sale. Provision is made to whom payment of the amount of compensation must be made.
43. **Clause 19** makes provision for the expropriating authority to pay from the compensation money any outstanding municipal property rates and other charges on the property (up to the date of possession by the expropriating authority).
44. **Clause 20** makes provision for instances where the expropriating authority may deposit the compensation with the Master of the High Court [e.g. if the expropriated property was left in a will to undetermined beneficiaries].

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Chapter 6: Mediation and Determination by Court

45. **Clause 21** provides that in the absence of agreement on compensation, the expropriating authority and the expropriated owner or expropriated holder of a right may attempt to settle their dispute by mediation.
46. The clause further provides that if the parties are unable to settle the dispute by consensus, or if any party did not agree to mediation, the expropriating authority must refer the matter to a competent court. The court must determine the dispute between the expropriating authority and the expropriated owner or expropriated holder of a right in the property.
47. The aforesaid provision does not preclude a person from approaching a competent court on any dispute relating to the application of the envisioned Act.

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Chapter 7: Urgent Expropriation

48. **Clause 22** deals with urgent expropriations. In the case of a disaster or if a court so orders, an expropriating authority may exercise a right to use property temporarily for a period not exceeding 12 months.
49. The expropriating authority is exempted from certain provisions of the envisaged Act, should it take property temporarily on an urgent basis.
50. The expropriating authority must within 30 working days of the notice to use the property temporarily make a written offer of compensation to the owner or holder of a right.
51. If the property is damaged during the temporary use, the expropriating authority must repair such damage or compensate the owner or holder of a right for the damage.

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Chapter 8: Withdrawal of Expropriation

52. **Clause 23** authorises an expropriating authority to withdraw an expropriation if –
- (a) the withdrawal is in the public interest; or
 - (b) the reason for which the property was expropriated is no longer applicable.
53. Under certain specified instances an expropriating authority may not withdraw an expropriation.
54. If an expropriation is withdrawn, ownership of the property again vests in the owner from whom it was expropriated. The expropriating authority will be liable for all reasonable costs and damages incurred or suffered by the owner as a result of the withdrawal.

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Chapter 9: Related matters

- 55. Clauses 24 to 31 deal with –**
- (a) delivery and publication of documents;
 - (b) extension of time allowed for certain actions;
 - (c) a register of all expropriations;
 - (d) civil fines and offences;
 - (e) power of the Minister of Public Works to make regulations;
 - (f) impact on existing legislation;
 - (g) repeal of laws; and
 - (i) transitional arrangements and savings.

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Chapter 9: Related matters (Continued)

56. **Clause 24** deals with the service of documents, delivery thereof and publication of expropriation notices and related documentation. This includes the use of radio and television if deemed necessary.
57. **Clause 26** requires the Department of Public Works to establish and maintain a register of all expropriations, which register must be accessible to the public. All expropriating authorities will be obliged to provide the Department with copies of all notices of –
- (a) intended expropriations;
 - (b) decisions not to proceed with intended expropriations;
 - (c) expropriations; and
 - (d) withdrawal of expropriations.

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Chapter 7: Related matters (Continued)

58. **Clause 27** deals with –
- (a) failure to provide information or documentation as prescribed in the Bill, for which a civil court may impose a fine; and
 - (b) wilful furnishing of false or misleading information which, upon conviction, will be punishable as if fraud had been committed.
59. As far as any existing laws dealing with expropriation are concerned, **Clause 29** proposes that those laws must be interpreted consistent with the provisions of the envisaged Expropriation Act. If there is a conflict, the envisaged Act will apply.
60. The envisaged Act will repeal the Expropriation Act, 1975 and the laws amending that Act.

Schematic Expropriation Process

1. Investigation and valuation of property to ascertain –

- Suitability of identified property for intended purpose; and
- Registered and unregistered rights in such property.

If property is **land**, consult with –

- Rural Development & Land Reform (DRDLR);
- Environmental Affairs (DEA);
- Mineral Resources (DMR);
- Water & Sanitation (DWS);
- Any other relevant organ of state; and
- Municipality where land is situated.

2. Notice of Intention to Expropriate must be –

- Published to inform public;
- Served on all known affected persons, inviting objections & submissions;
- If property is **land**, delivered to DRDLR; DEA; DMR; DWS and Municipality.

Affected persons must lodge objections or submissions within 30 working days, or within extended period granted by the expropriating authority.

Expropriation Process (Continued)

3. If an expropriating authority, after due consideration of all information and submissions received, decides to proceed with the expropriation, he/she must cause a **Notice of Expropriation** to be –
- Served on owner and holders of registered rights;
 - Served on all known holders of unregistered rights; and
 - Published to inform unknown holders of unregistered rights and broader public;
- If property is **land**, copy of notice must be delivered to –
- DRDLR; DEA; DMR; DWS; other relevant organs of state and the Municipality;
 - Registrar of Deeds and Mineral & Petroleum Titles Registration Office;
 - Holder of mortgage bond registered against property.

4. **Notice of Expropriation** must include –
- purpose of the expropriation // reason for expropriation of that particular property;
 - date of expropriation and date of possession of the property;
 - amount offered as compensation (including compensation offered to known holders of unregistered rights in the property);
 - explanation of what compensation comprises and how it was determined.



Expropriation Process (Continued)

5. Process in negotiating compensation

- ❑ Notice of Expropriation must include details of an offer of compensation.
- ❑ Expropriated owners and holders of rights must indicate (within 20 working days from date on which notice of expropriation was served) whether offer is accepted.
[The expropriating authority may extend this period]
- ❑ If not accepted, expropriated owners and holders of rights must indicate the compensation claimed and provide full particulars of such claim (including valuations or other professional reports informing such claim).
- ❑ If the expropriating authority does not accept the claim by an expropriated owner or holder of rights, he/she must make a revised offer; indicating full details thereof.
- ❑ A claim for compensation and an offer of compensation remain in force until –
 - expropriating authority makes a revised offer;
 - a claim or offer has been accepted; or
 - compensation has been decided or approved by a court.

Expropriation Process (Continued)

6. Resolution of disputes through Mediation or approval / determination by Court

- ❑ In the absence of agreement on compensation, the expropriating authority and the expropriated owner or expropriated holder of a right may attempt to settle their dispute by **mediation**.
- ❑ If the parties are unable to settle their dispute by consensus, or if any party did not agree to mediation, the expropriating authority must refer the matter to a competent **court**.
- ❑ The court must determine the dispute between the expropriating authority and the expropriated owner or expropriated holder of a right in the property.
- ❑ These provision does not preclude a person from approaching a competent court on **any dispute** relating to the application of the envisioned Expropriation Act.
- ❑ Where a court finds that a provision of the envisioned Expropriation Act has not been complied with, it must make such order as it considers just and equitable, having regard to all circumstances.

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~Thank you~

