NDIFUNA UKWAZI

DARE TO KNOW

c/o: Michael Clark, Head of Research and Advocacy
Email: michael@nu.org.za

28 February 2021

By email: Ms Nola Matinise
expropriationbill@parliament.gov.za
nmatinisie@parliament.gov.za

To whom it may concern,

RE: NDIFUNA UKWAZI COMMENT ON THE EXPROPRIATION BILL B23 OF 2020

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.

2. In December 2020, the Parliamentary Portfolio Committee on Public Works and Infrastructure ("the Committee") published the Expropriation Bill B23 of 2020 ("the Bill") which repeals the existing Expropriation Act 63 of 1975, provides for processes and procedures for expropriation of property by organs of state, and provides under which circumstances the expropriation of land and any improvements thereon for public purposes or in the public interest may take place without the payment of compensation. The Committee invited interested parties to comment on the Bill and, in early February 2021, extended the deadline for public comment until the end of February 2021.

3. Ndifuna Ukwazi has read and considered the Bill and makes the attached submission in accordance with the invitation to submit written comments.

Yours faithfully,

Ndifuna Ukwazi
(Per: Michael Clark, Head of Research and Advocacy)

[Sent electronically]

NDIFUNA UKWAZI COMMENT ON THE EXPROPRIATION BILL B23 OF 2020

INTRODUCTION

1. As mentioned in our cover letter, Ndifuna Ukwazi is a non-profit activist organisation and law centre that campaigns to advance urban land justice in Cape Town through research, community organising and litigation. Our primary mission is to expand, promote and protect access to affordable housing towards building a more just and equal city.

2. Over the last five years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, the management of public land in a manner that prioritises the social-economic needs and the promotion of social, transitional and inclusionary housing. We have published several resource guides and research reports on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to land and affordable housing.

3. It is from this perspective that Ndifuna Ukwazi has considered the Expropriation Bill B23 of 2020 ("the Bill"),[1] and makes the following submissions. Our submission focuses on the urban land context and s structured as follows:

    4.1 We make some general comments about expropriation, urban land justice and the political will required to realise expropriation as a mechanism for land reform.

    4.2 We then turn to specific concerns with the Bill that we believe should be addressed. These include:

        i. The Bill gives insufficient guidance on what would constitute "just and equitable" compensation (in the instances where property is expropriated subject to compensation and the compensation may not be nil);
        ii. The Bill provides insufficient protection for the holders of unregistered rights over property;
        iii. The process for the expropriating authority and owner or holder of unregistered rights in property to agree on compensation is potentially long-winded and may result in delays;
        iv. The lack of alignment between the Expropriation Bill and complementary legislation, (including public asset management legislation and land reform legislation); and
        v. The lack of state capacity to give effect to the Bill.

[1] Portfolio Committee on Public Works and Infrastructure, Expropriation Bill B23 of 2020, available at: https://static.pmg.org.za/B23-2020_Expropriation.pdf.

4.3 Thereafter we provide some concluding comments.

EXPROPRIATION, URBAN LAND JUSTICE AND POLITICAL WILL

4. Ndifuna Ukwazi is supportive of the use of expropriation, with or without compensation, as a means of achieving land reform and combatting spatial inequality. Expropriation, if properly utilised, is one of a variety of tools that could widen access to well-located urban land to poor and working-class people currently excluded from land markets.

5. South Africa is the most unequal country in the world, with inequality following racial, gender and spatial lines.[2] One of the primary drivers of this structural inequality is the skewed pattern of land ownership and the acute shortage of well-located affordable housing in urban areas. South African cities continue to be characterised by deep and enduring spatial inequalities that have been brought about by its colonial and apartheid history and an exclusionary contemporary housing market. This spatial injustice has meant that the vast majority of poor and working-class families have been excluded from accessing housing in well-located areas and have been confined to housing projects on or beyond the urban edge. Where a person lives in a city matters – it determines a person's access to opportunities and the quality of services. Many peripheral areas have limited access to basic services and social amenities such as schools, hospitals and clinics. Poor and working-class people spend a disproportionate component of their income and time on unreliable transport - some as high as 45% of their income.[3] Critically, research shows that there is a direct relationship between where people live in South African cities and the likelihood that they will find employment opportunities.[4] Far flung townships and informal settlements therefore end up trapping the poor in a cycle of structural poverty.[5]

6. The economic fall-out as a result of the COVID-19 pandemic has exacerbated existing social challenges including spatial inequality, and increased the need for access to well-located affordable housing and land. Data shows that the economic impact of the COVID-19 pandemic, the consequent economic recession and the national lockdown, has led to significantly higher rates of

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[2] Statistics South Africa (StatsSA), Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality (2019), available at: http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf.

[3] In Cape Town, low-income earners spend on average 45% of their earnings on transport compared a global average of 5-10%. See City of Cape Town Transport, *Transport Development Index* (2016).

[4] In the South African context, see J Budlender and L Royston, *Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas*, Socio-Economic Rights Institute of South Africa (SERI) Research Report (2016). See also, in relation to cities in the United States, E Badger and Q Bui, "Detailed maps show how neighborhoods shape children for life", *New York Times* (1 October 2018): https://www.nytimes.com/2018/10/01/upshot/maps-neighborhoods-shape-child-poverty.html.

[5] See Budlender and Royston, *Edged Out*, p. 2. See also the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel), *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (November 2017), p. 81.

unemployment, diminished incomes and higher rates of hunger.[6] The economic impact of the COVID-19 pandemic was also unevenly distributed spatially – with people in rural and peri-urban areas (i.e. people living on the outskirts of cities in townships or informal settlements) being disproportionately negatively affected by losses in jobs and income-generating activities.[7] In fact, according to the second wave of the South African National Income Dynamics Study – Coronavirus Rapid Mobile (NIDS-CRAM) survey people living in peri-urban areas were twice as likely to be unemployed than people living in the suburbs.[8]

7. While this spatial inequality has its historical origin in the colonial and apartheid eras, it has been reproduced in post-apartheid society despite the South African government's multi-faceted land reform programme and the provision of state-subsidised housing. In fact, these programmes have done little to alter the residential settlement patterns of South African cities, and may even have had the unintended consequence of entrenching and reproducing spatial injustice and social exclusion by creating "poverty traps" on the outskirts of our cities far from economic opportunities and social amenities.[9]

8. This is largely due to the glacial pace of land reform and spatial transformation.[10] The state's failure to advance land reform in South Africa is mainly attributed to the underutilisation of existing constitutional provisions that oblige the state to carry out land reform (sections 25(5) to 25(9) of the Constitution) and the plethora of laws, policies and programmes that seek to give effect to these provisions.[11] This includes the state's failure to use its own land to champion land reform,

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[6] See NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1" (2020), p. 3, which can be found, alongside all the NIDS-CRAM working papers at the NIDS-CRAM website, available: https://cramsurvey.org. See also, for a summary of the results, Spaull, "The jobs reckoning is here: 3 million jobs lost". The NIDS-CRAM data confirms preliminary data from Statistics South Africa ("StatsSA"). See StatsSA, "Results from Wave 2 Survey on the Impact of the COVID-19 Pandemic on Employment and Income in South Africa" (May 2020), available: http://www.statssa.gov.za/publications/Report-00-80-03/Report-00-80-03May2020.pdf.

[7] See NIDS-CRAM, "Synthesis Report Wave 2" (2020), p. 4, available: https://cramsurvey.org/wp-content/uploads/2020/09/1.-Spaull-et-al.-NIDS-CRAM-Wave-2-Synthesis-Findings..pdf. See also I Turok, "Four lessons to learn from the state's management of COVID-hit townships", *Business Day* (4 October 2020), available: https://www.businesslive.co.za/bd/opinion/2020-10-04-ivan-turok-four-lessons-to-learn-from-states-management-of-covid-hit-townships/.

[8] NIDS-CRAM, "Synthesis Report Wave 2", p. 4.

[9] Budlender and Royston, *Edged Out*.

[10] High Level Panel, *Report of the High Level Panel*, p. 81.

[11] Some of the key pieces of legislation that have been passed to give effect to land reform are the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA), the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996 (LTA), Extension of Security of Tenure Act 62 of 1997 (ESTA), the Prevention of Illegal Evictions, and Unlawful Occupation of Land, Act 19 of 1998 (PIE), the Restitution of Land Rights Amendment Act 15 of 2014, and the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

particularly in the urban context.[12] The state has consistently struggled to properly prioritise, implement and monitor its land reform programmes. As former Deputy Chief Justice Dikgang Moseneke has stated, the South African land reform project has been "beset by bureaucratic inadequacies".[13]

9. Some initial comments on expropriation's potential to accelerate land reform are necessary. First, the Constitution has never presented a barrier to land reform. The constitutional property clause – particularly sections 25(5) to 25(9) – provides the basis for progressive land reform programmes. Among the various constitutionally mandated measures, the Constitution allows for the expropriation of land through a law of general application as a key policy tool for the advancement of land reform, provided that such expropriation is for a public purpose or in the public interest. Moreover, the state's power to expropriate is not dependent on the willingness of the land owner – the principle of "willing buying, willing seller" does not appear in the text of the Constitution but was a self-imposed policy restriction of previous governments.[14] Although the Constitution provides that the expropriation of land must take place against the payment of "just and equitable compensation", it is entirely possible that the factors listed in section 25(3) may mean that "just and equitable" compensation would be "well below market value, or as little as one rand".[15]

10. Second, existing law already permits the state to expropriate land for the purposes of land reform or spatial transformation. This power is expressly and implicitly provided for in a range of redistributive laws. For instance, the Expropriation Act 63 of 1975 ("the former Expropriation Act") has always allowed for the possibility of the state expropriating land subject to compensation. Section 9(3) of the Housing Act 107 of 1997 ("the Housing Act") provides that a municipality may expropriate any land for a housing development if it is unable to purchase the land through an

[12] See High Level Panel, *Report of the High Level Panel*, p. 50. For research on how the City of Cape Town fails to utilise prime public land to combat spatial inequality, see N Budlender, J Sendin and J Rossouw, *City Leases: Cape Town's Failure to Redistribute Land*, Ndifuna Ukwazi Research Report (2019), available at: https://www.dropbox.com/s/c524q5x89yrutcc/Ndifuna%20Ukwazi%20%28NU%29%20City-Leases-Cape-Towns-Failure-to-Redistribute-Land.pdf?dl=0.

[13] Deputy Chief Justice D Moseneke, "Reflections on South African Constitutional Democracy: Transition and Transformation" (14 November 2014), a keynote address presented at the international conference entitled *20 Years of South African Democracy: So Where to Now?* hosted by the Mapungubwe Institute for Strategic Reflection (MISTRA) and the Thabo Mbeki African Leadership Institute (TMALI) at the University of South Africa (UNISA), Pretoria, 12-14 November 2014, available at: https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/.

[14] See Moseneke, "Reflections on South African Constitutional Democracy". See also the Socio-Economic Rights Institute of South Africa (SERI), "Note on Expropriation"(4 April 2018), pp. 4-5, available at: http://seri-sa.org/images/SERI_Note_on_Expropriation_final.pdf.

[15] SERI, "Note on Expropriation", p. 5.

agreement with the owner.[16] The Land Reform (Labour Tenants) Act 3 of 1996 ("the LTA") also enables the state to expropriate land to give effect to the land rights of labour tenants.[17]

11. However, the state has rarely used the mechanisms in existing laws and policies to expropriate land.[18] In fact, there are various instances where the state *actively resists* using these measures to facilitate land reform. For example, *Fischer v Unlawful Occupiers, Erf 150, Phillipi, Cape Division, Province of the Western Cape and Others*, a recent case in the Western Cape High Court, highlights the extent to which local government will go to to avoid engaging with land reform.[19] In this case, roughly 60 000 residents living in the Marikana informal settlement on private land in Philippi, Cape Town faced an eviction application. The residents successfully argued that the City of Cape Town, or the provincial or national housing departments, should expropriate the land and upgrade the existing settlement as an alternative to their eviction. The Court expressly directed the City to initiate the process provided for in terms of section 9(3) of the Housing Act, by entering into good faith negotiations to purchase the Marikana land, and expropriating the land in the event that purchase negotiations failed. However, instead of complying with this the High Court's judgment, which furthers the objectives of land reform, the City appealed the judgment, thereby delaying the urgent relief that the residents required and delaying the inevitable obligation that the state will be required to fulfil toward poor and working class families desperately in need of homes. This case shows that even in circumstances where the courts have given the state the green-light to expropriate, the state has been reluctant or unwilling to do so.

12. During a recent webinar series hosted by the Tshisimani Centre for Activist Education on the whether the Expropriation Bill is likely to speed up land reform, the executive director of the Socio-Economic Rights Institute of South Africa (SERI), Nomzamo Zondo, highlighted the state's reluctance to prioritise spatial transformation:[20]

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[16] Section 9(3) of the Housing Act states:

"(3) (a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if –

(i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;

(ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Provincial Gazette; and

(iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted."

[17] See section 23 of the LTA. See also *Uys N.O and Another v Msiza and Others* 2018 (3) SA 440 (SCA).

[18] See Moseneke, "Reflections on South African Constitutional Democracy"; SERI, "Note on Expropriation".

[19] See, for example, Socio-Economic Rights Institute of South Africa (SERI), "Fischer v Unlawful Occupiers, Erf 150, Phillipi ('Fischer eviction application')" (2019), Socio-Economic Rights Institute of South Africa (SERI), available: https://www.seri-sa.org/index.php/component/content/article?id=491:fischer-v-unlawful-occupiers-erf-149-philippi. See also Z Booi, "Landmark eviction judgment in Cape High Court", Ground Up (14 March 2014), available at: https://www.groundup.org.za/article/landmark-eviction-judgment-cape-high-court_1597/.

[20] Tshisimani Centre for Activist Education, "Will expropriation give life to a failing land reform programme?" (2021), available: https://www.tshisimani.org.za/2021/01/23/will-expropriation-give-life-to-a-failing-land-reform-programme/ (where videos of the full webinars in the series can be viewed). See also Z Pikoli, "Land activists: Without the voices of

> "If [the Expropriation Bill] is enacted into law tomorrow as it stands, it would give them [the state] the very same powers they had. If they wanted to expropriate for housing, they could expropriate in terms of the Housing Act. *They haven't exercised that power, so how do we move from that?*"

13. In this context, we believe that the real stumbling block of land reform has been the failure of political will on the part of the state - at all levels - to genuinely prioritise and drive the land reform programme. This is not something that can be remedied *solely* by the amendment of section 25 of the Constitution or the Expropriation Bill by making provision for the expropriation of land without compensation in certain circumstances. It requires a real commitment from the state - at all levels - to promote spatial transformation, speed up urban land reform, and recognise and strengthen insecure tenure. It also requires strong political leadership, competent management, adequate budgets, sufficient capacity and resources, sound institutional structures, efficient procedures and an effective system for monitoring and evaluations. Most importantly, it requires the state to embrace the already existing constitutionally mandated land reform programmes, policies and tools *in conjunction* with expropriation. Not only do these tools and programmes already exist, but they could also contribute equally meaningfully towards fast tracking land reform efforts. Without this shift in political will, the amendments to section 25 of the Constitution and the Expropriation Bill are at risk of being hollow gestures.

14. Ndifuna Ukwazi broadly supports the Expropriation Bill as an affirmation of the state's recognition of the importance of land reform to South Africa's ongoing project to address and reduce inequality. However, we are also deeply concerned that an amendment of the Bill to allow for instances of expropriation without the payment of compensation (as the Bill proposes to do) will not, without an accompanying shift in political will, speed up the processes of urban land reform and spatial transformation.

SPECIFIC CONCERNS

Insufficient guidance on "just and equitable" compensation

15. While one of the key objectives of the Expropriation Bill is to provide for the instances where land may be expropriated *without* compensation,[21] the Bill also regulates other instances of the expropriation of property in the public interest for a public purpose. In these instances, expropriation remains subject to the payment of "just and equitable" compensation. In fact, the Bill is the first piece of legislation to give expression to the requirement set out in section 25(3) of the

communities, the Expropriation Bill will not go very far", *Daily Maverick* (2 February 2021), available: https://www.dailymaverick.co.za/article/2021-02-02-land-activists-without-the-voices-of-communities-the-expropriation-bill-will-not-go-very-far/.

[21] See cl 12(3) of the Bill.

Constitution to determine and pay "just and equitable" compensation in instances of expropriation.[22]

16. Sections 25(2) and (3) of the Constitution permit the expropriation of property subject to the payment of "just and equitable" compensation as determined by agreement or, if there is no agreement, by a court. The Constitution provides that the amount of compensation should reflect an "equitable balance" between the public interest and the interest of the landowner having regard to a list of factors, namely the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct state investments in the property, and the purpose of the expropriation.[23] In fact, the lack of clarity about how each of these factors should be weighed or given expression when determining the amount of compensation payable is one of the key issues that initially sparked the national debate about expropriation without compensation and, ultimately, led to the amendment of section 25 of the Constitution and enactment the Expropriation Bill.

17. However, rather than providing much needed guidance on how public officials or courts should weigh the factors listed in section 25(3) of the Constitution, the Expropriation Bill simply reiterated what is already stated in section 25(3) of the Constitution. In fact, the wording of section 25(3) of the Constitution is reproduced *verbatim* in the Expropriation Bill. While the Committee may have opted for this approach to ensure a measure of flexibility for state officials and the courts in determining compensation, the implication of this approach is that the Bill does not shed any light on how these factors should be weighed and therefore fails to provide the clear directives that state officials need to be able to make decisions about the amount of compensation to offer in practice.

18. The need to provide this clarity and guidance through the Bill cannot be overstated. The Bill offers a practical and long lasting opportunity to address the uncertainty and polarised views that have been the root cause of the debates surrounding expropriation in recent years. In particular, we are concerned that the wording of the Bill will exacerbate rather than mitigate uncertainty about the role and importance of market value as a factor in determining the amount of compensation payable. Most concerningly, the failure to address this issue is likely to lead to even longer delays in the state utilising expropriation as a tool for land reform and spatial transformation. In the event that the Bill is not amended to offer guidelines with the factors that should be considered, we urge the Minister to adopt Regulations dealing with these without delay so that the Bill may have the desired effectiveness.

19. We therefore strongly urge the Committee to provide more direct guidance on how the factors listed in clause 12(1) of the Bill (and section 25(3) of the Constitution) should be considered or weighed *before* the Bill is enacted.

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[22] See cl 12(1) and (2) of the Bill.

[23] See sections 25(2) and (3) of the Constitution. See also Moseneke, "Reflections on South African Constitutional Democracy".

Insufficient protection for the holders of unregistered rights over property

20. Ndifuna Ukwazi welcomes the inclusion in the Bill of recognition and obligation to notify, engage and compensate the holders of unregistered rights over expropriated property. This inclusion is progressive and will enable unregistered rights holders to be consulted and informed about expropriation of property that they hold rights in. In particular, the broad definition of unregistered rights has the potential to offer legal protection to vulnerable groupings.

21. However, we are concerned that the Bill does not provide sufficient protection for unregistered rights holders. This is due to the fact that the Bill relies almost entirely on the owner of the property to inform the expropriating authority of the identities and contact details of any and all unregistered rights holders. The reliance on the property owner for information creates an opening for potential abuse by unscrupulous property owners who may withhold information about unregistered rights holders or, in extreme circumstances, may attempt to get rid of unregistered rights holders before any expropriation in an attempt to obtain better compensation. For example, a landowner that becomes aware of a possible expropriation might illegally evict a tenant, unlawful occupier or person holding customary rights to land in an attempt to increase the amount of compensation during an expropriation. The Bill should therefore also include alternative measures to obtain information about unregistered rights holders that are not reliant on the property owner.

22. Another concern relating to unregistered rights holders is the process of verification of unregistered rights provided for in clause 10 of the Bill. Clause 10 requires the holders of unregistered rights to provide “a copy of any written instrument evidencing or giving effect to the unregistered right”. However, a large number of unregistered rights holders do not have “written instruments” proving their rights over property. For example, people living on communal land, farm workers living on the farms that they work on, or even leaseholders with oral lease agreements. While clause 10(1) does allow for “other evidence to substantiate the claim”, the Bill should provide more certainty about what these alternative forms of evidence could be provided.

Process to agree on compensation is potentially long-winded and may result in delays

23. The Bill sets out detailed processes to regulate the expropriation of property in the public interest or for a public purpose and, generally, these processes are well-conceived and provide adequate protection to the owners of property. However, the processes governing the negotiation of compensation between the expropriating authority and a property owner or holder of an unregistered right to property are time-consuming, bureaucratic and likely to delay the expropriation process.

24. While it remains essential to provide adequate protection mechanisms for the right of owners and the holders of unregistered rights over property, the negotiation process could become unnecessarily cumbersome, consisting of various requests for valuations, presentation of valuations, offers of compensations, counter offers and acceptance / rejections of compensation

with counter offers - and this doesn't even include the processes of mediation (in the instances where the parties are unable to come to an agreement) and potential court proceedings and subsequent appeals (if mediation fails). The process has clearly been designed in an attempt to protect the rights of owners and unregistered rights holders in expropriated property, however, the protection of these rights should not unduly jeopardise the ability of the state to act swiftly to expropriate land for the purposes of land reform and spatial transformation. In an attempt to allay the fears of property owners, the Bill has failed to strike an appropriate balance between a swift, smooth expropriation process that could give effect to the state's land reform objectives and the rights and interests of property owners.

25. We therefore recommend that the Committee find ways to streamline the process in relation to the negotiations about the amount of compensation. Some possible ways of streamlining the process may include consolidating requests for information and offers / counter-offers, considering the feasibility of pre-determined formulae for calculating the amount of compensation in specific scenarios, being more clear about what the mediation processes would entail and considering ways to expedite the proceedings before the courts (for example, the Bill could make provision for utilising specialist courts or specialist judges to deal with matters of compensation in expropriation cases not unlike the use of Land Claims Courts to deal with land restitution matters).

Lack of alignment between the Expropriation Bill and complementary legislation, including public asset management legislation and land reform legislation

26. The lack of alignment between the Expropriation Bill and complementary legislation, including public asset management legislation and land reform legislation, is also a cause for concern. As a key mechanism to give effect to land reform and spatial transformation, we note with concern that the Bill is not expressly linked to the legislation, policies and programmes that aim to give effect to these objectives. In particular, we are concerned about two specific instances where we believe more could have been done to align the Bill with the existing legislative and policy framework.

27. First, the Bill should be more closely aligned with the state's existing property or asset management legislation, such as the Government Immovable Asset Management Act 19 of 2007 (GIAMA) and the Local Government: Municipal Finance Management Act 59 of 2003 (MFMA). This would ensure that the state more efficiently employ expropriation as a tool to release unused or underutilised public land (as well as land owned by state-owned entities) to promote land reform and redistribution, to redress spatial inequality and develop affordable housing, particularly in the urban context.

28. The lack of alignment between the Bill and the state's existing asset management legislation is most apparent in clause 12(3)(b) of the Bill, which provides that it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest "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".

This provision has the potential to be a game-changer for land reform and the development of state-subsidised housing, as the cost of land is often considered to be an insurmountable barrier to accessing well-located land for these objectives. However, more could have been done to align this provision with existing asset management legislation which also provides various mechanisms for inter-state transfers of land for the purposes of "land reform",[24] to "support the service delivery objectives" or "social development objectives" of state departments,[25] or to fulfil the "minimum level of basic municipal services".[26] None of the laws governing the state's asset management function contain the phrase "core function". This means that the meaning of clause 12(3)(b) of the Bill will have to be developed in isolation from existing legal mechanisms that could have furthered the development of the Bill's objectives. This is a missed opportunity to align the Bill more closely with the existing legal framework.

29. We therefore urge the Committee to reconsider clause 12(3)(b) of the Bill by aligning it with existing legislation that could be utilised to complement and further the objectives of the Bill.

30. Second, the Bill does not clearly articulate how it relates to the plethora of existing legislation, policies and programmes governing land reform and state-subsidised housing development. In particular, the Bill excludes any reference to, or discussion of, the potential beneficiaries of land reform programmes that would benefit from the possible expropriated land. This is a deeply concerning omission. Throughout the drafting processes of the Eighteenth Constitutional Amendment and the Expropriation Bill, the use of expropriation as a mechanism to promote land reform and spatial transformation has been central. In this context, it seems unsettling that the Bill makes only very vague references to how it aligns with the state's existing land reform agenda (the definition of the "public interest" includes "the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources").

31. Most concerningly, the Bill makes no reference to the ultimate potential beneficiaries of expropriated land. While the drafters of the Bill may have envisioned that these issues are addressed in land reform legislation, policies and programmes, the Bill should expressly make links between these disparate systems if they are to work together to achieve a more equitable society. This is also necessary to avoid unintended consequences and the abuse of expropriation as a tool that primarily seeks to advance land reform.

Lack of state capacity to give effect to the Bill

[24] See, for example, section 13(3) of GIAMA.
[25] See, for example, section 5(1)(f) and 13(3) of GIAMA.
[26] See, for example, section 14(1) of the MFMA.

32. We have serious concerns about the administrative capacity of the Department of Public Works and Infrastructure, as the primary expropriating authority empowered to expropriate property in terms of the Bill,[27] to efficiently and effectively fulfil its obligations in terms of the Bill.

33. The Bill provides various detailed processes and procedures regulating the expropriation of property, including processes to assess and investigate the suitability of expropriating a property;[28] valuing the property;[29] consulting with various stakeholders;[30] facilitating processes of public participation in relation to any expropriation;[31] verifying ownership and unregistered rights in property that has been earmarked for expropriation;[32] notifying, engaging and negotiating with owners of property that has been earmarked for expropriation and unregistered rights holders in such property;[33] determining what would constitute just and equitable compensation;[34] facilitating the payment of compensation;[35] initiating and participating in court proceedings related to the determination of just and equitable compensation (if mediation fails);[36] and developing, establishing and maintaining an expropriation register.[37]

34. These processes are highly complex and require considerable human capacity, time and resources from the Department of Public Works and Infrastructure - which, at present, is unlikely to have the funding, human resource capacity and necessary skills to facilitate these processes. However, in spite of the significant increase in administrative responsibilities on the Department, neither the Bill nor the Memorandum on the Objects accompanying the Bill make provision for a concomitant increase in funding, human capacity or resources. For example, the Memorandum of Objects states that the Bill "should not have a significant impact on the staff structures of expropriating authorities" and lists only the maintenance of an expropriation register and development of uniform procedures of expropriating authorities as financial implications of the Bill.[38] This is clearly inconsistent with the extensive capacity that will be needed for the Department to be able to fulfil its mandate in terms of the Bill.

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[27] While the definition of "expropriating authority" includes organs of state or authorities empowered to expropriate property in terms of other legislation, the Bill grants the Minister of Public Works and Infrastructure and her Department the power to expropriate property in terms of the Bill.
[28] Clause 5 of the Bill.

[29] Clause 5 of the Bill.
[30] See, for example, clauses 6, 7(3), 8(2)(c) and 19 of the Bill.
[31] Clause 24 of the Bill.
[32] See, for example, clauses 10 of the Bill.
[33] See, for example, clauses 7, 8, 14, 15, 16, 21(1), 22 and 23 of the Bill.
[34] Clause 12 of the Bill.
[35] Clauses 17 and 20 of the Bill.
[36] Clause 21 of the Bill.
[37] Clause 26 of the Bill.
[38] See paras 6.2 and 6.3 of the Memorandum on the Objects of the Expropriation Bill, 2020.

35. For decades, experts have decried the acute lack of state capacity as a primary cause for the glacial pace of land reform and spatial transformation.[39] In particular, experts have pointed to the lack of adequate funding for land reform programmes and the lack of human resource capacity in the Department of Rural Development and Land Reform as key constraints. The implementation of land reform programmes has been inherently complex and frequently contested, requiring considerable administrative support from state officials. These concerns have been raised in addition to more general concerns about the state's failure to efficiently and effectively deliver on its mandate, especially in relation to the redistribution of land, delivery of state-subsidised housing, and provision of public goods and services to poor and working class communities.[40]

36. The processes for expropriation in terms of the Expropriation Act will place an comparable administrative strain on the Department of Public Works and Infrastructure to that of the land reform programmes on the Department of Rural Development and Land Reform. To ensure that the Department of Public Works and Infrastructure is able to fulfil its mandate in terms of the Bill it will need adequate financial, human capacity and resources. If the Department does not receive the necessary support, the Expropriation Bill, and the land reform impetus underpinning it, will be dead in the water.

CONCLUSION

37. We appreciate the opportunity to have made these inputs on the Bill, and hope that our submission assists the Committee in formulating a Bill, and ultimately an Expropriation Act that will meaningfully, and with clarity, advance expropriation as a mechanism to accelerate land reform, including in the urban context.

38. Please do not hesitate to contact us should you require clarification or further information.

Yours faithfully,
Ndifuna Ukwazi

Per: Michael Clark, Head of Research and Advocacy

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[39] See B Cousins and R Hall, "Rural Land Tenure: The Potential and Limits of Rights-based Approaches", in M Langford, B Cousins, J Dugard and T Madlingozi (eds), *Socio-Economic Rights in South Africa, Symbols or Substance?* (2013), pp. 157–186; L Ntsebeza, "Chiefs and the ANC in South Africa: The reconstruction of tradition?", in A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008), pp. 238–261; B Cousins, "Land Reform in South Africa is Sinking: Can It be Saved?", Nelson Mandela Foundation Position Paper; and T Weinberg, "The Contested Status of Communal Land Tenure in South Africa", Institute for Poverty, Land and Agrarian Studies (PLAAS) Rural Status Report 3 (May 2015).

[40] See, for example, I Chipkin, "Beyond the Popular Discourse: Capacity Constraints in the Public Sector", Short Essays No. 3, Public Affairs Research Institute (PARI) (May 2011), p. 1; I Chipkin and S Meny-Gibert, "Public sector 'manages' to fail", *Mail and Guardian* (22 March 2013).