

Land Expropriation without compensation – New Draft Expropriation Bill 2019

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So, you thought a Constitutional amendment to Section 25 of the Constitution was necessary for expropriation without compensation. Think again and you may already have been caught off-guard. The Department of Public Works, through Minister Nxesi published and invited comments within 60 days of publication of the Draft Expropriation Bill 2019 in the Government Gazette 21st December 2018. This will no doubt be rushed through in time for the elections as a Constitutional change will probably require more time.

According to Jerry Margolius, a registered Professional Property Valuer, one cannot in a short article address and highlight all the provisions of the draft Bill but what follows is a general discussion of some of the main challenges one is likely to face including the fact that there may be no compensation payable in terms of Section 12 (3) which states that "it must be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant factors..". These factors include but are not limited to land occupied or used by a labour tenant as defined, land held for speculative purposes, land owned by a state corporation or other state owned entity (what about all the farmland already owned by the state), where land has been abandoned or the market value of the land is equivalent or less than that the present value of any direct state investment. All these will require much debate.

We know that the amendment to the expropriation legislation is long overdue. Much of the case law in this regard has been at loggerheads with the Section 25 (Property Clause) of the Constitution of the Republic of South Africa, 1996. But one already wonders if the draft Bill is reasonable both in its application and the timeous requirements placed on the expropriating party or property owner to conform to their obligations. Property is merely defined as that which is contained in the Constitution and as such is not limited to land and buildings. Property can be taken as far as your imagination will stretch e.g. cars, machinery, equipment, money etc., says Margolius.

One encounters in the Bill an initial two-fold process where, except in the case of an emergency, there is a procedural intention at first to expropriate which is then followed by the more formal notification. This has been a process followed generally by local authorities in the past now embedded in the Bill. The Bill, Margolius explains provides that despite the provisions of any law to the contrary, an expropriating authority may not expropriate property arbitrarily or for a purpose other than a public purpose or in the public interest. It may however not expropriate property of a state-owned corporation or a state-owned entity without the concurrence of the executive authority responsible for that corporation or entity. It further stipulates a process of negotiation with the owner or the holder of an unregistered right in property for the acquisition thereof on reasonable terms.

At the time of considering an expropriation it is necessary to establish the suitability of the property required and ascertain the existence of registered and unregistered rights in the property and the impact of such rights on the intended use of the property. Actions that may be performed during this stage is that persons with the necessary skill can survey, dig or bore on the land, construct and maintain a measuring weir in any river or stream etc. Margolius notes that an authorised valuer who must be registered as such, with the SA Council for the Property Valuers Professions, for purposes of ascertaining the value of the property may conduct the necessary inspections and investigations for that purpose. The valuer would be entitled to obtain copies of documents, request particulars orally or in writing including information in respect of municipal property rates or other charges, land use rights including the zoning of the land, availability of engineering services to such land, or such other information with respect to the land, as is in the possession of the municipality and as may be reasonably required for the valuation of the said land by the valuer. This Margolius indicates can be a lengthy process and time is required especially when one looks at the investigations of property required to address the compensation in terms of Section 12 of the Bill and the Section 25 of the Constitution.

The focus turns to the compensation being just and equitable, the formulation thereof and the claims process. Although, the word market value appears, there is no definition as with the case of the Property Valuation, 2014 (Act No. 17 of 2014) nor, is any reference made to the Valuer General. Perhaps, the authors of the Bill should have considered some of the more relevant clauses in that legislation. It is of note that the Valuer General only recently published Regulations.

Margolius notes that owners' rights in terms of section 12 are considered to be just and equitable as more specifically noted in the constitution, which provision are replicated in the Bill. The determination of the compensation as set out in 12(2) notes that the said compensation to be paid in terms of the Act, the expropriating authority must not, unless there are special circumstances in which it would be just and equitable to do so, take account of the facts that property may be taken without the owner's consent, its special usefulness or suitability for which it is being acquired if unlikely that the property would be purchased in the open market. The clause includes other factors currently found in the current Expropriation Act 63 of 1975 (as amended) including improvements made post date of expropriation, enhancement or depreciation before or after the date of service of notice. Furthermore, anything done with the object of obtaining compensation, therefore is excluded.

Owners will require professional assistance in establishing their compensation and would be obliged to prepare a written statement (Section 14) and where the property "...expropriated is land...", the effect of improvements on the land value needs to be provided. Does this now mean that as opposed to determining market value based on a comparable approach methodology also need to be viewed on the basis of a depreciated replacement cost methodology to distinguish these values and who will pay. The owner will need to provide details of all persons with unregistered rights which will include tenants as well. All these parties affected by the intended expropriation have the opportunity to object and make the necessary submissions (See Clause 7).

Margolius does mention that the Bill allows for mediation prior to proceeding to court but this is merely a voluntary process and the outcome may still result in a court process. An expropriation can also be withdrawn if it is in the public interest or no longer applicable. He is of the strong opinion that the Bill will require to be addressed more practically especially in respect of the timelines contained therein. This has been an issue with many of the prior drafts in that there is not much time allowances and one wonders to what extent that the Valuer General will be involved as that legislation does provide for the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by a department.

Jerry Margolius is a Registered Professional Valuer who has been attending on valuations of expropriations for some 40 years. He is the managing member of Jerry L Margolius & Associates who are associated with Margin Property Valuation Services. A copy of the Bill can be downloaded at www.marginpv.com.