



LAND REFORM

Expropriation Act: Deconstructed and Demystified

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President Cyril Ramaphosa signed the Expropriation Bill into law on 23 January 2025. The newly assented to Expropriation Act No. 13 of 2024 (“**Expropriation Act**”) comes 50 years since the implementation of the old 1975 Expropriation Act (“**1975 Act**”). The content contained in the new version of the Act has gone through a myriad of iterations, with the first version published in 2008, later in 2015 and the current version first published in 2020.

There is little in the public domain that demystifies the concept of “expropriation” as a legal construct. Simply put, expropriation is a tool used by governments in varying jurisdictions across the globe, to take private property for public use, with compensation.

In South Africa, the 1975 Act was used to acquire property solely for a public purpose, which includes examples such as the construction of public infrastructure such as public clinics, public schools, laying power lines and more recently the construction of the Gautrain.

What is the role of compensation in expropriations?

Intrinsic in the legal definition of expropriation, is a requirement for compensation to be paid. In other words, expropriation is inextricably linked with compensation. The amount and methodology of calculating compensation differs in varying jurisdictions. Some quarters argue therefore that the concept of “expropriation without compensation” is a legal absurdity. The 1975 Act provided for market value compensation commonly referred to as “willing buyer will seller compensation”.

What does the new Expropriation Act say about compensation?

In contrast, the Expropriation Act now makes provision for “just and equitable” compensation. The concept of “just and equitable” compensation was introduced already in our law 29 years ago when the Constitution was promulgated. Just and equitable compensation is made provision for in section 25(3) of the Constitution, and lists factors to be taken account in calculating just and equitable compensation. Between 1975 to date, South Africa has been expropriating using a financial model that was at odds with the Constitution.

The Expropriation Act therefore now aligns itself with the Constitution. Factors that must be taken into account in the calculation of just and equitable compensation are the current use of the property, the history of its acquisition, improvements made in the property, if there was any State investment made on the property and the purpose of the expropriation. The outcome of the application of the just and equitable method of calculation, is based on the facts of each case. Whilst it may be possible to arrive at nil compensation, it would only be in extremely rare circumstances that would enable nil compensation. It is also arguable that expropriation without compensation as a concept, may be susceptible to a constitutional challenge.

The second most important factor that is contained in the Expropriation Act, is the inclusion of a State power that enables the State to acquire property not only for a public purpose, but also in the public interest. This mirrors the Constitutional property clause, which defines the public interest as including the nation's commitment to land reform. This means that expropriations to make land available to enable citizens to gain access to land for land reform purposes now have a statutory basis in addition to the Constitutional basis, which has been in effect since 1996. The inclusion of land reform objectives in the Expropriation Act aligns with section 25 of the Constitution.

In essence, this means that since 1996, the Constitution has mandated a model of equitable balance whereby the public interest (including the nation's commitment to land reform) and the interest of the landowner must be balanced. In other words, if, on a consideration of all relevant factors, it would be just and equitable to pay less than market value for an expropriation, the Constitution not only justifies, but mandates, doing so.

What does the Expropriation Act say about expropriation without compensation (“EWC”)?

It is arguable that the Expropriation Act may be interpreted to go further than the Constitution by expressly stating that expropriation may be nil in certain circumstances. As such, the Expropriation Act expressly introduces the concept of EWC in our law. A few caveats should be noted in this regard. EWC applies only to land, as opposed to other forms of property, i.e. real rights such as mining rights, limited real rights, intellectual property, and movable property. The Expropriation Act does not contain a special definition for ‘land’. This is in contrast to the Constitution that provides that property is not limited to land.

EWC applies only where land is expropriated in the public interest as opposed to for a public purpose. This suggests that EWC will be applicable mainly (or perhaps only) to expropriations for land reform purposes, and expropriations in the context of access to natural resources such as minerals and water. Again, in these contexts, the only form of property that can conceivably be expropriated without compensation is land, and not the real rights or limited real rights attached thereto, such as mining rights or water use licences.

In section 12(3), the Expropriation Act lists four circumstances in which it may be just and equitable for EWC may be paid. These include where the land is held for speculative purposes and is not being used by the owner; where the land is held by an organ of state that is not using for its core functions and the organ of state is not likely to require the land for its future activities, and the organ of state acquired the land for no consideration; where an owner has abandoned the land by failing to exercise control over it despite being reasonably capable of doing so; and 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.

These particular circumstances may justify EWC, but must be considered in light of all relevant circumstances, which would no doubt include the factors in section 25(3), which are mentioned above.

Is EWC the answer to South Africa’s land reform problems?

The move away from the ‘willing buyer, willing seller’ model to the ‘just and equitable’ model of compensation will impact expropriations for land reform and will make compensation more affordable for the state. However, it is a misconception to think that EWC is the answer to all land reform problems. EWC as it is set out in the Expropriation Act would only be applicable in very limited circumstances, and would only apply to land which is not in productive use. EWC will have no significant impact on land reform in urban and developed areas. South Africa's land reform issues go significantly deeper than the Constitutional method of determining compensation, and will not be solved solely by the promulgation of the Expropriation Act.

Who has the power to expropriate?

The Expropriation Act vests the power to expropriate in the Minister of Public Works, currently Minister Dean MacPherson. Minister MacPherson has already indicated that “no expropriation without compensation of private property will happen under his watch”.

Whilst the Expropriation Act vests in the Ministry of Public Works, other pieces of legislation, such as the Mineral and Petroleum Resources Development Act No. 28 of 2002 (“**MRPDA**”) and the Restitution of Land Rights Act No. 22 of 1994 (“**Restitution Act**”), vest the power of expropriation in the Minister of Mineral Resources and the Minister of Land Reform and Rural Development respectively. The Expropriation Act also contemplate that an expropriating authority may be other organ of state.

Is the Expropriation Act constitutional?

The constitutionality of the Expropriation Act is contested. Section 25(2) of the Constitution provides that property may only be expropriated for a public purpose or in the public interest, and must be subject to compensation, which must be agreed between those affected or must be decided or approved by a court.

On 7 December 2021, the Constitution Eighteenth Amendment Bill, which aimed to amend this provision of the Constitution to reflect that compensation could be nil, failed to pass in the National Assembly. Some commentators and academics are of the view that EWC is implicit in the Constitution, and that the Constitution therefore implicitly recognises that it would in some circumstances be just and equitable for compensation to be nil. Others argue that compensation is an integral component of expropriations and that to expropriate property without any compensation is more analogous to a confiscation and akin to a deprivation.

This question is by no means clear, and it is likely that the Expropriation Act is likely to be challenged upon its commencement. Indeed, both the Democratic Alliance, ActionSA, Afriforum, and the Cape Independence Group have indicated their intentions to challenge the Act.

Is the Expropriation Act operational?

Section 31 of the Act provides that it will come into operation not on the date of presidential assent, but rather on a date determined by the President by proclamation in the *Government Gazette*. As at the date of this article, the Act was published in a *Government Gazette* on 24 January 2025, but its date of commencement has not yet been proclaimed.



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