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LAND REFORM

Holding onto land: the regulation of Agricultural Land Holdings Bill

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INTRODUCTION

During the 2016 State of the Nation Address, the president of the Republic of South Africa first announced that a Bill regulating the ownership of land would be published for comment and tabled before Parliament. The draft Bill at that stage sought to limit the ownership of land to 12 000 hectares for South Africans and if individual ownership exceeds the limit, the State would purchase the excess land and redistribute it as part of its redistribution programme. Foreign nationals would however, be permitted to enter into long term leases with the State for a minimum of 30 years.

AGRICULTURAL LAND HOLDINGS BILL

On 17 March 2017, Minister of Rural Development and Land Reform ("the Minister") published the Regulation of Agricultural Land Holdings Bill ("the Land Holdings Bill") for public comment and was a marked deviation from the contents of the initial draft Bill. With underlying objectives such as land distribution of agricultural land and to raise agricultural output and food security, the Land Holdings Bill once enacted, has the potential to lead to some unintended consequences. Interested and affected parties were expected to submit comments on the Land Holdings Bill on or before 13 June 2017.

In its current form, the Land Holdings Bill has as some of its objectives, the establishment of a public register detailing public and private agricultural land. It also prohibits the acquisition of land by foreigners. It, in its stead, advocates for the leasing of land by foreigners by way of long-term leases.

The Bill envisages the establishment of a new administrative body, to be known as the Office of the Land Commission which is tasked with the administration of the agricultural land holdings register. The envisaged creation of the Office of the Land Commission raises fundamental fiscal and financial concerns regarding the extent to which Office will be capacitated with adequate financial and human resources in order to discharge its mandate. The concern regarding the capacity and availability of resources emanates from the fact that existing statutory bodies such as the Restitution of Land Rights Commission function under strained conditions. Another example is the Office of the Special Master tasked with the administration and acceptance of claims by labour tenants, which had to receive claims by 2001, which remains in a state of flux.

AGRICULTURAL LAND DEFINED

All agricultural land and all transactions whereby agricultural land is acquired or disposed of, will be subject to the provisions of the Land Holdings Bill. The current definition of "agricultural land" which includes all land other than land which forms part of a proclaimed township or land in respect of which an application for the establishment of a township has been submitted prior to the commencement of the Act, or land which is excluded by the Minister by notice in the *Government Gazette* or which has been determined to be non-agricultural land in accordance with the Spatial Planning and Land Use Management Act No. 13 of 2013 ("SPLUMA"), is problematic for the a number of reasons some of which are as follows:

- the definition presupposes that land is currently categorised and regulated only in formal land use schemes and/or in accordance with SPLUMA. In reality, not all land neatly fits into the scheme of the proposed definition;
- the current legislative framework that regulates land-use management is undergoing a transition and there has not yet been an integrated alignment with all relevant laws;
- although the Bill is intended to apply only to “agricultural land”, land owned by mining entities for instance, which is neither determined by SPLUMA as “non-agricultural land” or formally zoned as “non-agricultural” land, would inadvertently, fall within the definition of “agricultural land”.

Every person who acquires ownership of a private agricultural land holding after the commencement of the Act is required to lodge a notification with the Commission within 90 days of the acquisition. The Registrar of Deeds will not register the transfer of such unless the requisite notification has been lodged with the Commission.

A “foreign person” will not be entitled to acquire ownership of agricultural land once the Land Holdings Bill is enacted and may only conclude long leases of agricultural land of 30 to 50 years, a lease which must also be registered with the Registrar of Deeds. A “foreign person” is defined as a natural person who is not a citizen or not ordinarily resident in South Africa, excluding a foreign juristic person controlled by a black person as defined in the Employment Equity Act No. 55 of 1998.

When disposing of agricultural land, a foreign person must first offer the agricultural land to the Minister who has the right of first refusal to acquire the land. If the Minister does not exercise the right, "the foreign person must make the land available for acquisition to the citizens". At this juncture, the Land Holdings Bill is not clear on the precise details of the envisaged process of making “land available”. The Minister responsible for agriculture is expected to determine the categories of ceilings for agricultural land holdings in each district and “redistribution agricultural land”. In determining the ceilings, the Minister is to have regard for various issues such as land capability factors such as cropping factors, current output, soils, viability, water availability and infrastructure, capital requirements, annual turnover of the land in question. Redistribution agricultural land on the other hand would be land that falls between or exceeds a ceiling category prescribed by the Minister.

Every owner, irrespective of nationality, of agricultural land at the commencement of the Act will be required to notify the Commission "of the identity of the portion of such agricultural land holdings which constitutes redistribution agricultural land in terms of the provisions of the Act" and also lodge a notification of ownership which sets out amongst other things race, gender and nationality of person.

The Minister at his recent 2017/18 Parliamentary Budget Speech on 19 May 2017 highlighted the dearth of information on land ownership patterns. The absence of reliable data on who owns South Africa has influenced the need to provide certain specific information that will enable the State to have a better understanding of land ownership patterns in South Africa.

The objectives of the Land Holdings Bill are commendable and in line with the Constitution, however, certain amendments will be required to be effected in order to ensure that an equitable balance is struck between promoting access to land for those who were previously deprived of land, and the commercial and economic need to make South Africa an attractive destination for direct foreign investment. Perhaps of paramount importance, is the need for clarity and consistency in policy position where the land question is concerned.

CONCLUSION

As the Land Holdings Bill focuses on the redistribution of agricultural land in the absence of reliable data on precisely how much land is already in the hands of the State, it may be prudent that the State takes positive steps in order to enable it to determine for itself, potentially the extent of agricultural land that may be utilised for purposes of poverty alleviation. In addition, there is sufficient scope for the State to utilise the Bill for purposes of making provision for collaboration and partnerships that would be created for purposes of providing holistic support to communities in relation to agricultural land ownership, in line with the objectives of ensuring food security.

The Land Holdings Bill is the first of its kind to create a distinction between the rights of citizens and those of foreigners and foreign entities in the context of agricultural land ownership. Although the concept of leasehold for foreigners is one that is recognised in many other foreign jurisdictions, it is crucial that the objectives and implementation of the Bill once enacted, are capable of being harmonised with the dire need to attract foreign direct investment in the context of a fledgling economy.

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