WERKSMANS
ATTORNEYS

LAND REFORM

The Lay of the Land

14 February 2020 *10 min read*

By Bulelwa Mabasa and Anele Ngidi, Director

The legislative landscape of the national policy on land is currently undergoing significant changes which are aimed at fast-tracking land reform and land redistribution. The recently published Constitution Eighteenth Amendment Bill is the first attempt at amending a clause in the Bill of Rights. Section 25 is also the longest clause in the Bill of Rights, demonstrating the tension and balancing act between the protecting of rights and the need for land reform.

The Amendment Bill is the first in our democratic history where a Bill seeks to amend a clause in the Bill of Rights.

The National Assembly agreed to amend section 25 to make expropriation of land without compensation more clearer in the Constitution as opposed to the current wording of section 25 which requires it be read in. The question has now developed from whether compensation will be payable or not but also how and on what basis no compensation will be due when expropriation takes place. The Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution, is now responsible for formulating the legislation and supporting legislative tools to answer this question.

The Amendment Bill essentially proposes the following:

"*an amendment to section 25(2) of the Constitution, to provide that in accordance with a new subsection 3A "a Court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil." The new subsection 25(3A) provides that "National legislation, must subject to subsections (2) and (3) set out specific circumstances where a court may determine that the amount of compensation is nil*".

The proposed amendment provides that a Court may determine that in certain specific circumstances, which will have to be provided for in legislation, it will be "just and equitable" that the amount of compensation for expropriation of land and any improvements thereon for land reform to be nil. The Amendment Bill will require a two-thirds majority (and possibly by a 75% majority in order for it to pass and will be the first of its kind. The circumstances under which zero compensation may be paid will then be stipulated in ordinary legislation.

The Amendment Bill has also proposed that expropriation without compensation only occurs in instances when the expropriation is for the purposes of land reform. What exactly is land reform is not legislatively defined but defined broadly in the White Paper on South African Land Policy April 1997, which is a 23 year old document that is out of touch with the current land, special and economic issues that plague the country. This means that compensation is still applicable in expropriations for a public purpose such as the building of a school or hospital.

Though the Amendment Bill may certainly embolden the State to take the necessary steps towards achieving land reform, this Bill is certainly not the cure for the land issues that plague South Africa.

Comments and submission on the draft are due by no later than 29 February 2020.

The Expropriation Bill

The Draft Expropriation Bill, 2019 ("the Bill") was published on 21 December 2018. Expropriation is codified in an existing Expropriation Act No. 63 of 1975 ("the old Expropriation Act") which was enacted before the Constitution. As such the old Expropriation Act did require amendment in order to clearly align its provisions with those stipulated in section 25 of the Constitution. The Bill as it was published in 2019 was subsequently withdrawn as an amendment of section 25 first had to be published in order for expropriation in the terms proposed could take place.

In terms of the Expropriation Act, certain organs of state are currently empowered to expropriate property. The Bill seeks to establish a uniform approach in relation to expropriation that is permitted in terms of other legislation and to ensure that the manner in which expropriation occurs in terms of those Acts accords with section 25 of the Constitution. Once enacted, will be read together with legislation such as the Restitution of Land Rights Act No. 22 of 1994, as amended.

The object and the purpose of the Bill is to give effect to section 25(7) of the Constitution and provide for uniform processes to be applied in expropriation actions.

Compared to the old Expropriation Act the Bill now defines amongst other things:

- “claimant” being a person who has lodged a claim for compensation with an expropriating authority;
- “expropriation” as the compulsory acquisition of property by an expropriation authority;
- “holder of a right” which means a person who holds an unregistered right in property; and
- “public interest” as including the nations commitment to land reform and to reforms that bring about equitable access to all of the country's natural resources in order to redress the results of past racial discriminatory laws.

Clause 2(1) of the Bill provides that property may not be expropriated arbitrarily or for a purpose other than a public purpose or in the public interest. When read together with the Amendment Bill, this clause envisions an instance when expropriation without compensation occurs in instances when the expropriation is for the purposes of land reform and when the expropriation is for a public purpose compensation will be payable.

What the Bill proposes is that when property is required for public purpose or in the public interest, the expropriating authority must first ascertain the suitability of the property for the purpose for which the land is required and determine the existence of registered and unregistered rights in relation to that property.

If the property to be expropriated is land, the State must appoint a suitably qualified person to survey the property and also appoint a valuer to determine the value of the land. During this process and investigation the expropriating authority is also required, in terms of the Bill, to engage with the relevant municipality where the land is concerned, departments such as the Department of Land Affairs and Rural Development, the Department of Water Affairs and any other organ of State whose functions and responsibilities will be materially affected by the intended expropriation.

If an expropriating authority intends to expropriate property, a notice of intention to expropriate must be served on the owner of the property and the holder/s of a right and the notice must be published in the Government Gazette and also in conspicuous areas on the property. This notice must contain the full details of the proposed expropriation, including the purpose for which the property is required and reasons for the expropriation.

The property owner, holder/s of (a) right/s and/or persons affected by the expropriation must also in the notice be given notification of the opportunity to submit objections or comments within 30 days of the notice.

The owner of a property or holder of an unregistered right, in responding to the notice received, must deliver to the expropriating authority a written statement containing the amount claimed by him or her as just and equitable compensation and the particulars of how this amount is made up. The Bill refers to the owner or holder of a right who submits a request for compensation arising out of expropriation as a claimant.

The expropriating authority will then consider all the comments and objections received before proceeding with the expropriation. In the event that the expropriating authority decides to proceed with the expropriation, it must serve a notice of expropriation on the owner of the property confirming the decision to expropriate.

The State's ability to expropriate property for a public purpose, in terms of enabling legislation or in the public interest is reaffirmed in the Bill and requires the expropriating authority to ascertain the following before expropriation the suitability of the property for the purpose for which it is required and the existence of registered and unregistered rights.

Ownership of the properties that are expropriated in terms of the Bill is to be vested in the expropriating authority or in the person on whose behalf the property was expropriated.

Depending on the purpose of the expropriation i.e. whether for a public purpose or in the public interest, the Bill also requires the Minster to pay just and equitable compensation for the expropriated property. The issue of compensation is dealt with in clause 12 of the Bill, which

requires that just and equitable compensation must reflect a balance between the public interest and the rights of the expropriated owner, whilst having regard to the following factors:

- current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the purpose of the expropriation; and
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement.

In terms of clause 7(6) of the Bill, once the expropriating authority has received the compensation proposed by the land owner, the expropriating authority must inform the owner of the property whether or not the amount proposed is accepted. In so far as the amount is not accepted, the expropriating authority must indicate the amount of compensation it is prepared to offer. To the extent that no agreement is reached within 40 days of the expropriating authority receiving the owner's proposal, the expropriation authority must decide whether or not to proceed with the expropriation.

Clause 15 of the Bill provides that, unless the expropriating authority and the landowner have agreed otherwise, the landowner will be regarded as having accepted the compensation offer made to him by the expropriating authority if the landowner fails to institute legal proceedings for the determination of the compensation before a date stipulated in the written notice delivered to the landowner.

Clause 16(3) of the Bill recognises a claim for just and equitable compensation and an offer thereto as remaining in force until –

1. the compensation claim or offer is revised by the landowner or the expropriating authority;
2. the amount of compensation has been agreed to by the expropriating authority or the landowner;
3. the compensation has been decided or approved by a court.

The Amendment Bill when read together with the Bill places land owners in a significantly better position within which to understand how expropriation could occur and the instances under which it will take place without compensation. Contrary to popular belief when read together both drafts reinforce the court position and participation in ultimately determining whether or not compensation is due and payable and the exact amount.

It is important to note that the landscape and status of land reform currently, must be understood within a broader context. There are a number of proposed Bills and policies such as the Expropriation Bill, the Beneficiary Selection and Land Allocation Policy which must also be considered and will be impacted by the proposed amendments or will seek to expand on the proposed amendments to the Constitution.

The Werksmans Land Reform Restitution & Tenure practice has extensive and in-depth expertise in this area and is well-placed and geared up to assist landowners, property developers, land claimants, communities, government departments, farmers, funders and investors.



Bulelwa Mabasa

Keep us close