

What you need to know about the Expropriation Bill and where it came from

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Introduction

- In 2019, the Parliamentary Advisory Panel on Land Reform advised the President that the old Expropriation Act No. 63 of 1975 (**"the 1975 Act"**) was unconstitutional and in conflict with section 25 of the Constitution of South Africa, 1996 (**"the Constitution"**). On 9 October 2020, the Department of Public Works and Infrastructure (**"the Department"**) published the Expropriation Bill B3-2020 (**"the Bill"**). This article aims to provide a brief explanatory summary of the expropriation and compensation processes envisaged in the Bill, as well as the proposed inclusion of nil compensation.

What is an expropriation?

- An expropriation is the unilateral acquisition of privately owned property by the State for a public purpose. Expropriations generally occur for a public purpose such as the construction of a road or power plant, and are accompanied by compensation. In South Africa, expropriations may also occur for the purpose of land reform and improving access to natural resources.^[1] Expropriations have historically been governed by the 1975 Act, which essentially prescribes market value compensation. However, a discrepancy exists between section 25 and the 1975 Act.^[2] Scholars have criticised our courts as being hesitant to apply the transformative potential of section 25.^[3] Until recently, the State has followed the "willing buyer, willing seller" approach of calculating compensation, which some have described as exacerbating the already limited land reform budget.^[4] Amid growing calls for the constitutional property clause to be amended, South Africa has therefore now been presented with the Bill.

How will expropriations work?

The three phases envisaged in the Bill are summarised below.

1. Investigation and valuation phase^[5]

An expropriating authority (**"EA"**) must first ascertain the suitability of a property for the purpose of the expropriation and must establish the extent of the registered and unregistered rights therein. The EA may inspect, survey and value the property. The inclusion of informal unregistered rights in the expropriation and compensation process is a transformative feature not found in the 1975 Act^[6] and aims to ensure that the holders of unregistered rights, such as farmworkers, are not excluded from receiving compensation.

2. Notice and consultation phase^[7]

- The EA must serve a notice of intention to expropriate (**"notice"**) on the owner and any known holder of a right in the property (**"holder"**). At this stage, ownership has not passed to the EA. This notice must explain the purpose of the expropriation, the reason why that particular property was chosen, and the date of the expropriation.

- The notice must also include an invitation for objections to the expropriation. The holder must claim an amount as just and equitable compensation.^[8] The EA must then reply to the owner or holder and accept or repudiate this amount and make its own offer of compensation in the latter case, accompanied by full details, reasons for the offer and supporting documentation.^[9]

3. Expropriation and compensation phase^[10]

- If the EA proceeds with the expropriation, it must serve a further notice, which must include the amount of compensation offered or agreed to, and a statement that the owner may institute court proceedings to dispute the amount of compensation within 180 days of the date of expropriation.
- The right to ownership and possession of the property will pass to the EA on the date of expropriation stipulated in the notice, together with all unregistered rights, unless same are specifically excluded.^[11] An owner remains entitled to the use of and income from the expropriated property, but remains responsible for any operating costs and taxes until the EA takes possession of the property.
- If the EA and the owner or holder cannot reach agreement on the amount of compensation, they may attempt to settle the dispute by mediation or by approaching a court.^[12] However, property can be expropriated, and ownership transferred to the EA, before an agreement on compensation has been reached or a court has made a determination on compensation.

Determination of compensation

- Compensation for expropriation has long been the subject of heated debate in South Africa. Most legal practitioners still hold the view that compensation should always be at market value.^[13] While following a generally conservative approach, our courts have affirmed that compensation is not based only on market value.^[14] The Constitutional Court^[15] has taken the view that a determination of compensation should follow a two-stage approach; starting with the market value and then adjusting it downwards or upwards based on the other factors contained in section 25(3) of the Constitution.^[16]
- Section 12 of the Bill regulates the determination of compensation. This section will effectively repeal the “willing buyer, willing seller” principle of the 1975 Act and replace it with the “just and equitable” principle contemplated in section 25(3) of the Constitution.^[17] However, the Bill goes further than the Constitution, prescribing five circumstances in which it may be just and equitable for nil compensation to be paid, namely where:
 - land is held for speculative purposes;
 - land is held by an organ of state and it not being used for its core functions;
 - land has been abandoned;
 - the market value of land is less than the state investment or subsidy in the acquisition of the land; or
 - the land poses a health, safety or physical risk.
- It should be noted that nil compensation will only be applicable to land expropriated for land reform, and not to expropriations in general.
- Moreover, section 12(3) is a non-exhaustive guideline as opposed to a restrictive list, which creates a discretion to be exercised by a court.^[18] It is conceivable other circumstances may also justify nil compensation, such as where land is occupied by a labour tenant, or where the property had been acquired pursuant to racially discriminatory laws and is now being expropriated for the purpose of land reform.
- Comments for the Bill have closed and South Africans are awaiting a possibly amended version.

^[1] Section 25(4) of the Constitution.

^[2] T Karberg (2019) ‘Weighing the scales – a critical analysis of the ‘equitable balance’ requirement for compensation under the Constitutional property clause. Unpublished LLB dissertation, University of Pretoria.

^[3] J Dugard ‘Property rights in court: an examination of judicial attempts to settle section 25’s balancing act re restitution and expropriation’ (2018) 34 *SAJHR* 56.

^[4] P de Vos ‘Willing buyer willing seller works... if you have a lifetime to wait’ (2013) <https://constitutionallyspeaking.co.za/willing-buyer-willing-seller-works-if-you-have-a-lifetime-to-wait/> (accessed 19 February 2021).

^[5] Chapter 3.

^[6] While section 19 of the 1975 Act regulates the payment of compensation in respect of certain unregistered rights, this provision is aimed at mortgages, liens and similar rights, and not the informal rights mentioned above.

[7] Section 7.

[8] Section 7(4).

[9] Section 7(6).

[10] Section 8 and 9.

[11] Section 9(1).

[12] Section 21.

[13] AJ van der Walt *Constitutional Property Clauses* (1999) at 347.

[14] *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T).

[15] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

[16] These factors include 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 investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

[17] Section 12(1).

[18] S Viljoen 'Expropriation without compensation: principled decision-making instead of arbitrariness in the land reform context' 2020 *TSAR* 35.



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