

## **Expropriation without compensation Part 1**

I am sure that we are all aware of the thorny issue of expropriation without compensation. Over the next few weeks, I will be discussing aspects of the new Expropriation Act 13 of 2024. The new Expropriation Act repealed the old Expropriation Act 63 of 1975. As you can see, Act 63 of 1975 was an old piece of legislation.

Before we even get to talk about Act 13 of 2024, we need to be aware of Section 25 of the Constitution, which is referred to as the "Property Clause". Section 25 is the section of the Constitution that guarantees property rights. A summary of Section 25 is as follows:

1. Section 25(1) says that no one may be deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property. In other words, any deprivation of property must occur as a result of a law that applies to everyone and property may not be deprived of in an arbitrary manner as happened during the days of apartheid when the previous government effected forced removals.
2. Section 25(2) says that property may only be expropriated in terms of a law of general application for a public purpose or in the public interest and subject to the payment of compensation. One could have a debate (and there have been many lengthy legal debates), as to what is public purpose or in the public interest. Examples of public purpose or in the public interest would be things like expropriating property to widen a road, build a dam or build a school. Expropriating a private citizen's house for a government minister to live in, would definitely not be an example of expropriation for a public purpose or in the public interest.
3. In terms of Section 25(3), the amount of compensation to be paid must be just and equitable and reflect a balance between the public interest and the interest of those affected.

It should be clear thus far, that any property that is expropriated must be for public purpose or in the public interest and compensation needs to be paid. This is in line with international norms and standards.

4. Section 25(3) goes further to state that the amount of compensation to be paid will be determined having regard to all the relevant circumstances, including:
  - a. The current use of the property;
  - b. The history of the acquisition and use of the property;
  - c. The market value of the property;
  - d. The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - e. The purpose of the expropriation.

The old Expropriation Act made reference to the concept of willing buyer and willing seller. In other words, when it came to determining the amount of compensation to be paid when property was expropriated by the State, the amount to be paid by the State to the owner of the property, would be determined as if there were a willing seller and a willing buyer. This would in essence be the open market value of the property, which many property practitioners would use a comparative market analysis (CMA) to determine.

If we think about the factors that the State may take into account in terms of Section 25(3) of the Constitution, when determining compensation to be paid for expropriated property and the concept of willing seller and willing buyer in the old Expropriation Act, it is not difficult to understand the conflict that could occur when it came to calculating the amount to be paid for the expropriated property. Furthermore, Section 25(4) of the Constitution says that for the purposes of Section 25 of the Constitution, public interest includes the nation's commitment to land reform and reforms to bring about equitable access to all of South Africa's natural resources.

Let us also consider that many property owners whose land was expropriated often tried to hold the State to ransom over the amount of compensation to be paid. The old Expropriation Act allowed the property owner to challenge the State on the grounds of the amount of compensation to be paid. It did happen that these land owners tied the State up in Court for many years in order to get the maximum amount of money out of the State.

I am sure you can see the storm brewing in the very large tea cup!  
More about the new Expropriation Act next week.