

Expropriation without compensation Part 2

Last week we started discussing some of the issues relating to the new Expropriation Act 13 of 2024, which repealed the old Expropriation Act 63 of 1975. Please refer back to last week's post to read up about S25 of the Constitution, often referred to as the "property clause".

It is interesting to note that the terms "public interest" and "public purpose" are defined in the Expropriation Act 13 of 2024.

1. "public interest" includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices;
2. "public purpose" includes any purposes connected to the administration of any law by an organ of state, in terms of which the property concerned will be used by or for the benefit of the public;

We can therefore see that "public interest" refers to land reform and "public purpose" refers to use which will be for the benefit of the public. An example of "public purpose" would be land that is expropriated to widen a road or build a school.

Section 2 of the Act also helps us to understand how the Act will be applied.

1. Section 2(1) says that despite the provisions of any law to the contrary, an expropriating authority may not expropriate property or cause it to be acquired under subsection (3) arbitrarily or for a purpose other than a public purpose or in the public interest.

This means that the Expropriation Act and Section 25 of the Constitution are aligned in that property may not be expropriated arbitrarily and the purpose of the expropriation must be for a public purpose (as defined) or in the public interest (as defined).

2. Section 2(2) says that subject to section 20 (which deals with urgent expropriation), a power to expropriate property may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or holder of a right in property for the acquisition thereof on reasonable terms.

We can see that Section 2(2) clearly provides that any expropriating authority must attempt to reach agreement with the owner of the property first, before applying its power to expropriate. This indicates that any expropriating authority is not just going to come along and effect mass expropriations of land in an arbitrary manner. Reading Section 2(1) and 2(2) together should already provide a sense of comfort for anyone concerned that the government is about to embark on wholesale expropriation of property in an arbitrary fashion without the owners being paid.

Section 12 of the Expropriation Act deals with the determination of compensation. Section 12(1) of the Act is worded very similarly to Section 25(3) of the Constitution.

1. Section 12(1) says the amount of compensation must be just and equitable reflecting an equitable balance between the public interest, the interests of those affected, including an owner, holder of a right a mortgagee, having regard to all 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.

What is important to note, is that Section 12(1) refers to the amount of compensation being just and equitable whereas 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. The new Act now introduces the concept of compensation being just and equitable which is drawn from Section 25(3) of the Constitution.

This means that compensation that is determined to be just and equitable, having regard to the circumstances identified in Section 12(1), may be very different from the open market value of a property calculated on the basis of a willing seller selling the property to a willing buyer.

Next week I will discuss Section 12(3) of the Expropriation Act, which deals with nil compensation, in other words, the dreaded expropriation without compensation.

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