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Community of Practice Valuations:

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By Mail & Guardian

Expropriation Bill will boost land reform

The National Assembly recently passed the Expropriation Bill, which has drawn much criticism since its tabling at the beginning of 2013. In our view, many of these fears are exaggerated and misplaced in view of section 25 of the Constitution (the property clause), the purpose of the Bill, and the fact that it is meant to replace its outdated predecessor, the Expropriation Act 63 of 1975 (the 1975 Act).

The state may not limit or take away property in any way it likes. Section 25(2) allows the state to expropriate property only for a public purpose (building roads, airports, hospitals, etcetera) and in the public interest (realising land and related reforms, as permitted by section 25(4a)).

This power, which entails the compulsory acquisition of property by the state from affected owners without their permission, isn't new; it also existed during apartheid.

The Bill hence provides an orderly procedure through which the state may expropriate property. The public purpose and public interest requirements are meant to prevent the state from abusing this power.

The fact that the Bill refers to "property" is not controversial, as section 25(2) uses this term. Property in this context refers to more than mere ownership of land, because the state must be able to expropriate all kinds of property (including movables, shares and other intangible commercial interests), should the public purpose or public interest demand it.

RIGHT OF WAY NEWS,,,

This approach, which is also followed in jurisdictions such as the United States, Germany and Ireland, is therefore unlikely to pose a threat to investor confidence.

The Bill provides better protection to property holders than its predecessor; it obliges the state to first attempt to acquire the property through agreement on reasonable terms. Only in failing such agreement may the state expropriate the property against payment of just and equitable compensation, which must be able to strike an equitable balance between the owner's interests and the public interest.

Market value one of several factors to determine compensation

Payment of compensation in the Bill now aligns with the provisions of section 25(3) in the Constitution. As in the Constitution, market value is but one of several factors that must be considered in determining compensation that is just and equitable.

The Bill defines "expropriation" as the compulsory acquisition of property by an expropriating authority. This doesn't mean that the state must be the ultimate beneficiary in all cases for there to be expropriation.

The 1975 Act included a provision allowing the minister to expropriate property on behalf of a juristic person, such as educational institutions, if such expropriation is for a public purpose. This kind of expropriation is called "third-party transfers".

The Bill does not provide for this type of expropriation in similar terms, but stipulates in clause 9(1a) that ownership vests "in the person on whose behalf the property was expropriated". This is a necessary provision, because expropriation for land reform purposes would necessarily involve third-party transfers.

It is also conceivable that third party transfers for the benefit of educational institutions would satisfy the public purpose and public interest requirements.

It is debatable, however, whether the expropriation of property involving a third-party transfer purely for economic development purposes would satisfy the public purpose or public interest requirements. Experience elsewhere, such as in the US, reveals that such expropriations are not well received and can amount to an abuse of state power. The reference in clause 2(1) of the Bill to the fact that expropriation may not be arbitrary

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would afford courts the opportunity to scrutinise the purpose of the expropriation more strictly than is currently the case.

State will not be able to acquire land without compensation

The state custodianship model does not mean — as so many people fear — that the state may indirectly acquire (or even nationalise) certain categories of property without having to pay compensation. According to section 25(1), which governs the regulation of property, there must be sufficient reason for introducing such a model into a property regime. In the absence of such reason, the custodianship model is unconstitutional.

The Constitutional Court's 2013 *Agri SA* judgment doesn't provide authority that state custodianship of all property, such as land ownership, will necessarily comply with section 25(1).

As to its ability to promote land reform, the Bill must be considered in view of South Africa's unfortunate past and the Constitution's commitment to land and related reforms, as authorised in section 25(4-9).

The Bill, unlike its predecessor, which only allowed expropriation for public purposes, permits the state to pursue a reform-based agenda. Clause 3(2) permits an organ of state, which includes the department of rural development and land reform, to request the minister to expropriate property for land reform purposes, which would comply with the public interest requirement.

It is therefore likely that, once the Bill has been passed into law, the state will use it to realise land reform. - EJ Marais & BV Slade

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