

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

NEW SERIES: This is the first in a series of articles dealing with the expropriation of property without compensation in South Africa.

EXPROPRIATION WITHOUT COMPENSATION: THE EXPROPRIATION BILL

The notion of expropriation without compensation has elicited much discourse, among both South Africans and foreign investors. Despite many divergent views on the issue, recent parliamentary developments indicate that expropriation without compensation in South Africa may no longer be a distant prospect.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

[CLICK HERE](#) 

EXPROPRIATION WITHOUT COMPENSATION: THE EXPROPRIATION BILL

Recent parliamentary developments indicate that expropriation without compensation in South Africa may no longer be a distant prospect.

The Expropriation Bill, as currently formulated, replicates several features of the 1975 statute.



The notion of expropriation without compensation has elicited much discourse, among both South Africans and foreign investors. Despite many divergent views on the issue, recent parliamentary developments indicate that expropriation without compensation in South Africa may no longer be a distant prospect.

While there are many statutory instruments that currently regulate the expropriation of property by the South African State, two of the most important are s25 of the Bill of Rights (which enshrines the constitutional right to property) and the Expropriation Act (which sets out the processes that must be followed when the State uses its powers of compulsion to acquire property for a public purpose).

Early in December 2018, following a public-participation process, both Houses of Parliament resolved that the Constitution should be amended to expressly allow for expropriation without compensation as a means to achieve land reform in South Africa. A parliamentary committee has been established to initiate this amendment and is required to report back by 31 March 2019.

Alongside the initiative to amend the Constitution, the Minister of Public Works has published a draft of the legislation that will be utilised to give effect to the new expropriation regime: the Expropriation Bill. Interested persons have until 19 February 2019 to submit written comments on the Bill.

The Expropriation Bill is intended to repeal and replace the current Expropriation Act, a statute that was brought into force

in 1975 and has governed the State's compulsory acquisition of property ever since. While the Constitution enshrines certain high-level protections for property rights (such as the protection against arbitrary deprivation), the Expropriation Bill details the mechanisms governing the expropriation of property, the payment of compensation and the resolution of disputes before the courts.

The Expropriation Bill, as currently formulated, replicates several features of the 1975 statute. These include: empowering officials to investigate property in order to determine its suitability for expropriation; vesting the Minister of Public Works with the power to expropriate property for a public purpose; obliging an expropriating authority to publish a notice of intention to expropriate and to engage with the property owner(s) in question; regulating the earning of income and the payment of charges associated with the property after expropriation but prior to the State's assumption of occupation; and the settlement of disputes before the courts.

One of the most significant features of the Expropriation Bill is the extent to which it revises the payment of compensation for expropriated property.

EXPROPRIATION WITHOUT COMPENSATION: THE EXPROPRIATION BILL

CONTINUED

One of the most significant features of the Expropriation Bill is the extent to which it revises the payment of compensation for expropriated property.



First, it provides that compensation paid to a property-owner must be just and equitable, "reflecting an equitable balance between the public interest and the interests of the expropriated owner". Circumstances relevant to the compensation determination include: the property's current use, history and market value; the extent of previous State investment in the property; and the purpose of the expropriation. In this regard, the Expropriation Bill will provide a much-needed revision to the outdated 1975 statute, in order to bring it in line with the prevailing constitutional dispensation and the decisions of the courts. Importantly, a property's market value is but one of several factors that is relevant to determining just and equitable compensation.

Second, the Expropriation Bill sets out considerations that generally should *not* be taken into account in determining compensation. These include: the fact that the property was acquired without the property owner's consent; the special suitability of the property for the State's

purposes if there is no open market for a property with that purpose; and enhancements to the property effected unlawfully, after the publication of the notice of expropriation or in order to obtain additional compensation. An individual property-owner may, however, show that, in a particular set of circumstances, it is just and equitable to take these factors into consideration when determining compensation.

Third, unlike the 1975 statute, the Expropriation Bill does not provide that the State must always pay at least some form of compensation. Rather, the Bill explicitly provides for circumstances in which it will be just and equitable to pay nil compensation. These circumstances include: where land is occupied or used by a labour tenant; where land is held for a purely speculative purpose; where land is owned by a State-owned entity; where the land in question has been abandoned; and where the market value of the land is equivalent to, or less than, the present value of previous state investment in the land. This is not a finite list, but rather

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



EXPROPRIATION WITHOUT COMPENSATION: THE EXPROPRIATION BILL

CONTINUED

At present it is not clear when these processes will be completed or when the President will sign the Expropriation Bill into law.

a list of possible situations in which it may be permissible for the State to pay nil compensation. Each instance of expropriation must be considered on its own merits, with due regard to all relevant circumstances.

While the Expropriation Bill generally deals with "property" (which includes movable and incorporeal property), the circumstances in which it anticipates the payment of nil compensation relate only to the taking of land. Whether these circumstances will be expanded to include property more generally will be the matter of debate in the Portfolio Committee as it processes the Bill.

The Expropriation Bill is merely a draft. In order to acquire the force of law it must go through certain parliamentary processes, which include being scrutinised and approved by both Houses of Parliament. At present it is not clear when these processes will be completed or when the President will sign the Expropriation Bill into law. However, it has been recently speculated by the Parliamentary Portfolio Committee that the Bill may only be ready for consideration after the 2019 general election.

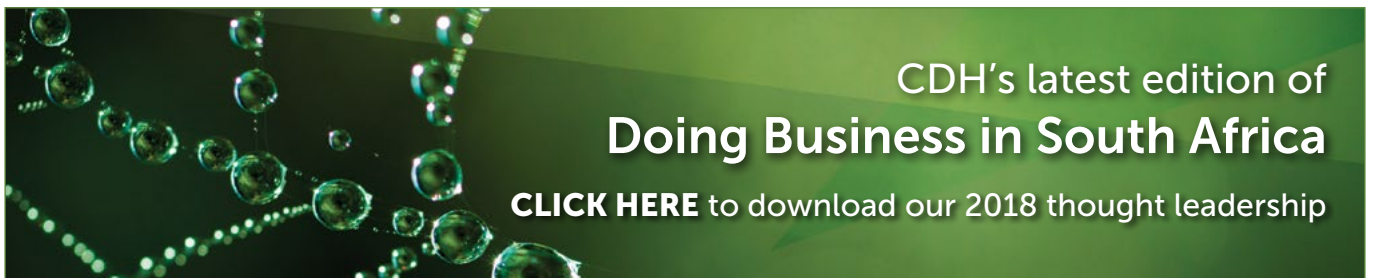
Ashley Pillay, Sabrina de Freitas and Keanan Wheeler

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

[CLICK HERE](#) 

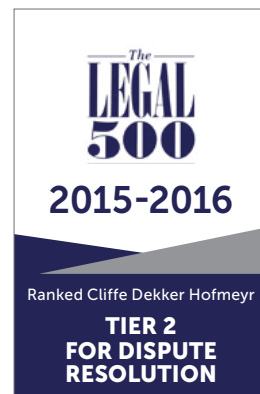
NEW SERIES

The next article in the series will deal with protections available in respect of an expropriation.



Best Lawyers 2018 South Africa

NAMED CDH LITIGATION LAW FIRM OF THE YEAR



- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.
- CHAMBERS GLOBAL 2018 named our Corporate Investigations sector as a Recognised Practitioner.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Insurance.
- CHAMBERS GLOBAL 2018 ranked our Dispute Resolution practice in Band 2: Media & Broadcasting.
- CHAMBERS GLOBAL 2017 - 2018 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.
- Julian Jones ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Restructuring/Insolvency.
- Tim Fletcher ranked by CHAMBERS GLOBAL 2018 in Band 4: Dispute Resolution.
- Pieter Conradie ranked by CHAMBERS GLOBAL 2012 - 2018 in Band 1: Dispute Resolution.
- Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 2: Dispute Resolution.
- Joe Whittle ranked by CHAMBERS GLOBAL 2016 - 2018 in Band 4: Construction.



OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
Business Development
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2019 7596/FEB

