

DISPUTE RESOLUTION ALERT

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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.

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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.

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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

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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

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NEW SERIES

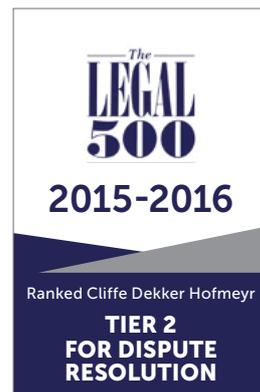
The next article in the series will deal with protections available in respect of an expropriation.



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