

24 MARCH 2021

# AGRICULTURE, AQUACULTURE & FISHING SECTOR ALERT

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### Expropriation of land without compensation – where are we?

On 13 December 2019, the Constitution Eighteenth Amendment Bill (the Amendment Bill) was published in the Government Gazette. Since then, a lot of water has passed under the bridge with regards to an amendment to the laws of the Republic of South Africa dealing with the expropriation of land without compensation.

## Expropriation of land without compensation – where are we?

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Subsequent to the publishing of the Amendment Bill amending section 25 of the Constitution, and as expected, the Expropriation Bill 23 of 2020 (the Expropriation Bill) was advertised in the Government Gazette. The Expropriation Bill is aimed at providing the mechanisms for and the circumstances under which land may be expropriated with and without compensation as envisaged by section 25 of the Constitution.

The reason the Amendment Bill preceded the Expropriation Bill is clear if regard is had to section 25(2) of the Constitution, which provides for the expropriation of property, but only in terms of a law of

general application. The Expropriation Bill is this law of general application and any legislation enacted must be in accordance with the provisions of the Constitution of the Republic, failing which, it is open to challenge and being set aside by the Constitutional Court. In due course, many provisions of the Expropriation Bill may very well form the subject matter of constitutional challenges in the Constitutional Court.

Section 25 of the Constitution in its current form does not expressly provide for the expropriation of property without compensation and, in fact, section 25(2)(b) expressly provides for compensation. The Amendment Bill seeks to change this position. I have already [published alerts](#) in which I have submitted that section 25 of the Constitution as it now stands does, by implication, provides for expropriation without compensation in circumstances where a court could hold that such expropriation for nil value would be just and equitable in the circumstances.



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## Expropriation of land without compensation – where are we?

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The Expropriation Bill is currently the subject of a public participation process during which both written and oral submissions are being received.

Nevertheless, the Amendment Bill seeks to create certainty by amending section 25(2)(b) to include a proviso to the effect that, *“Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.”* The Amendment Bill also introduces a new section, section (3A) which provides that, *“National Legislation must, subject to sub-sections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.”* These amendments have opened the door for legislation that empowers government to expropriate land without compensation, being the Expropriation Bill, and the specific circumstances referred to in section 3A of the Amendment Bill are provided for in section 12(3) of the Expropriation Bill.

One of the major concerns in regard to the latter section of the Expropriation Bill is that although the specific circumstances under which nil compensation is payable

are set out, this list is not exhaustive and there may be other circumstances under which land is expropriated for nil compensation.

The Expropriation Bill is currently the subject of a public participation process during which both written and oral submissions are being received. The public participation process in respect of the Amendment Bill has been finalised and the *Ad Hoc* Committee established for the purposes of introducing legislation to amend section 25 of the Constitution has recently submitted their written report on the outcomes of the public participation process, which report is dated 22 February 2021. This report is a 79-page document and some of the highlights include the following:

- In response to the preamble to the Amendment Bill, which preamble includes the admonishment that little is being done to redress the skewed land ownership pattern, the submissions included the fact that farming is a technical job and many

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farms redistributed in the Eastern Cape are no longer viable. *"Providing someone with the land to farm on is no guarantee that the farm will be successful. Thus, investment in many ways must be done in support of the farmers for farms to thrive and be sustainable."*

- A secondary submission in response to the preamble to the Amendment Bill was the damage caused to the economy and the fact that if the property rights were removed, one cannot expect to have a flourishing economy. The submissions include the impact of the amendment on foreign investment and the compounded economic damage that may be caused to the economy.
- Submissions were made to the effect that the amendment was unnecessary as section 25 already makes provision for courts to order nil compensation when it is just and equitable to do so.

- Lastly, in regard to the proposed insertion of section (3A) in the Amendment Bill, the bulk of the submissions proposed the circumstances under which nil compensation is payable and the majority of those related to circumstances where property sought to be expropriated was initially acquired without payment, such as gifts, donations or low sale purchases before 1994.

This public participation process with regard to the Amendment Bill resulted in more than 200,000 submissions in regard to the Amendment Bill and we will have to wait and see whether these submissions result in further amendments to the Amendment Bill and ultimately section 25 of the Constitution. This will certainly also impact on the ultimate version of the Expropriation Bill that is enacted into law in due course.

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*Burton Meyer*

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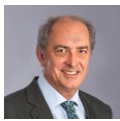
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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