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DISPUTE RESOLUTION **ALERT**

SERIES

This is the second in a series of articles dealing with the expropriation of property without compensation in South Africa.

IN THIS **ISSUE**

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CLIFFE DEKKER HOFMEYR

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

Expropriation Without Compensation: Domestic Legal Protections

Parliament has resolved that the constitutional amendment process will be taken up after the general election that the President has proclaimed for 8 May 2019.

As discussed in a previous publication, South Africa's legislative authorities are in the process of amending two significant aspects of our expropriation framework: s25 of the Bill of Rights (ie the constitutional property clause) and the Expropriation Act (ie the statute regulating the nuts and bolts of the State's compulsory acquisition of property).

Initially, the Constitutional Review Committee's intention was to amend the constitutional property clause before the final parliamentary session of the current electoral cycle. However, the last session has come and gone, with no amendment having been finalised.

One of the previous Parliament's final acts was the adoption, in March 2019, of a report regarding the amendment of s25 of the Bill of Rights. Among other things, the report incorporates a roadmap for the constitutional amendment process, addresses a High-Court challenge to the work of the Constitutional Review Committee and summarises the advice from various experts (including academics, lawyers, valuers and politicians). The expert advice includes input on possible modalities for expropriation, the need for broader legislative reform and the importance of judicial oversight in respect of expropriation. Following the adoption of the report, Parliament resolved that the constitutional amendment process will be taken up after the general election that the President has proclaimed for 8 May 2019.

South Africans and foreign investors alike await the outcome of the abovementioned parliamentary processes with bated breath. Statements from the ruling party indicate that the amendment of the Constitution will focus on land reform and redistribution and will seek to achieve those objectives through the acquisition and utilisation of State-owned land, vacant or unused land, and property held for speculation or encumbered by excessive debt. Furthermore, there have been express commitments to promoting agricultural production and food security without undermining economic growth and job creation.

While these statements may offer some level of comfort, they remain political positions rather than legally binding commitments. It is, furthermore, clear that there is still much for the Houses of Parliament to explore in the process of amending the constitutional property clause, and that this exploration process could result in an expropriation regime

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Expropriation Without Compensation: Domestic Legal Protections...*continued*

The Constitution commits South Africa to the rule of law, which requires, among other things, the government to act lawfully, for a proper purpose, in good faith and rationally.

that is radically different from anything currently envisaged. Accordingly, the question of which protections, if any, exist for land owners who may face expropriation under the new regime has fast become a pertinent one.

Some of those domestic protections are set out below.

The principle of legality

The Constitution commits South Africa to the rule of law, which requires, among other things, the government to act lawfully, for a proper purpose, in good faith and rationally. This means that, in the context of expropriation without compensation, the State –

- must observe the constraints imposed by the Constitution (including the prohibition against arbitrariness);
- must comply with the substantive and procedural constraints imposed by any applicable legislation, including the Expropriation Act (for example, the obligation to negotiate and the various processes requiring notification and the consideration of representations);
- may only act in order to achieve an authorised objective (for example, land reform); and
- must not act for an ulterior purpose (for example, a purpose that does not give effect to restitution, redistribution or a genuine public purpose).

Furthermore, the exercise of the power to expropriate must be rationally related to the State's empowering purpose – there must be a rational connection between the decision to expropriate particular property and the public purpose behind the expropriation, and there must be sufficient information to indicate that the property is suitable for the purpose in question.

No arbitrary deprivation

While there has been much debate on changing the Constitution's compensation regime, there have been no indications that the government intends to amend s25(1) of the Constitution, which encapsulates a protection against the arbitrary deprivation of property and has been elaborated upon in a range of judicial decisions.

The expropriation of property constitutes "deprivation" within the meaning of s25(1). The prohibition against arbitrary deprivation means that any expropriation must be preceded by a fair process and be justified by a "sufficient reason".

- A fair process, generally, requires the affected property owner to be timeously notified of the proposed expropriation and the reasons therefor, in addition to being afforded an opportunity to make representations in respect of the proposed expropriation, which representations must be properly considered by the decision-maker.

Expropriation Without Compensation: Domestic Legal Protections...*continued*

Section 34 of the Constitution enshrines a right of access to courts and allows individuals to have any justiciable dispute resolved by a court or independent tribunal, including a dispute regarding expropriation.

- A "sufficient reason" for the wholesale expropriation of rights in land without compensation will have to show that the decision to expropriate is not merely rational, but also that it is proportional in the circumstances. The proportionality enquiry will require the decision-maker to consider, among other things, the nature and use of the land in question, whether less restrictive or invasive means are available, whether the expropriation is necessary in the circumstances and whether the land owner has done something to justify the forfeiture of ownership.

Administrative justice

The courts and Parliament have accepted that a decision to expropriate property must meet the requirements of administrative justice set out in s33(1) of the Constitution and the Promotion of Administrative Justice Act (PAJA). Such a decision must therefore be lawful, reasonable and procedurally fair. A decision to expropriate would fail to meet this standard if, for example, it were affected by bias, the taking into account of irrelevant considerations, the ignoring of relevant considerations, non-compliance with mandatory procedures or material errors of fact or law.

Access to courts

Section 34 of the Constitution enshrines a right of access to courts and allows individuals to have any justiciable dispute resolved by a court or independent tribunal, including a dispute regarding expropriation. Such disputes could relate to the determination of compensation, or an aggrieved property owner's charge that the State has failed to meet the standards of lawfulness, rationality, procedural fairness, non-arbitrariness and administrative justice set out above. In judicial proceedings for the review of an expropriation decision, the decision in question may be set aside, remitted to the decision-maker or substituted by a court, depending on the circumstances.

The bold independence of the South African courts in addressing irregular and unlawful conduct by the State is rightly celebrated, and has been shown time and again by the courts' willingness to invalidate high-profile public decisions.

Protection of investments

In July 2018 the Protection of Investment Act came into force, and provides further protection to property owners in their capacity as investors. Under this statute, the government must ensure that administrative, legislative and judicial processes do not operate in a manner that

Expropriation Without Compensation: Domestic Legal Protections...*continued*

Domestic and foreign investors may rest assured that South Africa has a sophisticated and robust domestic legal framework through which their rights may be protected.

is arbitrary or that denies administrative and procedural justice to investors. The Act also guarantees a certain level of parity of treatment in respect of foreign and local investors, although there are permissible exceptions.

Going forward

The outcome of the constitutional amendment process, and the associated legislative overhaul, remains to be seen. However, domestic and foreign investors may rest assured that South Africa has a sophisticated and robust domestic legal framework through which their rights may be protected. The ongoing parliamentary processes will, furthermore, afford interested parties a series of opportunities to participate in, and contribute to, the changes that are to come.

Ashley Pillay, Sabrina de Freitas and Keanan Wheeler

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The next article in the series will deal with the international-law implications for South Africa's new expropriation regime.

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No escaping contractual liability: The Constitutional Court clarifies when a public entity requires approval for incurring "future financial commitments"

Generally, a public entity's accounting authority approves its finances – "only exceptional contracts require [ministerial] approval."

Contracting in the public sector can be a risky endeavour. Organs of state are bound by a panoply of regulatory constraints that are often unclear. Worse still, non-compliance with these constraints can undermine or invalidate agreements concluded between public entities and service providers, due to circumstances that are wholly outside the control of the private service providers. Risk-mitigation strategies, such as thorough due-diligence investigations, are therefore of the utmost importance before transacting with the State.

The Constitutional Court has now brought clarity to one area of the law governing public-sector contracting: the incurring of "future financial commitments".

In *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2018] ZACC 12 (handed down on 2 April 2019), the Road Traffic Management Corporation, a public entity, sought to escape its contractual obligations under a multi-million-Rand service-level agreement with a private company, Waymark, on the basis that the Minister of Finance had not authorised the agreement in accordance with s66 of the Public Finance Management Act, No 1 of 1999 (PFMA). Section 66 of the PFMA stipulates that, in respect of certain public entities, a Cabinet Minister must authorise a transaction that incorporates "any future financial commitment". The Corporation argued that, because the agreement made provision for payments for services rendered over several financial years, it imposed "future financial commitments" and was therefore governed by s66 of the PFMA. The absence of ministerial approval, so the Corporation argued, vitiated the impugned agreement.

The High Court found that the agreement was not binding because of the Corporation's non-compliance with s66. Indeed, by virtue of the operation of the PFMA, the High Court concluded that the Corporation did not need to bring review proceedings to set the contract aside – the agreement could simply be ignored.

In contrast, the Supreme Court of Appeal found in favour of Waymark. It ruled that s66 of the PFMA does not apply to the ordinary procurement of goods and services, even if that procurement results in a multi-year contract which envisages payments over an extended period of time.

The Constitutional Court ultimately agreed with the Supreme Court of Appeal. Petse AJ, for a unanimous bench, reasoned as follows:

- Generally, a public entity's accounting authority approves its finances – "only exceptional contracts require [ministerial] approval." Thus, in the ordinary course, ultimate financial approval lies with the entity's board of directors rather than with a Cabinet Minister.
- A "future financial commitment", in the context of s66, does not entail expenditure which has yet to be budgeted for. That is too broad a

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No escaping contractual liability: The Constitutional Court clarifies when a public entity requires approval for incurring "future financial commitments"*...continued*

It is now clear that s66 of the PFMA does not apply to ordinary procurement contracts even if they have multi-year periods and payment plans.

reading of the PFMA, which would have impractical, inefficient and unbusinesslike results. The objective of the PFMA is not to be overly restrictive; rather, it is to balance financial discipline and oversight with efficient and effective spending and resource allocation.

- When the PFMA refers to a "future financial commitment", it means "a transaction that is somehow similar to a credit or security agreement" and a transaction that is "distinct from most other transactions". The object of s66 is not to regulate ordinary procurement contracts or major corporate action – it is far narrower in scope.
- The interpretation suggested by the Corporation, that an entire transaction is not binding without ministerial approval if even one of its severable obligations extends beyond a budgeted year, notwithstanding the value or nature of that obligation, would result in absurd, unbusinesslike results.
- Restricting s66 to credit or security arrangements and similar transactions will not leave a legislative gap. Rather, the ordinary contracting for goods and services, the procurement of significant assets and the incurring of multi-year expenditure will be regulated by other provisions of the PFMA and the regulations thereunder.

As mentioned in a previous publication, the National Treasury admitted, in a circular issued in September 2005, that s66 of the PFMA is framed so broadly that it captures many ordinary operational transactions, which was not the legislative intention. Rather, the statutory purpose was to ensure that ministerial authorisation is obtained in respect of "transactions for which funds have not been provided [in] the budget of the... public entity". The National Treasury indicated its intention to address "the inherent ambiguity" in s66 by means of an amendment to the PFMA, which amendment has not yet occurred.

The Supreme Court of Appeal and the Constitutional Court have thus narrowed the meaning of the otherwise broad term, "any future financial commitment". It is now clear that s66 of the PFMA does not apply to ordinary procurement contracts, even if they have multi-year periods and payment plans. However, the courts have gone further than the National Treasury's stated intention and found that s66 does not apply to any instance of ordinary procurement or significant corporate action, even if it entails expenditure for which no budget has been provided. It remains to be seen whether the PFMA will be amended to (re)introduce some form of oversight in respect of unbudgeted expenditure. Watch this space.

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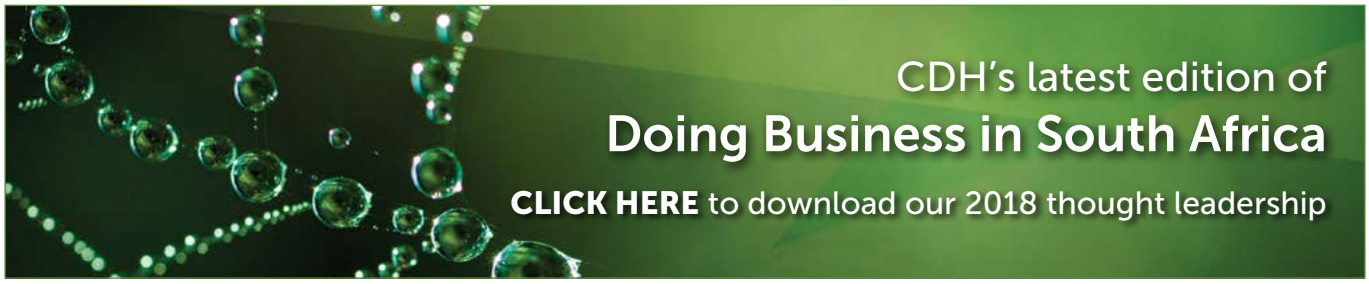

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving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

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