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DISPUTE RESOLUTION ALERT

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The Expropriation Bill and the implications on foreign ownership

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CLIFFE DEKKER HOFMEYR

The Expropriation Bill and the implications on foreign ownership

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On 15 October 2020, the highly anticipated Expropriation Bill was tabled in the National Assembly. The publication of the Bill arrives on the back of a turbulent economy, underpinned by rigorous debate on how to achieve an equitable distribution of South Africa's resources.

It is therefore of no surprise that the Bill has caused controversy, uncertainty and confusion regarding the impact it will have on South African and foreign property owners alike. While the implications of the Bill may be far-reaching, it is important to analyse the Bill through both a narrow assessment of its textual construction as well as through a wider engagement with its broader purpose.

The Bill's objective is "[to] provide for the expropriation of property for a public purpose or in the public interest; to provide for certain instances where expropriation with nil compensation may be appropriate in the public interest; and to provide for matters connected therewith".

The introduction of "expropriation with nil compensation" has caused the bulk of the debate, especially with our law's current approach to the reading of section 25 of the Constitution (preventing the arbitrary deprivation of property and allowing for expropriation subject to just and equitable compensation). In this respect, it is also prudent to address the impact on foreign property owners and the application of the Bill (at present) to these property owners.

The Bill is silent on foreign property owners altogether. Given this silence, it is presumed that such property will be treated in the same manner as locally owned property.

Any preference given to foreign owners (or local owners for that matter) may constitute unfair discrimination based on nationality, which would be clearly unconstitutional. Despite the need for equal treatment between foreign and local property owners, the Bill is silent on how service of necessary documentation and publication for that matter is to be effected in respect of foreign owned property targeted for expropriation.

It is important to address the fact that the Expropriation Bill attempts to instil a uniform process which derogates from the notion that expropriation (with or without compensation) will be carried out arbitrarily. The Expropriation Bill provides rigid procedural steps which the expropriating authority must adhere to; with these steps being essential to safeguard against any arbitrary or improper deprivation of property.

Very briefly, these procedural steps are founded in the following categories:

- investigation and valuation of the property by the expropriating authority;
- service of a notice of intention to expropriate on the owner and other right holders;
- negotiations regarding appropriate compensation; and
- service of notice of expropriation (once the decision has been made to expropriate).

The Expropriation Bill and the implications on foreign ownership ...continued

The absence of a protocol for notifying foreign owners of an intended expropriation presents a severe barrier to the requirement to actively participate with owners prior to any expropriation.

The procedural steps (especially regarding the service of certain notices) are silent regarding property owned by foreigners, especially foreign property owners who reside outside the confines of South Africa. This begs the question how foreign property owners will be treated in accordance with the Expropriation Bill, and whether the Bill will incorporate provisions to deal specifically with foreign property owners.

Section 7(1) of the Expropriation Bill provides that once the expropriating authority intends to expropriate property it must "serve a notice of intention to expropriate on the owner and any known holder of a right in the property". The Bill however is silent on how service will take place on foreign property owners.

The Bill defines "service" in relation to such notices as follows: "to serve by delivery or tender, post, publication or in accordance with the direction of a court, and 'serve' has a corresponding meaning". Given the

requirement to provide the owner of the property with due notice, the failure to provide an adequate process for service on foreign owners presents procedural hurdles to overcome.

Without express direction regarding service on foreign property owners in the Bill, one can gather that should a foreign property owner require service of a notice of intention to expropriate, same will have to be dealt with in accordance "with the direction of the court", which would require the expropriating authority to approach the High Court for direction in respect of service – which seems rather cumbersome should there be alternative options available to the expropriating authority.

The absence of a protocol for notifying foreign owners of an intended expropriation presents a severe barrier to the requirement to actively participate with owners prior to any expropriation. In the absence of (foreign property) owners

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The Expropriation Bill and the implications on foreign ownership *...continued*

In light of the extensive public, political and legal scrutiny of the Expropriation Bill (especially regarding the notion of 'expropriation without compensation') the Bill's procedural and substantive provisions must be carefully interrogated.

receiving notice of the expropriation, the expropriating authority runs the risk of acting arbitrarily and against public interest (the interest of foreign property owners being a factor of 'public interest') when expropriating foreign owned property. As with other service-related matters regarding foreign parties, a rigorous service process for foreign owned property that is targeted for expropriation can and must be developed to address these concerns.

There is no doubt that the Expropriation Bill will cause grave concern amongst foreign investors, however the legislature is required, especially to address the

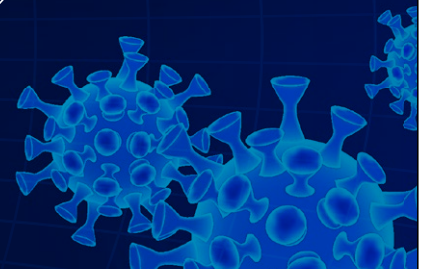
pushback it may encounter, to ensure it crosses the "t"s and dots the proverbial "i"s as far as procedure is concerned.

In light of the extensive public, political and legal scrutiny of the Expropriation Bill (especially regarding the notion of 'expropriation without compensation') the Bill's procedural and substantive provisions must be carefully interrogated. This will assist in ensuring constitutional compliance, while assisting the State to achieve the desired redress as well as affording adequate protection to private property owners.

Burton Meyer, Claudette Dutilleux and Jonathan Sive

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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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