

EXPROPRIATION

# Examining the agricultural interests of the new Expropriation Act

## Finding a balance between the public interest and the interests of those affected by the expropriation

**O**n January 24, 2025, the country, and then some, was swept into a mix of emotions as the Expropriation Bill of 2020 was signed into law by the President as the Expropriation Act 13 of 2024 ("the Act"). The commencement date has not been announced, meaning the Act is not yet in force. There has been no indication of exactly when the President plans to make this announcement. Turning now to why this piece of legislation carries with it some controversy.

The Act is intended to replace the 1975 Expropriation Act and adopts the language of Section 25 of the Constitution, which addresses the right to property and the conditions under which property may be expropriated. The Constitution highlights that property – whether movable or immovable – cannot be expropriated arbitrarily. The Act confirms this position, confirming that there has to be a legitimate public purpose or public interest underpinning the intended expropriation, and sets out the factors which must be considered to determine suitable compensation for the expropriation.

The Act prescribes the powers of the "expropriating authority", which is defined as an organ of state or person empowered by the Act or any other legislation to expropriate property. An example of such an organ of state is the Minister responsible for Public Works and Infrastructure.

The nub of the controversy the Act brings with it is the extensively debated express power given to the expropriating authority to offer nil compensation for the expropriation of "land" – i.e. immovable property – for public interest purposes, after considering all relevant circumstances, including the ones specifically listed in section 12(3) in the Act.

There has been much discussion around the constitutionality of this provision, given that our Constitution speaks not only the impermissibility of arbitrary deprivation of land but also to the fact that the expropriated party must be provided with compensation for the expropriation.

There was an attempt to amend the Constitution to unambiguously align with the possibility of offering no compensation, but the proposed amendment was rejected by the National Assembly and never came into force. Whether the wording of "nil

compensation" versus, for example, "no compensation" is sufficient to succeed against a constitutional challenge can only ultimately be determined by our court, if and when the matter comes before it.

Below we look more carefully at the compensation and certain procedural provisions under the Act.

Section 12(1) of the Act empowers the expropriating authority to determine and award just and equitable compensation for expropriation. These factors mirror the factors listed in Section 25 of the Constitution. It is highlighted that the compensation must find a balance between the public interest, and the interests of those affected by the expropriation. Possible affected parties, besides the owners of the property, could, for example be mortgagees and tenants of the property in question. The factors listed under section 12(1) are as follows:

- the current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- the purpose of the expropriation.

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The specific factors listed under section 12(3) – the nil compensation provision – are:

- where the land is not being used and the owner of the land's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
- where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
- notwithstanding registration of ownership in terms of the Deeds Registries Act 47 of 1937, where an owner has abandoned its land by failing to exercise control over it despite being reasonably capable of doing so; and
- where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.

When it comes to nil compensation, it is important to note that:

- the above factors are not exhaustive;
- it has to be just and equitable;

- it has to be in the public interest; and
- it only relates to immovable property ("land").

It must also be noted that there are certain factors which may not be taken into consideration, unless there are special circumstances where it is just and equitable to do so, when considering compensation. These factors include the following:

- the fact that the property has been taken without the consent of the owner or holder of a right;
- the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;
- any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
- improvements made to the property in question after the date on which the notice of expropriation was served upon the expropriated owner or expropriated holder, as the case may be, except where the improvements were agreed to in advance by the expropriating authority or

where they were undertaken in pursuance of obligations entered into before the date of expropriation;

- anything done with the object of obtaining compensation therefor; and
- any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated.

The Act furthermore prescribes the procedure to be followed by the expropriating authority before any property may be expropriated. This includes, amongst other things:

- obtaining the consent of the owner or occupier of the land for a valuator and/or other third parties to enter the premises for inspection, surveillance and valuation purposes. Failing receipt of this consent, the expropriating authority must approach the court to grant access;
- publishing a notice of intention to expropriate, which contains details as to the expropriation, the intended purpose of the property and how compensation was determined, which must also be served on the owner of the property;

- considering any objections received to the notice of intention to expropriate; and
- publishing a notice of expropriation where the expropriating authority has decided in favour of expropriation, setting out details as to the property and compensation offered, which must similarly be served on the owner of the property.

mortgagee in the event of there being a bond registered over the immovable property, as well as detailing the process to be followed where there is a mortgage bond registered over the property.

In addressing mortgage bonds, the 1975 Expropriation Act specifically details how debt in relation to a mortgage bond is to be

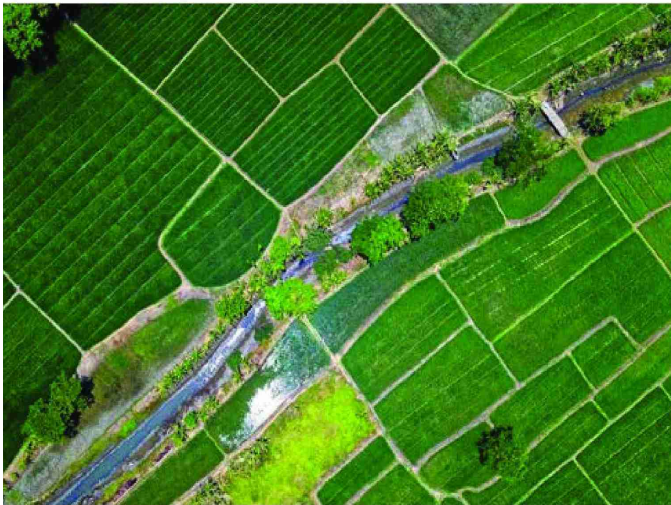
and mortgagee, that the compensation funds may be paid to the Master of the High Court, subject to the provisions of section 19(3).

The Act, while containing many of the same provisions as the previous legislation in relation to mortgage bond holders, including still making provision for payment of compensation to a mortgagee in the instance of the land having a mortgage bond registered against it at the time of expropriation, differs in that it introduces a time frame in which notice of agreement between landowner and mortgagee should be given to the expropriating authority. The Act contemplates that agreement should be reached and notice thereof given to the expropriating authority within 30 days of possession being taken of the expropriated land, failing which the expropriating authority is authorised to deposit the compensation with the Master of the High Court.

While the Act does provide for the investment of these funds for the benefit of the persons who may become entitled thereto (as did the previous legislation), the short time frame in which notice is to be given for an agreement to be reached between landowner and mortgagee before such compensation would then be paid to the Master of the High Court, may be a cause of concern and uncertainty for mortgagees and landowners from an administrative point of view. It should, however, be noted that section 23 of the Act does provide for the extension of any period applicable to certain affected persons (including holders of rights), on good cause shown and as may be reasonable in the circumstances.

The Expropriation Act 13 of 2024 marks a transformative development, whether welcomed or not, in South Africa's expropriation framework, providing a structured and comprehensive process for expropriation in the public interest and/or for public purpose. Ultimately, the implementation of this Act will require careful navigation by all stakeholders, with courts playing a critical role in response to emerging issues and disputes. ■

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Should it be the case that the expropriating authority and a disputing party do not agree on the amount, time and manner of payment of compensation, section 19(1) of the Act provides that the parties may refer the matter to mediation. This is a notable addition to the Act, as mediation did not feature in the 1975 Expropriation Act, which provided for either referral to arbitration or referral to court. The Act therefore emphasises mediation as the first port of call as opposed to court proceedings and thereby motivates for the resolution of disputes by way of amicable negotiations and discussions between the parties. However, if mediation fails, or if the parties do not wish to mediate, then court proceedings can be initiated within 180 days of the date of the notice of expropriation.

A further significant change to the Act is the introduction of certain time frames to be adhered to by affected parties during the course of the expropriation process, including by a the property owner and

discharged, most importantly always contemplating that there would be some sort of compensation payable to a landowner. The legislation specifically provided that the Minister may "...not pay out any portion of the compensation money in question, except to such person and on such terms as may have been agreed upon between the owner of such property and the mortgagee...". This position was taken further as follows:

"If the owner and the mortgagee, buyer or builder, as the case may be, fails to conclude an agreement contemplated in subsection (1), any of the said persons may apply to the court referred to in section 14(1) for an order whereby the Minister is directed to pay out the compensation money as they court may determine, and the court may, on such application issue such order, including an order as to costs, as the court may deem fit."

The previous legislation provided that in the event of a dispute between landowner