LAND RIGHTS AND REGISTRATION

LAND REGISTRATION GENERALLY DESCRIBES SYSTEMS BY WHICH MATTERS CONCERNING OWNERSHIP, POSSESSION OR OTHER RIGHTS IN LAND CAN BE RECORDED TO PROVIDE EVIDENCE OF TITLE, FACILITATE TRANSACTIONS AND PREVENT UNLAWFUL DISPOSAL.
Although the constitutional clause does not constitute a positive guarantee to the right to property, it does grant negative protection (a negative guarantee) to property rights in that these rights may only be regulated within the framework of a law of general application and such interference may not be arbitrary. In terms of s25(2) (the expropriation provision), property may be expropriated in terms of a law of general application provided that compensation has been paid and the expropriation is for a public purpose or in the public interest. The amount of compensation to be paid is determined with reference to the factors listed in s25(3): the current use of the property; the history of the acquisition and use of the property; the market value of the property; extent of the direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

Section 25 of the Constitution also confirms the nation’s commitment to land reform and a more equitable distribution of natural resources. This section embodies a three-pronged approach to land reform. Section 25(5) read with s25(8) confirms the state’s duty to take reasonable legislative measures to foster access to land on an equitable basis.

Section 25(7) states that persons are entitled, to the extent provided for in legislation, to tenure security if their tenure was previously unsecured as a result of racially discriminatory practices. Finally, s25(8) provides for restitution of land to persons or communities that were dispossessed of these rights after 1913 as a result of racially discriminatory laws or practices.

In December 2018, following a public participation process, both Houses of Parliament, namely the National Assembly and the National Council of Provinces resolved that s25 of the Constitution should be amended to expressly allow the expropriation of property without compensation in certain circumstances. The purpose of this proposed amendment is to accelerate the land reform process in South Africa. The Draft Constitution 18th Amendment Bill was gazetted and made available for public comment on 13 December 2019. Parliament has also re-established the National Assembly Ad Hoc Committee (“Ad Hoc Committee”), originally appointed to initiate and introduce legislation to amend s25 of the Constitution. The Ad Hoc Committee has until 31 December 2020 to complete its investigation of when land may be expropriated for land reform purposes without compensation. The Constitution Amendment
Bill qualifies section s25(2)(b) of the Constitution, which states that property may be expropriated subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. The Constitution Amendment Bill has added that 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. Furthermore, national legislation must set out the circumstances where a court may determine that the amount of compensation is nil. It is expected that a revised draft of the Expropriation Bill, which will replace the existing Expropriation Act, No 63 of 1975, will detail the circumstances where a court can find that compensation for expropriated property is nil. The revised draft of the Expropriation Bill will be made available for public comment and will be tabled in Parliament later this year.

The compensation provisions of the revised Expropriation Bill should be read with reference to the provisions of the Property Valuation Act, No 17 of 2014 that was enacted to provide for, amongst other things, the valuation of property that has been identified for land reform purposes. Section 12 of the Property Valuation Act states that the office of the Valuator General will determine the value of property that has been identified for land reform purposes with reference to the prescribed criteria, processes and guidelines. The relevant criteria and guidelines will include the relevant provisions of the Constitution, as set out in s25(3), as amended and the Expropriation Bill insofar as it refers to instances where compensation will not be paid for expropriated property.
The transfer of ownership in land is effected by registration in a deeds registry in accordance with the provisions of the Deeds Registries Act.

South Africa boasts a sophisticated and efficient system of land registration. The system is one of registration of title as opposed to a system of registration of deeds, as is found in many Western countries. Although the system of registration may be described as a negative system, that is one in which the state does not guarantee title, disputes as to the validity of title are few and far between. The South African system of registration effectively provides the registered owner of land with security of title.

REGISTRATION OF TITLE

The registration of rights in land and other immovable property is regulated by the Deeds Registries Act, No 47 of 1937.

This security of title is the result of the respective responsibilities carried by professional land surveyors (under authority of a Surveyor-General), the deeds registries established throughout South Africa (each under authority of a Registrar of Deeds, with a Chief Registrar of Deeds exercising authority on a national basis) and an independent attorneys’ profession. In the latter case, the preparation and execution of deeds requires the services of an attorney in professional practice, who has passed a specialist examination in the law and practice of conveyancing, and has been admitted to practice as a conveyancer by the High Court of South Africa.
LAND RIGHTS AND REGISTRATION

Chapter 14  p5

As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person, he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership.

Notably, South Africa is in the process of introducing an electronic deeds registration system. To this end, the Electronic Deeds Registration Act, 2 of 2019 will replace the current preparation and lodgement procedures contained in the Deeds Registries Act and the Sectional Titles Act, No 95 of 1986. On 6 December 2019, section 2 of the Electronic Deeds Registration Act came into effect. In terms of section 2, the Chief Registrar of Deeds must “establish and maintain an electronic deeds registration system using information and communication technologies for the preparation, lodgement, registration and storing of deeds and documents”, and is empowered to issue directives to aid this process.

The development of an electronic deeds registration system (e-DRS) has already commenced and it is anticipated that it will operate in tandem, and in addition to, the pre-existing online Deeds Registration System (which serves the purpose of maintaining the electronic land register). It is envisioned that the e-DRS will promote (i) security of title, (ii) improved turn-around times, (iii) country-wide access to registration services, (iv) overall availability of information and (v) enhanced accuracy of information. The imminent and direct problems that the legislature seeks to combat with the Electronic Deeds Registries Act and the e-DRS include the increase in volume that deeds offices are faced with due to land reform, the lack of uniformity in registration procedures at deeds offices across the country, the absence of a system which is flexible enough to accommodate new forms of land tenure and the need for decentralisation and mobility when it comes to property transfer and registration procedures. Although there is not a prescribed timeline to finalise the new electronic deeds registration system, it is understood that this is top priority of the Chief Registrar of Deeds.

The reliance placed on the title afforded an owner by due registration is aptly summarised by Hoexter J A, in the Appellate Division case of Frye’s (Pty) Ltd v Ries (1957(3) 575 AD), where he said the following (at 582):

“As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person, he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership.”
While the common law ownership of land includes the ownership of all fixed improvements erected on the land, South African law also recognises separate ownership of buildings or parts of a building. Such ownership is regulated by the Sectional Titles Act, No 95 of 1986, as amended by the Sectional Titles Schemes Management Act, No 8 of 2011. Those involved in sectional title schemes, whether as developer, investor or home buyer, should also be aware of the Community Schemes Ombud Services Act, No 9 of 2011, which came into operation on 7 October 2016. This act regulates, inter alia, the resolution of disputes in respect of community schemes (including sectional title schemes) and the governance of such schemes.

In South African law, lessees are protected for a period up to ten years by virtue of the ‘huur gaat voor koop’ rule. In essence this rule grants real protection to lessees for ten years in instances where the lessor has sold the property to a third party. The new owner must abide by the provisions of the lease even though he was not a signatory to the original lease agreement. Should the lessee wish to have similar protection after the expiry of ten years, such lease will have to be registered in the deeds office, failing which the lessee will only be protected from eviction if the purchaser of the property was aware of the lessee at the time when he purchased the property.

Rights to minerals in South Africa are regulated by the Mineral and Petroleum Resources Development Act, No 28 of 2002. The Act makes provision for equitable access to and development of the nation’s mineral and petroleum resources, and recognises the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic. Provision is made in the Act for guaranteeing security of tenure in respect of prospecting and mining operations.

The registration of mineral and petroleum titles and other related rights and deeds is effected at the Mineral and Petroleum Titles Registration Office, in accordance with the provisions of the Mining Titles Registration Act, No 16 of 1967.

Rights in land are further subject to regulation relating to environmental issues and concerns. Applicable legislation such as the National Environmental Management Act, No 107 of 1998, is aimed, among other things, at preventing pollution and ecological degradation, promoting conservation and securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
Certain activities require authorisation before they may be conducted. For example, an environmental impact assessment and environmental authorisation may be required under the National Environmental Management Act’s Environmental Impact Assessment Regulations, of 2006, where a landowner intends to develop his or her property.

In addition to legislation regulating mineral rights and environmental issues, land use rights are governed by a variety of planning laws on a national, provincial and, in particular, on a municipal level. The Spatial Planning and Land Use Management Act, No 16 of 2013 provides the framework for spatial planning in South Africa. However, s156(1)(a) and (b) of the Constitution provides that a municipality has executive authority and the right to administer the local government matters listed in Part B of Schedule 4, which includes municipal planning. Section 156 of the Constitution further directs local authorities to enact by-laws to effectively administer matters falling within its executive authority. As such, local authorities have enacted, or are in the process of enacting, municipal by-laws that govern land-use planning within their area of jurisdiction.
In the case of the acquisition of land or any real right in land (as well as certain transactions involving companies, close corporations and trusts that own residential property), a transfer duty is, subject to certain exceptions, payable prior to registration in the deeds registry.

The below transfer duty rates apply to properties acquired on or after 1 March 2017, and apply to all persons (including companies, close corporations and trusts):

<table>
<thead>
<tr>
<th>VALUE OF PROPERTY (rand)</th>
<th>RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>R0 to R900,000</td>
<td>0%</td>
</tr>
<tr>
<td>R900,001 to R1,250,000</td>
<td>3% of the value exceeding R900,000</td>
</tr>
<tr>
<td>R1,250,001 to R1,750,000</td>
<td>R10,500 + 6% of the value exceeding R1,250,000</td>
</tr>
<tr>
<td>R1,750,001 to R2,250,000</td>
<td>R40,500 + 8% of the value exceeding R1,750,000</td>
</tr>
<tr>
<td>R2,250,001 to R10,000,000</td>
<td>R80,500 + 11% of the value exceeding R2,250,000</td>
</tr>
<tr>
<td>R10,000,001 and above</td>
<td>R933,000 + 13% of the value exceeding R10,000,000</td>
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</tbody>
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Certain transactions are exempt from transfer duty. This is regulated by the Transfer Duty Act, No 40 of 1949.
LAND RIGHTS AND REGISTRATION

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