

Land expropriation: rights and info

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A recent article on the seizure of farmland that came hot on the heels of an announcement by government that it will no longer negotiate for longer than six months with land owners, has sparked panic. Two experts have taken up the task of finding out what the truth of the matter is.

Following long drawn-out negotiations between land owners and the Minister of Agriculture and Land Affairs, Ms Lulu Xingwana, the Minister threatened that farms will be expropriated if agreements with regard to selling price have not been reached within six months after negotiations had started.

Following speculation in the media and rumours that land will be summarily expropriated without reasonable and fair compensation, Xingwana made another public statement to explain that it will not be the case. She voiced her dismay that negotiations between land owners and government took so long. In some cases, negotiations have been going on for four years with no end in sight.

In a media release of 15 August by the Department of Land Affairs, Xingwana said that there are many farmers with whom the department had been negotiating about land prices without success for longer than four years. According to her, these negotiations can't possibly last for ever, especially not in cases of real restitution. She also said that protracted negotiations are not justifiable.

The Restitution of Land Rights Act sets out the procedure which the government and farmers should follow during negotiations, including cases in which price negotiations have come to a stalemate.

The recent pressure on the minister stems from the fact that in the previous 12 years, the government had managed to reach only 4% of the redistribution goal of 30%, as agreed to in 1994. The cut-off date for the government to reach its goal, is 2014, and for this reason the Minister is anxious to take the necessary steps. These steps include moving away from the policy of willing buyer and willing seller.

According to the government, the poor progress made in the reform process is due precisely to this principle of willing buyer and willing seller. Government also believes that land owners' incapacity to reach agreements with government on matters of payment is part of a delay tactic which is aimed at hamstringing the land reform policy.

The minister's call that protracted negotiations should be limited to six months, received much criticism, and was likened to a Zimbabwe style land grab. This contrasts with the department's policy of orderly, peaceful and sustainable methods of land reform, which should also be in line with the Constitution.

The minister has a measure of authority in terms of the Restitution of Land Rights Act, which stipulates how she may implement the land reform process, including expropriation. The courts do, however, have the last say, and the courts can declare non-transparent, arbitrary

decisions made by the minister unconstitutional, if such decisions are not within the framework of legislation.

Current legislation

The restitution of land rights was implemented by Parliament to return land to persons or communities who had been deprived of their land or right to land after 19 June 1913, if such seizures were the result of racially motivated, discriminatory legislation or practices. According to the law, a person or community will only be considered for restitution of land or right to land if the following applies: He or she, or the community of which he or she is a part, had been deprived of land or a right to land after 19 June 1913, which deprivation had been the result of previous racially motivated, discriminatory legislation or practices mentioned above; the claim for restitution has been submitted no later than 31 December 1998; such person or community had not received fair compensation for the land or right to land.

In 2003, the Restitution of Land Rights Act was amended and the Restitution of Land Rights Amendment Bill saw the light. In terms of these amendments, the minister has the authority to come into possession of land for any purpose which is related to land reform, including buying the land and expropriating it. Section 42(E) is of special importance because it gives the minister authority to take possession of or expropriate land which is the object of a land claim. It also states that in cases where a valid land claim was made, and the claim process is yet to be completed, the minister has the authority to take possession of the land before or after the claim process has been completed.

Expropriation and compensation

The reason for the land reform policy, and the accompanying expropriation of private land authorised by legislation, is an attempt to offer equal access to South Africa's natural resources to all residents of the land by compensating persons or communities who in the past were deprived of their land in terms of racially motivated, arbitrary legislation. Expropriation is not voluntary selling of the property, but a forced deprivation of the property, in some cases even against the wishes of the owner.

In cases of expropriation, the owner has the right to claim compensation in terms of section 25(2)(b) of the Constitution. The Constitution also offers guidelines in section 25(3) as to how this compensation should be calculated. The Constitution enshrines not only the land owner's right to land, but also authorises the expropriation thereof, if compensation is paid for the expropriation. The Constitution aims to maintain balance between the individual's right to property and the community's interest.

The conundrum is how compensation will be calculated in cases of expropriation. The compensation must maintain a balance between public interest and the persons whose rights are affected by the expropriation. The amount should be reasonable and fair. The amount to be paid in compensation should be measured against a number of criteria, in terms of section 25(3) of the Constitution. These include: Current use of the property; how the land was obtained and how it has been used; the market value of the property; the measure of investment made by the current owner, the role that subsidy played in obtaining it and capital improvements on the property; and the purpose of the expropriation.

As was mentioned above, a balance must be maintained between the land reform policy and payment of reasonable, fair compensation to land owners. It has been claimed that the principle of willing buyer and willing seller is delaying the land reform process. According to certain legal experts, section 25(3) of the Constitution states that expropriation of property for compensation at less than market value would in some cases be justifiable.

The critical question is whether compensation for expropriation should be pegged to the market value of the property. The Restitution of Land Rights Act does not deal with ways to determine the market value, but section 12 of the legislation forms the basis on which compensation should be determined. In principle, it means that compensation should not exceed the amount which would have been paid by a willing buyer to a willing seller on the date on which notice of expropriation was given to the owner. This amount includes compensation for financial losses incurred because of the expropriation.

In the matter of *Du Toit vs Minister of Transport* ((CCT), unreported case number 22.04, verdict given on 8 September 2005) the Constitutional Court found that determining the market value by means of the principle of a willing buyer and willing seller, should be tempered by the provisions of section 25(3) of the Constitution. This means that courts may depart from the principle of market value in cases where it may be reasonable or fair in the light of section 25(3). However, the underlying principle of the Constitution remains reasonableness and fairness.

Summary

Before the minister can expropriate land in terms of section 42(E) of the Restitution of Land Rights Act, there must be a valid, existing land claim on the land. The minister is not empowered to expropriate agricultural land willy-nilly.

In terms of the minister's current policy, only if no agreement had been made with regard to the amount of compensation within six months, the minister might go ahead with expropriation steps.

Land owners are advised to get a sworn valuation of their land as soon as a land claim is made. This sworn valuation must take into account the market value of the property. It is not in the owner's best interest to demand an unreasonable amount for his/her land, because this will only cause the minister to activate the expropriation procedure.

If property has been expropriated and the owner is dissatisfied with the amount of compensation, he may approach the court to determine a fair compensation. Section 25(3) of the Constitution applies.

The biggest dispute will probably be calculating the amount of compensation at the time of the expropriation. In terms of the Constitution (section 25(3)) the court can depart from the market value of the land only when the requirements of the mentioned legislation have been satisfied. There would have to be good reasons before the courts interfere with the rights of the land owner. Expropriation Zimbabwe style would be unconstitutional because it infringes the rights of the owner. - Eugene Geysers and Monica Vessio.

(Ref: http://www.property24.com/Property24/Hub/ShowSectionArticles_Full.aspx?articleid=4189)