

RESTITUTION BY EXPROPRIATION OF LAND RIGHTS – WHAT ABOUT MARKET VALUE?

The Zimbabwe Route? The Issues

In very recent Media Release from the Department of Agriculture, the Minister for Agriculture and Land Affairs, Ms Lulu Xingwana has vehemently rejected recent media insinuations that the country's land reform will go the "Zimbabwe route" following the Ministry's decision not to perpetuate prolonged farm selling price negotiations. (*Media release: Department of Land Affairs 15 August 2006*)

The Minister is quoted as saying: "There are many farmers we have been negotiating land prices with for more than four to five years without success. Surely, we cannot keep on negotiating forever, especially genuine restitution cases," says the Minister, and further: "[t]hese prolonged discussions are unjustifiable. The Restitution Act clearly stipulates what process should be followed by both the government and farmers during negotiations, including in cases of stalled price negotiations." (*Media release: Department of Land Affairs 15 August 2006*)

The recent pressure placed on the Minister, stems from the fact that government has, in the past 12 years, only managed to deliver less than 4%, of the 2014 30% land redistribution target, agreed to in 1994. (*Media release: Department of Land Affairs 15 August 2006*)

In The Land Summit, which was held last year in Nasrec, the "willing-buyer, willing-seller" principle, as well as what were viewed as some farmers' use of prolonged price negotiations as a delay tactic, were some of the main contributing factors to what has been dubbed as a 'slow pace of land reform'. (*Media release: Department of Land Affairs 15 August 2006*)

The criticism of the Minister's call to limit protracted negotiations to a six month period being "Zimbabwean-style land grabs" is felt by the Department to be 'deliberately mischievous' in that the department alleges that it has given its commitment to conducting South African's land reform 'within the ambits of the rule of law, in an orderly, peaceful and sustainable manner'. The government has further re-enforced the point that while the South Africa's land reform programme is a constitutional obligation, it is also a process governed by the Restitution Act, which unambiguously stipulates what and how the Minister can implement the restitution process - including expropriation - and the courts have the jurisdiction to declare any steps the Minister takes outside this legal framework to be beyond its authority and therefore, unconstitutional. (*Media release: Department of Land Affairs 15 August 2006*)

The Legislation

The Restitution of Land Rights Act 22 of 1994 ("the act") was enacted by parliament in order to provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913, as a result of past racially discriminatory laws or practices. The act further established a Commission on restitution of Land Rights and a Land Claims Court to administer land claims, and to further provide for matters connected therewith.

A person is entitled to restitution of a right in land if:

- (a) he or a community was disposed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or he was a direct descendant of such a person;
- (b) the claim for restitution was not lodged later than 31 December 1998;
- (c) a person is not entitled to restitution of a right in land if just and equitable compensation of a right in land; or any other consideration which is just and equitable, (the amount is calculated at the time of the dispossession of such right) was received in respect of the dispossession. (Section 2(1)(a)(c) and (1A)(a)(b) of the act)

In 2003, the Restitution of Land Rights Act was amended (*Restitution of Land Rights Amendment Act* no. 48 of 2003), so as to empower the Minister of Land Affairs to purchase, or acquire in any manner, or expropriate land or a portion of land or a right in land for any purpose related to land reform. Specifically, Section 42 E was inserted into the act, which section, empowers the Minister to purchase, acquire or expropriate land or a portion of land or a right in land in respect of which a claim, in terms of the act, has been lodged.

The purpose of the acquisition by the Minister, would be for restoring or awarding of such land, portion of land or right in the land, to a claimant who is entitled to restitution thereof in terms of the act's specific requirements. Section 42 E goes as far as saying that, where a claim has not been lodged in terms of the act, such acquisition of land may be authorized by the act, for purposes which are directly related to or affected by a claim and which will promote the achievement of restoring or awarding such land, portion of land or right in land to a claimant who is entitled to such restitution.

Section 42 E further contemplates that the *Expropriation Act* No. 63 of 1975 (Expropriation Act) shall, with necessary changes, apply to an expropriation for the purposes of restitution of land (section 42E (2)). An example of a necessary change may be that while the Expropriation Act makes reference to the Minister of Public Works; the relevant minister under the Restitution of Land Rights Act, would be the Minister of Land Affairs.

Where the minister expropriates land, a portion of land or a right in land, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the Court in accordance with Section 25(3) of the Constitution Act 108 of 1996 (the Constitution) (section 42E (3)).

The debate and a resolve thereto are not unsophisticated matters – there are two assemblies, whose very divergent interests and rights, have to be securely cosseted, in the name of our Constitutional dispensation which gives priority to the rule of law, which in turn promises an equitable balance in its duty to guard individual's rights vis-à-vis public and social needs.

In essence we are looking at a two step process:

1. Expropriation
2. Compensation

Expropriation

The courts have defined the act of expropriation as the obtaining of ownership in a property by virtue of compliance with the provisions of authorizing legislation. (*Aaron v Johannesburg Municipality* 1904 TS 696 714; LAWSA V10 132). Expropriation is the

compulsory acquisition of property, it is not a *compulsory* sale. The owner of the property need not want to sell and in fact he *does not* sell. His property is taken away from him by compulsion, and sometimes perhaps even against his will. The remedy available to him is compensation determined in accordance with the constitution. The expropriator (usually the State) and the expropriatee may come to an agreement with regards the amount of the compensation. The underlying principle of expropriation by a statutory power is generally not aimed at acquisition but rather to serve some or other public need. (LAWSA V10 135-6).

The Bill of Rights is viewed as a cornerstone of democracy in South Africa. It enshrines the rights of all people and guards the democratic values of human dignity, equality and freedom. The state is obliged to respect, protect and fulfill the rights in the bill of rights (S79 (1) & (2) of the Constitution). While the Constitution embodies the right to property, it also authorizes expropriation in certain circumstances. Section 25 of the Constitution canvasses that no one may be *deprived* of property except in terms of law of general application and that no law may permit arbitrary deprivation of property; it further states that property may be expropriated for a public purpose or in the public interest, and this must be 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. Section 25(3) of the Constitution, specifically states that the amount of the compensation and the time and manner of payment must be just and equitable reflecting an equitable balance between the public interest and the interests of those affected. Section 25(3) of the constitution sets out criteria that must be regarded when trying to arrive at a just and equitable balance, these criteria are:-

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

The public interest includes the nation's commitment to land reform, and to reform to bring about equitable access to all South Africa's natural resources (S25 (4)(a) of the Constitution).

The Expropriation Act has been enacted to provide for the expropriation of land and other property for public purposes which include any purposes connected with the administration of the provisions of any law by an organ of state (Section 1 of the Expropriation Act).

Should the Minister (in the definition section of the Expropriation Act it refers to the Minister of Public Works but due to the authorizing legislation in terms of Restitution of Land Rights Act, it is expected that the notice in this regard would come from the Minister of Land Affairs) decide to expropriate he (or she) shall serve upon the owner in question an appropriate notice, which notice must contain the following (Section 7 of the Expropriation Act):

1. a clear and full description of the property being expropriated or if only a portion of a piece of land is being expropriated it must be accompanied by a sketch plan showing the approximate position of such portion and state the approximate extent of such portion. (When a portion of land is being expropriated there are certain additional rights available to the owner of the land to enable him to obtain information to more specifically establish in more detail precisely the position and extent of such portion).

2. the date of expropriation, the date as from which the property will be used, the period during which it will be used and the date upon which the state will take possession of the property.
3. inform the property owner of certain duties incumbent upon him by virtue of the act which he must abide by within a certain time period in order to protect his rights, including matters related to the compensation of the property.

In the above notice, the Minister, *may* (not must) offer the owner concerned an amount of compensation for the property (Section 10(1) of the Expropriation Act). Owners of property which is being expropriated are warned of the contents of Section 10(5)(a) of the Expropriation Act which states that after a determined amount of communications exchanged between the Minister and the owner who is facing expropriation, with regards the amount of compensation, have been carried out, the owner will be deemed to have accepted an offer made to him by the Minister if he fails to make an application to court for the determination of the compensation, before the date determined by the Minister by written notice addressed to him. Section 12 of the Expropriation Act lays down certain guidelines with regards the basis on which compensation is to be determined.

Essentially the relevant sections in the Restitution of Land Act, the Expropriation Act and the Constitution need to be canvassed before a court of law, so that the implication of these sections may be clearly established, with particular attention being given to the compensation which may or must be awarded for the expropriation of land carried out in accordance with the Restitution of Land Act.

There is a legal presumption that compensation must be paid, this is also an enshrined constitutional principle, when rights are expropriated (LAWSA V10 155). There is a further legal presumption that the legislature does not intend unreasonable results in the process of expropriation. While before it was legally possible to expropriate without compensation, the Constitution changed this position. Section 25(2)(b) bestows a right on the person whose right (land) is being expropriated to receive compensation, the amount of which and time and manner of which must either be agreed upon or decided or approved by a court of law.

Determination of Compensation

The State is faced with what appears to be a conflict between promoting land reform as provided by s 25(5) of the Constitution and paying just and equitable compensation for expropriation as provided by s 25(2) and (3) of the Constitution. It appears that the 'willing buyer-willing seller' principle has somewhat frustrated any rapid land reform progress. (AJ Van Der Walt, 'Reconciling the State's Duties to Promote Land Reform to Pay Just and Equitable Compensation for Expropriation', (2006) 123 SALJ 23).

Certain authors have interpreted Section 25(3) of the Constitution to imply that expropriating required land against compensation at a level below market value is constitutionally viable (J Zimmerman Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?' (2005) 122 SALJ 378). While this concept appears to be against current government policy, various non-governmental organizations, who are specifically concerned with land reform and redistribution, have placed great pressure on the Minister of Land Affairs and Agriculture to re-visit this policy (AJ Van Der Walt, SALJ 2006 23).

Compensation is at the very heart of the expropriation issue. And generally the basis upon which the amount of compensation is determined is market value. Market value is a matter of fact and is not arrived at through any specific legal formulae. There is no definition in the Expropriation Act for 'market value' *per se*, however, section 12 gives the basis on which compensation is to be determined. This amount in terms of the act and in case of a property, may not exceed the aggregate of 'the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and an amount to make good any financial loss caused by the expropriation'. This is a difficult concept to apply in cases of expropriation as by its very nature an expropriation is compulsory. Although the Expropriation Act does not, as noted above, give a definition for 'market value' and furthermore neither is one given in the Constitution, some factors which may be considered by a court of law when asked to determine the just and reasonable price offered or requested for land which has been expropriated, are, *inter alia*, use of the property at the time of expropriation, influence of the expropriator's actions which may have caused an increase or decrease in the value of the property, potential uses of the property, demand on the open market, (LAWSA V10 154-165).

There are also factors which may not be considered when determining compensation, and these factors are in fact statutory rules (Section 12(5) Expropriation Act). The Courts have stated, for example in this regard: 'the [Expropriation] Act contains some stringent provisions...which tend to point away from the Legislature's having contemplated that an owner whose property has been expropriated should necessarily be put in precisely the same position as he would have been but for the expropriation' (*Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 245D). Examples of factors that may not be considered are: when the owner is an unwilling seller, special suitability for expropriator's purpose, unlawful use or use detrimental to health, improvements made after date of notice of expropriation, an unregistered right in respect of other property, indirect damage, acts done to obtain compensation etc.

Although there is no evidence that the state intends to expropriate at below market value, it has been suggested by many writers in this field that expropriation of land against compensation that is below market value may be feasible. While some writers were of the view that market value should not be the privileged central issue in determining 'just and equitable' compensation, others felt that whether compensation was at or below market value one cannot move away from the centrality of market value as a bench mark.

While the specific issue of the value of compensation of expropriations in terms of the Restitution of Land Rights has not yet been canvassed before a court of law, the issue of market value in terms of expropriations has been before the Supreme Court of Appeal, which decision was upheld by the Constitutional Court. In *Minister of Transport v Du Toit* 2004 4 All SA 603 (SCA) the court found that in order to determine whether a particular compensation award is constitutionally justifiable one must first establish what would be according to the 'standard' approach and then check whether it is in line with the constitutional demands, (AJ Van Der Walt, SALJ 2006 23). In other words the court would take a two step approach 1. what is the market value and 2. how should it be adjusted in terms of section 25(3) of the Constitution.

The suggestion that because land reform is 'Constitutionally special' it should therefore be weighted toward the public interest and across the board discounts for compensation should be set (Zimmerman (2005) 122 SALJ 407) is in the writers view, somewhat misguided. While Land Reform is important, it is also important to view the matter from the fact that it is

not the people who are claiming restitution of land that are affected by the debate over the amount of compensation. Once land is expropriated it will be a matter of placing the issue of compensation before a court of law to decide on the amount and not on the fairness of the expropriation. Thus, while land reform is indeed a sensitive constitutional issue; it should be weighted against the individual who is being expropriated. It is in fact the individual that is losing his/her livelihood or residential or business property. It is for these very reasons that any form of blanket discount for compensations should be viewed as grossly unconstitutional and that the court should scrutinize and decide the matter on the facts of each case. The writer agrees with the views of Professor Van der Walt that section 25 of the Constitution 'contains a very delicate and carefully calibrated balance that leaves open the possibility that the scales will be tipped in favour of either set of interests in any given case. The courts therefore have to consider all circumstances very carefully in every individual case and then decide how compensation should be determined, rather than working on the assumption that the section favours land reform and that a blanket discount is therefore in order.'

While there are certain procedural issues and rights that the owner of land who is faced with expropriation should consider, like the fact that he or she should ensure the validity of the Expropriation notice, that expropriation is being effected under valid statutory authority and such statute should be identified etc. Most importantly, however, the owner who is facing expropriation should consider that the value of the compensation which he accepts should be carefully considered, before he accepts a final figure, which he may very well then be bound to. Land owners are facing expropriation by the State and not by the people who have made claims in terms of the Restitution of Land Rights Act. In other words there are many factors that must be considered by a court of law, some of which have been listed hereinabove, others including – but not limited to – the good will of a business running on the land (both personal and local) and more importantly the uses of the property both existing and possible future uses. The owner of land is advised to make sure that once faced with expropriation he ensures that he is well acquainted with his rights as expropriatee and that he ensures that if a value which is below market value (sworn valuations are recommended to be obtained from an independent valuator) is offered as a final expropriation value, he considers having this value canvassed before a court of law.