

The New Expropriation Bill

The Constitution of the Republic of South Africa caters for the topic of Expropriation. It reads as follows;

25. Property

- (1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) *Property may be expropriated only in terms of law of general application -*
 - (a) *for a public purpose or in the public interest; and*
 - (b) *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.*
- (3) *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, having regard to all relevant circumstances, including -*
 - (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.*
- (4) *For the purposes of this section -*
 - (a) *the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
 - (b) *property is not limited to land.*

The concept of a Government expropriating property owned by private citizens is not unique to South Africa. Most countries (if not all) will have legislation of this type. What is somewhat novel and/or unique in so far as South African expropriation is concerned is the following;

1. Property is not limited to land. It includes any kind of assets. This theoretically would extend to rights in respect of immovable property (mining or water rights); shares in companies; equipment and machinery etc etc
2. Property can be expropriated if in the "public interest" and not merely for a "public purpose". In normal states, expropriation would be limited to property needed for a "public purpose" such as the creation of public service facilities such as power stations, sewerage works, roads etc. Public interest (as you will see from Section 25 (4)(a) above) is specifically defined to include our nation's commitment to land reform and to bring about equitable access to our country's natural resources. In our country therefore property can be expropriated if, for example, the purpose is to redistribute such property to previously disadvantaged South Africans.

3. The compensation which the state is required to pay is not necessarily linked to the market value of the asset. The compensation must be determined with reference to all of the criteria mentioned in Section 25 (3)(a) through to Section 25(3)(e). What weight should be attached to each of the criteria; how these criteria should be applied and what effect they will have on the compensation is not stipulated nor provided for. It is however clear that the Constitution does not require the Government to pay market value for the property in every case! The other criteria are obviously intended to facilitate a discount on the price in certain circumstances! How large the discount will be and when it will be justified remains to be seen.
4. The compensation need not be paid immediately. The Constitution implies that the time of payment of the compensation is not a fixed issue and that it therefor need not in all cases be paid at the time of the seizure of the property. It could therefore be paid "later" or even possibly in instalments over many years.

Before proceeding any further I thought it appropriate to dwell for a moment on the implications of my paragraphs 3 and 4 above. Astute readers would no doubt ask themselves why the determination of the amount of compensation to be paid for expropriated property and the timing of payment is stated in our Constitution in such an uncertain and/or ambiguous fashion. The answer to this lies in political compromise. When we South Africans decided to facilitate a new democracy the parties who negotiated on our behalf were at loggerheads over the matter of ownership and/or control of our countries riches. Some wanted white South Africans to keep what they had acquired and to be paid full market value for anything which might be taken away from them by the new Government. Some viewed the things which white South Africans had come to own and control as "ill-gotten gains" which should be given up without compensation at all. The parties could not reach full consensus and therefore to a degree postponed confronting the issue by reaching the "compromise" now to be seen in Section 25(3) of the Constitution. They effectively left the issue "hanging".

During approximately 2008 the South African Government presented a draft Expropriation Bill for comment. It invoked howls of protest and was then without explanation withdrawn. Many people seemed to be thoroughly surprised by the contents of the Bill even though most of its content reflected Section 25 of the Constitution! It appears that few South Africans truly appreciated the consequences of the compromise recorded in Section 25. One of the fundamental objections to that draft Bill revolved around the matter of access to the courts as a final arbiter of the amount of compensation to be paid. You will note that Section 25(2)(b) stipulates that the compensation to be paid must either be as agreed or as decided by a court. The parties who prepared the 2008 Bill tried to deal with this part of the Constitution by restricting the right of South Africans who were unhappy with the compensation offered to take the decision made by the Government to a court for "review". Although the average reader might imagine that this would give effect to Section 25(2)(b) it does not! There is a significant difference between the powers and consequence of a "review" as opposed to a court "deciding" on the adequacy of compensation. Review procedures restrict a court to examining the fairness of the processes which led to the decision made by the Government and do not ordinarily permit the court to examine the merits of the decision itself. What our Constitution clearly provided for is that a court should have the power to consider the amounts of the compensation and change it if the court thinks it appropriate.

A new Expropriation Bill has now been published for comment along with ancillary legislation called the Property Valuation Bill. The new Expropriation Bill is not in itself entirely objectionable. It does not (like its predecessor) try to restrict access to the courts and largely reflects the contents of Section 25 of the Constitution. The Bill therefore does not serve in any

way to clarify the uncertainties about the calculation of compensation and the timing of payment. Those issues still remain "hanging".

The Property Valuation Bill seeks to create a new Government department which will determine and calculate compensation amounts in cases of expropriation. This Bill once again caters for the valuations to be done with reference to Section 25 of the Constitution so the uncertainties are not clarified in this Bill either.

How then will we ever get clarity about how Section 25 of the Constitution as repeated in the two Bills should be applied in practice?

I think the regulations to be promulgated in terms of the Property Valuation Bill might serve as an indication of how the current Government intends to apply Section 25. The Bill empowers "the Minister" to make regulations concerning "the criteria for determination of the value of property" ; "the standards and procedures for the valuation of properties" and "the manner in which a valuation must be performed and any other relevant matters relating to the valuation of properties".

If the regulations referred to above don't clarify the issues then we will have to wait for the first expropriation to occur. The conduct of that expropriation will no doubt clearly reveal the intentions of the current Government and how it interprets the powers permitted by Section 25.

If the Government understands Section 25 to be permission to expropriate property and as a general practice pay less than market value for the property and as a further general practice to not make payment of the compensation at the time of expropriation then the only way to reverse such understanding is to seek direction from the Constitutional Court.

The Constitutional Court is the ultimate authority and arbiter on all matters relating to the interpretation of our Constitution and it will therefore probably and inevitably have to confront the issues which the parties who negotiated our Constitution chose to leave "hanging". This will be an extremely difficult decision for the Constitutional Court to make. It is a deeply political issue and in my opinion should have been hammered out (one way or another) by the parties who negotiated our Constitution. I personally believe that it was not fair for the parties who negotiated our Constitution to force a decision of this nature into the hands of judges. That is however what was done and it can't now be changed.

The future of South Africa will in my view turn on the matter of how the Constitutional Court chooses to deal with this issue.

It could choose to approach the matter without reference to race issues. It could (in my view correctly) acknowledge that the Section 25 powers can be used or abused by this Government or the next against any South African (black or white) and that all South Africans deserve proper and reasonable protection of their property rights. Such an approach is likely to result in an interpretation which obliges Government to pay a market related price for expropriated property and to pay immediately unless there are compelling reasons specific to that property of the sort mentioned in Section 25 to not do so.

The Court could on the other hand go the other way. It could see this entirely as a race issue. It could conclude that Section 25 powers will only be used against white South Africans and never against black South Africans and that there is therefore no reason to restrain the current government or the next in exercising the full potential of the Section 25 powers. It could in the light of our country's history view property owned by whites to indeed be "ill-gotten gains" and accordingly conclude that it is entirely "just and equitable" for white South Africans to not receive full protection of their property rights; that nominal compensation for expropriated

property it is entirely appropriate and that the Government should not be burdened with the obligation to make payment immediately.

If the Constitutional Court chooses the latter route then the consequences for South Africa could be dire. Individual white South Africans who are selected for expropriation of their property will understandably consider the expropriation to be an act of oppression if it leaves them poorer than before. Oppression, as all South Africans know from our own bitter history, leads to resistance. This is not only a South African characteristic. It is international and timeless. The Roman philosophers commented on this tendency as follows. By Tacitus (56AD to 120AD) "*A desire to resist oppression is implanted in the nature of man.*" and by Seneca (4BC to 65AD) "*Resistance to oppression is second nature*". If this occurs there will be no winners at all.

At the end of the day I really hope that our Government ; our Constitutional Court and all South Africans will realize that democracy must (in the words of James Bovard, Civil Libertarian 1994) be something more than two wolves and a sheep voting on what to have for dinner. We would also do well to heed the words of Thomas Paine who said "*He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself*" and especially remember the words of our own beloved Nelson Mandela who said "*Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another.*"

Milton Koumbatis

Director Miltons Matsemela Inc

Email miltonK@miltons.law.za

Prepared 24th June 2013