

## Property Right Under Threat?

I have received a number of inquiries about an article which recently appeared in the Burger newspaper announcing the demise of property rights in South Africa. Property owners are apparently "panicking" and clarification has been requested.

The article in the Burger arises from the proposed new Expropriation Act which the government intends to bring into law during the course of this year and which will replace the current Act.

The article conveys the impression that the government intends to imbue itself with the power to expropriate any asset owned by individuals in the Republic of South Africa which it chooses to acquire without necessarily paying to such person the market value of the asset whilst depriving the person concerned of the privilege of having an independent court review the necessity for the expropriation and determine the amount of the compensation paid.

I really wish that I could say with conviction that the article inappropriately sensationalizes and misrepresents the true meaning of the intended legislation. Regretfully it is in many respects the truth.

From the point of view of property practice the amendments require certain adaptations and training namely:

The Government has always had the right to expropriate property belonging to any individual in the Republic but its right to so do has been restricted to property needed for a public purpose and against proper and market-related compensation. The concept of public purpose is understood to mean that the property is required for use by the government or a municipal authority for purposes of enabling the government/authority to carry out its obligations. (Example land needed for a public road etc.)

Before analyzing the proposed legislation I think it is important to be aware of the contents of Section 25 of the Constitution of South Africa. This section might come as somewhat of a surprise to many people who until now might have believed that our Constitution offers comprehensive protection against the removal of assets by the State and that a "Zimbabwe like" future was never possible.

Although it is perhaps tiresome to read an article which is overly lengthy I cannot do justice to this topic without setting out the entire contents of Section 25 of the Constitution which I now do hereunder:

## **“Constitution of the Republic of South Africa 1996**

### **Chapter 2 - Bill of Rights**

#### **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.
5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
9. Parliament must enact the legislation referred to in subsection (6).”

**What is clear from the above section is that the current government is not only entitled but in fact obliged to create legislation which achieves the following:**

1. The state must have the right to deprive persons of property if required for a public purpose or if in the public interest.
2. Property must not be restricted to land only and can include any asset.
3. The Act must apply to everyone and not only to a limited group or to an individual.
4. Compensation must be paid which is just and equitable and in determining this the market value of the property is merely one of a number of factors which must be taken into account. The extent of direct state investment and subsidy in the original

acquisition of the property and furthermore the history of the acquisition of the property should also be considered.

5. The courts should decide or approve the compensation amount.

What is not clear is the meaning of “public interest”; the weight to be attached to the concept of “market value”, as opposed to the other factors, and the exact role of the courts in the process. Clarity on these issues is vital as it will inform property owners of the likelihood of their property being expropriated and what they are likely to be paid therefore. This lack of clarity is regretfully in the nature of the beast of the Constitution. In this regard it must be understood that when the ANC and the apartheid government sat down to negotiate a deal there were many areas where the parties could not reach complete agreement. The topic of property rights was obviously one of the “hottest issues”. The apartheid government preferred to see the absolute entrenchment of the already established property ownership and the ANC preferred to see, if not the nationalization of most property then certainly a fair redistribution thereof to address the wrongs of the past. Section 25 therefore records the extent of the compromise reached and leaves it to the Constitutional Court to clarify all the “vague issues” at a later time. That process is now starting.

Not surprisingly and in the process of preparing the legislation contemplated in terms of Section 25 the ANC government has seen fit to interpret all the “vague issues” in a way which serves the purpose of enabling the government to redress the past as cheaply and with as little court interference as possible. The government still plainly holds that all property acquired in the pre Constitution era is an ill gotten gain and that it is not fair or appropriate for any portion of such a gain to be reversed for full compensation. This position is clearly conveyed in the introduction to a memorandum produced by the Department of Public Works (who are the authors of the new legislation) when announcing the principals on which the Act would be based. I set out hereunder a short extract from the document which can be read on the department’s website and which is indicative of the approach:

#### **"EXPROPRIATE FOR PUBLIC PURPOSE IN THE PUBLIC INTEREST**

In 1659, a little war of plunder broke out between the Dutch and the Khoisan. After many years of abuse at the hands of the Dutch, the Khois had decided to wage resistance. At the time, Jan van Riebeeck, was the commander of the Dutch in the Cape. The war ended at about the beginning of 1660. The leader of the Khois, Autshumao (also called 'Harry the Strandloper') had been captured during the war and imprisoned at Robben Island. In April 1660 after the war, he was brought back for peace negotiations. During those negotiations Van Riebeeck told Autshumao that not enough grazing land was available for the cattle of both the colonies and the Khoi-Khoi. Autshumao then asked van Riebeeck "If the country is too small, who has the greater right; the true owner or the foreign intruder?" The response of Van Riebeeck as recorded in his diary was: "We have won this country in a just manner through a defensive war, and it is our intention to keep it". Van Riebeeck's response is seminal. It was the beginning of a colonial process of land deprivation that continued for more than 250 years, and sparked many violent conflicts."

**Although it is not possible within the context of this article to set out the entire text of the proposed legislation I think it can be fairly summarized as follows:**

1. The relevant minister has the power to expropriate all and any property (not just land) if the minister believes that it is in the public interest to so do or that a public purpose will be served thereby. The concept of public interest is defined as including (but not necessarily limited) to the "nation's commitment to land reform and to reform to bring about equitable access to our country's natural resources."
2. An advisory board will be established to advise the minister on property which should be expropriated and the amount of compensation to be paid. This board will be appointed by the minister and must be representative of the demographics of South Africa.
3. If the minister is thinking to expropriate any particular property the owner of the property and persons who have unregistered rights in respect of the property (such as tenants; farm workers; purchasers thereof and the like) must be informed of the minister's interest in the property and the amount of compensation which the minister might pay. The recipients of the notice are entitled to make representations to the minister.
4. When the minister has made the decision to expropriate the property then a notice must be served on the owner and those who have unregistered rights in which notice the date on which the expropriation will become effective and the amount of compensation offered to the owner and to the holders of unregistered rights must be stated. Provision is made for payment of interest and furthermore for the protection of bondholders.
5. The minister is obliged when determining the amount to be paid as compensation to take into account the issues which are stated in Section 25 (3) of the constitution and not merely market value.
6. If any party is not happy then such party may approach court. The court must be made up of judges who have been specially appointed for such purpose and who have received specific training on how to deal with such matters. The court will not have the power to decide whether the minister was correct in deciding that the expropriation of the property is in fact in the public interest or whether it serves a public purpose and is limited to a review of the procedures followed and no more. Insofar as the valuation component is concerned the legislation becomes somewhat "fuzzy". It is provided that if any party is unhappy about the compensation then he will be permitted to approach a court to determine whether the court is willing to "approve" of the amount. If the court does not "approve" of the amount then the court does not have the right to determine the correct amount and the matter must be referred back to the minister with guidelines. The minister must then re-consider the matter and if the party is still unhappy then he is entitled to once again go back to court. What then happens is not spelt out at all and one must then assume that the process could continue indefinitely!

**I have difficulties with the Act some of which are fairly obvious and some of which perhaps less so. My difficulties are the following:**

1. The legislation fails to address the vagueness in the concept of public interest and simply reproduces the very same vagueness which lurks in our constitution. Reference to land reform and equitable access to natural resources adds little to no clarity and leave property owners unable to predict whether the government has the power to seize their property or not. It is conceivable (albeit unacceptable) that the government will by virtue of the legislation have the power to seize any assets owned by any person (even from a black) which were acquired before the ANC came to power under the guise of

making the assets available to black people. By excluding the court's power to determine whether the expropriation of a particular property is truly in the public interest or not the government has effectively and in my view in a disturbingly immoral fashion exploited the vagueness in the Constitution to give themselves virtual carte blanche. This issue will no doubt be addressed in the Constitutional Court before too long. Although the Constitutional Court is packed with judges carefully selected by the ANC one hopes that the Court will bravely and fairly deal with the issue.

2. The legislation fails to address the question of the weight to be attributed to the market value of property as opposed to the other "historical" issues and again simply reproduces the very same vagueness which lurks in our constitution. As the legislation (despite its best efforts) has not been able to totally exclude the operation of the courts in the determination of compensation one again hopes that the courts will find the wisdom to deal with the dilemma.
3. The government has blatantly manipulated/misinterpreted the provisions of the Constitution and has retained to itself alone the power to determine the amount of compensation which will be payable. The Department of Public Works has offered a contrived argument based on the fact that the word "or" which appears in Section 25 (2) (b) (i.e. determined or approved by a court) means that it is perfectly acceptable to allow the minister to "determine" the amount of compensation and that the courts be limited to "not approving it". I am entirely convinced that the parties to the negotiated settlement reflected in Section 25 of the Constitution never for one moment believed that it would be acceptable for the government in its sole discretion to determine compensation and that all the courts would be left to do is to "not approve it" and send it endlessly back to the minister! This issue will no doubt also appear before the Constitutional Court in due course. What should happen when an owner is unhappy with the compensation offered is that the minister should at very least have the obligation to ask an unfettered court to approve the compensation offered and should bear the onus of proving the correctness of the amount. The burden should not be on the owner at all! It seems to me that the current minister and her band of "advisors" in the Department of Works are being too smart by half and that they should remember that although their thoughts are that this Act will only be used against white people the fact remains that it could one day be used against them and black people and that this is the time to make sure that the government's powers are not given too broadly! Powers once given are difficult to take back. I really hope that this is not a prime example of the truth of the saying that "there are none so deaf as those who will not hear".
4. I am entirely unhappy about the fact that the government has decided to limit the kind of judge who can hear a matter regarding the issue of expropriation and compensation. It seems to me that the government intends (or could in any event) create a squad of politically biased judges who will simply follow government's lead in every case. These were the kind of underhand tactics that the apartheid regime regularly indulged in and which were rightly and roundly criticized by all right-thinking people. It is shocking to me to see an ANC "open" government indulging in thuggery of this sort.

What then of the future of property rights in the Republic of South Africa? Can we now assume that the government will expropriate everything and that private ownership will disappear? Even though the legislation will undoubtedly empower the government to expropriate certain assets at somewhat of a discount the fact remains that the government will have to pay **real money** for the assets and that having done that they will not

be permitted in law to simply "give them away" and be obliged to sell them at market price. The ultimate reality is that the government itself does not have sufficient money to purchase all the privately owned assets in the Republic of South Africa (even at a discount) and even if it could it would find itself stuck with such assets as black South Africans (the intended recipients of these expropriated assets) cannot themselves possibly afford to buy these assets from the government at full market price!! **The possibility of the government expropriating everything is therefore absurd.** The general tenure of Section 25 of the Constitution and the kind of "public speak" which ANC politicians and ministers have recently been using (interested parties might enjoy listening to the tape recording of the presentation of this legislation to the relevant parliamentary committee which is available on the internet- the chairlady seemed more interested in where and when lunch would be served rather than the bill itself) suggests that the true focus of the legislation is on land and particularly rural as opposed to urban land.

As an owner of non land assets I am not worried at all. As an owner of urban land I am also not intending to lose sleep over this legislation. If I owned a farm which was not being particularly fruitfully used and if it was one of a number of farms which I owned then and only if the farm was particularly important to me I might lose some sleep!

My personal view is that the ANC itself was more "*gung-ho*" about stripping all assets from white South Africans at the time when the Constitution was negotiated than it is now and that it has come to understand that if the country is to remain an active and participating member in the world wide "capitalist club" actions of this nature are counterproductive. The government is hopefully mindful of the fact that to create a situation where no-one enjoys security of tenure of any assets in the country would be to excommunicate ourselves from the rest of the world by creating a situation where we would receive no foreign investment. The repercussions of this would be extremely harmful to our economy. I think comfort can be taken from the fact that the Government did not rush this legislation to fruition years ago. If it had intentions to take *everything* then it would not have dragged its heels as has been the case. The point could also be made that the Restitution of Land Act which has been in existence for some time has not led to the wholesale seizure of land nor destabilized our economy.

The bottom line is that although the legislation might well give the government the power to take anything it likes the reality is that it will in fact take very little indeed.

By Milton Koumbatis  
*13 May 2008*