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Expropriation # 3: The Land Hunger

By Chantelle Gladwin-Wood, Partner and Anja van Wijk, Senior Associate

Introduction

This article is one in a series on expropriation and looks at some of the fundamental legal issues surrounding expropriation without compensation (“EWC”). This article asks what the ‘land hunger’ is that EWC is supposed to address as a part of the broader program of ‘land reform’ undertaken by government in line with the values underpinning our Constitution.

What is Land Reform?

Land reform is a broad concept that comprises of many different programs aimed at giving South Africans redress for past wrongs relating to land. This can be achieved through the restoration of stolen land or compensation for land that was stolen, better security of tenure (through the issuing of title deeds to those who are living on land but do not hold title to it), stronger tenure rights for those living on land that they do not own but work (such as farm workers), or other communal land rights that serve to allow members of the public or of a certain community rights to access someone else’s land in certain circumstances (for example where a

person acquires the right to visit his ancestor’s grave on a piece of land owned by someone else). There are many other forms of land reform not mentioned here, and (because our relationship with property is constantly shifting in our constitutional democracy) there will always be the potential for new and valuable forms of reform to literally “shape the landscape”.

Then Why EWC?

EWC has been proposed as a method to accelerate land reform, and it is in this context that an amendment to section 25 of the Constitution to permit EWC was proposed. The general idea was that the government couldn’t possibly afford to pay market value (based on the “willing buyer willing seller” formula) for all of the land that is needed to satisfy the “land hunger” and that accordingly many more recipients of land reform can be assisted if the government can ‘take’ land without having to pay for it. The argument goes that because the current systems of expropriation and land claims require compensation, the government hasn’t been



able to afford to facilitate wide scale redress as originally planned.

Stated Ends?

If, however, our government is to achieve its stated end (of greater redress via land reform in order to satisfy the 'land hunger') it needs to formulate its land reform program after investigating and answering some critical questions (which we submit it has not done). These would include (but are not be limited to) the following.

Who are the land hungry?

- Does 'land hunger' involve only a desire for land itself?
- Can it be thought of more generally as a hunger for security of tenure or for a means to provide for one's family's accommodation?
- Can it be thought of more generally as a hunger for wealth?
- Can a hunger for land include the needs of not only the individual and their immediate family, but their extended family, or future generations?
- What type of land hunger qualifies for redress?
 - Saleable or lettable units (not primarily for the beneficiary's accommodation but rather for economic benefit),
 - large tracts of commercial farm land,
 - smaller tracts of farm land for subsistence purposes,
 - residential homes in urban areas, or
 - homes/plots in rural areas that the family hails from?

Do all of the 'land hungry' qualify for redress?

Does everyone of a certain race, heritage or ethnicity qualify or are there other qualifications?

- Do black people from outside of South Africa qualify?
- Do Jewish people who landed in South Africa to escape the holocaust qualify?
- Are black people or previously disadvantaged people with income or assets above a certain threshold excluded?
- Do white or previously advantaged people with less than a certain income/asset threshold qualify?
- What about black people from wealthy families (remembering that in many black families wealth is held by one member for the benefit of all others)?
- What about black persons from wealthy families, such as some of the royal families?
- What about black South Africans born into the 'new South Africa' - is there any cut-off date or will any black person qualify, no matter when they were born? If so, will there ever be a cut-off date?

What kind of land will satisfy the 'land hunger'?

- Will land anywhere do or will each person's unique needs/wants be taken into account?
- Does it include improvements on the land (such as a dairy on a farm, a warehouse on a piece of industrial land, or a house on a residential erf)?
- Does it include not only improvements, but other implements necessary to turn the land into an economic unit (for farming you might



need tractors, labour, seed, implements; whereas for lettable residential units you might need land in residential areas, access to municipal services, etc).

Conclusion

Although the report of the Joint Constitutional Review Committee recommended on 15 November 2018 in broad terms that section 25 be amended to facilitate EWC in order to accelerate land reform and satisfy the “land hunger”, no consideration appears to have been given to what “land hunger” is, or how it can be satisfied. Although the authors support EWC where it is just and equitable, much more thought needs to go into precisely how redress for past injustices needs to take place, in order for it to be effective. Any amendment made hurriedly simply to satisfy a disappointed electorate will be doomed to fail if the proper research has not been done in order to ascertain what the “land hungry” actually want, and what is necessary in order to satisfy that hunger. If appropriate consideration is not given to the above, this may very well render the amendment (to remove the right to compensation) an arbitrary and unjustifiable limitation in terms of our Constitution and common law.

***Caveat:** Nothing in this article is to be understood as legal advice given to any person in any circumstances. The content hereof is merely an expression of the legal opinion of the authors based on laws as they stand at the time of publishing and possible future consequences, and any person who needs specific legal advice in relation to the issues discussed herein should contact the authors for same. Any specific references to the sources of the laws*

quoted herein can be obtained directly from the authors upon request.



Chantelle Gladwin- Wood

Partner at Schindlers Attorneys

Phone: +27 (0) 11 448 9678

gladwin@schindlers.co.za



Anja van Wijk

Senior Associate at Schindlers Attorneys

Phone: +27 (0) 11 448 9722

vanwijk@schindlers.co.za