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Expropriation #4: The Expropriation Bill of 21 December 2018

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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 examines the content and potential legal impact of the newly published Expropriation Bill.

What is the Expropriation Bill?

This is a draft piece of legislation put out for public comment by the government. If passed by Parliament subsequent to the comment period (in its current or in an amended form) it will amend the existing Expropriation Act 63 of 1975. In many respects the Expropriation Bill mirrors the Expropriation Act, with the obvious inclusion of a clause expressly authorizing EWC (which will be dealt with more fully below).

What is the existing Expropriation Act?

This piece of legislation¹ is the law that prescribes the manner in which expropriation must

happen. Although expropriation is authorized by section 25 of the Constitution, section 25 doesn’t spell out in any detail how and under which circumstances expropriation needs to happen. The details of the how and (and sometimes when) are set out in the Expropriation Act.

Why is there a proposed amendment?

The existing Expropriation Act prescribes that compensation must be paid for expropriation and it sets out formula that determine how much that compensation is. If it is not amended, it would mean that (even if section 25 of the Constitution does permit EWC, which the authors hereof believe it does) there is no way that the government can expropriate without compensation because the law detailing how expropriation must happen (i.e. the Expropriation Act) does not allow EWC.

¹ Act 63 of 1975.



What does the Expropriation Bill say?

The highlights are:

- (i) All expropriation must happen in accordance with section 25 of the Constitution. The Bill is drafted in accordance with the existing section 25. This is an indicator that the government may decide to only amend the Expropriation Act but leave section 25 of the Constitution unamended and intact.
- (ii) The Bill does not limit EWC to cases of land (we expected it to be limited to land because the public hearings in relation to EWC were only in relation to land). We might see a challenge in this regard, because the public hearings in relation to EWC were only done in relation to land. However, the Bill itself is also following a public comment process, so it might be found that the comment process on the Bill was adequate.
- (iii) The Bill does not include any of the formula for calculating compensation that we see in the existing Expropriation Act. Section 12 introduces the possibility that expropriation can happen without compensation. The Bill further includes a list of cases in which it *might* be appropriate to expropriate without compensation, but this list is definitive of whether the property can be expropriated without compensation – every case must

be analysed on its own facts, in terms of section 25 of the Constitution, with reference to the factors referred to therein, to determine whether it is just and equitable to expropriate without compensation. In terms of this section it would be possible to expropriate any kind of property without compensation even if that kind of property is not on the list in section 12. The list includes types of property such as:

- a. **where the land is used or occupied by a labour tenant**

This item has been criticised for its conclusion because (apart from it being desirable that labour tenants have better security of tenure) it is not immediately apparent why it would be just and equitable for a farm owner to have to part with a portion of the farm without compensation. This is one of the most contentious elements of the Bill and much has been said in the public space about this aspect of it.

- b. **land acquired purely for speculation**

This item has also been criticised because ‘speculation’ is not defined and to the extent that it remains undefined it may be utilized to target land owners who are in the business of buying/developing/selling land for a profit (which might damage that land



- owner's trade/means of making an income).
- c. **state owned land;**
 - d. **abandoned land;** and
 - e. **land where the market value is less than or equal to the amount already invested by the state.**
- (iv) Section 12 also includes an interesting list of factors that the expropriation authority is enjoined not to take into account when determining the amount of compensation payable (if any). To our minds, the list is reasonable and justifiable in an open and democratic society because the factors listed thereon are of the kind that one could reasonably expect would not influence the amount of compensation upwards. The list includes factors such as:
- a. the fact that the property was taken against the will of the owner/right holder;
 - b. any special suitability of the property for use by the expropriating authority (unless that special suitability would have had attracted a special value on the open market); and
 - c. in enhancement in the property's value if it results from unlawful actions.
- (v) The Bill retains the "willing buyer willing seller" idea as the starting point for the determination of compensation payable. It envisages a situation where the affected parties are given notice of the impending expropriation and asked to make submissions as to the value of their rights, before the expropriating authority makes a final decision in relation to how much compensation is payable. It also encourages the expropriating authority to get a professional valuation of the property before making its decision. To the extent that the person/entity being expropriated is not satisfied with the amount of compensation proposed to be paid by the expropriating authority, the aggrieved person has recourse to court, in which case the court will be the final arbiter of the amount payable.
- (vi) The Bill creates and protects different types of right holders differently. Broadly speaking there are three classes: owners, registered right holders and unregistered right holders. The general idea is that all persons with any type of rights in the property being expropriated should be compensated (unless it is just and equitable not to compensate them) but they are all given the opportunity to make submissions in relation to the value of their rights.



a. **Owners**

All owners are entitled to compensation (unless it is just and equitable not to pay them any compensation).

b. **Registered Right Holders**

The Bill provides that (unless the expropriating authority expressly expropriates the registered right at the same time as expropriating the ownership of the property concerned) registered real rights remain intact and unaffected by the expropriation.

c. **Mortgage bonds**

There is one exception to the rule stated above pertaining to registered real rights, and that is in relation to mortgage bonds. Bonds are not protected as registered real rights and section 9(d) prescribes that the effect of expropriation is that the ownership of the property passes to the expropriating authority free of any unregistered rights, but with all registered rights (apart from bonds) remaining intact.

This is interesting because the Bill does not state that the bond is being expropriated – in fact, it goes to pains to avoid saying this. This might be an attempt to avoid a judgment that the bonds are being expropriated too (because they are not ‘taken’ in the way that the property is ‘taken’ – they just

cease to bind the new owner, who is the state – and they remain enforceable against the old owner who was expropriated). So although the bond holder loses its security for the repayment of the loan, it does not lose the right to claim that repayment.

Although the bond holder is entitled to receive notice of the intention of the expropriating authority to expropriate, it is not entitled to receive the expropriation notice itself. The same applies to other registered right holders (presumably because the other registered rights remain intact and are not affected by the expropriation unless they too, in addition to the ownership, are expropriated, in which case they must be dealt with as if they were ownership and compensated according to the same principles).

The bond holder is entitled to make representations as to why/how its rights are affected and as to the value of its right but is not entitled to compensation therefore. We suspect that we might see a court challenge by bondholders on the basis of the allegation that the security right (as opposed to the claim for payment) might in some cases be of separate value in terms of section 25 of the Constitution. This was recognised



as a possibility by the Constitutional Court in the case of *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others*².

d. Unregistered rights

Understandably it is more difficult to protect unregistered right holders because it is not apparent that there are any unregistered rights without (sometimes extensive) investigation. There might be cases where this is fairly obvious (for example where tenants are concerned) but it might be very difficult otherwise to detect the existence of and track down the holders of unregistered rights in the property in question.

The Bill makes a special effort to protect unregistered right holders who are not initially detected and advised of the expropriation. A special level of protection is given to builder's liens, the rights of a purchaser of the property, and unregistered leases inasmuch as the owner of the property is obliged to notify the expropriating authority of the existence of such unregistered rights when the expropriating authority sends the owner the first notice of intention to expropriate, and thereafter the expropriating authority must deal with

those unregistered rights and (if just and equitable) compensate the holders thereof separately to the ownership.

(vii) Rights to enforce payment

The Bill contemplates that (notwithstanding whether payment has been made or not) the state can take possession on the date referred to in the expropriation notice. The Bill provides little recourse for a person who has not been paid their compensation at time or at all. They are essentially forced (after giving notice to the expropriation authority to demand payment) to approach a court for assistance. The state is reputed to be a bad payer in several kinds of cases (such as RAF claims, certain welfare grants, and for some tender contracts) and it is expensive and time consuming for a person affected by non-payment to have to approach a court. Ideally a more friendly mechanism of encouraging/enforcing payment could be introduced, one that motivates the state to pay without operating unduly harshly against it, such as mediation, or perhaps not allowing the state to take possession of the expropriated property until such time as payment has been made in full.

(viii) Atypical 'registered' rights

The definition of 'registered' (in relation to rights) includes registration in any government office in terms of any law. It is not limited to

² *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others, City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v*

Livanos and Others (CCT283/16, CCT293/16, CCT294/16, CCT283/16) [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) (29 August 2017).

registered rights in land. An interesting question arises as to how rights registered in offices other than the Deeds Office will be dealt with – such as where the interests of a bank are noted against the ownership of a vehicle because the bank financed the acquisition thereof. This will qualify as a registered right, but because this is not a mortgage bond the bank will be entitled to compensation if the right is expropriated along with ownership.

This will (presumably) have to happen if the expropriating authority wants to expropriate the vehicle because the bank's interest is registered against the title of the vehicle and (presumably) the bank's interest in the vehicle cannot remain intact after the expropriation because the vehicle vests in a new owner – i.e. the expropriating authority – unless of course the expropriating authority is taking over the loan.

To the extent that the bank is entitled to compensation for the loss of its security (because presumably the bank's right to claim repayment of the loan as against the person being expropriated will survive the expropriation) it could be argued that a mortgage bond holder should be in the same position and that it is arbitrary not to equate the two types of finance simply because one relates to a movable and the other to an immovable. How the affected parties (and the court) will deal with this will remain to be seen.

Conclusion

In the authors' view, the Bill is largely just and equitable and may pass constitutional muster in its present form (provided that it is found that the few contentious issues referred to above are not a violation of section 25 or 36). It represents a conservative, but forward-looking, approach to expropriation, by removing the major impediment to EWC contained in the present version of the Expropriation Act and clarifying under which circumstances the government might be looking to expropriate without compensation.

Ultimately any expropriation undertaken in accordance with the Bill (once it is brought into law, in whatever its final form is) will be subject to the overarching provisions of section 25 and 36 of the Constitution, which require that all acts of expropriation take place in terms of a law of general application, be in the public interest or public purpose, and ultimately be just and equitable in the circumstances.





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