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Codifying the ‘just and equitable’ principle for compensation: Can you fit a square peg in a round hole?

On Sunday, 12 March 2017, the African National Congress (ANC) released a series of discussion documents in preparation for their 5th National Policy Conference due to take place midway through this year. Role-players in the agro-food value chain will be relieved to note that expropriation without compensation does not appear in the initial content of the policy document on economic transformation.¹ Instead, it places a welcome emphasis on a stable policy environment to foster inclusive growth. Given the plethora of conflicting statements around land reform and expropriation without compensation, this is a document that is sure to be hotly contested in the coming months. The initial contents of the draft policy document largely bolster the prevailing policy direction; however, one proposal, in particular, does stick out.

Land reform features prominently in the policy document but it does not call for expropriation without compensation, instead, it proposes a codification of ‘*just and equitable compensation for the acquisition of land for land reform purposes*’.² This poses a number of conceptual difficulties:

Firstly, the constitution does not prescribe ‘just and equitable’ compensation for land reform, it merely states that all property expropriated for a public purpose or in the public interest is subject to the payment of just and equitable compensation.³ There is a crucial distinction to be made between the state’s obligation to effect land reform on the one hand, and the state’s ability to expropriate. The state’s three-pronged strategy of land restitution, redistribution and tenure security all originate directly from the constitution⁴ but it does not go as far as to say how the state must acquire this property. A landowner who sells his property to the state for the purposes of land reform is therefore not automatically entitled to just and equitable compensation. Instead, he is entitled to whatever he agreed the purchase price should be because the nature of the transaction is no different than that of a private sale, even if it is to the state. Just and equitable compensation is only applicable within the context of expropriation (a power which has vested in the Minister of Rural Development and Land

¹ African National Congress. 2017. Economic Transformation Discussion Document for the 5th National Policy Conference to be held on the 30th of June to the 5th of July 2017. Accessed at <<http://www.polity.org.za/article/anc-discussion-document-2017-economic-transformation-2017-03-13>> accessed on the 13th of March 2017.

² *Op cit* foot note 1 on page 3.

³ Section 25 (2) of the Constitution of the Republic of South Africa, 1996.

⁴ Sections 25 (7), (5) and (6) of the Constitution.



Reform for decades⁵ but one which is seldom used). Just and equitable compensation only becomes relevant to land reform if the state follows the lengthy route of expropriating property for that purpose.

Secondly, the calculation of compensation cannot be reduced to a rigid formula or equation. Section 25 (3) of the constitution states that *“compensation 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”.*

The 5 factors specifically listed in the constitution can assist a court in arriving at a conclusion but they are by no means conclusive. In statutory interpretation, use of the word *“including”* indicates that the list which follows is not a closed one. In other words, any other factor that is not listed may be used in arriving at a just and equitable amount as long as they are relevant given the circumstances.

For example, if the owner has to incur moving costs because his home has been expropriated or if a bank has to incur costs to deregister a notarial bond, those costs could well be taken into consideration even if they are not listed factors. An attempt to codify just and equitable compensation based on the listed factors is problematic because one cannot create a logarithm that accounts for all of the possible unlisted factors, which a court may deem relevant given the circumstances. Likewise, it is impossible to formulate how much weight should be attached to each factor as its applicability will differ depending on the circumstances of each case.

Finally, balancing the rights and interests of affected parties is by its very nature a normative exercise that requires a value judgement. Hence it is appropriate that the constitution has entrusted the courts with this function in the event that the parties cannot reach agreement on their own. The challenge with codification is that it might attempt to ascribe a mathematical formula to normative factors that must be applied on a case by case basis against the backdrop of each inquiry’s own unique set of circumstances.

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⁵ See sections 42E of the Restitution of Land Rights Act 22 of 1994, S 26 of the Extension of Security of Tenure Act 62 of 1997 and section 12 of the Provision of Land and Assistance Act 126 of 1993.

