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Agbiz involved in land reform and related policy developments

Introduction

The past two months have seen considerable movement in the land reform policy domain as no fewer than two Bills and one set of draft regulations were published for public comment and consequently received considerable media attention. In each instance, Agbiz was involved in the policy discussions in the lead up to publication and continue to remain at the forefront by consulting widely and formulating comments for submission.

Regulation of Agricultural Landholdings Bill, 2017

The Bill published on the 17th of March 2017 seeks to establish a land commission to receive compulsory disclosures relating to the race, gender and nationality of all land owners, prohibit prospective land ownership by foreigners and place upper limits or ‘ceilings’ on the extent of land a single entity can own. Whilst the commission can be an enabling mechanism to obtain credible land ownership data, the prohibition on foreign ownership and imposition of land ceiling can have negative consequences for the protection of property rights, affect the land market and negatively influence business confidence in the sector. Agbiz compiled comprehensive comments outlining the unintended consequences and negative impacts that the Bill may have both on the sector, as well as on the fortunes of land reform beneficiaries themselves.

Regarding land ceilings in particular, we highlighted the negative consequences that may result if existing farmers and land reform beneficiaries are denied the opportunity to make use of economies of scale to remain internationally competitive. We also identified contradictions between the proposed mechanism and current land redistribution programmes, the National Development Plan objectives, Operation Phakisa outcomes as well as alternative solutions proposed by the private sector to motivate why land ceilings will not in fact benefit the land redistribution cause.

Restitution of land Rights Amendment Bill

Last year the Constitutional Court set aside the legislation reopening the lodgement period for restitution claims and interdicted the Commission from processing any new claims received until the 7500 odd claims submitted before 1998 were finalised. Since the Act was set aside on procedural grounds owing to a defective public consultation process, its re-enactment was not unanticipated. It did however come as somewhat of a surprise to learn that the Bill would be reintroduced not by the state, but as a private member’s Bill by an ANC Member of Parliament. Agbiz seized the opportunity to prepare comments and submitted



recommendations to the Speaker of the National Assembly. In our comments, we highlighted the need to resolve long-outstanding implementation challenges to reduce the uncertainty that has accompanied the slow pace at which the claims have been settled to date.

Property Valuation Regulations

The newly created Office of the Valuer-General recently published comments to the Property Valuation Act (Act 17 of 2014) for public comments to be submitted before the 21st of June. The draft regulations propose a formula by which property identified for land reform purposes would be valued according to the 'just and equitable' principle prescribed in the constitution to calculate compensation upon expropriation. The proposed formula amounts to the difference between 'market value' and 'current use value', minus any historical acquisition benefits such as interest or infrastructure subsidies previously received from the state.

There are a number of difficulties with this approach that can be identified from the outset. For example, historical benefits and subsidies can logically only be relevant if the current owner received the benefit during his tenure as owner. To take such measures into account if the current owner obtained the property at market value and is merely the successor in title to the person who benefitted from historical state assistance would not only be illogical, but may well be a misinterpretation of the concomitant factor listed in section 25 of the Constitution. Section 25 lists the 'history of the acquisition of the property' as a factor but the weight attached to this factor would surely differ between owners as the constitution obliges the courts to look at what is just and equitable in the circumstances of each individual case.

Be that as it may, property valuation is a highly complex and technical discipline. As such, Agbiz is busy consulting with senior valuers, academics and agricultural economists to fully understand the potential economic consequences and will draft comments that are aligned with current practice in the field of property valuation, especially in relation to the calculation of 'current use value'. Meaningful comment on the regulations must be carefully considered and well researched as it presents a unique interface between economic principles, the technical procedures of property valuation and constitutional property law. To view the regulations through a purely economic or legal paradigm would not do justice to the complexity of these draft regulations.

For the time being, it is important to clarify exactly how and where a valuation conducted by the OVG will fit into the broader land reform and expropriation regime as popular rhetoric could skew perceptions regarding its non-binding nature. Although valuations can play an important role in negotiations on the price for land purchased or expropriated for land reform purposes, it is not binding on the owner. During negotiation to sell, a seller cannot be obliged to accept any offer he or she does not agree with and even during an expropriation procedure, the valuation can at most inform the state as to what their offer of compensation should be. In the end though, if agreement cannot be reached, the OVG cannot simply fix the amount of compensation as the constitution clearly states that it must either be agreed upon or be decided by a court of law.



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