Agri-Hub Office Park, Building C, 1st Floor, 477 Witherite Street, The Willows, Pretoria, South Africa, 0184 |
Tel. +27 12 807 6686 | Fax. +27 12 807 5600 | admin@agbiz.co.za | www.agbiz.co.za | Vat nr. 4920204684

29 January 2025

Expropriation Act – separating fact from fiction

In January 2025, President Cyril Ramaphosa signed the Expropriation Act into law. The president's signature followed an intensive consultation process spanning 12 years, numerous written inputs, two Nedlac processes, and two parliamentary processes. The final act in the legislative process triggered fierce responses from civil society groups, political parties, and various interest groups. Some hailed it as a landmark change in land reform policy whilst others condemned it as the end of private property rights as we know them. We don't have insight into the cabinet processes that should or should not be followed, but the content of the Act doesn't support either camp's conclusions. To place the Act's actual impact into context, some common misconceptions must be clarified.

Expropriation tramples on property rights

Section 25 of the Constitution is commonly referred to as the property clause, but it does not contain a right to property. What it does do, and importantly so, is to safeguard property rights from arbitrary deprivation. All property rights are subject to limitations (for example, you can own a car but you cannot drive it on a public road without a license). However, it can only be done by a law of general application, and it cannot be arbitrary, meaning there must be a legitimate and defendable reason for the limitation. The same rules apply to an expropriation. Where the state requires private property for a public purpose or in the public interest, there must be a legitimate reason and the reason must be contained in legislation (land reform laws, for example). Expropriation is therefore not an 'exception' nor a 'watering down' of property rights because no expropriation can take place outside of the law or for an arbitrary reason. In plain language, the Expropriation Act does not allow the type of 'land grabs' or arbitrary land seizures seen in other countries where the rule of law was compromised.

If the Expropriation Act was not passed, the state could not expropriate

The state's powers of expropriation do not come from the Expropriation Act but from the Constitution itself. Where the state requires property for a public purpose (like building a dam) or in the public interest (such as land reform), the property can be acquired against the owner's will as long as just and equitable compensation is paid. 'Public purpose' or 'public interest' is not a blank cheque, either as the type of property, the reasons why it is needed, and the organ of state are responsible is specified in each piece of legislation that provides expropriation powers, and it must be set out in the notice of intention to expropriate. What the Expropriation Act does, is provide a uniform procedure that must be followed whenever expropriation takes place. In the land reform context, the Labour Tenants Act, ESTA, and the Restitution Act already provided the minister responsible for land reform with the power

of expropriation for several decades. In the latter example, the normal verification process would still need to be followed to prove a valid claim before expropriation can take place but if it does, the provisions of the Expropriation Act will apply. In the case of labour tenant claims, the claims will also have to comply with the requirements for validity as set out in the Labour Tenants Act. The only exception is the Minister of Public Works, who derives the authority to expropriate from the Expropriation Act itself, but this is limited to his mandate.

Conversely, if the Expropriation Act were not enacted, the authority to expropriate for various reasons would still exist. The difference is that the procedure contained in the old, 1975 Act would then be applied. This Act predates the Constitution, and the process it prescribes is unlikely to pass constitutional muster.

The Expropriation Act is a land reform Act

Expropriation is a means to an end; it cannot be a policy in itself. Our land reform policy, the who, what, and where thereof, is still regulated by various laws and policies of the Department of Land Reform and Rural Development. The Expropriation Act resides with the Ministry of Public Works and is merely one way in which the state can acquire property. In fact, the Act itself ensures that the expropriation is a means of last resort. The Act provides that the state can only expropriate if it has failed to buy the property on reasonable terms. It is a deadlock-breaking mechanism that can only be used as a last resort. Expropriation is certainly not a 'short-cut' for the state to acquire property, as the procedures that the state must follow are far more onerous than buying the property in question.

The Act includes of a list of properties that can be taken without compensation

The 'nil-compensation' provisions are not as clear-cut as other elements and are rightly the most controversial part of the Act. Its impact is also the most difficult to predict, as compensation is not a simple equation; it is a delicate balancing of rights that will differ from case to case. Our Constitution requires compensation to be just and equitable, reflecting an equitable balance between the public's interest and that of the affected parties. All relevant factors must be considered but the overriding standard is still that the compensation must be just and equitable. The same will apply when an expropriating authority offers R0 compensation; unless the owner somehow accepts an offer of zero Rand, a court will need to decide whether the circumstances actually justify R0 compensation. This must be done after all relevant factors are considered, not merely those listed in s12(3) of the Act.

Section 12 (3), the nil-compensation provision, rightfully causes a great deal of anxiety because we will only know exactly what its impact is once the courts have had the chance to apply it. Nevertheless, our constitutional framework is unlikely to allow a situation where the mere presence of a single factor (such as those listed in s12 (3)) will trump all other factors when the scales are weighed. In fact, the actual wording of the clause does not state that it *will* be just and equitable to award R0 compensation; it merely states that it *may* be just and equitable. It is a statement of what can happen in the realms of academic possibility rather than an indication of the probable outcome.

Does this make the Act benign or innocent? Certainly not.

If the reaction to the Act is anything to go by, there are clearly very different expectations surrounding this Act. While the courts have the final say on the legality of an expropriation and the compensation payable, it is the state that must take the first step and make an offer. If the offer is unreasonable, and no agreement can be reached through mediation, the onus will be on the affected owner, mortgagor, or right holder to take the matter to court. The real risk, therefore, does not lie in nil compensation but in protracted and expensive litigation. This is a lose-lose situation for both parties. Ultimately, the best

outcome would be to avoid expropriation altogether through reasonable negotiation and settlement where property is legitimately required for a public purpose or interest.

Lastly, the interpretation of the definition of “expropriation” will be crucial. The Act limits the definition of expropriation to the compulsory acquisition of property for a public purpose or in the public interest by an expropriating authority or an organ of state upon request to an expropriating authority. This definition may imply that limitations on property other than full acquisition by the state may not attract compensation. Likewise, there is some uncertainty about the situation where the state already owns property that is used by rightsholders. Occupiers in South Africa’s vast communal areas technically live on state-owned land, so changes to their rights of occupation may not be considered an expropriation under this definition and therefore may not attract compensation.

By Theo Boshoff*

**The author is the CEO of the Agricultural Business Chamber, Agbiz, and holds a masters’ degree in Constitutional Property Law from the North West University. The views expressed in this article are his own.*