

Expropriation Act – disputed sections examined

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Background: The Expropriation Act remains a source of controversy, with looming court challenges and differing interpretations of various sections of the Act. Ultimately, only the courts can provide an authoritative interpretation of Act's provisions, and litigation should therefore be welcomed if it can bring greater clarity.

Public interest: It is important to note that the Expropriation Act did not bring about expropriation in the public interest, it is provided for in section 25 of the Constitution which reads: *"Property may be expropriated only in terms of law of general application*

a. for a public purpose or in the public interest; and

b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

Unregistered rights: The 1975 Expropriation Act did not provide for the protection or compensation for unregistered rights in land. Typically, these would be short-term leases, rights of residence of, for example farm workers and off-register land rights in townships and old homeland areas. Under the 1975 Act, unregistered rights dissolved by expropriation do not attract any compensation. In a 2021 article by Werksmans attorneys, it is confirmed that: *"The inclusion of informal, unregistered rights in the expropriation and compensation process is a transformative feature not found in the 1975 Act and aims to ensure that the holders of unregistered rights, such as farmworkers, are not excluded from receiving compensation."*¹

The Act defines unregistered rights as: *"right[s] in property, recognised and protected by law [...] which does not require registration and includes a right to occupy or use land"*.

According to the Act, the expropriating authority must establish whether unregistered rights over the property in question exist. If they do, they must essentially be treated in the same way as registered right holders.

Conclusion: Ayanda Khumalo and Nkosinathi Thema from Webber, Wentzel attorneys wrote in a recent article²: *"Overall, the Act operationalises the Constitution's property clause, and on a balanced and simple reading, it does not grant the state any additional powers than what is already constitutionally prescribed."*

Procedural nature of the Act: Expropriation powers have existed in a myriad of laws prior to the Expropriation Act being signed. Importantly, however, those powers of expropriation can only be exercised for the specific purposes specified in the respective laws. And the procedure that must be followed in all cases, is that prescribed by the Expropriation Act.

Examples of laws that grant expropriation powers include:

¹ What you need to know about the Expropriation Bill and where it came from:
<https://www.werksmans.com/legal-updates-and-opinions/what-you-need-to-know-about-the-expropriation-bill-and-where-it-came-from/>

² The Expropriation Act: A solution to South Africa's land reform challenges?
<https://www.webberwentzel.com/News/Pages/the-expropriation-act-a-solution-to-south-africas-land-reform-challenges.aspx>

- S 41(3): National Roads Agency Limited and National Roads Act 7 of 1998
- S 16: Airports Company Act 44 of 1993
- S 5(1): Infrastructure Development Act 23 of 2014
- S 26: Electricity Regulation Act 4 of 2006
- S 55: Mineral and Petroleum Resources Development Act 28 of 2002
- S 32: Petroleum Pipelines Act 60 of 2003

The Minister of Land Reform and Rural Development has expropriation powers assigned to him by the following laws:

- Section 26: Extension of Security of Tenure Act 62 of 1997
- Section 12: Land Reform: Provision of Land and Assistance Act 126 of 1993
- Section 42E: Restitution of Land Rights Act 22 of 1994
- Section 38 of the Communal Land Rights Act 11 of 2004

Municipalities usually have expropriation powers for purposes that are within the powers of the local authority. Housing, for example is a municipal function.

Section 9(3)(a) of the Housing Act No107 of 1997 provides as follows:

“A municipality may by notice in the Provincial Gazette expropriate any land which is required by it for the purposes of housing development in terms of any national housing programme, if

- (i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof.
- (ii) (ii) it has obtained the permission of the MEC to expropriate such land before notice of expropriation is published in the Provincial Gazette; and (iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.”

Once again, municipalities will be required to follow the procedure outlined in the Expropriation Act.

Process of expropriation: The process of expropriation is subject to the requirements of administrative justice. There are, broadly stated, five steps in the expropriation process, namely:

- Investigation and valuation
- Notice of intention to expropriate
- Notice of expropriation
- Verification of unregistered rights on property
- Determination of compensation

Each of these broad steps requires several actions. For example, in the investigation stage, the expropriating authority must investigate the suitability of the property for the required purposes and the impact on municipal planning.

The role of the Court: The role of the court in determining disputes is absolutely critical. The 2008 version of the Expropriation Bill was withdrawn because of resistance to the fact that it tried to water down the role of the court. Section 15(1) of the Act provides that:” an expropriated owner or expropriated holder of a right is entitled to payment of compensation on the date and in the manner as agreed to by the parties or as decided or approved by a court.” Furthermore,

section 19 (6) guarantees that a court can be approached on any matter whether compensation, an irregular process or an unlawful expropriation.

As to when the courts can intervene, the Constitutional court, in the case of *Haffejee NO and Others v eThekweni Municipality*³ ruled that:” *The provisions of section 25(2)(b) do not require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the court before expropriation under section 25(2);*

(b) Generally, the determination of compensation, in accordance with the provisions of section 25(3), before expropriation will be just and equitable;

(c) In those cases where compensation must be determined after expropriation, this must be done as soon as reasonably possible, in accordance with the provisions of section 25(3).”

The cost of litigation: The cost of litigation is indeed a cause for concern. Although the Act provides for mediation and provides for the land-or rightsholder to request the expropriating authority to institute legal proceedings rather than doing so themselves and the Biowatch judgement⁴ mitigates against cost orders against private parties when they defend constitutional rights, a scenario where RNil compensation is offered and land is transferred to the expropriating authority prior to a dispute on compensation being determined is an unlikely, but not impossible scenario. Usually, when compensation is offered, the compensation offered will be paid prior to the property being transferred, even when a dispute exists. But if RNil is offered, none will be forthcoming at the time that the property or rights holder will need funds for litigation. The Constitution itself requires that the time and manner of payment must also be just and equitable, not only the amount. It is difficult to foresee that an offer of RNil compensation, coupled with the taking of the property prior to a dispute on compensation being determined by a court, can be considered just and equitable. But this a fear that property owners have that cannot just be ignored.

Conclusion:

Agbiz’s approach to the legislation from the outset has been to improve it and many hours were spent in NEDLAC and Parliament doing exactly that. There are some remaining concerns, including the definition of expropriation, the scope of the RNil compensation clause and the cost of litigation to those affected by expropriation that get involved in disputes. In time, the court will provide further clarity on the concepts of 'just and equitable', the scope of sections 12(3) and (4), and the timing and manner of compensation. Agbiz’s mandate is to foster conditions for the sector to grow inclusively and to enable businesses in the South African agricultural value chains to operate competitively and sustainably. This mandate guides our inputs into legislation such as this. Therefore, we will continue to closely monitor the implementation of this legislation and consider our options if it negatively impacts the growth, sustainability or competitiveness of the sector.

³ 2011 (6) SA 134 (CC), para 43

⁴ Biowatch Trust v Registrar Genetic Resources and Others: 2009 (10) BCLR 1014 (CC)