

Agbiz inputs on the PVA review

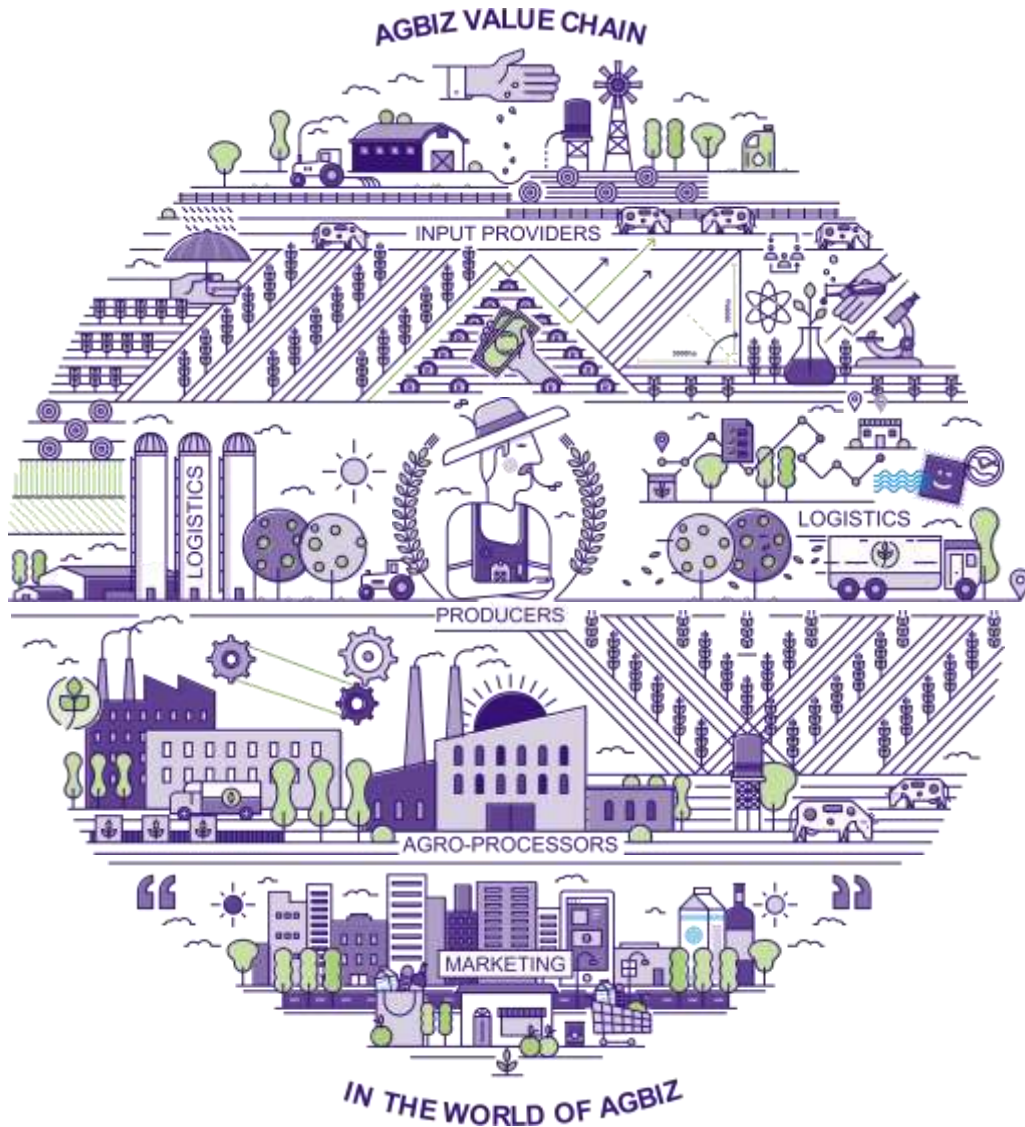
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Ministerial Advisory Panel

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For today

1. *Who we are*
2. *Introduction*
3. *“Compensation” vs “Value”*
4. *Regulatory function v implementation;*
5. *Specific inputs on the Property Valuation Regulations;*
6. *Conclusion*



1. Who we are

- Primary agriculture contributes 2-3% of GDP but together with the value chain (agribusiness), it is closer to 14%;
- Agbiz represents the agribusiness part of the value chain;
- Agribusinesses are involved in transformation and capacity development through BBBEE, EE, CSI, farmer establishment, graduates in business, etc;
- Agbiz members directly finance agriculture and has an interest in the valuation of agricultural assets. (R180 billion exposure!)

Agbiz committed to transformation in the sector and making land reform work





2. Introduction

- Accurate valuations are critical for successful land acquisition;
 - The state should not pay excessive amounts; but
 - The integrity of the land market must be maintained to prevent adverse impacts on agricultural finance (premised on the collateral value of land as security);
- Chapter 6 of the National Development Plan:
“[we must] enable a more rapid transfer of agricultural land to black beneficiaries without distorting land markets or business confidence in the sector”
- The OVG is a critical institution but at the moment, its valuations lead to excessive litigation which slows the process down;
- Our comments are aimed at achieving an equilibrium where valuations are trusted by the state and private sector to speed up land reform.

3. Value v Compensation

- Conceptual difference between the concept of ‘value’, which relates to the property, and ‘compensation’ which relates to the owner;
- Difficult, conceptual distinction, but one which is warranted by s25 of the Constitution;
- In the pre-constitutional era, value was largely equal to compensation because compensation was market-related; but
- The emphasis placed on a balance between the interests of the state v interests of the individual signals a difference between the concepts;
- NB! – the ‘compensation’ can differ between owners even if the ‘value’ of their properties are the same!
- Not merely theoretical, drawing a distinction can have real, practical benefits as will be shown.

3. Value v Compensation

Courts inconsistent when it comes to expropriation

Pre-constitutional era:

- Adjust the valuation if there were "demonstrable errors of inherent improbabilities" (*Estate Marks case*)
- Court is the "super-valuator", despite not being experts, a court can 'correct' a valuation but must then accept it as compensation (*Southern Transvaal Buildings case*);
- Value & Compensation seen as one and the same (courts correct valuation, not compensation); but
- Based on the old Expropriation Act where market value was payable.

3. Value v Compensation

Constitutional era:

- *Msiza case* – Court corrected valuation (excluded speculative value) but then deviated based on the purpose of the expropriation to arrive at just & equitable compensation (R1,8m v R1,5m); but
- *Msiza Appeal* (SCA) – overturned and held that the purpose was already taken into consideration in the market value – why is it then listed as 2 separate factors in s25?
- *Moloto case* (LCC) – “The mere fact that the Valuer General is empowered by the aforesaid section of the PVA Act to determine the compensation, does not, per se, oust the jurisdiction of this Court to do so...”
- *Melmoth case* (LCC) – “PV Act merely states that the OVG must value the land "for the purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines; It does not say that the OVG makes the decision as to the compensation to be paid...”

3. Value v Compensation

Practical advantages to draw a distinction

- Clarifies the roles of the valuer v the Minister;
 - Valuers should determine the 'value' of the property in line with objective criteria, i.e.
 - Market value, no speculative value (current use), value of past subsidies;
 - The Minister should receive a report on the 'value', and then apply non-financial considerations to determine what the offer should be;
 - i.e. apply purpose of the expropriation, history of the acquisition etc.
- This would make it clear that it is the Minister who applies policy considerations, and not the valuer;
- Channel litigation away from OVG:
 - If there is a dispute about the value, OVG should be cited;
 - If there is a dispute on the deviation from value to arrive at compensation, the Minister (head of policy) should be cited.

3. Value v Compensation

Practical advantages to draw a distinction

- Provide clarity to the courts on how factors were applied;
 - Isolating the influence of non-quantifiable factors that would allow compensation to deviate from value will result in better caselaw;
- Greater alignment between databases for valuations:
- The same property may be valued for:
 - Finance (by a bank);
 - Municipal Property Rates (by a municipality); and
 - State acquisition (by the OVG);
- At present, there may be a huge variance – allowing the OVG to determine ‘value’ and the Minister to determine ‘compensation’, the values in various databases may be closer together (although the Minister need not offer or pay the value if there are grounds to deviate from value when offering compensation).

3. Value v Compensation

Proposal

- OVG to determine 'value' based on quantitative factors;
- Minister to determine 'compensation' by applying qualitative factors to the value (similar to the 2-step approach to determine compensation – *Du Toit case*);

Example: Land Acquisition and Compensation Act of Victoria, Australia:

31 (3) *The offer must set out the amount that the Authority, on the information available to it, has assessed as a fair and reasonable estimate of the amount of compensation payable to the claimant under this Act on the assumption that the claimant held the interest in respect of which the offer is made.*

[...]

(5) *In making the offer the Authority must have regard to a valuation of the land carried out by the Valuer-General or a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960.*

Value	Compensation
Determined by OVG	Offered by the Minister
Relates to the Property	Relates to the owner
Quantitative	Qualitative
Delivers the report to the Minister	Makes an offer to the owner (purchase or expropriation)

4. Regulatory function v implementation

- PVA – OVG the referee and a player?
- CRLR reported delays Parliament due to valuations;
- Capacity constraints an internal matter - not be opposed to the OVG taking on a regulatory matter provided the South African Council for the Property Valuers Profession is consulted.
- SACPVP members will be required to carry out the mandate so should be explicitly consulted;
- There are several examples where statutory councils are consulted in addition to public consultations (i.e. BBBEE Act, NMW Act. OHS Act etc.);
- See written input for recommended changes to the wording of the PVA.
- Technical point of law – PVA allows the Minister and not the OVG to prescribe criteria – current Regs could therefore be *Ultra Vires*.

5. Property Valuation Regulations

- ‘Formula’ ascribes values to the factors listed in s25 of the Constitution;

Challenges

- S 25 requires a contextual approach – cannot be reduced to a simple formula;
- S 25 requires the application of ‘all relevant factors’ – formula applies 4 factors irrespective of relevance and excludes others that could be relevant;
- Pre-determined ‘weighting’ given to each factor not compatible with a contextual approach;
- ‘balancing of interests’ not compatible with a rigid formula – *German Farmer’s Case (BVerfGE 21)*

5.1 Current use value

- The 'current use' factor has been translated into the 'net-present value' which is added to market value and divided by 2.
- There is no basis for this formula in the application of s25 and it is the leading cause for litigation as it results in an under-valuation;
- Net-present value may be commonly used in valuation practice but there is no grounds for this interpretation in s25 of the Constitution;
- S25(3)(a)'s correct application, as per the Msiza case, is to exclude the speculative value of the property if it were to be used for any purpose other than the current use at the time of the valuation;
- Other policy considerations – scare resources?

5.1 Current use value

The 'net present value' formulation furthermore poses the following challenges:

- No timeframe prescribed to judge income from property – simply refers to 'time of valuation';
- Agricultural properties have a variable income;
- ROI not taken into consideration;
 - Regulation 5 (3) allows the impact of capital investments to be taken into account but no capitalisation rate prescribed (see 2009 Valuation Handbook).
- Valuation of moveables, standing crops or timber;
 - Lifecycle of standing crops (i.e. orchards) not properly accounted for;

5.1 Current use value

- Discriminates against land used for residential purposes (i.e. not income generated);
- Net Present Value aimed at valuing the going concern, not the land;
 - Income heavily reliant on management practices and business reputation, not the land's potential;
- Unintended consequence – unsustainable use of land;
- References to valuing mineral rights unfounded – mineral rights do not accrue to the owner of the land in South African law;

5.2 Acquisition benefits v the history of the acquisition of the property

"Acquisition benefits" means any benefits that accrued to the owner of, and the subject property, because of the manner of acquisition, including that they did not acquire the property at market value and from a willing owner, and where such acquisition and benefit was due to, aided by, or a consequence of past discriminatory laws and practices, or unlawful conduct.

2 elements required for acquisition benefits to be subtracted:

1. Benefits must have accrued due to past, racial inequality (*Msiza case*); Cannot punish a person who acquired property through non-market transactions but untainted by racial discrimination (i.e. by inheritance - *Mhlanganisweni Community case*); and
 2. Must have accrued to the current owner – cannot punish current owner for benefits received by predecessors in title (*Gildenhuys*)
- Unsure if all these requirements must be met – see def. of Acquisition benefits;
 - German law possibility – increase in value must be due to own labours or contribution (*Kleyn*)

5.3 Subsidies

- 2 requirements to apply s25(3)(d):
 1. Must be direct (i.e. help with the acquisition or beneficial capital improvement, general tax breaks not direct – Gildenhuis); and
 2. Current owner must have benefitted (Van der Walt);
- Above seems covered by Regulation 5 (9) but method of calculation need to be revised;
- Regulation 5(10) & (11): look at replacement costs.
- *Farjas & Florance cases*: CPI most accurate
- Proposal: calculate value at the time and apply CPI to reach current value

5.4 Purpose of the expropriation / acquisition

- S 25(3)(e) requires the purpose to be considered when calculating compensation;
- Regulations requires the valuation certificate to state that the purpose is a public purpose or in the public interest but does not get factored into formula for compensation;
- *NB – must not confuse public purpose/interest as a pre-requisite for a lawful expropriation vs the influence which the purpose may have on the calculation of compensation!*
- Mere statement that acquisition is in the public interest/purpose neither here nor there...(Reg 4(1)(c) & 7(q);

5.4 Purpose of the expropriation / acquisition

- Proposal: record purpose in valuation certificate but the obligation should be on the Minister to quantify its influence in the offer – (value v compensation);
- Purpose must be taken into consideration if relevant (s25(3)(5)), but its quantification cannot be arbitrary (Msiza Appeal);
- Weighting of this factor & its relevance in different circumstances essentially a policy decision – should not be within the scope of the PVA / valuer's role;
- A compensation policy could be developed as a policy document that guides the Minister as to which purposes justify a reduction / addition to compensation, but this should not be part of the valuer's responsibility.

5.5 Unlisted factors that may be relevant

- S25(3) requires “all relevant factors” to be considered;
- Can include ‘unlisted’ factors (*du Toit case*);
- Fixed formula with a pre-determined weighting may exclude factors that may be relevant;
- Various factors (even those in old Expropriation Act) can be considered as long as the outcome is just & equitable compensation – *du Toit case*;
- Hence, any of the following must be factored in where relevant:
 - *Solatium*;
 - Interest;
 - Relocating costs etc.
- Non-beneficial use of scarce resources? – German law concept of property serving a public function could be relevant.

5.6 Additional comments

- Reg 2 (a) – database of property and land market information;
 - Concern about creating yet another public database that is not integrated with the Deeds Office, proposed land commission or municipal property valuation roll;
 - Purchase price or compensation should be noted against the title deed;
- Reg 2 (b) - Disclosure of information
 - Similar powers are provided for in the PVA, why do they need to be duplicated in the Regs?
 - Should also be qualified by the application of s 68 (1) (c) (i) of the PAIA – grounds for a private body to refuse information if it places it in a compromised bargaining position.

5.6 Additional comments

- Reg 2 (c) – manner in which information is stored;
 - Must comply with POPI;
- Regulation 2 (d) & (E) – additional information included in the database;
 - Should only be information ‘reasonably’ needed to conduct the valuation – see s13(1)(c) of the PVA;
- Reg 3 – protection of information
 - Provision welcomed but there is a potential loophole;
 - Protection only afforded when conducting a valuation – same should apply to information in the Register;
- Reg 4 (2) (e) & (f) – interests to be valued
 - Mortgage holders should be notified; and
 - ‘just & equitable’ valuation should not be applied to moveables where a going concern is valued opposed to land only.

5.6 Additional comments

- Reg 4 (4) – notification to owner
 - Holders of real rights in the property should also be notified;
- Reg 4 (4) – time & date for physical inspection
 - Should provide an obligation on the valuer to arrange a time and date with the person in charge before entering the property (safety concern);
- Reg 8 (m) – exclusion of liability
 - Valuation certificate does not have the legal standing to do this – must be by agreement or statute;
- Reg 9 – representations by owner
 - Include holders of real rights;
- Reg 9 (2) – 30 days to make a written representation
 - Propose 90 days as an independent valuation may be required to substantiate representations.

Conclusion

- Presentation a 'snap-shot', more detail provided in the written submission;
- The PVA is of critical importance to ensure affordable rates are paid for land reform;
- Valuations that are fair and widely accepted will be beneficial to all as it reduces the chances of litigation and promotes agreement;
- We are more than willing to provide further assistance on any of the points raised in this submission.

Thank you!

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