'Just and Equitable compensation' gets a bit more content

Section 25 of the Constitution makes provision for 'just and equitable' compensation to be paid for property expropriated for a public purpose or in the public interest. It is widely known that calls to amend the constitution has recently been growing louder from certain corners as the protection of property rights is used as the scape goat to mask the country's failures to effect meaningful and efficient land reform. As a counter to this argument, one should note that the state has possessed the authority to expropriate land for land reform purposes since 1993, however this power has been used so sparsely that the courts have not had the opportunity to give content to the principle of 'just and equitable' compensation, although a recent judgement of the Supreme Court of Appeal (SCA) has assisted to some extent.

Section 25 states that;

> *"payment 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—*
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> *(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 approach adopted by the Constitutional Court to date has been to start by quantifying the market value, and then to adjust the amount depending on the applicability of the other factors in the given circumstances.

This approach was followed in the Land Claims Court (LCC) in the case of *Msiza v the Director General for the Department of Rural Development and Land Reform*, but the court was tasked with resolving a dispute regarding the 'development potential' of a portion of land that was to be bought by the Department for the benefit of a labour tenant residing on a portion of the land. According to the facts of the case, the property owners claimed that the market value should take into consideration the possibility that the land could be rezoned for non-agricultural developments, and that the market value should accordingly be determined according to its 'developmental potential'. The LCC rejected this approach and held that the market value should be determined according to its current use as agricultural land. However, the LCC went further and deducted R300 000 from the amount agreed to by the valuers for the land owner and the Department if the developmental potential was to be disregarded. The basis of this deduction was founded in clause 25 (3) (e) in that the 'purpose of the

expropriation' could be taken into account in determining compensation, and that land reform is a national imperative.

On appeal, the SCA upheld the decision that the developmental potential should not be considered in calculating the market value under the circumstances but differed regarding the second aspect. The SCA Upheld the appeal in so far as that the R300 000 should not be discounted in the absence of a clear methodology used to arrive at this number.

This judgement should be seen as a victory for the rule of law as it confirms that compensation cannot be calculated in the absence of rational methodology. In other words, the 'purpose of the expropriation' does not provide the judiciary with a blank check. However, it does leave one asking the question as to what methodology would be acceptable to arrive at a formula for calculating the influence of the 'purpose' of the expropriation given that it is a factor which a court can take into consideration? Stated differently, the judgement confirmed how it cannot be applied, but we are still left wondering how and when it can in fact be applied?

ENQUIRIES:

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