

Expropriation of land in terms of section 25 of the *Constitution* and its implications

The right to property is envisaged in the *Constitution of the Republic of South Africa*, 1996. This is a protected right in terms of the Constitution as well as in the *Universal Declaration of Human Rights*. Article 17 of the Declaration specifically stipulates that: “Everyone has the right to own property alone as well as in association with others. It further goes to say “No one **shall** be arbitrarily deprived of his property”. Some countries even claim that this right is controversial, but that is a story for another day. The purpose of this article is to shed some light on what may be missing from the amended Expropriation Bill of 2018, which was published for public comments before it can be enacted into law.

Section 25 of the Constitution purports the right to property by stating that: (1) No one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. (2) 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 been agreed to by those affected or decided or approved by court. Section 3 goes further to state that the amount of compensation and the time and manner of compensation must be just and equitable.

Section 2(a) of the Constitution is more of a concern in this case, as when property is expropriated it is usually for a public purpose or interest and this will be included in the notice of expropriation. But now, the problem comes in when such a public purpose or interest is now abandoned or rather no longer pursued. What I mean to say is, what happens now to the land or property that was taken for a legitimate reason to either build a road or a school but is now being used for urban settlements instead? Which can most definitely be classified as a private purpose. Or better yet, that land is now auctioned to the highest bidder as the public purpose could no longer be realised, what now? What about the landowner who gave up his land so the public can benefit? What about his rights as a landowner and his interest to the land? Do they automatically fall away as the land is expropriated? Is there any remedy for landowners who do not have any other choice but to sell the land to the government based on the Expropriation Bill? These are all the questions that need to be answered, however the Expropriation Bill does not provide any answers to this extent. Let's firstly start by looking at the meaning behind the word expropriation.

The Expropriation Bill defines expropriation as, compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority. It is implied herein that the expropriating authority is the government, more specifically the departments of Public Works and Land Affairs. According to the *Harvey v Umhlathuze Municipality* 2011 1 SA 601 (KZP) public purpose can be regarded as a requirement that serves as justification for an expropriation. This is due to the fact that expropriation is indeed justified by two elements, that being public purpose or interest and payment of compensation as envisaged in section 25 of the Constitution.

Now, property has indeed been expropriated and compensation has been paid and the correct procedure is followed. The problem stems in when the expropriated property has been acquired by the expropriating authority, however the property has not been used for the purpose of which it was expropriated for. Meaning that the public purpose has not been realised, which was the issue in the Harvey case. A brief background to the Harvey case is that, the municipality had expropriated Mr Harvey's property for the sole purpose of developing it into a public recreation open space area. This area was to be named “The Ridge”, in which the municipality decided to re-zone the area into a residential area instead. Mr Harvey instituted a claim against the municipality in order to get his

property back since the public purpose could not be realised. The court had to consider whether it is possible to grant an order effecting the re-transfer of property to its original owner, if the purpose for which the property was originally expropriated is no longer possible. The court refused to order the re-transfer or re-expropriation of the to the previous owner on the basis of non-realization of public purpose. This decision was due to the fact that there is no legislative basis for such an order to be made. Now the question becomes, shouldn't there be such a legislative basis or a provision at least within the Expropriation Bill, which protects landowners or property owners and grants them the right to re-claim their property should public purpose not materialize? After all, it is implied by the *Constitution* that continued possession by the expropriating authority would result in arbitrary deprivation of property should public purpose not be realised after a certain period.

Other countries such as Germany, Canada and the London have provisions set for situations such as in the Harvey case, wherein property is expropriated for a public purpose but such a purpose does not materialise. Isn't it time South Africa puts in place a similar provision or create legislative basis wherein property owners can indeed re-claim their property back from the expropriating authority after a certain period should the public purpose not be realised?

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