



Promoting active citizenship and good governance

# Land and Settlement Development Research Study

Report on:

## Expropriation

2013

Prepared by:



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## **1. PURPOSE OF THE STUDY**

Afesis-corplan has appointed CS Consulting to undertake a study that will achieve the following outcomes:

- 1.1 Afesis-corplan (and other civil society organisations – and others) have a better understanding of how expropriation legislation has and can be used to access land for settlement development.
- 1.2 Afesis-corplan (and other civil society organisations) are able to make more informed recommendations to appropriate role-players on how to improve the way that expropriation (or alternative/ similar) legislation can be used to access land for low income household settlement development.

## **2. TERMS OF REFERENCE**

The consultant's brief for this assignment is to compile a short basic expropriation report that includes the following sections:

### 2.1 Context

- a. What legislation is available that governs expropriation
- b. What complementary and alternative approaches are there to expropriation to access private land for settlement development
- c. What are the debates around expropriation

### 2.2 Case study

- a. Why was expropriation conducted in this case study
- b. What was the process that was followed and who was involved
- c. What challenges were encountered and how were these addressed
- d. What has been the outcome and impact of this expropriation exercise

### 2.3 Analysis

- a. What broad lessons can be drawn from the expropriation context and case study experience in terms of how to do expropriation
- b. What are the perceived advantages and disadvantages of expropriation compared to alternative options for accessing private land for settlement development (from the perspective of key stakeholders)

- c. What recommendations can be made for how expropriation can be better used to access appropriate land for low income households
- d. What options are there for how civil society can use and get involved in expropriation

## 2.4 Activities

### 2.4.1 In relation to the broad contextual report

- a. Undertake desk top research and write up expropriation contextual chapter of the report that summarises the legislation governing expropriation, how expropriation fits within a broader bundle of possible interventions and the key debates around expropriation
- b. Interview identified experts in the expropriation environment to get their views on the use of expropriation for settlement development.
- c. Attend Afesis-corplan seminar on land data bases and expropriation to help gather information on expropriation

### 2.4.2. In relation to case studies

- a. Assist Afesis-corplan to identify one case study example to analyse
- b. Collect and summarise existing documented information on this case study
- c. Interview key role-players who were involved in the expropriation case study to obtain their views on what happened, what challenges and opportunities were identified and what recommendations they would make for improvement in future.

### 2.4.3 In relation to analysis

- a. Write up draft expropriation contextual and case study reports
- b. Circulate draft reports to identified role-players and follow them up to obtain further feedback
- c. Produce final report and obtain approval from Afesis-corplan

### **3. BACKGROUND INFORMATION**

Expropriation is the process by which the State divests the owner of private property of his ownership rights in order to put the expropriated property to use in the public interest or for a public purpose. The erstwhile owner is paid compensation which amount is calculated by using various formulas. It is mostly the issue of quantum in respect of compensation that is litigated as opposed to the expropriation itself.

The land reform programme of the Department of Land Affairs (DLA) consists of three sub-programmes: restitution, redistribution and tenure security. These three concepts will be briefly discussed hereunder:

#### **a. Restitution**

Under the Land Restitution Act of 1994, persons or communities who lost their property as a result of apartheid laws or practices after 1913 were permitted to submit claims for restitution (return of disposed land) or financial compensation.

#### **b. Redistribution**

Land redistribution concerns making land available for agricultural production, settlement and non-agricultural enterprises.

The main emphasis of land redistribution is to provide the disadvantaged and the poor with land for housing and small scale farming purposes.

#### **c. Tenure Security**

Subsequent to 1994 laws were introduced to give people - especially farm workers and labour tenants - security of tenure, over houses and land where they work and stay.

These laws, which prohibit the eviction of certain labour tenants and occupiers unless the prescribed procedures are followed consist of:

- Land Reform Act 3 of 1996;
- Extension of Security of Tenure Act 62 of 1997 (ESTA); and

- Prevention of Illegal Occupation of Land Act of 1998 (PIE).

Restitution is the most common ground/motivation for land expropriation. However, expropriation for redistribution and tenure security is also possible and can potentially benefit more people.

State expropriation of private property on behalf of land reform beneficiaries is allowed for in the Constitution of the Republic of South Africa. Various pieces of legislation passed since the Constitution confirms the power of the Minister of Public Works, Minister of Agriculture and the Premiers to expropriate land for all land reform purposes. The Minister of Agriculture and Rural Development and Land Reform may, for the purposes of ESTA, exercise expropriation powers equivalent to those the Minister of Public Works exercises under the Expropriation Act of 1975. The Premier of the Eastern Cape derives the authority to expropriate land and land rights from the Eastern Cape Land Disposal Act 7 of 2000.

## **4. LEGISLATIVE FRAMEWORK**

The legislative framework in respect of expropriation comprises of the following:

- The Constitution of the Republic of South Africa, Act 108 of 1996;
- Expropriation Act 63 of 1975;
- Housing Act 107 of 1997;
- Eastern Cape Land Disposal Act 7 of 2000;
- Extension of Security of Tenure Act 62 of 1997;and
- Expropriation Bill.

Each of these is discussed in more detail below.

### **4.1 The Constitution**

Property rights are protected by Section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996. Section 25(1) guarantees citizens the right not to be deprived of property except in terms of law of general application. Property rights can be expropriated in terms of Sections 25(2)

and (3). Section 25(2) permits the state to only expropriate property in terms of a law of general application for a public purpose or in the public interest. A law of general application is any legislation passed by Parliament.

The state must pay the expropriated owner compensation for the property. Compensation is to be agreed upon or, if not agreed upon, approved by a court. Expropriations on behalf of land reform beneficiaries are justifiable under the Constitution and are expressly provided for:

- Section 25(5) obliges the State to take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis; and
- Section 25(8) states that no provision of section 25 of the Constitution can prevent the State from achieving land, water and related reform, in order to redress the results of past racial discrimination.

If the State chooses to pursue resource redistribution in a manner that violates any provision of Section 25, however, it must do so in accordance with Section 36(1). Section 36(1) (the limitations clause in the bill of rights) states that rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This means that the State can refuse to honor Constitutional property rights in some circumstances. Expropriations ordinarily will not contradict the right to property as expropriation is contained /allowed in Section 25 itself.

If the State expropriates property without compensation or with very little compensation, the limitations clause becomes relevant. (See Annexure A)

## **4.2 Expropriation Act 63 of 1975**

The Expropriation Act has been promulgated to provide for the expropriation of land and other property for public and certain other purposes, and for matters connected therewith.

The Act provides for the process of expropriation which includes permanent and temporary expropriation, inspection of property, notification of expropriation and compensation.

The salient sections of this Act are set out hereunder:

#### **4.2.1 Power of Minister to expropriate property for public and certain other purposes and to take the right to use property for public purposes**

- (1) Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.*
- (2) The power of the Minister in terms of subsection (1) or any other law to expropriate any property, shall include the power to expropriate, when any property is so expropriated, so much of any other property which, in the opinion of the Minister, is affected by such expropriation as the Minister may for any reason deem expedient.*
- (3) The power of the Minister in terms of subsection (2) to expropriate property which, in the opinion of the Minister, is affected by an expropriation, shall, in the case where only a portion of a piece of land is expropriated in terms of this section, include the power to expropriate the remainder of such a piece of land if the owner so requests and satisfies the Minister that due to the said partial expropriation the said remainder has become useless to the owner, or if the Minister, after consultation with the Minister of Agriculture, is satisfied that the said remainder is or is likely to become an uneconomic farming unit.*
- (4) If the Minister negotiates with an owner of property for the acquisition thereof by means of agreement and the owner requests the Minister that the property be expropriated, the Minister may, subject to the other provisions of this Act, expropriate such property.*

#### **4.2.2. Exercise by local authority of power to expropriate property or to take the right to use property temporarily**

- (1) If a local authority has the power to expropriate property or to take the right to use property temporarily, such power may only be exercised, mutatis mutandis, in accordance with the provisions of this Act.*
- (2) For the purposes of the application of subsection (1) any reference in this Act to the Minister and the State shall be construed as a reference to the local authority concerned.*

#### **4.2.3 Notification that property is to be expropriated or is to be used temporarily**

- (1) If the Minister has decided to expropriate, or to take the right to use temporarily, any property in terms of the provisions of section 2, he shall, subject to the provisions of subsection (5), cause to be served upon the owner in question an appropriate notice in accordance with the provisions of subsection (3).*
- (2) The notice of expropriation shall—*
  - (a) contain a clear and full description of the property in question and, in the case of the taking of a right to use property temporarily, also of such right, as well as, in the case where only a portion of a piece of land or a real right in or over such portion is expropriated, or a right is taken to use only such a portion, a sketch plan showing the approximate position of such portion, and state the*

*approximate extent of such portion: Provided that whenever only a portion of a piece of land or a real right in or over any such portion is expropriated, or a right is taken to use only such a portion, the owner may, within thirty days from the date of notice, request the Minister by registered post to furnish, in accordance with subsection (3), further particulars of such portion so as to enable the owner to determine the position or extent of the said portion, and upon the furnishing of such particulars the date of the notice in which such particulars were furnished, shall, for the purposes of this Act, be deemed to be the date of notice;*

- (b) state the date of expropriation or, as the case may be, the date as from which the property will be used, as well as the period during which it will be used, and also state the date upon which the State will take possession of the property;*
  - (c) draw the attention of the owner to the provisions of sections 9 (1) and 12 (3) (a) (ii);*
  - (d) if an amount is therein offered as compensation, draw the attention of the owner to the fact that if a lessee has a right by virtue of a lease contemplated in section 9 (1) (d) (i) in respect of the property of which the Minister had no knowledge on the date of notice, the Minister may withdraw that offer.*
- (3) Subject to the provisions of subsection (5), the Minister shall cause the notice of expropriation and all other notices and documents in connection therewith to be served by causing the original or a true copy thereof to be delivered or tendered or sent by registered post to the person in question.*
- (4) If the property to be expropriated is land, the Minister shall, subject to the provisions of subsection (5), cause a copy of the notice of expropriation, or a notice to the effect that the land is being expropriated, giving the particulars of the expropriation, to be served, in the manner prescribed in subsection (3), upon every person who, according to the title deed of the land or the registers of the Registrar of Mining Titles or of any other Government office in which rights granted in terms of any law relating to prospecting or mining affairs are recorded, has any interest in that land, and, if the land is situated within the area of jurisdiction of a local authority, upon such local authority, and, if, to the knowledge of the Minister, the land is the subject of an agreement contemplated in section 9 (1) (d) (ii), or a building thereon is subject to a lien contemplated in section 9 (1) (d) (iii), upon the buyer or the builder.*
- (5) If the whereabouts of the owner or of every owner of the property in question or of any person or every person having an interest therein, as is contemplated in subsection (4), is not readily ascertainable by the Minister, or, if by reason of the number of such owners or persons having such an interest or for any other reason, he is satisfied that service of a notice or other document in accordance with subsection (3) is not practicable, or if the property is subject to a fideicommissum and it is not known to the Minister who all the fideicommissaries are or will be, he shall, instead of or in addition to causing a notice or document or notices or documents to be published in accordance with subsection (3), cause to be published once in the Gazette and once a week during two consecutive weeks in an Afrikaans and in an English newspaper circulating in the area in which the property in question is or is situated an appropriate notice complying with the provisions of subsection (2) or containing the other document in question.*

#### **4.2.4 Duties of owner of property expropriated or which is to be used by State**

- (1) An owner whose property has been expropriated in terms of this Act, shall, within sixty days from the date of notice in question, deliver or cause to be delivered to the Minister a written statement indicating —*
- (a) if any compensation was in the notice of expropriation offered for such property, whether or not he accepts that compensation and, if he does not accept it, the amount claimed by him as compensation and how much of that amount represents each of the respective amounts contemplated in section 12 (1) (a) (i) and (ii) or (b) and full particulars as to how such amounts are made up;*

- (b) *if no such compensation was so offered, the amount claimed as compensation by him and how much of that amount represents each of the respective amounts contemplated in section 12 (1) (a) (i) and (ii) or (b) and full particulars as to how such amounts are made up;*
- (c) *if the property expropriated is land and any amount is claimed in terms of paragraph (a) or (b), full particulars of all improvements thereon which, in the opinion of the owner, affect the value of such land;*
- (e) *the address to or at which the owner desires that further documents in connection with the expropriation may be posted or delivered or tendered:*

*Provided that the Minister may at his discretion extend the said period of sixty days, and that, if the owner requests the Minister in writing within thirty days as from the date of notice to extend the said period of sixty days, the Minister shall extend such period by a further sixty days.*

- (3) *If the property expropriated is immovable property, the Minister may in the manner contemplated in section 7 (3) or (5)—*
  - (a) *request the owner to deliver or cause to be delivered to the Minister within sixty days his title deed thereto or, if it is not in his possession or under his control, written particulars of the name and address of the person in whose possession or under whose control it is;*
  - (b) *request any person in respect of whom particulars have been furnished in terms of paragraph (a), to deliver or cause to be delivered to the Minister within sixty days the title deed in question.*
- (4) *The provisions of subsection (1) (a), (b) and (c) shall mutatis mutandis apply in respect of the taking, in terms of section 2, of a right to use any property for public purposes.*
- (5) *Any person who willfully furnishes false or misleading particulars in any written instrument which he by virtue of the provisions of subsection (1) or (3) (a) delivers or causes to be delivered to the Minister, shall be guilty of an offence and liable on conviction to be punished as if he had been convicted of fraud.*
- (6) *Any person who without sufficient reason refuses or fails to comply with a request by the Minister in terms of subsection (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.*

#### **4.2.5. Offers of compensation**

- (1) *The Minister may in the notice of expropriation offer the owner concerned an amount of compensation for the property.*
- (2) *If no compensation was in the expropriation notice offered for the property in question and the owner concerned fails to furnish any relevant information in terms of section 9 (1), the Minister shall within a reasonable period offer him an amount as compensation for such property.*
- (4) *If an owner has in terms of section 9 (1) indicated what amount is claimed by him as compensation and has furnished the relevant information in terms of section 9 and the Minister is not prepared to pay that amount as compensation, the Minister shall within a reasonable period offer him an amount as compensation and indicate how much of that amount represents each of the respective amounts contemplated in section 12 (1) (a) (i) and (ii) or (b) and furnish full particulars as to how such amounts are made up.*
- (5) (a) *Unless the Minister and the owner have agreed otherwise the latter shall be deemed to have accepted an offer made to him by the Minister in terms of subsection (1), (2) or (4) if he fails to make an application to a court referred to in section 14 (1), for the determination of the compensation, before the date determined by the Minister by written notice addressed to him.*
  - (b) *A notice in terms of paragraph (a) shall be addressed to the owner concerned not later than eight months prior to the date contemplated therein, and the Minister shall not later than 60 days before such date by written notice direct the attention of such owner to the first-mentioned notice.*
- (6) *A claim for compensation in terms of section 9 (1) and an offer of compensation in terms of*

*subsection (1), (2) or (4) shall remain in force until it is replaced, either before or after the institution of proceedings contemplated in section 14 (1), by another claim or an offer in terms of subsection (1), (2) or (4), according as to which subsection is applicable, or until the compensation has been determined by the court, unless the Minister and the owner have agreed otherwise.*

*(7) The Minister may from time to time ask for reasonable particulars regarding the owner's claim for compensation, and the owner may from time to time ask for reasonable particulars regarding the Minister's offer of compensation, and particulars so asked for shall be furnished within a reasonable time.*

*(8) If the Minister or the owner fails to comply with a request in terms of subsection (7), the court may, on application, issue an order directing him to comply therewith.*

#### **4.2.6 Payment of amount offered as compensation**

*(1) The Minister shall pay, on the date on which an amount is, in terms of section 10 (1), (2) or (4), offered as compensation or, if the State has then not yet taken possession of the property, on the date on which it takes possession thereof, not less than eighty per cent of such amount to the owner concerned or the person contemplated in section 19 or deposit it with the Master or utilize it in settlement of the tax or other moneys contemplated in section 20 under the same circumstances under which he should have so paid, deposited or utilized such compensation had it been determined on the date concerned.*

*(3) The payment, deposit or utilization of any amount under subsection (1) shall not preclude the determination by agreement or by a court contemplated in section 14 (1), of a different amount as compensation, but if the amount so determined as compensation is less than the amount paid, deposited or utilized, the owner to whom or on whose behalf the last-mentioned amount was paid, or the Master with whom it was deposited, or the local authority concerned, as the case may be, shall refund the difference to the State together with, in the case of such owner or local authority, interest at the rate contemplated in section 12 (3) from the date on which the amount was so paid or utilized, and, in the case of the Master, the interest accrued thereon.*

#### **4.2.7. Basis on which compensation is to be determined**

*(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed—*

*(a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of—*

*(i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and*

*(ii) an amount to make good any actual financial loss caused by the expropriation; and*

*(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:*

*Provided that where the property expropriated is of such nature that there is no open market therefore, compensation therefore may be determined—*

*(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or*

- (bb) *in any other suitable manner.*
- (2) *Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to—*
- (a) *ten per cent of such total amount, if it does not exceed R100 000; plus*
  - (b) *five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus*
  - (c) *three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus*
  - (d) *one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.*
- (3) (a) *Interest at the standard interest rate determined in terms of section 26 (1) of the Exchequer Act, 1975 (Act No. 66 of 1975), shall, subject to the provisions of subsection (4), be payable from the date on which the State takes possession of the property in question in terms of section 8 (3) or (5) on any outstanding portion of the amount of compensation payable in accordance with subsection (1): Provided that—*
- (i) *in a case contemplated in section 21 (4), in respect of the period calculated from the termination of thirty days from the date on which—*
    - (aa) *the property was so taken possession of, if prior to that date compensation for the property was offered or agreed upon; or*
    - (bb) *such compensation was offered or agreed upon, if after that date it was offered or agreed upon,*  
  
*to the date on which the dispute was settled or the doubt was resolved or the owner and the buyer or the mortgagee or the builder notified the Minister in terms of the said section 21 (4) as to the payment of the compensation money, the outstanding portion of the amount so payable shall, for the purposes of the payment of interest, be deemed not to be an outstanding amount; and*
  - (ii) *if the owner fails to comply with the provisions of section 9 (1) within the appropriate period referred to in the said section, the amount so payable shall during the period of such failure and for the purpose of the payment of interest be deemed not to be an outstanding amount.*
- (b) *Interest payable in terms of paragraph (a) shall be deemed to have been paid on the date on which the amount has been made available or posted to the owner concerned.*
- (c) *Any deposit, payment or utilization of any amount in terms of section 11 (1), 20 (2) or 21 (1) or shall be deemed to be a payment to the owner, and no interest shall in terms of paragraph (a) be payable on any such amount as from the date on which it has been so deposited, paid or utilized.*
- (4) *If the owner of property which has been expropriated occupies or utilizes that property or any portion thereof, no interest shall, in respect of the period during which he so occupies or utilizes it, be paid in terms of subsection (3) on so much of the outstanding amount as, in the opinion of the Minister, relates to the property so occupied or utilized.*
- (5) *In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely—*
- (a) *no allowance shall be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;*
  - (b) *the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;*
  - (c) *if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;*

- (d) *improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;*
- (e) *no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;*
- (f) *any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;*
- (h) *account shall also be taken of—*
  - (i) *any benefit which will enure to the person to be compensated from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate him in whole or in part for any financial loss which he will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;*
  - (ii) *any benefit which will enure to such person in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;*
  - (iv) *any relevant quantity of water to which the person to be compensated is entitled or which is likely to be granted to him, in terms of the provisions of the Water Act, 1956 (Act No. 54 of 1956), or any other law.*

### 4.3 Housing Act 107 of 1997

The Housing Act has been promulgated to provide for the facilitation of a sustainable housing development process; for this purpose to lay down general principles applicable to housing development in all spheres of government, to define the functions of national, provincial and local governments in respect of housing development and to provide for the establishment of a South African Housing Development Board, the continued existence of provincial boards under the name of provincial housing development boards and the financing of national housing programmes; to repeal certain laws; and to provide for matters connected therewith. This Act specifically authorizes Local Government to expropriate land for the purpose of housing of its residents and requires that the process as set out in the Expropriation Act be followed.

#### **PART 4: LOCAL GOVERNMENT** **Section 9 Functions of municipalities**

- (1) *Every municipality must, as part of the municipality's process of integrated development planning, take*

*all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to-*

*(a) ensure that-*

*(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;*

*(b) set housing delivery goals in respect of its area of jurisdiction;*

*(c) identify and designate land for housing development;*

*(3) (a) A municipality may by notice in the Provincial Gazette expropriate any land 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) it has obtained the permission of the MEC to expropriate such land before the 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.*

*(b) Sections 1, 6 to 15 and 18 to 23 of the Expropriation Act, 1975 (Act 63 of 1975), apply, with the changes required by the context, in respect of the expropriation of land by a municipality in terms of paragraph (a), and any reference in any of those sections-*

*(i) to the 'Minister' and the 'State' must be construed as a reference to the chief executive officer of the relevant*

*municipality and the relevant municipality, respectively;*

*(ii) to 'section 2' must be construed as a reference to this subsection; and*

*(iii) to 'this Act' must be construed as a reference to this Act.*

#### **4.4 Eastern Cape Land Disposal Act 7 of 2000**

This Act has been promulgated to provide for the acquisition and disposal of land owned by the Government of the Province of the Eastern Cape and for matters incidental thereto. The Act expressly includes the acquisition of land by the Premier of the Eastern Cape viz expropriation.

#### **Eastern Cape Land Disposal Act**

*Definitions:*

*In this Act unless the context otherwise indicates:—*

*“**acquire**” includes the purchase, expropriation, exchange, letting or receipt of provincial immovable property through donation, the conclusion of a land availability agreement in respect of provincial immovable property and registration of a real right in respect of provincial immovable property in favour of the Government and “**acquisition**” shall have the same meaning;*

#### **2. Acquisition and disposal of provincial immovable property.**

*(1) The Premier may, on the terms and conditions as he or she deems fit acquire or dispose of provincial immovable property.*

## 4.5 Expropriation Bill

On 12 November 2007 the Government published the draft policy on the Expropriation Bill, which proposes amendments to the current expropriation framework. It criticizes the existing Expropriation Act in that the latter:

- Since it pre-dates the Constitution is not infused with transformative intent;
- Is not consistent with comparable foreign statutes; and
- Is inconsistent with the Constitution as far as the public purpose and compensation requirements are concerned.

The Draft Policy was followed by the Expropriation Bill, introduced by the Minister of Public Works and tabled in Parliament in 2008 and, after extensive and emotional debate, withdrawn. During the public consultation process, numerous objections were made to the 2008 Bill, including warnings of a threat to the property market; that the Bill would severely discourage foreign investment; and that it would infringe the protection of property in Section 25 of the Constitution. The 2008 Expropriation Bill was withdrawn due to significant constitutional challenges as it prohibited expropriated parties from challenging the value offered for their property in court.

On 15 March 2013, the Department of Public Works published the draft Expropriation Bill for public comment, together with an explanatory memorandum. The Bill seeks to replace the Expropriation Act 1975 as well as its predecessor, the draft Expropriation Bill, 2008.

The Bill purports to give effect to Section 25 of the Constitution of the Republic of South Africa, which deals with the protection of property.

The most important aspects of the Bill is discussed under the heading “Debates and Issues”

### The objectives of the draft Expropriation Bill (2013)

The Draft Bill seeks to align the Expropriation Act with the Constitution and to provide a common framework to guide the processes and procedures for expropriation of property by organs of state, by providing for –

- (a) The express inclusion of public interest as one of the purposes for which property may be expropriated. Expropriation in the public interest, for instance, provides government with a tool to achieve its commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;
- (b) All affected parties to be notified of a contemplated expropriation, to afford such parties an opportunity to raise objections and make representations to the expropriating authority, before a decision to expropriate is taken. The expropriating authority must give consideration to all submissions and attempt to reach agreement with persons whose rights and interests may be adversely affected before deciding to expropriate;
- (c) Urgent temporary expropriation to facilitate disaster management or comply with a court order authorizing such expropriation;
- (d) The expansion of the scope of protected rights to provide for compensation for both registered and unregistered rights. In terms of the Expropriation Act, only the holders of registered rights and certain specified unregistered rights are eligible for compensation upon expropriation. Section 25 of the Constitution, however, does not distinguish between registered and unregistered rights. It could thus be perceived as unconstitutional to terminate unregistered rights without compensation;
- (e) The payment of just and equitable compensation to persons affected by expropriations, with such compensation reflecting an equitable balance between the public interest and the interests of those affected. Whilst the market value of expropriated property is a predominant factor in the Expropriation Act, the Constitution does not give undue weight to any single factor over others, but requires consideration of all relevant factors, including -
- the current use of the property;
  - the history of the acquisition and use of the property;
  - the market value of the property;
  - the extent of direct state investment and subsidy in the acquisition
  - beneficial capital improvement of the property; and
  - the purpose of the expropriation.

- (f) Expropriating authorities and affected persons to exchange technical reports and other relevant information, in endeavouring to reach agreement on compensation. In the absence of the parties to an expropriation reaching agreement on compensation, any such party may approach a court to decide or approve the amount of compensation or the time or manner of payment of such compensation;
- (g) All disputes emanating from expropriations to be dealt with by the Court having competent jurisdiction.
- (h) The establishment and maintenance of a register of all expropriations by the Department of Public Works. All expropriating authorities will therefore be obliged to provide the Department with copies of all notices of contemplated expropriation, expropriation and withdrawal of expropriation, as well as decisions not to proceed with contemplated expropriations;
- (i) The withdrawal of an expropriation of property if the expropriating authority is of the opinion that it is in the public interest or otherwise expedient to do so;
- (j) All existing laws dealing with expropriation to continue to apply, to the extent that they are consistent with the provisions of the Draft Bill and the Constitution. The Draft Bill proposes that no property may be expropriated unless the procedures prescribed in the Draft Bill have been followed; and
- (k) The repeal of the Expropriation Act, 1975.

## **5. CASE STUDY**

The case study chosen for this assignment involves Erf 16 Bryntirion (Pty) Ltd versus the Minister of Public Works which was heard at the Supreme Court of Appeal of South Africa (914/10) [2011] ZASCA 246 (1 December 2011). This case sets out the legal process that will ensue upon an aggrieved landowner opposing the actual purpose of an expropriation as opposed to the compensation. A similar process will be followed where the expropriation for the purpose of low cost housing is proposed.

## 5.1. Background

On 3 January 2008, the respondent, the Minister of Public Works (the Minister), issued a notice reflecting her decision to expropriate Erf 16 Bryntirion (the property), being immovable property owned by the appellant, Erf 16 Bryntirion (Pty) Ltd (Bryntirion), and situated within the Bryntirion Estate which incorporates the Presidential Residence, the Presidential Guesthouse and the houses of cabinet ministers. Bryntirion instituted proceedings in the North Gauteng High Court, Pretoria, for an order, inter alia, reviewing and setting aside the Minister's decision. The court below of first instance dismissed the application. Bryntirion, with the leave of the court, appealed to the Supreme Court of Appeal against the dismissal of the application.

## 5. 2. Facts

During September 2005, the Department of Public Works (the department) approached Bryntirion with an offer to purchase the property. The letter recording the offer stated the reason for the intended purchase as follows:

*'The intention to purchase your property has been informed by the fact that all properties within the estate boundaries are government owned except for the one land parcel viz. Erf 16 Bryntirion which is owned by your company Erf 16 Bryntirion Pty LTD.*

*As the government is intending to upgrade the estate, your property is situated on the main entrance to the Bryntirion estate and if not purchased will have a detrimental impact on the security planning for the estate as a whole.'*

Bryntirion, through its attorneys, advised the department that it had no intention of selling the property. On 22 September 2005, the department again addressed a letter to Bryntirion, asking it to reconsider its position and requesting a meeting of the parties in order to discuss the reasons for the proposed acquisition of the property by the department. Bryntirion did not take the department up on this suggestion.

During October 2005, notice was given to Bryntirion of the intention of the City of Tshwane Metropolitan Municipality to close Nassau Street (a street running through Bryntirion Estate) and

to consolidate a number of erven and the internal road network to form the Bryntirion Presidential Estate.

In terms of a letter dated 26 January 2006, the department advised Bryntirion that it had 21 days to make representations and be heard before the property was 'finally expropriated'.

On 8 February 2006, Bryntirion advised the department that it intended to object to the expropriation and requested certain information to enable it to make representations. After initially agreeing to furnish the information requested by Bryntirion, the Minister, by letter dated 4 August 2006, advised Bryntirion that its request for information was premature in that a decision had not yet been made to expropriate the property. In the same letter, the Minister set out the purpose of the intended expropriation:

*'You are well aware that the property ... lies within the proximity of the residential complex for Senior Government Officials including Ministers. The Government intends to upgrade the estate with a view to, amongst others, enhancing the security planning for the estate as a whole. The property to be acquired in giving effect to this objective will be so acquired for public purpose and in the public interest.'*

*You are therefore granted an opportunity in terms of Section 3 of PAJA to respond in writing to our Department as to why your property should not be acquired for public purposes and in the public interest. Kindly send your representations within 14 days from the date of receipt of this letter to our Department.'*

In terms of a letter dated 13 September 2006, Bryntirion's attorneys repeated their request for certain information in order to enable Bryntirion to make representations and further stated that there appeared to be a contradiction as to whether or not a decision had already been taken to expropriate the property. The department, in its response dated 10 October 2007, set out the reasons for the intended expropriation in the following terms:

*'1. Your client's property is the only private property within the Bryntirion Estate;*

*2. The positioning of your client's property on the estate makes it impossible to cordon off the entire estate for effective security measures; and*

3. *The Government intends to upgrade the estate with a view to, amongst others, enhancing the security planning for the estate as a whole.*<sup>1</sup>

The letter proceeded to furnish answers to some of the questions posed while withholding information which, in the view of the department, would compromise matters of security. Information was withheld in relation to, inter alia, the plans to upgrade the Estate, alternative entrances to the Estate and the fate of the property after expropriation. Bryntirion was also called upon to file representations, if any, within seven days of receipt of the letter.

By letter dated 2 November 2006, Bryntirion's attorneys set out 'preliminary representations' as to why the property should not be expropriated. These included:

*'The expropriation is not in the public interest or for a public purpose.*

*The expropriation is not urgent.*

*No proper and rational consideration has been given to the alternatives to expropriation.*

*The Bryntirion Estate can be constituted without inclusion of our client's property, and our client's property can therefore not be said to be the only private dwelling within the estate.*

*Security will not be more effective or better managed by inclusion of our client's property in the estate.*

*The consolidated plan of the proposed consolidated erf in Bryntirion Presidential Estate as prepared by Metroplan excludes our client's property as part of the consolidated erf.*

*Our client has occupied the property for ten years with the State as his neighbour on all sides, except on the street front with Dumbarton Road. Our client's presence has at no previous time been suggested to constitute a security risk or an impediment to the effective security of the adjoining properties occupied by Government officials.*

*No real threat to the security of residents of Bryntirion Estate which is any greater than the security risk to residents in the adjoining residential areas in Pretoria has manifested and which reasonably requires Government Ministers and officials to be segregated in a security estate from persons resident in the adjoining areas.'*

On 13 February 2007, the Minister advised Bryntirion, in writing, that she was required to make a decision regarding the proposed expropriation of the property. Relevant portions of her letter state:

### Purpose of Expropriation

*2.1 The property in respect of which I have to make the aforementioned decision, is required for inclusion into the Government residential complex for members of Cabinet. It is the only property within the complex under private ownership.*

*2.2 The acquisition of the property is intended to effect adequate security measures within the complex.*

*3. Upon expropriation, the property will form part of the Government complex to which it is presently immediately adjacent.*

*4. You will be entitled to compensation in respect of the property to be expropriated.*

*5.3 You are hereby afforded the opportunity to comment, in writing, within 21 days of delivery of this letter to you.*

On 13 March 2007, Bryntirion's attorneys made representations as to why the property should not be expropriated. These representations were substantially similar to the representations made on 2 November 2006, set out above. There was further correspondence between the parties around the issue of expropriation of the property.

On 3 January 2008, the Minister signed a notice of expropriation which was delivered to Bryntirion on 7 January 2008. Compensation in the amount of R7 620 800-00 was offered to Bryntirion.

Bryntirion instituted review proceedings on 27 February 2008 in terms of Uniform Rule 53.

On 12 August 2008, the Minister delivered a record of what she had considered before she took the decision to expropriate the property. It was common cause that the documents that were placed before the Minister to enable her to make a decision regarding the property consisted of legal opinions, correspondence between the department and Bryntirion's attorneys and consultants' reports. The Minister did not include the legal opinions in the record on the grounds that they were privileged and included only an edited version of a consultant's report titled 'Department of Public Works, Bryntirion Estate- Preliminary Design Report on the Security Electronic Systems' (the Bryntirion Report). The Minister refused to make full disclosure of the Bryntirion Report on the grounds of state security. Pursuant to the Minister's refusal to make available the three legal opinions and the full Bryntirion Report, Bryntirion applied to court, in terms of Uniform Rule 30A, for an order directing her to deliver these documents. This application was dismissed by the High Court (Seriti J) on 17 June 2009.

Section 2 of the Expropriation Act 63 of 1975 empowers the Minister to expropriate any property for 'public purposes' subject to the obligation to pay compensation. For present purposes, the requirements for a valid expropriation are that it must be for a 'public purpose', comply with the procedural requirements set out in the Expropriation Act, be the product of a *bona fide* exercise of discretion and not arbitrary or irrational and it must not be for an ulterior purpose.

Bryntirion argued that the decision to expropriate was irrational. In order to succeed, it must demonstrate that the decision served 'no legitimate governmental purpose'. The SCA Judge held that in his view, no basis upon which it could be found that the decision to expropriate was irrational. The evidence clearly demonstrates that the expropriation had a rational purpose relating to legitimate security concerns. It has been held that expropriation of land bordering on the official residence of the President in order to obtain a greater measure of security and privacy for him is an expropriation for 'public purposes'. The expropriation in the present case was clearly for 'public purposes'. In fact, it was not contended otherwise by Bryntirion.

It was common cause that the Minister's decision to expropriate the property was 'administrative action' as defined in Section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and which materially and adversely affected Bryntirion's rights. Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. In order to give effect to the right to procedurally fair administrative action, an administrator must, inter alia, give the affected person notice of the nature and purpose of the proposed administrative action and an opportunity to make representations

Fair administrative procedure depends on the circumstances of each case. Adequate notice includes the duty to provide the affected person with the essential information which motivates the impending action, and must indicate what the main considerations for the contemplated action are in order to enable the affected person to prepare a response.

It was contended that Bryntirion was not given sufficient information in order to make meaningful representations as to why the property should not be expropriated. It was further contended that Bryntirion was not given adequate notice of the nature and purpose of the proposed administrative action, nor was it given a reasonable opportunity to make representations in regard to the proposed expropriation. The effect of this, so the argument went, was to render the expropriation process procedurally unfair.

From the very first communication to Bryntirion, and consistently thereafter, it was advised that the ultimate purpose of the expropriation was to make the Bryntirion Estate a single geographic unit. Bryntirion was told that the property was the only privately owned property within the estate, that the government intended cordoning off the entire estate in order to enhance the security and this could only be effectively achieved if the property was to achieve part of the estate. Bryntirion was left in no doubt that the reason for the expropriation related to the establishment of a secure estate. Bryntirion was invited to make representations on four occasions. Representations were in fact made on two occasions. It is clear from the representations made by Bryntirion that it had been given sufficient information regarding the underlying reasons for and the purpose of the

expropriation. Bryntirion has never been in any doubt about the reasons for the expropriation. It did not need to know precisely what measures would be taken. In these circumstances, it cannot be said that the procedure adopted was unfair.

The high watermark of Bryntirion's case was that the security concerns could be met without the expropriation. It had suggested, inter alia, that a perimeter fence could quite easily be erected around the Estate without including the property in the new security perimeter. It was also argued that the security concerns raised by the Minister with regard to the property could be raised against all the residences on the western side of Dumbarton Road.

It is for the expropriating authority to decide how best to achieve its purpose. The evaluation of whether an expropriation is expedient or necessary lies with the expropriating authority. The fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a 'public purpose'.

The Appellant, Bryntirion being unsuccessful in his appeal application, was forced to sell his property to the State. The price (compensation) was still to be agreed, or on failure to agree, determined by the court. It appears that the parties agreed as no subsequent litigation pertaining to the quantum of compensation could be found.

#### Lessons learned:

- Expropriation is an administrative action which can materially and adversely affect the rights or legitimate expectations of any person and must be procedurally fair; inter alia the affected person must be given notice and given an opportunity to make representations;
- Fair administrative procedure depends on the circumstances of each case;
- Where expropriation is for a public purpose it may be successful despite there being other means to achieve the purpose;
- Expropriation must have a rational purpose.

## **6. THE DEBATES/ THE ISSUES**

The newly drafted Expropriation Bill of 2013 is expected to be promulgated and in force by the last quarter of 2013. Currently this Bill is being extensively debated, especially by legal professionals, for the reasons as set out here under.

The Expropriation Bill appears to depart from the Act in that it increases the scope for expropriation to include grounds that are in the "public interest", and no longer bases the determination of compensation on market value. The expansive scope is in line with constitutional imperatives.

Notably the Deputy Minister of Public Works, Jeremy Cronin, has stated that the Bill's passage will standardise expropriation processes that flowed from up to 200 pieces of enabling legislation. This in itself will create more certainty in respect of expropriation processes.

Furthermore, Cronin has remarked that the fundamental objective of the Bill is to achieve its objectives in the public interest in a just and equitable way. This gives the public greater comfort as the Bill is not aimed at empowering the State to expropriate at will. The expropriating authority will be obligated to motivate why property would serve a public interest/purpose and also allows for affected parties to judicially challenge the decision to do so.

The 2008 Expropriation Bill was withdrawn due to significant constitutional challenges as it prohibited expropriated parties from challenging the value offered for their property in court. This provision has not been retained in the current version. The public comment process has been concluded, and will be tabled in Parliament subsequent to being referred to Cabinet. The parliamentary process will, nevertheless, certainly present a further opportunity for concerned citizens, civil society and businesses to make comments, hopefully to be followed by public hearings and a frank national discussion on the matter

In line with the property clause in the Bill of Rights, the Bill forces the consideration of all relevant factors and places less emphasis on market value in determining compensation, .

Such factors will include the history of acquisition and the extent of state subsidy involved i.e. the State will most likely be less inclined to offer the full market price where such property was obtained with the assistance of a state subsidy; the purpose here can only be assumed that the purpose of this is to prevent the State from repeatedly paying or contributing to the purchase of the same property.

Where the compensation offered is contested, the Bill provides that the party will be paid 80 percent of the amount determined by the Minister which will be paid on transfer and the balance upon settlement of the dispute by the court.

### Important and potentially problematic provisions of the Bill

#### a. Compensation

As required by the Constitution, the compensation must be "just and equitable" and reflect "an equitable balance between the public interest and the interests of the expropriated owner and the expropriated holder".

The market value of the property to be expropriated is only one of a non-exhaustive list of five relevant considerations which must be taken into account when determining the amount of compensation. The four remaining factors are:

- the current use of the property;
- the history of the acquisition and use of the property;
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- the purpose of the expropriation.

Accordingly, the compensation awarded in the event of an expropriation might well be less than market value. While this is a departure from the Act, it is in fact in line with the Constitution. This could open the possibility for a person to receive a greater value for property currently valued at a nominal value due to its zoning because the intended purpose of the expropriation places a greater value on the property. However, the new expropriation Bill states that compensation must not take into account "the special suitability or usefulness of the property for the purpose for which it is required by the

expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market.”

#### b. Public interest

The Bill empowers the Minister to expropriate property for a both a public purpose and in the public interest.

The Bill defines public interest very broadly, in that it does not provide additional criteria to assist in the assessment of what would be in the public interest. Public interest is instead defined as "(including) the nation's commitment to land reform, as well as reforms to bring about equitable access to all South Africa's natural resources and related reforms in order to redress the results of past racial discriminatory laws or practices. This definition merely includes some examples of what might be in the public interest. This is potentially problematic as it raises the possibility of litigation that may otherwise be avoided by defining the concept of public interest more acutely.

Without properly and clearly defining the meaning of this concept, this may also result in unintended and negative consequences for property owners and holders when left to subjective interpretation by the Minister or other expropriating authorities. As such, a much more exact definition of *public interest* is essential.

#### c. Expropriation for the benefit of a juristic person

The Bill permits the expropriation of property on the grounds of public interest or public purpose for the benefit of a juristic person which is established by law, and which is required to account for the management of its finances under the Public Finance Management Act, 1999 (PFMA) or the Local Government: Municipal Finance Management Act, 2003 (MFMA).

This means that municipal entities and all the public entities listed in the PFMA, constitutional entities and parastatals as well as their subsidiaries are included in the definition of juristic person which would enable these entities to benefit from the expropriation of land.

## 7. ALTERNATIVES

As an alternative to expropriation of land the State could consider passing legislation which would essentially give the State the legal right of first refusal on all or specified land transactions (direct approach) or levying penalties by way of higher rates and taxes on vacant land (indirect approach) whereby landowners may be more incentivised to offer vacant land for sale. The promulgation of any such legislation would be an arduous and time consuming process, which will no doubt come under the scrutiny and dissatisfaction of various groups, especially investors, which, it could be argued will have an adverse effect on the economy. It appears that the City of Johannesburg is already implementing this practice and it would be advisable for other Municipalities to investigate this approach. What would appear to be a mutually beneficial option is the conclusion of 99 year leases by the State with property owners as this would secure a real (property) right thus securing tenure.

Land banking is another strategy where governments acquire land cheaply and hold it for future housing developments. There is no one single definition of land banking. The land banking concept can be applied in a variety of different ways depending on the context and whether it is applied by the private sector or public sector. Land banking is not only a tool for public authorities as it is also used by private investors speculating on land value as a profit-making endeavor.

Land banking in developing countries is a concept most often associated with accessing land for the provision of public purposes such as housing, managing land markets and directing land speculation. A more appropriate definition of land banking and one that which seems more fitted for developing countries is presented below:

‘Land banking implies that government acquires land in advance of needs. The main advantages are that it allows the purchase of land, relatively cheaply, for public purposes and provides a tool to influence the pattern of development in accordance to overall planning objectives’ (UNESCAP, 1993) as quoted in Urban Landmark (2007).

There are at least three fundamental actions to land banking namely:

- Land acquisition
- Land management

- Land development

Achieving efficiencies in every one of those actions determines whether land banking objectives are met. It is most often a delayed and expensive land acquisition process that undermines success. Given the technical and legal nature of each of these steps, structuring the appropriate managing entity is crucial. What is required is an entity that has the authority to acquire, assemble and manage the development of large parcels of land. In most instances land banking is managed through an independent body such as a Land Bank or Community Land Trusts (CLT) Urban Landmark (2007).

## **8. CONCLUSIONS FROM CASE STUDY RESEARCH**

Based on the legislative framework and the case study outlined above, the following represents a summary of concluding remarks on the complex issue of expropriation:

- Property rights are protected by Section 25 of the Constitution of the Republic of South Africa.
- In terms of Section 25(2) the state may only expropriate property in terms of law of general application for a public purpose or in the public interest. The state must pay the expropriated owner compensation for the property. Compensation is to be agreed upon or, if not agreed upon, approved by a court.
- In most instances, litigation relating to expropriation is not in respect of the actual expropriation, but rather the amount of compensation.
- The laws of general application relevant to this opinion are the Expropriation Act 63 of 1975, as primary expropriation legislation, with the secondary legislation being the Housing Act 107 of 1997 and the Eastern Cape Land Disposal Act 7 of 2000. The Expropriation Act sets out the process (blueprint) to be followed in respect of expropriation.
- Property may be expropriated either for a specific purpose in terms of legislation i.e. the purpose of housing in terms of the Housing Act or for a public purpose / public interest in terms of the Expropriation Act.
- Expropriation for the purpose of providing low – cost housing is recognized by our courts as serving a public purpose. In *Offit Farming Enterprises (Pty) Ltd v Coega Development*

Corporation (Pty) Ltd<sup>1</sup> the Supreme Court of Appeal held that *“the expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself, using the same contractors. I do not think it can be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company.”*

- The Housing Act specifically authorizes Provincial Government / Local Government to expropriate land for the purpose of housing of its residents within the framework of a national housing policy.
- The expropriation process as contained in the Expropriation Act involves the following (any reference to Minister should be replaced by Premier or Provincial MEC for Housing where expropriation is in terms of the Eastern Cape Land Disposal Act or Housing Act respectively):
  - The delivery of a Notice of Expropriation which must include a description of the property, the date of expropriation;
  - The owner shall, within sixty days from the date of notice in question, deliver or cause to be delivered to the Minister a written statement indicating:
    - whether or not he accepts the compensation if any compensation was offered in the notice of expropriation and, if he does not accept it, the amount claimed by him as compensation;
    - if no such compensation was so offered, the amount claimed as compensation.
  - If the property expropriated is immovable property, the Minister may request the owner to deliver or cause to be delivered to the Minister within sixty days his title deed thereto.
  - If an owner has indicated what amount is claimed by him as compensation and the Minister is not prepared to pay that amount as compensation, the Minister shall within a reasonable period offer him an amount as compensation.
  - Unless the Minister and the owner have agreed otherwise the latter shall be deemed to have accepted an offer made to him if he fails to make an application to a court for the

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<sup>1</sup> Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd [2010] 2 All SA 545 (SCA)

determination of the compensation, before the date determined by the Minister by written notice addressed to him.

- The amount of compensation shall be based on the following:
  - (i) amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and
  - (ii) an amount to make good any actual financial loss caused by the expropriation; and
  - (iii) an amount equal to—
    - (a) ten per cent of such total amount, if it does not exceed R100 000; plus
    - (b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus
    - (c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus
    - (d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.
- The compensation to be paid for any property expropriated by the Minister or for any right to use property taken by the Minister, shall, in the absence of agreement, on the application of any party concerned be determined by a provincial or local division of the Supreme Court in whose area of jurisdiction the property in question is or is situated on the date of expropriation.
- It is thus clear that expropriation for the purpose of provision of adequate housing recognized by the legislature as it is specifically provided for in the Housing Act 107 of 1997.

## 9. RECOMMENDATIONS

### 9.1 General recommendations

The following is a broad list of possible recommendations

#### 1. Expropriation as last resort

If government understands expropriation as generally being undertaken as a last resort, then more clarity needs to be given on the type of interventions that need to be considered prior to resorting to expropriation.

#### 2. Expropriation and compensation amounts

The amount of compensation for expropriation is usually the most controversial issue. More research needs to be done on making it clear that amount should not take into account anticipated land price increases as a result of government intervention (e.g. future rezoning or building of a new bus route past the area as the area is developed for low income housing). If its farm land now, expropriate as farm land even if it is then to be used as low income housing.

#### 3. Spatial planning and expropriation

Government needs to improve more on its land and housing planning so that it is clear what land is needed for settlement and low income housing development. This will make it much easier for government to expropriate land in the public interest. This planning should look at alternative land portions so that if a decision is taken to expropriate, it can be shown that attention was given to alternative land. Government should consider expropriation more in instances where they have developed clear spatial development plans.

#### 4. Expropriation for land banking:

Government should conduct further research on and undertake pilot projects looking at land banking. The use of expropriation legislation in such land banking contexts should be considered so that appropriate, affordable land is obtained. Clarity should be obtained in such instances that expropriation

can be used even if the land in question is not to be immediately made available for low income housing.

5. Using public/ state land rather than expropriating private land

More attention needs to be given to first identify state and public land for low income housing so one does not have to consider expropriating private land. However, public / state land should not be used just because it is available. It must be able to fit within a broader spatial development framework where the land is considered desirable for development.

6. Awareness raising and publicity of expropriation

Government and civil society need to draw the public's attention to where expropriation is or has been conducted well or badly. Many communities do not understand how it works and this contributes to fueling misunderstanding, rumors and other negative interpretations. Attention needs to be given to explaining and summarizing how compensation is determined in expropriation contexts. The amount of compensation tends to be the most controversial issue when it comes to expropriation. Examples of good and bad compensation should be provided. Simplified documentation / pamphlets/ DVD's etc. should be developed that summarise and explain how expropriation works.

7. Capacity building around expropriation

Government officials, communities, the legal profession and others need to be trained in knowing when expropriation is appropriate and how it is to be conducted. Significant attention needs to be given to building capacity in determining compensation amounts. Bad precedent in determining compensation (either too much or too little) gives expropriation a bad name, so it is important that those that determine expropriation amounts have the skills and knowledge to do so appropriately. .

8. Expropriation check lists

A summary check list should be developed that communities, government, land owners and others can use to see if all the issues have been thought through before deciding to do expropriation and while

doing the expropriating. The check list can also include a set of criteria for when it's appropriate to use expropriation. Examples of this would be:

- when there is no other piece of land that can be used (e.g. informal settlement already on land and can't be moved? )
- when other options of land have been identified but this piece is the most promising
- when negotiations have been tried but failed
- as an 'inducement' to get owner to willingly sell. Especially when it can be shown that by willingly selling the owner is actually likely to get more money

#### 9. Expropriation and data bases

Government should keep a central data base, which is accessible and publicized to the public, of what land has been expropriated, the purpose of the expropriation, the compensation amount and how the compensation was determined.

#### 10. Expropriation and monitoring and evaluation

Government departments that regularly do expropriation should establish expropriation forums, made up of representatives from other government departments, the private sector and civil society. These forums should be informed of all expropriation that is being considered and undertaken by that particular department. Consideration should be given to establish such a forum as an inter-departmental forum (e.g. housing and land affairs) so that expropriation can be monitored from a central point

#### 11. Expropriation and community groups

Communities and government need to partner especially in instances where communities are requiring government to support them in acquiring land through expropriation. Pilot projects should be developed where land identified by communities, that forms part of municipal plans, is expropriated by government on behalf of the communities..

#### 12. Pre- planning and interim/ emergency services and expropriation

More research needs to be done to look at what interim and/or emergency interventions can be taken in instances where communities are already occupying land that is in the process of being expropriated or considered for expropriation or where the land is needed for occupation in an emergency or other situation, but expropriation processes are still under way.

### 13. Land Value Capture (LVC) and expropriation

More research needs to be done to look at opportunities for linking LVC and expropriation. An example of LVC is if government builds a new BRT bus stop which results in the land prices around the bus stop increasing. The private land owners in the area then make a profit when they sell the land around the bus stop as a result of the increased value of the land. The state can use property taxes and fees etc. to recoup some of this land value increment that the land owners obtained as a result of state intervention in building the bus stop. This income is then used by the state for development purposes (e.g. subsidize well located low income housing). In such instances, expropriation could be considered to purchase well located land in these areas. Given that expropriation takes more than just market price into account a strong argument could be made for paying far less than market rates in these instances as the value improvement to the land is not due to the land owner but rather due to the state. Income through taxes and fees can also be put into an expropriation fund to be used to expropriate other well located land in this area.

### 14. Expropriation and social workers

It needs to be recognized that land and expropriation is a very emotional issue. We should not shy away from this. Government departments doing expropriation should consider employing psychologists and social workers so that the social and emotional aspect to expropriation is also considered and it's not just seen as a technical matter. These social workers would advise on, for example the procedures and language that gets used during the expropriation process in a way that does not trigger anger and aggression.

## 9.2 Recommendations for Civil Society (CS)

The following provides a list of example of what civil society can do in relation to improving the use of expropriation in achieving the objective of accessing land for low income housing.

1. Civil Society (CS) organizations need to build their understanding of expropriation so they are in a position to engage with an expropriation process, either from the point of view of those wanting to expropriate (e.g. a municipality expropriating land for low income housing purposes), or from the point of view of those opposing expropriation (e.g. where it can be seen that the expropriation is not in the public interest, or there appears to be corruption in the process, or, for example environmentally inappropriate land is being expropriated.)
2. CS should lobby for many of the recommendations listed above to be implemented by government and others.
3. In many instances, such as the awareness raising, capacity building, and check list recommendations listed above, civil society itself may have to fund raise for and initiate the awareness raising and capacity building interventions.
4. CS needs to put far more pressure on municipalities to undertake appropriate spatial planning. Such planning will be crucial for government to be able to demonstrate that expropriation is justified and that the land to be expropriated forms part of a long term development plan of the municipality.
5. CS should identify and publicize examples where expropriation has been done well in the past and draw attention to the advantages of a well run expropriation exercise. (i.e. courts and valuers were wrong in how they compensated)
6. NGO's involved in legal work and litigation, should, through working with communities and/or municipalities undertake and/or lobby for government to undertake expropriation in specific cases. This will give role-players more experience and confidence in using expropriation and will show that expropriation can be appropriate in many instances in addressing the housing needs of the poor.

7. In instances where expropriation is conducted, development NGOs should also be involved so that the projects that are developed on the land are planned and implemented in a way that involves the community that will benefit from the land.

## **10. REFERENCES**

- I. Constitution of the Republic of South Africa
- II. Eastern Cape Land Disposal Act 7 of 2000;
- III. Erf 16 Bryntirion (Pty) Ltd versus the Minister of Public Works (914/10) [2011] ZASCA 246 (1 December 2011)
- IV. Expropriation Act 63 of 1975;
- V. Expropriation Bill
- VI. Extension of Security of Tenure Act 62 of 1997
- VII. Housing Act 107 of 1997
- VIII. Urban Landmark: International Land Banking Practices- Considerations for Gauteng Province, 2007

## ANNEXURE A: Constitution property clause

### Constitution – Section 25 Property

*(1) No one may be deprived of property except in terms of law of general application, and 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*

*(6) 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.*

*(3) The amount of the compensation and the time and manner of 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-*

*(a) the current use of the property;*

*(b) the history of the acquisition and use of the property;*

*(e) 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.*

*(4) For the purposes of this section-*

*The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.*

*The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

*(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

*(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

*(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).*

*(9) Parliament must enact the legislation referred to in subsection (6).*