

WILL THE EXPROPRIATION BILL BE THE DEATH OF DEVELOPMENT IN SOUTH AFRICA?

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The latest Expropriation Bill, which was published in December 2018 (the Bill), has the potential to bring all development in South Africa to a screeching halt.

Expropriation without compensation is a contentious issue in South Africa. Everyone appears to accept that South Africa needs to redress the injustices of the past and to do so, the demographic of land owners needs to be reformed. At what cost though?

The Bill mimics the Constitution of the Republic of South Africa, 1996, by stating that property may be expropriated for a public purpose or in the public interest and further states that the amount of compensation to be paid to an owner must be just and equitable, reflecting a balance between the public interest and the interests of the owner.

The Bill lists the following factors that must be considered when compensation is to be determined, including the current use of the property, the historic acquisition, market value, the extent of the State's investment and the purpose of the expropriation. This list is not exhaustive and is, again, taken from the Constitution.

Where the Bill deviates from the Constitution is that it provides for 5 distinct circumstances in which it may be just and equitable for land to be expropriated for "nil compensation". Three of the five circumstances are relatively uncontroversial: where the land is occupied by a labour tenant, where the land is owned by a state-owned entity and where the market value of the land is equal to or less than the State's investment in the land.

The remaining two are the proverbial cats amongst the developers' pigeons: where the land is held for "purely speculative purposes" and where the owner of the land has "abandoned" the land.

The Bill does not in any way clarify what is meant by "speculative purposes". Suppose a developer is holding a piece of land for development purposes, but it is not clear what type of development is to be erected. Would the State be entitled to expropriate the land for zero compensation?

What is meant by the phrase "abandoned land"? If an owner has not resided on a property for a few years and has done nothing to maintain the property, is the State entitled to expropriate that land, without paying anything to the owner, when there may still be significant value in the land?

If that isn't enough to deter development, the way in which the Bill deals with mortgage bonds certainly will. The Bill states that the mortgage on an expropriated property will cease to exist. The Bill contemplates that the mortgagor and mortgagee must agree amongst themselves as to who is to be paid the compensation and if there is a dispute, the compensation will be paid to the Master of the High Court and the mortgagor and mortgagee must fight it out in court.

It is absurd to think that the Legislature intended for the State to be in a position to expropriate the land without paying any compensation in the above scenarios, and for mortgage bonds to simply cease to exist upon a property being expropriated without allowing for a mortgagor to be compensated. The Bill in its current form poses a serious threat to development and investment in South Africa and ought to be challenged and amended until it is in line with the Constitution.

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