

Definition of expropriation – a risk that should not be ignored

Background

The Expropriation Bill is currently before the Portfolio Committee on Public Works and Infrastructure. The portfolio committee started discussing the Bill clause by clause on 10 March. What was surprising, was that, when the definitions were discussed, there was no mention of the definition of expropriation, which is not only the most controversial definition but one of the most problematic aspects of the Bill. There was a lot of discussion on the definition of property and whether that definition should exclude intangible and movable property, but no discussion on the definition of expropriation. Similarly, in a legal opinion obtained by the portfolio committee from Advocate Geoff Budlender (SC), there is a lengthy exposition about the definition of property, but very little is said about the definition of expropriation.

Why is this definition problematic?

Constitutionally speaking, two concepts are relevant when it comes to the taking of property, namely deprivation and expropriation. Deprivation is the wider concept encompassing any reasonable limitation placed on the use and enjoyment of property for the greater good, expropriation is an extreme form of deprivation. Only expropriation attracts compensation. That is why the definition of expropriation is so important – if an action by Government that has an impact on property falls outside the definition of expropriation, it will be regarded as mere deprivation, and no compensation will be payable.

The definition in the Expropriation Bill is very narrow and has a strong focus on the acquisition of the property by the state. It does not consider the loss that the property owner suffers. The definition reads as follows: “*‘expropriation’ means the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and ‘expropriate’ has a corresponding meaning*”. This definition

may have the dual effect of allowing excessive regulation as well as undermining all rights in state property short of full ownership. In the first instance, the definition excludes all instances where the state does not acquire the property but limits the owners' rights to such an extent that it becomes of no value. It opens up the possibility of all sorts of regulatory limitations on property with no compensation and of the state acquiring property on behalf of third parties, whilst now acquiring the property for itself. In the second instance, it allows the rights to extinguish all rights held by third parties in state-owned properties without paying compensation. This is a scary prospect when you consider that roughly a third of the population of South Africa live on communal land that is formally owned by the state. Should communities be moved, the state could extinguish their rights without paying compensation as the state did not technically 'acquire' the property since it already vested in the state.

Internationally, the courts have developed the concept of "expropriation" on a case-by-case basis over a considerable length of time. The majority of these jurisdictions have opted for the courts to retain the discretion as to when government action which encroaches upon an owner's right to use and enjoy the property will amount to an expropriation. Ideally this should also be the case in South Africa. . Basic restrictions required by law are forms of deprivation but which do not typically require compensation. A good example is a need for a drivers' licence (restriction) when a car (property) is driven on a public road. When restrictions become so severe that the property has no real value anymore, compensation becomes payable. It is impossible to predict what types of restrictions are so severe as to attract compensation but that is exactly what the Expropriation Bill seeks to do. It has placed a peg in the ground and proclaimed that nothing short of state acquisition is serious enough to warrant compensation. The definition of expropriation should be scrapped from the Bill to allow our courts to consider each case that comes before them on its own merits and decide whether the deprivation amounts to an expropriation or not.

Nedlac process

The definition of "expropriation" was included in the Bill after the first round of Nedlac engagements in 2013. At the most recent Nedlac engagements on the Bill, this definition was an area of disagreement. Business took the following view on the definition: "The term

“expropriation” is not defined in section 25 of the Constitution. It is not prudent to try and define or limit such a term in legislation as the concept originates from the Bill of Rights directly. Business was also concerned that the definition would limit the possibility of an extreme form of deprivation of ownership not being regarded as an expropriation if the state does not acquire the property. Business suggested wording i.e. “expropriation” means the compulsory acquisition of property or a right in property by the state or an [an expropriating authority] organ of state and any deprivation of ownership or a right in property that is equivalent to compulsory acquisition.” This proposal was not agreed to by the other social partners in Nedlac.

Relevant court judgements

The most quoted and also most criticised judgement is the Constitutional Court judgement in the *Agri SA* case that dealt with old order mineral rights.¹ The Constitutional Court held that the extinguishment of old order mineral rights did not amount to expropriation as the state did not acquire the rights but merely held it as the ‘custodian’ on behalf of the nation. The action was regarded as a mere deprivation that does not attract compensation.

In *Arun Property Development (Pty) Ltd v City of Cape Town*,² the Constitutional Court gave recognition to the so-called doctrine of constructive expropriation. According to the provisions of the Western Cape Land Use Planning Ordinance (LUPO), the City of Cape Town required Arun property developers to cede certain portions of its property to the City to be used as public spaces as a condition for approving the development of the property for residential purposes. The LUPO made provision for the municipality to require land in excess of what is required to be ceded without compensation but expressly stated that the developer was not entitled to compensation. Although the legislation was explicit in that no compensation is payable, the Constitutional Court held that it is tantamount to expropriation and ordered the payment of just and equitable compensation. In the court’s opinion, the action amounted to an expropriation as contemplated in the Constitution irrespective of what the legislation stated. This judgement seems to recognise the concept of constructive

¹ *Agri SA v Minister for Minerals and Energy*¹ 2013 (4) SA 1 (CC).

² 2015 (2) SA 584 (CC).

expropriation and the duty to compensate if rights are materially affected even if it does not amount to acquisition by the state.

In a 2007 article entitled: “Constructive appropriation: a key to constructive expropriation. Guidelines from Canada”³, Prof Elmarie van der Schyff argued that consideration could be given to adopting the Canadian approach to constructive expropriation to South Africa whereby if the loss to the aggrieved party is accompanied by a form of appropriation by the expropriating authority compensation is payable. This view is supported.

Conclusion

This definition is not something to glance over. It deserves serious consideration by all the political parties in the Portfolio Committee and the legal advisers who are advising the committee on the Bill.

³ The Comparative and International Law Journal of Southern Africa [Vol. 40, No. 2 \(JULY 2007\)](#), pp. 306-321