

Expropriation Bill – is the debate focusing on the right issues?

With the draft Bill's introduction into the National Assembly last month, the Expropriation Bill is again making headlines. Expropriation of any kind is a daunting prospect. The mere thought of the state being able to acquiring ownership against the owner's will is not something which can be taken lightly but if you factor in possibility of nil compensation, it is little surprise that the Bill's introduction to Parliament has caused anxiety in some circles.

That being said, consider the following scenario: the state makes the decision to invest in a multi-million Rand infrastructure project such as a highway or a reservoir that will bring substantial benefits to the public. Most land owners see the benefits and are willing to negotiate a sale but the entire project is held up by one or two owners who refuse to enter into negotiations no matter what offer is put on the table. What is the state to do? This is where expropriation typically comes into play and why almost every country has similar legislation on its statute books.

Indeed, the state's authority to expropriate comes directly from section 25 of the Constitution which allows the state to expropriate property but limits it to expropriation required for a public purpose or in the public interest, subject to just and equitable compensation. Because expropriation is such a severe limitation on a person's property rights, it must always be used at a last resort. This may sound good in theory but the burning question we should be asking ourselves is what actually prevents the state from simply taking a shortcut and using expropriation in the first instance? This is exactly where the Expropriation Bill comes in.

The authority to expropriate originates from the Constitution and there are approximately 150 laws on the statute book that permit public entities to acquire property through expropriation for various purposes, including infrastructure projects, environmental protection and, of course, for land reform. The Expropriation Bill's role is therefore to set out the procedural steps that the state must follow to ensure a fair procedure and to ensure the compensation paid reflects a just and equitable balance between the public's interest and that of the individual. Stated differently, its role is to set out the checks and balances that level the playing field between a property owner and the state during negotiations. Internationally, expropriation is not used as a last resort because of some special consideration for property owners, but rather because it is a difficult and cumbersome process. Instead of focusing on the concept of expropriation (which already exists in our law) commentators assessing the Bill should focus on whether the procedural guarantees and the provisions relating to compensation still ensure that it is faster, easier and even cheaper to simply buy the property in question.

Turning to the Bill itself, there are a number of procedural guarantees that support this notion. Firstly, an authority can only resort to expropriation if the parties have failed to reach an agreement to acquire the property through a purchase on reasonable terms. Where negotiations to buy a property have failed and the state decides to expropriate, a complex process must be followed including a notice of intention to expropriate, an inspection of the property, valuations, offers and counter offers before a notice of expropriation can finally be delivered. In other words, one cannot be caught off-guard by an expropriation.

The compensation element is slightly more contentious. The Bill still requires the payment of just and equitable compensation, but there is the possibility that compensation may be nil, having regard to all of the relevant circumstances. Importantly, it is not the state that decides but rather a court of law. The Bill makes provision for the parties to reach an agreement on compensation, failing which the matter may be mediated and finally set down for a court to decide. Based on past decisions, the courts have been reluctant to deviate substantially from market value unless there are truly compelling circumstances that warrant it.

The Expropriation Bill is by no means perfect and a robust debate is required on many of the provisions. However, it is worth remembering that expropriation of any kind will always be a last resort since it is a lose-lose situation for both a property owner and the state. If public interest matters such as land reform are tackled with enthusiasm and good faith on all sides, then expropriation should not play a leading role in the process.