

# Valuation, the role of the OVG and a formulistic approach to applying section 25(3) of the Constitution

by Theo Boshoff and Annelize Crosby

## History and background

The origins of the Office of the Valuer-General (OVG) lie in the 2011 draft Green Paper on Land Reform. The Green Paper, which was never formalised into a White Paper, cited the perceived failure of the willing-buyer, willing-seller approach, corruption and malpractices in valuation, the lack of a database of property values, a mechanical approach to valuation and the absence of a legal framework to give effect to section 25(3) of the Constitution as reasons for establishing the OVG. The OVG was supposed to provide fair and consistent land values for rating and taxing purposes, determine financial compensation in the case of expropriation, provide specialist valuation advice to government, set norms and standards and maintain a database of valuation information.

Whilst private sector was in support of the state creating in-house valuation capacity, there were concerns raised from the start about using a formula reserved for compensation to determine the value of land, as well as the role of the OVG in determining compensation when expropriation takes place.

After many rounds of negotiation, the Property Valuation Act was promulgated in 2014. The Act only provided for the regulation of valuations in respect of land acquisition for land reform purposes, not for rating and taxing purposes. The Act requires the OVG to value land identified for land reform not according to market value but according to the method prescribed by the Constitution to determine just and equitable compensation for expropriation. It furthermore requires the OVG to make recommendations to the minister regarding criteria for the determination of the value of property and procedures and guidelines, excluding the method of valuation.

In 2018 regulations were published in terms of the Act, to try and give effect to the mandate of the OVG to set norms and standards for valuation. In the Regulations, a formula was proposed to establish just and equitable compensation. This formula was controversial even before the promulgation of the Regulations as many financial institutions and agricultural organisations cautioned against elements of the formula during consultations on the draft Regulations. This article will deal in more detail with those concerns.

## The role of the OVG in deciding compensation

Several court judgements emerged dealing with the role of the OVG and the offers made to landowners based on the formula contained in the Regulations. The court found that the OVG cannot determine just and equitable compensation, in the case of a dispute over-compensation, only the court can make such a determination. In the most recent judgement in the Moloto-case<sup>1</sup>, the court confirmed that the interpretation of section 25 cannot be

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<sup>1</sup> Moloto community v Minister of Agriculture, Land Reform and Rural Development and others: LCC 204/2010

equated to valuation. Whilst valuation practice can and should help to inform a court's determination of compensation, section 25 of the Constitution is based on a contextual analysis of the facts and a court is best placed to do so.

There is a review underway into the role of the OVG, the Property Valuation Act and its Regulations. A ministerial committee conducted hearings in 2021 and Agbiz presented its views in this regard to the ministerial committee. More recently, in April 2022, Agbiz was interviewed by researchers appointed by the OVG to conduct a study on the impact of the Property Valuation Act on the land reform programme in South Africa.

### **A mechanical approach to value at the heart of the problem**

It has proved extremely difficult to come up with a formula for the interpretation of the factors listed in section 25(3) of the Constitution and it can be argued that that is completely the wrong approach in any event. Section 25(3) does not contain a closed list of factors. It is intended to lead to a result which is just and equitable taking into account both the rights of the affected individuals and the public interest. Any relevant factor can come into play and the end result may be market value, below market value or above market value compensation.

In its 2021 submission to the ministerial committee reviewing the Act, Regulations, and the role of the OVG, Agbiz stated, amongst other things, that: *"Agbiz' s own membership is highly invested in the agricultural sector. Input suppliers and agribusinesses rely on a prosperous and stable agricultural sector, and certainty around property rights and value is central to that. Financial institutions have approximately R140 billion invested in the sector, most of which is secured by mortgage bonds that use the land as collateral. Should land prices be forced down through legislative interventions causing market distortions, the collateral value of bonded land will diminish, prompting financial institutions to take a more conservative approach to lending to the sector. Should land markets be manipulated to push down the price of agricultural properties acquired for land reform purposes, it will have a knock-on effect and negatively affect the value of all agricultural land. In turn, this could harm business confidence and investment in the sector and deprive land reform beneficiaries from taking part in a vibrant and growing agricultural sector. Likewise, such an outcome will reduce the inherent value of the land transferred to the beneficiaries, thereby disadvantaging the very people the programme is intended to benefit."*

The nett effect of the application of the formula and particularly the current use value element thereof, has, in practice been to drastically lower the amount of compensation offered to landowners. In the case of the Moloto properties, the landowners were on average offered 33,7% less than market value.

There are, in our view, some fundamental flaws in the approach followed by the OVG. The first is the confusion between value and compensation. Whilst value relates to the property, compensation relates to the owner. At the heart of international expropriation law is the aim to compensate the owner for the loss suffered as a result of a forced acquisition of property. Valuers determine compensation according to objective criteria. Valuers and the

OVG are not well equipped to determine compensation where several subjective factors can come into play.

Secondly, the OVG cannot act as referee and player at the same time. The OVG cannot do valuations and determine compensation. As long as the OVG must look out for the best interest of the state in its valuation, it will not be seen as an independent and impartial third party.

Thirdly, a strict formulistic approach is not desirable and is bound to lead to unjust results in certain cases. All relevant factors should be weighed up and considered, and those that are not relevant to the case in point discounted.

Fourthly, the formula as contained in the Regulations is in itself problematic. There is no basis for this formula in the application of s25 and it is the leading cause for litigation as it results in an under-valuation. The current use value, in essence, comes down to the income method of valuation, which, according to the international valuation standards, is not well suited to valuing agricultural properties. Also, this requirement may well be *ultra vires* the Property Valuation Act, which provides that norms and standards may be prescribed, but not the method of valuation.

### **The proposed way forward**

The review process of the role of the OVG, the legislation and the study on the impact of the legislation must be welcomed. There are definite lessons to be learnt from the application of the Act and Regulations over the past seven years, as well as from court judgements and the insights of stakeholders such as Agbiz and the valuer's profession. There are also lessons to be learnt from other jurisdictions such as Australia.<sup>2</sup>

We propose the following:

- The Regulations definitely require an overhaul. The formulistic approach is not ideal and there are very valid concerns regarding the current use value approach.
- The outcome of any method used for valuation should inform and offer but the final outcome must be just and equitable.
- International valuation standards should be taken into account when doing valuations in South Africa.
- The integrity of the land market must be maintained to prevent adverse impacts on agricultural finance.
- A distinction needs to be made between the concepts of value and compensation.
- The role of the OVG should be advisory in nature.
- Valuations should be done by experienced, registered valuers who should be free to use their professional training and expertise to arrive at the value of the property.

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<sup>2</sup> Theo Boshoff (2022): The role of the Valuer-General in the calculation of compensation for expropriation: A comparative analysis between South African and Australian law, South African Journal on Human Rights, DOI: 10.1080/02587203.2021.2012819

- If the OVG were to advise on compensation, it would require experts with agricultural economical and other relevant backgrounds to advise on the more subjective factors that can impact on compensation.