HERBERT SMITH FREEHILLS

EXPROPRIATION OF LAND WITHOUT COMPENSATION

25 July 2018 | Africa
Legal Briefings – By **Peter Leon, Jonathan Ripley-Evans, Matthew Burnell and Mzukisi Kota**

Following the South African Parliament's decision to investigate expropriation of land without compensation, there has been a spike in land invasions across the country. Land owners and persons in control of land need to be vigilant and act quickly to protect their property interests. While there has been much commentary on the motion, there is still much which is unclear to the public about its meaning and ambit. To bring some clarity to the issues, we have prepared a series of briefings to provide practical steps that companies should consider.

LAND INVASION AND EVICTION (PART 1)

10 April 2018

THE LEGALITIES OF LAND INVASION

A distinction must be drawn between trespassers and unlawful occupiers. Trespassers are persons that have accessed land without the permission of the land owner or person in control of the land.[1] Trespassing is a criminal offence and the land owner or person in control of the land may request that **the police** remove such person from their property. Land owners or occupiers should not take the law into their own hands and remove the trespassers from their property.

Where a trespasser erects a structure or dwelling with the intention of residing on the property, they are no longer considered to be a trespasser and are now referred to as an "unlawful occupier".

Unlawful occupiers may only be removed from the land in terms of a **court order** obtained in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("**the PIE Act**"). This process is cumbersome, costly, time consuming and there is no guarantee that the court will award the court order. Evicting unlawful occupiers without a court order is, however, a criminal offence.

An owner of land that intends to evict unlawful occupiers is required to give them at least **two weeks written notice** of their intention to apply for an eviction order. In the case of land invasions, it may be difficult and burdensome to effect this notice. In considering the application the court must be satisfied that all persons were given adequate notice of the court proceedings, failing which they may dismiss the application. The local municipality must also be notified of the application. In the case of a land invasion, it is suggested that the consent of the court is obtained regarding the manner in which the notice will be served on the relevant parties, many of whom will be unknown to the owner.

This notice must include the date and time of the hearing, the address of the court where the eviction application will be heard, the grounds for bringing the eviction order and indicate that the unlawful occupiers can attend court to oppose the application and that they can seek legal aid. If the court is not satisfied that the unlawful occupiers have been adequately notified, the eviction application may be dismissed.

After the notice period has elapsed the matter will be heard. The presiding officer must consider a variety of factors in considering whether to grant or refuse the eviction order including the rights of children, women, the elderly, disabled persons and the length of time the persons have been on the property. If persons have been on the property for longer than 6 months, the presiding officer must consider if there is alternative accommodation for these persons.

If the eviction order is granted, it will contain two dates: the first date is the date by when the unlawful occupiers must have vacated the land and the second date is the date on which the eviction will be executed on those person that have not vacated the property. The execution of the court order will be conducted by the police.

It must be noted that the above only refers to persons that have invaded land and does not apply to persons who may be present on the property in terms of the Extension of Security of Tenure Act[2] or the Labour Reform (Labour Tenants) Act,[3] which contain their own requirements.

PRECAUTIONARY STEPS IN PREPARATION FOR POTENTIAL LAND INVASION

Although there may not be an imminent threat of a land invasion, if it occurs, you will need to act quickly. We suggest that you:

Contact your local municipality Land Invasion Unit: Most municipalities have established a Land Invasion Unit that is tasked with preventing unlawful land invasions. Contact the municipality in whose jurisdiction the land is situated, identify the responsible person(s) at the land invasion unit and obtain their contact details. In our experience, most land invasions occur over weekend or after hours. It is therefore important that you obtain a cellular telephone number or after hours contact details for the Land Invasion Unit.

Public Order Policing Unit: Each police station has a public order policing unit which is responsible for *inter alia* crowd management and community protests. It is important to identify the responsible person at the Public Order Policing Unit and obtain their contact details. In the event of trespassers, the Public Order Policing Unit will need to be notified as soon as possible to assist in removing persons before they erect dwellings.

Developing a procedure, educating staff and reporting: Companies must develop a land invasion procedure that must be communicated to all relevant stakeholders within the company. This procedure should include:

Identifying which persons must monitor the land and fences to determine if there is any trespassing or land invasion;

Indicating how regularly the land/fences must be monitored;

Requiring the relevant persons to keep a log of when the land/fences were checked and to note any irregularities. Photographic evidence of any irregularities should be recorded;

Noting any interactions with the trespassers/unlawful occupiers;

Developing a code of conduct that should be adopted to minimize any violent incidents. For example, employees should not try to forcibly remove persons or dwellings;

Identifying the relevant persons within the company that must be notified as soon as trespassers/unlawful occupiers are identified on the property. These persons' contact details should be included in the procedure;

Identifying the relevant person that must immediately open a docket of trespassing/land invasion with the police. This person must have the necessary authority (in terms of internal procedures) to represent the company.

Erect notice boards: Erect notice boards indicating that the land is private land and that trespassers will be prosecuted. This is important, particularly where land is not demarcated by a fence.

STEPS TO TAKE UPON LAND INVASION

In the event that your land is invaded, it is important to act quickly and legally. As soon as you become aware of a land invasion, the following steps should be taken:

- **Immediately inform the police**: The designated person must immediately notify the police of the trespassing/unlawful occupation. The designated person will be required to complete an affidavit which must (as a minimum) include:

    - His or her name, title and an indication that he or she has the authority to lodge the complaint (i.e. the land owner, person with authority to depose to the affidavit);
    - that the persons unlawfully accessed the property without permission;
    - that the person has no lawful reason to be on the property; and
    - any other relevant information such as the fact that the unlawful occupiers were violent or threatened harm.
- **Contact the Land Invasion Unit**: contact the Land Invasion Unit and the POP Unit to assist where persons are trespassing on the property. If the dwellings have been established, the Land Invasion Unit and the POP will not be able to remove the unlawful occupiers and eviction proceedings will need to be launched.
- **Contact your lawyer and launch eviction proceedings**: In the event that the Land Invasion Unit and POP are unable to remove the trespassers or the land invasion has progressed to occupation, it will be necessary to launch eviction proceedings in terms of the PIE Act or Extension of Security of Tenure Act or the Labour Reform (Labour Tenants) Act. It is critical that eviction proceedings are initiated as soon as possible to minimize any prejudice and to remove the risk that the presiding officer may refuse to grant the eviction order.
- **Compile all relevant information**: The following information will be relevant to the eviction proceedings and should be provided to your attorney as soon as possible including:
    - full details of the persons bringing the application (i.e. the land owner and person in control of the land). This will include the full name, identity or registration number and the physical address;
    - to the extent possible, the full details of the unlawful occupiers;
    - a full chronology of events from the date and time when the unlawful occupiers were identified until the time that the affidavit will be signed. This should include reporting the incidents to the police, any engagements with the unlawful occupiers, any unlawful incidents or any harm suffered;
    - details of any real and imminent danger, injury or damage to person or property that

may arise; and

- details of any hardship the applicants will suffer if the eviction order is not granted as compared against the hardship that will be suffered by the unlawful occupiers if the order is granted.

---

1. Trespass Act 6 of 1959.
2. 62 of 1997.
3. 3 of 196

A BRIEF ANALYSIS OF THE MOTION ADOPTED BY PARLIAMENT (PART 2)

8 May 2018

INTRODUCTION

There has been much discussion, debate and commentary over the past couple of months on the motion adopted by the South African Parliament on 27 February 2018, in relation to the expropriation of land without the payment of compensation. More recently, the Joint Constitutional Review Committee ("**CRC**") has called for public comments on the review of section 25 of the Constitution "to make it possible to expropriate land in the public interest without compensation".

While there has been much commentary on the motion, there is still much which is unclear to the public about its meaning and ambit. In order to aid in bringing some clarity, we have prepared this brief which seeks to clarify a number of issues which have been at the centre of the public debate on the motion. This brief forms part of a series of briefs we are circulating over the next few weeks to assist would-be responders to the invitation from the CRC.

THE INITIAL MOTION PROPOSED BY THE EFF

As a starting point, it is worth briefly highlighting some aspects of the initial draft motion proposed by the Economic Freedom Fighters ("**EFF**") for adoption by Parliament. The draft prepared by the EFF contained several emphatic statements which were ultimately amended by the African National Congress ("**ANC**") and did not make it into the final motion actually adopted by Parliament. Nonetheless, it is worth briefly addressing some aspects of the original EFF draft motion which have continued to be part of the public debate and will inevitably be at the centre of the comments submitted to the CRC.

In particular, the EFF draft motion raised a number of questions which we believe it would be helpful for would-be participants in the public comment process to engage with, ie:

- Is there a crisis regarding "the land question"?
- Is section 25 of the Constitution at the centre of such crisis?
- Does section 25 require the state to pay compensation when expropriating land?

Is there a crisis regarding "the land question"?

The assertion that there is a crisis in relation to access to, and the ownership of, agricultural land and the need for urgent redress and transformation in this sector is not a particularly controversial one. The Department of Rural Development and Land Reform published the "Land Audit Report Phase II: Private Land Ownership by Race, Gender and Nationality" in November 2017. The report records that 72% of farms and agricultural land which is owned by individuals is owned by white people, with 15% owned by coloured people, 5% by Indian people and 4% by African people.

AgriSA published a report titled “The Land Audit: A Transactions Approach” in November 2017, which also focuses on agricultural land. This report states that the national level of ownership of agricultural land by Previously Disadvantaged Individuals and government has increased from 14.9% in 1994 to 26.7% in 2016. It is worth noting that the report has been widely criticized for a number of reasons, including that it does not differentiate between land owned by government and land owned by black people, and that there is no basis for this collapse which effectively argues that governmental land is black-owned land. Nonetheless, even in its own terms, the report shows that at least two thirds of agricultural land in the country continues to be owned by a demographic which represents less than 10% of the population.

The issue of land reform, restitution and redistribution in the country has also been looked at extensively and reported on by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (“**the High Level Panel**”) in its report of the same title.[1]

The High Level Panel records, amongst other things, that its work “*reveals that the record on the progressive realisation of [the rights to equitable access to land, to tenure security and to restitution] is concerning*”. It goes on to list the various shortcomings in the pace and implementation of land reform, including the failures experienced in the development and application of the relevant laws and policies. Importantly, the High Level Panel also reports that “*the ills of the past are being reproduced in post-apartheid society despite extensive legislative reform” and that “the observed changes have not dented the deep inequities in the quality of services received in many instances nor have they made fundamental shifts in outcomes*”.

In view of the above, and if, as the High Level Panel reports, the deep inequities that existed under apartheid continue to exist in relation to land ownership, it seems difficulty to argue that there does not currently, or soon will, exist some degree of crisis in relation to such land ownership.

Is section 25 of the Constitution at the centre of the land crisis?

Perhaps the most important aspect of the original EFF draft motion which must be addressed in the public comment process is the suggestion that section 25 of the Constitution is at the centre of the land crisis. It is apparent from the High Level Panel’s report (and other sources) that the greatest factors which have undermined land redistribution efforts to date are the failure of government policies, ineffective administration and increasing corruption, amongst others.

The High Level Panel's report records how official process applied to date have been “cumbersome and slow, characterised by poor coordination between different departments and spheres of government”. It also records how people at the public hearings held by the Panel spoke scathingly about the role of state officials and politicians in land reform and how they were seen as stealing from the people what little they have.

The current land redistribution programme is generally focussed on the state buying then leasing out whole commercial farms at discounted rates. Importantly, as discussed below, this is not something which is required by section 25 of the Constitution. It is a policy choice made by the South African government over the past twenty-odd years.

While section 25 does require the payment of compensation for an expropriation, the simple fact is that the South African government has to date not followed any intensive expropriation programme for the purpose of land redistribution. There is nothing in the Constitution which dictates that there has to be a "willing buyer and willing seller" approach to land reform. It is accordingly a fallacy that it is the requirement to pay compensation or the protection of property rights in section 25 of the Constitution which has been the central hurdle to land restitution. The mechanism of expropriation provided for in section 25 of the Constitution has simply not been tested by any systemic expropriation programme of the South African government since the advent of democracy.

Does section 25 require the state to pay compensation when expropriating land?

Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application and, importantly, "no law may permit arbitrary deprivation of property". While an extensive breakdown of all the legal nuances and implications of section 25(1) goes beyond the scope of this brief, it is important to note that section 25(1) of the Constitution, though worded in negative terms, actually permits deprivations of property if:

A. they are done in terms of law of general application; and

B. the law in question does not authorise, or result in, arbitrary deprivations.

The permissibility of expropriations of property, which is a particular category of deprivation, is specifically dealt with in section 25(2) of the Constitution. This subsection permits the expropriation of property in terms of a law of general application, on two conditions:

A. for a public purpose or in the public interest; and

B. subject to compensation, the amount, time and manner of payment of which have either been agreed to by those affected or decided by a court.

Section 25(3) deals in some detail with the compensation payable for an expropriation, requiring that 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*" and having regard to all relevant circumstances. What the section requires is a nuanced balancing of potentially competing interests to try and ensure that needed reform is achieved while protecting the rights of existing property right holders. It also lists various factors which should be considered in determining the amount of compensation payable.

There has been much debate about whether the proper outworking of the balancing exercise required by section 25(3), to quantify the amount of compensation payable for an expropriation, could result in zero compensation being payable in particular instances. While there might be some circumstances where this could be the outcome of the balancing exercise, this would likely be rare and only occur in the most exceptional circumstances. In addition, the balancing exercise required by section 25(3) necessarily means that the payment of zero compensation could only be on an ad *hoc*, individual property basis. The payment of zero compensation would also have to be the outcome of the balancing exercise (particularly as the list of factors to be considered is non-exhaustive) rather than an option which generally exists at the discretion of government. Accordingly, it seems correct, in our view, that a law or policy which seeks to generally allow expropriation of property without the payment of compensation would probably be contrary to section 25(3) of the Constitution as it currently stands.

THE MOTION ADOPTED BY PARLIAMENT

As indicated above, the final motion adopted by Parliament had been amended by the ANC and softened, somewhat, from the initial proposal drafted by the EFF. The final motion "notes" that President Ramaphosa, in his State of the Nation address ("**SONA**"), committed to a land reform programme which "entails expropriation of land without compensation"[2] and which:

- makes use of all mechanisms at the disposal of the state;
- is implemented in a manner which:
    - increases agricultural production;

    - improves food security;
    - ensures that the land is returned to those from whom it was taken under colonialism and apartheid; and
    - undertakes a process of consultation to determine the modalities of the resolution.

Importantly, the motion instructs the CRC to:

- review section 25 of the Constitution and other clauses where necessary;
- propose necessary amendments with regard to the kind of future land tenure regime needed; and
- report to the National Assembly by 30 August 2018.

We note that the motion adopted is, at least on the face of it, specifically about land. Neither the draft motion prepared by the EFF, nor the final motion adopted by Parliament seems to be concerned with "property" in general. Rather, the motion is quite clearly concerned with "land", and as section 25(4)(b) of the Constitution notes, "property is not limited to land". Accordingly, while section 25 of the Constitution deals with "property" rights more broadly, and section 25(3) speaks about the expropriation of property, the motion adopted by Parliament, and the mandate given to the CRC therein, specifically relates to land and not to all property.

Other than seeking to create the possibility of expropriating land without paying compensation, the remaining scope of the mandate to the committee is not very clear from the wording of the motion. It is particularly unclear what is meant by "the kind of future land tenure regime needed" and whether this means the CRC will look at all land tenure issues or only the ownership of agricultural land. However, as the motion makes reference to the remarks of President Ramaphosa's SONA, the reform programme he spoke of is presumably the regime that the CRC is being required to investigate and propose. Accordingly, the proposal ultimately put forward by the CRC in relation to any amendments to section 25 and other sections of the Constitution should ensure that any expropriation of land without compensation satisfies the requirements of:

- increasing agricultural production;
- improving food security; and

- ensuring that the land is returned to those from whom it was taken under colonialism and apartheid.

This means that there is an opportunity for interested parties to apply their minds not only to how the mechanism of expropriation of land without compensation might work, but also to how it might be structured so as to achieve the objectives set out by the President in the SONA. Further, it seems to us that commenting parties should also consider whether there are any additional objectives that should be at the heart of any future land tenure regime.

Finally, it is important to bear in mind in making submissions to the CRC that the Constitution should generally be the ground law upon which more specific statutes should be founded and to which such statutes should seek to give effect.

Accordingly, any submissions made to the CRC should try and distinguish between what should be addressed in the Constitution itself versus what the Constitution should empower in order for Parliament to address through appropriate statutes.

---

1. The High Level Panel was commissioned by the Speakers' Forum and chaired by Former President Kgalema Motlanthe.

2. I think the word "entails" is intended to mean "includes" in this context

THE LEGAL ASPECTS OF THE ANC LAND REFORM SUMMIT OUTCOMES (PART 3)

31 May 2018

INTRODUCTION

The African National Congress ("ANC") held its first ever Land Summit ("Summit") over the weekend of 19 and 20 May 2018. There were a number of noteworthy aspects to this Summit, not least of which is the fact that it was open to the general public and not only to ANC members. The Summit ultimately made a number of recommendations which will be put before the ANC's National Executive Committee ("NEC") for adoption. The most significant recommendations for the purpose of this update are the following:

- to immediately use section 25 of the Constitution to press ahead with expropriations and to test the argument that it allows expropriations without compensation in certain circumstances; and
- to immediately pass the Expropriation Bill and the Land Redistribution Bill.

The recommendations which came out of the Summit generally seem to show a welcome move away from the rhetoric that the Constitution has been the barrier to transformation in the land ownership patterns of the country. In fact, the ANC went as far as to state its commitment to the Constitution affirmed that from its perspective "the Constitution is not a sell-out document".

Importantly, if the recommendations of the Summit are ultimately adopted by the ANC's NEC and acted upon, it seems that the amendment of section 25 of the Constitution may no longer be a given. To this end, the Summit recommended that the Constitutional review process should be used to ensure that any ambiguity in respect of section 25(2)(b) of the Constitution is removed and, if it is found that any law impedes or slows down effective land redistribution, such law also be addressed in this process.

We set out below some thoughts on the two key recommendations set out above.

IMMEDIATELY USING SECTION 25 TO EXPROPRIATE

The recommendation that section 25 of the Constitution be put to the test immediately to see the extent to which it enables expropriations of land for redistribution, even expropriations without compensation, is arguably the most sensible outcome of the Land Summit. Implicit in the recommendation is an acknowledgement that the government has not really tested the expropriation potential of section 25 of the Constitution, at least not in respect of expropriation for land redistribution.

Embarking on a concerted programme of expropriation of land for purposes of redistribution, as mandated by the Constitution, is, arguably, long overdue and should bring to the fore the extent to which factors other than government ineffectiveness have impeded progress in respect of land redistribution. The inevitable litigation that will ensue should also result in much needed judicial guidance on what factual scenarios would satisfy the Constitutional standard and which would not, particularly in respect of expropriation without compensation.

In our view, if the government is to truly test what can be achieved through section 25 of the Constitution, it would be best for it to embark on a general expropriation for redistribution programme – as this has not been done to date – and not merely a programme focused on expropriation without compensation. In other words, the concerted expropriation programme should encompass a whole range of expropriations, i.e. expropriations with compensation paid, the amount of which is determined using the test laid down in the Constitution rather than "market value", and expropriations without compensation, where this is justifiable in terms of the Constitutional test. If a programme of this nature is followed, then the debate about whether or not there is a need for Constitutional amendment can be one supported by actual data on what is possible or not in the ambit of the provision rather than generic unsubstantiated statements about the hurdles it presents.

In the absence of a true testing of the transformative potential of section 25 of the Constitution, it is likely that any draft amendments to the Constitution will be misguided, irrational (in the legal sense) and potentially have a range of unintended consequences, including being open to constitutional challenges for contravening other rights.

To this end, it is worth pointing out that the scenarios set out in Helen Zille's article titled "It's time for a test case on expropriation without compensation" would probably be good starting points to argue for the payment of zero compensation in respect of expropriations.[1]

IMMEDIATE PASSING OF THE EXPROPRIATION BILL AND REDISTRIBUTION BILL

The Summit recommended that Parliament immediately pass the Expropriation Bill, presumably because this is the primary statute through which the testing of section 25 of the Constitution can occur. There is nothing particularly controversial in this recommendation, other than to note that the Expropriation Bill was actually already passed by Parliament as far back as May 2016. After it was passed, it was sent to the President for assent and signature into law. The President did not sign the bill and rather sent it back to Parliament, citing constitutional concerns about, among other things, the adequacy of the consultation process on the bill.

The Expropriation Bill itself is not particularly radical and largely repeats the provisions of section 25 in respect of expropriation. The most controversial aspect of the Expropriation Bill has been the fact that it authorises expropriation "in the public interest" and not merely for a public purpose. The "public interest" is defined to included "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's national resources…". The breadth of this definition has been a concerning factor for a lot of property rights holders. The other main area of controversy relates to the calculation of the compensation payable for an expropriation under the Bill. The extant expropriation legislation (i.e. the Expropriation Act, 1965) supports the payment of market value related compensation for expropriated property, and the Bill seeks to replace this regime with the "just and equitable" regime of section 25 of the Constitution.

The immediate passing of the Expropriation Bill is an essential cog if the ANC is to truly embark on a concerted expropriation programme for land reform purposes. The existing Expropriation Act is simply not well-suited to this purpose. Importantly, even under the Expropriation Bill, the non-payment of compensation will have to be on an ad-hoc basis on the application of the constitutional test and the weighing up of all relevant factors.

Finally, we note that Mr Ronald Lamola spoke about the recommendation that a Redistribution Bill be passed which will address redistribution of land issues alongside the Expropriation Bill. While it is not entirely clear, in the absence of a draft statute, what this bill will address specifically, it is noteworthy that it has been mentioned that the focus will not be limited to agricultural land but also urban land. In this regard, specific mention was made of properties owned by organs of state which are not utilised which could address urban land needs.

FINAL THOUGHTS

If the outcomes of the Summit are anything to go by, it seems to us that the public debate on the land question and on the motion passed by Parliament in relation to compensation of land without expropriation has, so far, had an overall positive impact. The outcomes of the Summit seem indicate an acceptance by the ANC that the primary hindrances to the transformation of land ownership patterns in the country have been the policies adopted by the government and the failures in how they've been implemented.

A concerted effort by government to pursue the constitutional mandate contained in section 25 of the Constitution is the rational and responsible starting point for expropriation of land for redistribution purposes. It is only after this option has been wholeheartedly pursued by government, and thwarted by the application of section 25, that amendments to this section of the Constitution should be considered.

Lastly, we note that the approach of passing the Expropriation Bill as a matter of priority and proceeding with a concerted effort to test what is achievable under section 25 of the Constitution is also one that means that the government can embark on the envisaged redistribution programme as soon as possible. If the mooted land redistribution were to be preceded by a Constitutional amendment, it is unlikely that much actual redistribution action would be possible within the next two years. This is because an amendment of the Constitution would likely take several months to achieve from the time a draft is first put out to the public. Once the Constitutional amendment is in place, it is likely that consequent amendments to some statutes, or entirely new statutes, would be required before actual action could be taken pursuant to the amended constitutional provision. This period could be even longer if the resolution that extensive public engagement be undertaken on any proposed amendment were to be taken seriously and implemented thoroughly.

Accordingly, using section 25 of the Constitution as it stands is, in addition to the matters set out above, probably the most efficient (from a timing perspective) manner of embarking on a programme of expropriation for redistribution.

---

[1]This article ran in various publications. Here is a link to the news24 column https://www.news24.com/Columnists/GuestColumn/its-time-for-a-test-case-on-expropriation-without-compensation-20180507

EXPROPRIATION OF LAND WITHOUT COMPENSATION IN SOUTH AFRICA MAY BREACH INTERNATIONAL LAW (PART 4)

25 July 2018

While South Africa continues to debate whether it is, or should be, constitutionally permissible for the government to expropriate land without compensation, as a form of redressing apartheid dispossession (see our prior updates here), it is important to consider the effect such a move may have on not only foreign direct investment ("**FDI**") but international law.

FDI is the lifeblood of any developing economy, and South Africa cannot afford to forego it. From 2013 to 2017, while FDI inflows into the country declined from US$ 8.3 billion to US$ 1.3 billion, its annual GDP growth rate fell from 2.5 to 1.3 percent.[1]

The proposed amendment of section 25 of the Constitution[2] - the property clause - (even while it is still being debated) may well affect the pricing of investment risk, which may lead prospective as well as existing investors to turn their attention to more hospitable investment destinations. Existing foreign investors, in particular, will need to consider what rights and recourse might be available to them under international law to mitigate the risk of expropriation without compensation.

THE CURRENT POSITION UNDER SOUTH AFRICA'S CONSTITUTION

As explained in our second update, section 25 of the Constitution provides that the amount, manner and timing of compensation for expropriation 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". The market value of the property is but one of several factors that must be taken into account.[3] It is therefore conceivable that, in particular circumstances, it might be "just and equitable" for the amount of compensation to be much lower than market value, or even possibly zero.[4] The courts have, however, generally not departed from market value when calculating compensation for expropriation even in land reform cases.[5]

PROTECTION FOR FOREIGN INVESTORS UNDER INTERNATIONAL LAW

Additional legal protections may be available when the property owner is a foreign investor, because the government's conduct is then regulated not simply by the Constitution but by international law. For the reasons set out below, uncompensated expropriation of foreign-owned property may well constitute a violation of South Africa's international law obligations, both under customary international law as well as under a number of treaties to which it is a party.

Under customary international law, each sovereign state expects other states to treat its nationals and their property in accordance with certain basic standards, collectively known as the "international minimum standard of treatment".[6] This standard entails that expropriation may only be undertaken for a legitimate public purpose, in accordance with non-discriminatory due process, and accompanied by compensation. Opinion is divided, however, as to the amount, manner and timing of this compensation.[7] The standard often expected (and certainly preferred) by foreign investors is "prompt, adequate and effective" compensation, language used in 1938 by then US Secretary of State, Cordell Hull, in representations to the Government of Mexico in respect of land confiscated from US nationals for agrarian reform purposes in 1917, during the Mexican Revolution.[8] In practice, the "Hull formula" requires prompt payment of the full market value the property bore before the expropriation was undertaken.

While capital-exporting countries understandably prefer the Hull formula, developing countries have increasingly inclined towards a more flexible standard of "appropriate compensation". The notion was introduced in the United Nations General Assembly's 1962 *Resolution on Permanent Sovereignty over Natural Resources* and replicated in its 1974 *Charter of Economic Rights and Duties of States*.[9] Although there is no consensus on what this term means in practice, at least one arbitral tribunal has held that it requires an enquiry into all relevant circumstances rather than fixation on any particular formula (such as market value).[10]

Despite these potentially different expectations of what amount compensation must be paid, under customary international law, upon the expropriation of a foreign investor's property, there is clear consensus that it requires that at least *some* amount of compensation must be paid. This basic norm is common to the Hull formula and the later United Nations resolutions. To the extent, therefore, that section 25 of the Constitution is interpreted or amended to permit the expropriation of foreign-owned property without any compensation at all, any such expropriation would contravene customary international law.

INVESTMENT TREATIES

A breach of customary international law engages the international responsibility of the state, which is traditionally enforceable only by one sovereign state against another (exercising so-called "diplomatic protection" over its own nationals).

Over time, however, sovereign states began to conclude agreements with one another, which not only defined the applicable standards of treatment (including compensation for expropriation) but empowered the nationals of one state to enforce those standards directly against another through international arbitration.

Most of these agreements take the form of bilateral investment treaties ("**BITs**") (i.e. concluded between two states). To date, at least 2,952 BITs have been concluded globally, of which at least 2,358 are currently in force (the BITs which South Africa are party to are elaborated on below).[11] Some agreements are multilateral, such as the 1965 Washington Convention, which created the International Centre for Settlement of Investment Disputes ("**ICSID**"), a standing investor-state arbitration facility which is part of the World Bank Group. The Washington Convention has been ratified by 153 countries, but not South Africa, meaning that the nationals of one of those countries, who have invested in the territory of another, may sue that "host state" at ICSID.[12]

ZIMBABWE'S EXPERIENCE

The use of investor-state arbitration as a remedy against expropriation of land without compensation is illustrated most vividly by the experience of South Africa's northerly neighbour, Zimbabwe. Before embarking on its controversial "fast-track land reform programme" (which culminated in the amendment of Zimbabwe's Constitution in 2004),[13] Zimbabwe had ratified the ICSID Convention and concluded thirty-one BITs, each requiring market value compensation for expropriation. Contrary to the protections afforded under these BITs,[14] the 2004 constitutional amendment permitted the state to confiscate any land without due process (ousting the jurisdiction of the courts) and without any compensation other than for improvements made by the owner.

Before long, Zimbabwe faced its first ICSID claim, instituted in 2003 by a group of Dutch nationals whose farms had been seized.[15] In 2009, an ICSID tribunal awarded the claimants US$ 10.6 million (plus 10 percent interest compounded every six months). The unpaid debt, after applying interest, stood at US$ 25 million by the end of 2015, when a US District Court authorised the claimants to execute the award against the US assets of several Zimbabwean state-owned entities.[16]

In 2015, another ICSID tribunal upheld a claim against Zimbabwe by Swiss and German landowners and awarded them compensation (including moral damages) totalling over US$ 195 million.[17] The Tribunal also ordered Zimbabwe to bear the claimants' legal costs (about US$ 20 million), as well as the Tribunal's costs (US$ 1.3 million). Zimbabwe's own legal costs came to almost US$ 2 million.[18]

These cases illustrate how, when expropriating property owned by foreigners who are afforded protection under international law, paying no compensation may ultimately cost the government much more than simply market value. This experience holds important lessons for South Africa.

SOUTH AFRICA'S TREATIES

After holding its first democratic elections and re-integrating into the international community in 1994, South Africa concluded forty-nine BITs, of which twenty-two entered into force. All of these permit investors from the other state party to institute an international arbitration claim against South Africa (including at ICSID in many cases, even though South Africa is not a member of ICSID).[19] These BITs typically prescribe the Hull formula of "prompt, adequate and effective" compensation for expropriation.

By the time Zimbabwe suffered its first adverse ICSID award in 2009, South Africa had also faced two significant investor-state arbitration claims. In 2003, an ad hoc tribunal ordered South Africa to pay a Swiss national an undisclosed sum of damages for having failed to protect his game farm from land invasion and vandalism.[20] In 2007, an ICSID claim was instituted by Italian and Luxembourg investors (under the ICSID Additional Facility Rules), arguing that the imposition of mandatory black empowerment ownership requirements on their South African subsidiaries amounted to uncompensated expropriation, among other breaches of the applicable BITs. The parties ultimately settled the matter in 2010.[21]

Against this backdrop, in July 2010 the Zuma Administration resolved to embark on a process of reviewing and renegotiating the country's BITs, deeming them too restrictive of policy space for developmental reforms. Subsequent to the Cabinet's decision, the Department of Trade and Industry ("**DTI**") identified, among other things, "a clear tension between the BIT standards of 'full and effective compensation', 'market value compensation' and the 'less than market value' compensation prescribed by the Constitution".[22] Consequently, between 2012 and 2017, the government:

> decided to cease entering into new BITs and to terminate its existing ones, commencing in 2012 with Switzerland and member states of the European Union;[23]
>
> promulgated a law (the 2015 Protection of Investment Act that recently came into force),[24] which (among other things) provides that expropriation of foreign investors' property will be governed solely by section 25 of the Constitution; and
>
> spearheaded an amendment to the 2006 SADC Protocol on Finance and Investment, which (among other things) removes investors' recourse to international arbitration, and replace the Hull formula of "prompt, adequate and effective" compensation with a more flexible standard modelled on the South African Constitution.[25] Earlier this year, the Cabinet approved this amendment.[26] If Parliament ratifies the decision, South Africa will become the tenth signatory to the Agreement.

WHERE DOES THIS LEAVE FOREIGN INVESTORS?

It is an accepted principle of international law that a country cannot simply implement domestic legislation to avoid its international law obligations.[27] Because of this, regardless of what domestic legislation (which includes what the Constitution) prescribes, foreign investors can still rely on the protection afforded by the existing BITs, if they can show that they qualify as "investors" in terms of those treaties (for more detail on how to establish this, see our recent briefing note here).

Second, many of the BITs include "sunset clauses" which provide that the protection afforded under the BIT will remain in place for a specified number of years after the BIT is terminated. As a consequence, a foreign investor's rights under these treaties remain in place even after it is terminated. Article 14 of the BIT between the United Kingdom and South Africa, by way of example, provides that investors who invest in either country before the BIT is terminated, will continue to enjoy the rights under the agreement for a further twenty years after the agreement is terminated.[28]

Third, there is a strong argument that the "just and equitable" compensation prescribed by the Constitution, in circumstances where the property owner is a foreign national, must at least meet the standard set by customary international law or by any BIT that may be applicable. This is so because the Constitution itself commands the government (including the courts) to obey its international obligations.[29]

Finally, there is a further, more practical, reason. In striking an "equitable balance between the public interest and the interests of those affected" (as required by section 25 of the Constitution), a court could not ignore the compelling public interest in ensuring that South Africa does not breach its international obligations, and thus does not waste scarce resources defending an international claim, and possibly paying damages, costs and interest, when this would be obviated by the prompt payment of adequate compensation.

If, however, the Constitution is interpreted, or amended, to permit the expropriation of property owned by foreign nationals without any compensation, South Africa could become vulnerable to numerous investor-state arbitration claims, capable of costing the country much more than the market value of the expropriated investments. As well as the immediate cost, such claims may have considerable impact on the country's attractiveness as an investment destination, as the experience in Zimbabwe and further afield in Venezuela has vividly shown.

---

[1] United Nations Conference on Trade and Development ("**UNCTAD**"), *World Investment Report 2018*, 6 June 2018.

[2] The Constitution of the Republic of South Africa, 1996 ("**Constitution**").

[3] Section 25(3) of the Constitution requires consideration of "all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) 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] There has been one reported case of such an outcome: *Nhlabathi and Others v Fick* [2003] ZALCC 9 (8 April 2003), where the Land Claims Court awarded former farmworkers a servitude over private land in order to access family burial sites, and found that it was "just and equitable", in the circumstances, to award no compensation to a landowner for this effective judicial expropriation.

[5] See *Uys NO and Another v Msiza and Others* [2017] ZASCA 130; 2018 (3) SA 440 (SCA); and *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* [2012] ZALCC 7 (19 April 2012).

[6] E. Borchard, "Minimum Standard of the Treatment of Aliens", 38 *Michigan Law Review* 445 (1940).

[7] See UNCTAD, "Expropriation", *Series II on Issues in International Investment Agreements* (2012); and Organization for Economic Co-operation and Development ("**OECD**"), "Expropriation laws and review processes", *Policy Framework for Investment* (2015).

[8] See S Nikiema, *Compensation for Expropriation* (March 2013) at 9. Of particular relevance to the current debate in South Africa, Hull's letter included the following statements: "We are entirely sympathetic to the desires of the Mexican Government for the social betterment of its people. We cannot accept the idea, however, that these plans can be carried forward at the expense of our citizens, any more than we would feel justified in carrying forward our plans for our own social betterment at the expense of citizens of Mexico. … *The taking of property without compensation is not expropriation. It is confiscation.*"

[9] United Nations General Assembly, *Resolution 1803(XVII) of 1962: Permanent Sovereignty over Natural Resources*; and *Resolution 3281(XXIX) of 1974: Charter of Economic Rights and Duties of States*.

[10] *Government of the State of Kuwait v American Independent Oil Company (Aminoil)*, Award of 24 March 1982, 21 *ILM* 976 (1982).

[11] See UNCTAD's *Investment Policy Hub.*

[12] South Africa is currently not a member of ICSID; see the Database of ICSID Member States.

[13] The Constitution of Zimbabwe Amendment Act 17 of 2004, which inserted section 16B of the Constitution, with effect from 16 September 2005.

[14] Those with China, Denmark, Germany, the Netherland, Serbia, and Switzerland entered into force before the 2004 amendment to the Constitution came into effect.

[15] *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6.

[16] *Funnekotter and Others v Agricultural Development Bank of Zimbabwe and Others*, United States District Court for the Southern District of New York, Case No. 13 Civ. 1917 (CM), 17 December 2015.

[17] *Bernhard von Pezold and Others v Republic of Zimbabwe,* ICSID Case No. ARB/10/15; *Border Timbers Ltd and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

[18] Zimbabwe has lodged a challenge against this award with an ICSID Annulment Committee, which remains pending.

[19] States that are not members of ICSID may still consent to its arbitration under its Additional Facility Rules.

[20] Although the award has not been made public, the tribunal reportedly found that South Africa had breached its obligation to afford the investor "full protection and security". See LE Peterson, "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights", *Friedrich-Ebert-Stiftung Dialogue on Globalization*, 2006, at 35.

[21] *Piero Foresti, Laura de Carli and Others v Republic of South Africa,* ICSID Case No. ARB(AF)/07/01.

[22] Department of Trade and Industry, *Bilateral Investment Treaty Policy Framework Review*, July 2009.

[23] In total the government has reportedly issued notices of termination in respect of thirteen BITs, being those with Belgium-Luxembourg, Germany, Switzerland, The Netherlands, Spain, the United Kingdom, France, Denmark, Austria, Greece, Italy, Finland and Sweden (although the latter is not actually eligible for unilateral termination until 1 January 2019).

[24] *Government Gazette* No 41766 of 13 July 2018.

[25] Agreement Amending Annex 1 (Co-operation on Investment) of the SADC Protocol on Finance and Investment, adopted by the SADC Summit of Heads of State and Government in August 2016, and formally signed on 17 May 2017.

[26] Statement on the Cabinet Meeting of 14 March 2018.

[27] See article 27 of the 1969 Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[28] The BIT was terminated with effect from 31 August 2014.

[29] See section 39(1)(b) as well as Chapter 14 of the Constitution, and *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

PETER LEON
PARTNER,
JOHANNESBURG
+27 10 500 2620
Peter.Leon@hsf.com

JONATHAN RIPLEY-EVANS
DIRECTOR,
JOHANNESBURG
+27 10 500 2690
Jonathan.Ripley-Evans@hsf.com

ERNST MÜLLER
SENIOR ASSOCIATE,
JOHANNESBURG
+27 10 500 2628
ernst.muller@hsf.com

LEGAL NOTICE