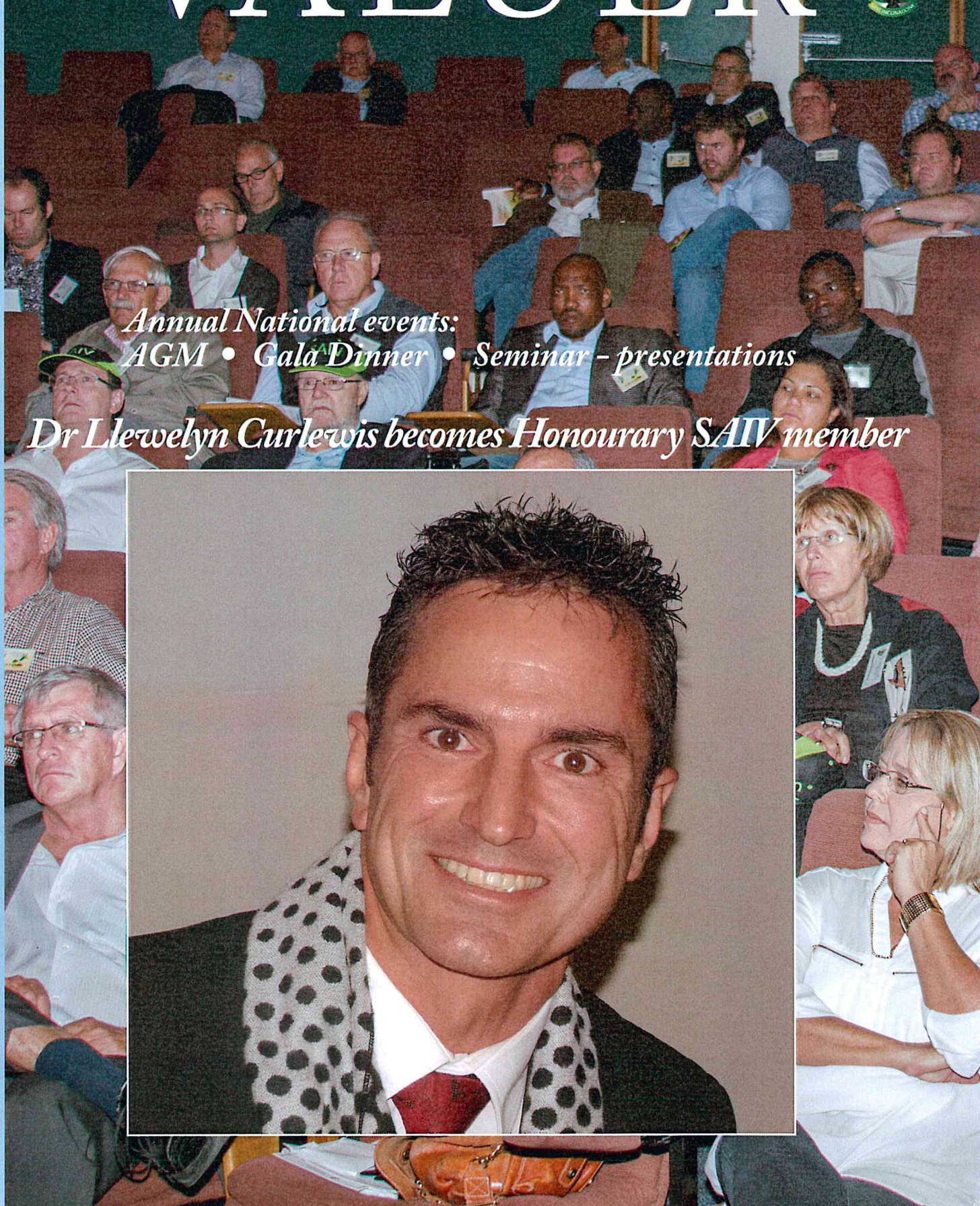


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The Expropriation Bill (Bill 4 of 2015)

Introduction

The 2015 Expropriation Bill¹ is the latest of several previous Bills which sought to align the 1975 Expropriation Act² with the Constitution, and to introduce a number of changes to facilitate the expropriation process. It is impossible to give a full overview of the Bill within the 45 minutes allowed to me. I will therefore concentrate on the provisions which are relevant for valuers.

The applicable principles contained the Constitution are, firstly, that property may be expropriated only in terms of a law of general application for a public purpose or in the public interest;³ secondly, that the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;⁴ thirdly that expropriation is subject to the payment of compensation to be agreed by those affected or decided by a court;⁵ and fourthly, that the expropriation process, being administrative action, must be lawful, reasonable and procedurally fair.⁶

The Constitution requires the amount of compensation and the time and manner of payment to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.⁷ The Constitution thereupon lists five circumstances which could be relevant,⁸ they are all repeated in the Bill,⁹ and will be discussed hereunder. The Bill must be interpreted so as to promote the spirit, purport and objects of these provisions.¹⁰ Insofar as any provision contained in the Bill may be in conflict with the Constitution, it could be declared by a competent court to be constitutionally invalid.¹¹

Although a few clauses in the Bill may be constitutionally invalid¹² and some clauses may be ambiguous, cumbersome or impractical, the Bill is, in the main, not a bad or unacceptable Bill.

The expropriation process

There are, in most countries, two methods of expropriation: the judicial method and the administrative method. Each method has numerous variants. Under the judicial method, generally, the court must sanction the expropriation and at the same time, determine the amount of compensation. Ownership passes to the expropriator when the court makes its order. Under the administrative method, the expropriator, acting within its statutory powers, effects the expropriation by serving a notice of expropriation. Ownership passes to the expropriator on the date of expropriation as stated in the notice, without prior court sanction. The court determines the compensation after the expropriation has

been effected. The court may review the expropriation if the expropriator has exceeded its powers or has not followed proper procedures. The 1975 Expropriation Act as well as the 2015 Expropriation Bill follows the administrative method of expropriation. This is also the method followed in many other countries. The Constitution, in sec 25, requires the compensation to be determined (in the absence of agreement between the parties) by a court, but does not require the act of expropriation to be sanctioned by a court.¹³

The expropriation process can be divided into the following stages:

- prior investigation and valuation;
- service of a notice of intention to expropriate;
- negotiation between the expropriating authority and the owner or holder of unregistered rights; and
- notice of expropriation.

Investigation and valuation

When a property is required for a public purpose or in the public interest, an expropriating authority must ascertain the suitability of the property for the purpose for which it is required, the existence of registered and unregistered rights in such property and the impact of such rights on the intended use of the property.¹⁴ In doing so, the expropriating authority may use the services of its own officials, or employ outside consultants and valuers. In this regard, the following clauses are of importance to valuers:

Clause 5(2) "Subject to section (3), if the property is land, an expropriating authority may, in writing -

(a)

(b) authorise a valuer, for purposes of ascertaining the value of the property, to enter upon the land or any building on such land and to do the necessary inspections and investigations for that purpose."

Clause 5(3) "The person or persons contemplated in subsection 2(a) and (b) may not enter the property unless authorised in writing by the expropriating authority to do so, and—

(a) the owner or occupier of the property has consented thereto in writing, after being informed;

(b) ; or

(c) in the event of the owner or occupier refusing or failing to grant consent contemplated in paragraphs (a) and (b), is in possession of a court order authorising the expropriating authority and such person or persons to enter the land, including any building thereon, for purposes of conducting the investigations contemplated in subsection (2)."

Clause 5(6)

"(a) A person authorised in writing to perform an act contemplated in subsection (2), must—

(i) provide the owner or occupier of the property with a copy of the said written authorisation; (ii) at all times whilst performing

any such act, be in possession of such written authority; and
(iii) identify himself or herself to the owner or occupier of the property by means of an official identification document.

(c) If the person contemplated in paragraph (a) fails to comply with subparagraphs (i), (ii) or (iii) of that paragraph the owner or occupier of the property may refuse that person entry to the property or may refuse the performance of an act contemplated in subsection (2)."

The Bill awards comprehensive powers to a valuer to obtain information from an owner or occupier of the land concerned, as set forth below.

Clause 5(4) "The valuer contemplated in subsection (2)(b) may—
(a) require the owner or occupier of the property to give him or her access to a document in the possession of the owner or occupier that the valuer reasonably requires for the purposes of valuing the property;

(b) extract information from or make copies of a document to which he or she is given access in terms of subparagraph (a);

(c) in writing require the owner or occupier of the property to provide him or her, either in writing or verbally, with particulars regarding the property that he or she reasonably requires for the purposes of valuing the property; and

(d) despite the provisions of any law to the contrary, require the municipality in whose area the land is situated, to provide such valuer—

(i) insight into building plans of improvements on such land;

(ii) a copy or copies of building plans on such land at the cost of the valuer or valuers; and

(iii) such information in respect of municipal property rates or other charges, land use rights including the zoning of the land, availability of engineering services to such land, or such other information with respect to the land, as is in the possession of the municipality and as may be reasonably required for the valuation of the said land by the valuer."

These clauses, and other similar clauses contained in the Bill, may be far too wide. The documents which the owner, tenant or occupier are required to make available, should be limited to official documents (such as title deeds), contracts and the like. The person conducting the investigation should not have access, for example, to the financial records of the owner or to reports and valuations obtained by the owner for purposes of assisting him in negotiating a sale of the property to the state or in anticipation of an expropriation. The owner may have obtained a valuation of the property with which he disagrees and does not intend to use. Why must he be compelled to make it available to the valuer undertaking the investigation, enabling the state to use it against him in future? The clauses, as presently worded, might intrude upon the owner's constitutional right to privacy. To the extent that the clauses are retained, there should be a provision that the information and documents given to the person

undertaking the investigation and which are not already in the public domain, must remain confidential.

Notice of intention to expropriate

If, after investigation, the expropriating authority intends to expropriate a property, it must serve a notice of intention to expropriate on the owner and the holder of an unregistered right in the property of which the expropriating authority is aware.¹⁵ An unregistered right means a right in property, including a right to occupy or use land, which is recognised or protected by law, but is neither registered nor required to be registered.¹⁶ The contents of the notice are prescribed in the Bill, as follows:

Clause 7(2) "A notice of intention to expropriate must include—

(a) a statement of the intention to expropriate the property;

(b) a full description of the property;

(c) a short description of the purpose for which the property is required and the address at which documents setting out the purpose may be inspected and particulars of the purpose may be obtained during business hours;

(d) the reason for the intended expropriation of that particular property;

(e)

(f) a directive to the owner and a holder of a right contemplated in subsection 35 (1)(a) to deliver or cause to deliver in writing, within 30 days of service, subject to section 25—

(i) the names and addresses of any holders of unregistered rights and particulars of such rights, other than those furnished in accordance with section 5(5)(a) to the extent that such names, addresses and particulars are within the knowledge of the owner or the holder; and

(ii) a written statement stipulating the amount claimed by him or her as just and equitable compensation.

(g)

(h)"

If the owner or holder of an unregistered right is not prepared to accept the compensation offered, he or she must respond as set forth hereunder.

Clause 7(4) "Subject to section 25,¹⁷ an owner or a holder of an unregistered right responding to a notice contemplated in subsection (1) must within 30 days of the service of the notice or, if the notice had not been served on him or her, within 30 days of the publication, as the case may be, deliver to the expropriating authority a written statement indicating—

(a) the amount claimed by him or her as just and equitable compensation and furnishing full particulars as to how the amount is made up;

(b) if the property is land, full particulars of all improvements thereon which, in the opinion of such owner or holder of a right, affect the value of the land.

(c)

(d)"

Clause 7(6) "The expropriating authority must, within 20 days of receiving the statement contemplated in subsection (4), in writing—

(a) inform the relevant owner or relevant holder of an unregistered right whether the amount of compensation claimed in the statement is accepted; and

(b) if the amount of compensation claimed is not accepted, indicate the amount of compensation offered by the expropriating authority, furnishing full details and supporting documents of how the amount offered is made up."

Negotiation

An expropriation authority has no power to expropriate property unless it has, without success, attempted to reach an agreement with the owner or the holder of an unregistered right for the acquisition of the property.¹⁸ The Bill does not specify to what lengths the expropriating authority must go in its attempts to reach agreement. If no agreement on the amount of compensation payable can be reached within 40 days of the expropriating authority receiving the claim for compensation in terms of cl 7(4) of the Bill, the expropriating authority must decide whether or not to proceed with the expropriation.¹⁹

Notice of expropriation

If the expropriating authority decides to proceed with the expropriation, it must do so by serving a notice of expropriation. The requirements for a notice of expropriation and its accompanying documents, and also the effects of an expropriation, are set forth in the following clauses:

Clause 8(3) "The notice of expropriation served as contemplated in subsection (1) must contain -

(a) a statement of the expropriation of the property;

(b) the full description of the property, including—

(i) in the case where the expropriation applies to a portion of a land parcel, the approximate extent of such portion in relation to the whole; or

(ii) in the case where the expropriation applies to a right in land, a description of the approximate position of the right in land on such land;

(c) a short description of the purpose for which the property is required and the address at which documents setting out that purpose may be inspected and particulars of that purpose may be obtained during business hours;

(d) the reason for the expropriation of that particular property;

(e) the date of expropriation or, as the case may be, the date from which the property will be used temporarily and also stating the period of such temporary use;

(f) the date on which the expropriating authority will take possession of the property; and

(g) except in the case of an urgent expropriation contemplated in section 22, the amount of compensation offered by the expropriating authority or agreed to by the expropriating authority

and the owner and the holder of an unregistered right, as the case may be."

Clause 8(4) "The notice of expropriation served as contemplated in subsection (1) must be accompanied by documents detailing the following:

(a)

(b) in the case where the expropriation applies to a portion of a land parcel, a survey diagram or sketch plan showing the approximate position of such portion in relation to the whole;

(c) in the case where the expropriation applies to a right in land, a survey diagram or sketch plan, on which the approximate position of the right in land on such land is indicated, unless the right in land is accurately described without such survey diagram or sketch plan; (d) an explanation of what the offer of compensation referred to in subsection (3)(g) comprises of, together with supporting documents detailing how the offer of compensation was determined, if applicable;

(e) a directive calling upon the expropriated owner and expropriated holder as the case may be, to submit in writing the names and addresses of all holders of unregistered rights in the property and particulars of such rights, other than those furnished in accordance with sections 5(5)(a) and 7(2)(f), if any, to the extent that such names, addresses and particulars are within the knowledge of the expropriated owner;

(f)

(g)

(h)"

Clause 9(1) "The effect of an expropriation of property is that -

(a) the ownership of the property described in the notice of expropriation vests in the expropriating authority or in the person on whose behalf the property was expropriated, as the case may be, on the date of expropriation, released from mortgage bonds, if applicable;

(b) all unregistered rights in such property are simultaneously expropriated on the date of expropriation unless—

(i) the expropriation of those unregistered rights are specifically excluded in the notice of expropriation; or

(ii) those rights, including permits or permissions, were granted or exist in terms of the provisions of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

(c)

(d) the property remains subject to all registered rights, with the exception of a mortgage bond, if any, in favour of third parties with which the property has been burdened prior to expropriation, unless or until thereof in terms of this Act such registered rights are expropriated from the holder."

A purchaser of property subject to a deed of sale and the holder of a builder's lien over property does not have a separate claim for compensation if the property is expropriated. The compensation money awarded to the owner must, however, be apportioned

tioned between the owner and the buyer or the holder of the builder's lien, as the case may be.²⁰

It is unclear whether the rights of an "occupier" as defined in ESTA, the rights of a labour tenant, the rights of a farm worker or the rights of a claimant for land restitution have to be regarded as unregistered rights under the Bill and therefore subject to the payment of compensation.

The provisions in the Bill relating to claims for compensation for unregistered rights are not as clear as they might have been.²¹ The provisions include the following:

Clause 11(1) "An expropriated holder of an unregistered right in a property that has been expropriated by the operation of section 9(1)(b) is, subject to section 10 and this section, entitled to compensation."

Clause 10(1) "If, after the date of expropriation, a person claims to have held an unregistered right in the expropriated property for which that person has not been compensated, the expropriating authority must request that person to deliver within 20 days of receipt of the request, subject to section 25, a copy of any written instrument in which the unregistered right is contained, if such instrument is in his or her possession or under his or her control, or any other evidence to substantiate the claim." Clause 10(2) "If the unregistered right, claimed as contemplated in subsection (1), pertains to the use of improvements on expropriated land, the evidence required in terms of subsection (1) must include—

- (a) a full description of those improvements;
- (b) an affidavit or affirmation by the person concerned stating whether those improvements were erected by that person and if so, whether the materials used for erecting those improvements were owned by that person; and
- (c) the amount claimed as compensation for such unregistered right, together with details or a report, if any, on how the amount is computed."

Amount of compensation

The principles in accordance wherewith the amount of compensation payable to an expropriated owner or holder of an unregistered right are set forth in the following clauses:

Clause 12(1) "The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable of the expropriated owner or expropriated holder, having regard to 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 ac-

quisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation."

The Constitution does make it peremptory that all five factors be applied. Only those which are relevant need to be considered. Similarly, the five listed factors are not the only factors that may be taken into account. Other factors may also be relevant.²² It could include the factors specifically listed in clause 12(2) of the Bill, most of which have been taken from the 1975 Expropriation Act.²³ It could also include factors not listed at all, such as actual financial loss caused by the expropriation.²⁴

Clause 12(2) "(2) In determining the amount of compensation to be paid in terms of this Act, the expropriating authority must not, to the extent that it is just and equitable to do so, take account of—

- (a) the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;
- (b) the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;
- (c) any enhancement in the value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
- (d) improvements made on the property in question after the date on which the notice of expropriation was served upon the expropriated owner and expropriated holder, as the case may be, except where the improvements were in advance agreed to by the expropriating authority or where they were undertaken in pursuance of obligations entered into before the date of expropriation;
- (e) anything done with the object of obtaining compensation therefor; and
- (f) any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the purpose in connection with which the property was expropriated."

Although market value does not have a central role in the determination of compensation, it could be a starting point in the determination of compensation since it is one of the few factors listed in section 25(3) of the Constitution which are readily quantifiable. After market value has been determined, amounts may be subtracted or added as other relevant circumstances [including the sec 25(3) factors] may require.²⁵

The factors for the determination of compensation as listed in the Bill are not all within the expertise of a valuer. That raises the question of whether a valuer can or should express opinions on the relevance and quantification of factors which fall outside his field of expertise,²⁶ or whether he should limit his evidence to those factors in respect of which he does have expertise, and leave it to the parties or the Court to consider the others and,

having done so, to determine the final amount of compensation. In essence, the function of an expert is to assist the Court to reach a conclusion on matters which the court does not have the necessary knowledge to decide.²⁷ It could well be that evidence on matters not within a valuer's expertise would not be admissible in a court hearing. If the valuer does express an opinion on the amount of compensation which the expropriating authority ought to pay, this would make him an arbiter on justice and equity. It would be an addition to his normal functions, a change and a challenge.

The Department of Land Affairs, in the *DLA Handbook on property valuation* (May 2000), takes the position that the valuer must consider all the relevant factors. The following excerpt comes from the Handbook:

The final figure that must be presented to the DLA by the valuer in the circumstances identified above is thus, not the market value of the land, but rather a figure corresponding to the just and equitable compensation that the valuer concludes the state is obliged to pay. In arriving at this figure, the valuer must adjust the market value according to the established valuation methods by factoring in the issues listed in paragraphs (a), (b), (c) and (e) of section 25(3).²⁸

Compensation claims and offers

After the notice of expropriation has been served, the owner or holder of an unregistered right must deliver a claim for compensation. The Bill prescribes what information must be set forth in the claim and which documents must be delivered together with the claim, as set forth below.

- Clause 14(1) "An owner or a holder of an unregistered right who receives a notice of expropriation in terms of section 8(1) must, subject to section 25, within 20 days from the date on which that notice was served on that owner or holder deliver or cause to be delivered to the expropriating authority a written statement—
- (a) either confirming that the compensation as stipulated in such notice was agreed to or, if applicable, indicating whether the offer of compensation stipulated in such notice is accepted;
 - (b) if no compensation was offered, as in the case of an urgent expropriation in terms of section 22 or if such offer in the notice is not accepted, indicating the amount claimed by such owner or holder as just and equitable compensation;
 - (c) furnishing full particulars as to how the amount contemplated in paragraph (b) is made up, including a copy of a valuation, other professional report or other document that form the basis of the compensation claimed, if any;
 - (d) if the property expropriated is land, furnishing full particulars of—
 - (i) improvements on the land that in the opinion of the owner or the holder affect the value of that land; and
 - (ii) all unregistered rights that exist in respect of such land and that he or she is aware of, including the name and address of the

holder of such unregistered right and, if the unregistered right is contained in a written instrument in his or her possession or under his or her control, a copy of that written instrument;

- (e)
- (f)

After the expropriating authority has received the compensation claim and if it does not accept the claim, it must make an offer of compensation to the owner or person in charge, as set forth in clause 15 below.

Clause 15 "(1) If the expropriating authority does not accept the amount claimed by a claimant in terms of section 14(1) the expropriating authority must, within 20 days of delivery of the statement contemplated in that section, make an offer of just and equitable compensation to the claimant in writing, furnishing full particulars of how such amount is made up and calculated.

(2) The offer of compensation contemplated in subsection (1) must be accompanied by copies of reports detailing how the offer of compensation is determined, if the amount is different to the amount offered by the expropriating authority in terms of section.

(3) Unless the expropriating authority and the claimant have agreed otherwise, the latter must be regarded to have accepted the compensation offer made to him or her by the expropriating authority, as contemplated in subsection (1), if he or she fails to institute legal proceedings for the determination of the compensation before a date stipulated by the expropriating authority by written notice delivered on the claimant, provided that the said date may not be a date earlier than 60 days from such notice."

Sec 12(1)(a) of the Property Valuation Act 17 of 2014 provides that "whenever a property has been identified for purposes of land reform that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines." It should be clarified whether the compensation offers which the expropriating authority is obliged to make in terms of the Bill, are subject to sec 12(1)(a) of the Property Valuation Act.

Determination of compensation by a court

In the absence of agreement between the parties, the compensation due to an owner or holder of an unregistered right must be determined by a court.²⁹ The court can be a High Court or a Magistrate's Court having competent jurisdiction, in whose area of jurisdiction the property concerned is situated.³⁰

Expropriation register

The Bill requires the Director-General of the Department of Public Works to keep an expropriation register, as set forth in the following clauses:

Clause 26(1) "The Director-General must ensure that a register of all expropriations that are intended, effected and withdrawn, and of decisions not to proceed with a contemplated expropriation by all expropriating authorities, is opened, maintained and accessible to the public."

Clause 26(2) "All expropriating authorities must deliver to the Department a copy of any notice of an intended expropriation, expropriation and withdrawal of expropriation, and of any decision not to proceed with an intended expropriation, within 20 days of the service or delivery of such notices."

Time periods

The Bill prescribes several time periods and cut-off dates for compliance with responsibilities and duties, both by the expropriating authority and the land owner or holder of a unregistered right. The method of calculation of such periods is important.

Clause 1(2) "(a) A Saturday, Sunday or public holiday must not be reckoned as part of any period calculated in terms of this Act. (b) The period 20 December to 7 January inclusive, must not be reckoned as part of any period calculated in terms of this Act."

The expropriation authority has the power to extend a period within which something must be done in terms of the Bill. It is not clear whether an extension is permitted after the period sought to be extended has already expired.

Clause 25 "Wherever a period is mentioned within which something must be done in terms of this Act, the expropriating authority may, on written request and good cause shown by the relevant owner or relevant holder of a right in property or other interested or affected person, as the case may be, from time to time extend that period for a further period or periods as may be reasonable in the circumstances."

The Bill does not specify what remedies (if any) the owner or person in charge will have if the expropriating authority refuses to extend a time period.

Litigation costs

Clause 21 of the Bill introduces a formula for the determination of liability for legal costs in court proceedings for the determination of compensation for the expropriation of a property. The formula is disadvantageous to the owner or holder of an unregistered right, more so than would be the case in ordinary civil litigation. The formula might well be in conflict with the principles underlying the Constitution.

It was held by the Constitutional Court that in litigation between the state and private parties seeking to assert a constitutional right, the state should ordinarily pay the costs of the private party if the state loses. If the state wins, it should normally bear its

own costs and not recover them from the party.³¹ Compensation claims for expropriation is constitutional litigation.³²

Other expropriation laws

A distinction should be drawn between the power to expropriate and the method of expropriation. It has been alleged that the Bill gives the power to expropriate to a myriad of State institutions. That is not correct. The Bill gives the power to expropriate only to the Minister of Public Works. Other state institutions might have the power to expropriate under different legislation. If they have, they must, in terms of 2(3) of the Bill, exercise such power in accordance with the method of expropriation set forth in the Bill.

Clause 2(3) "An expropriating authority may expropriate property in terms of a power conferred on such expropriating authority by or under any law of general application, provided that the exercise of those powers is in accordance with sections 5 to 27 and 32."

Clause 29 (1) Subject to section 2, any law dealing with expropriation of property that was in force immediately before the date on which this Act came into operation, must be interpreted in a manner consistent with this Act, and for that purpose any reference in any such law to—

"(a) a functionary authorised to expropriate property, must be construed as a reference to an expropriating authority; and (b) compensation as provided for in sections 12 and 13 of the Expropriation Act, 1975 (Act No 63 of 1975), must be construed as a reference to compensation contemplated in the provisions of section 25(3) of the Constitution and the provisions of this Act."

Clause 29(2) "In the event of a conflict between this Act and any other law contemplated in subsection (1) in relation to matters dealt with in this Act, this Act prevails."



By Dr Antonie Gildenhuys

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