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Committee Secretary
National Council of Provinces
Mr. Hlupheka Mtileni
3rd floor, W/S 3/083
90 Plein Street
Cape Town
8001

Doc Ref: MOSIDIM/#320169v1

Your ref:

Direct: +27 11 645 6752

E-mail: mosidim@banking.org.za

Mr. Hlupheka Mtileni
email: expropriationcomments@parliament.gov.za

Dear Mr Mtileni

Public Submission: Expropriation Bill [B23B – 2020]

The Banking Association South Africa (“The Banking Association”) would like to thank The Department of Public Works and Infrastructure and the National Assembly Committee on Public Works and Infrastructure for the opportunity to comment on the above-mentioned Bill.

Who we are

The Banking Association is an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 35 member banks which include both South African and International banks. All licensed banks are members of The Banking Association. Our vision and role, together with our areas of focus, including a list of our members may be found on our website, www.banking.org.za

Context

The Banking Association is fully supportive of the State’s initiative/s to rectify past racial injustices and efforts to correct current land ownership patterns. In so far as the State uses expropriation legislation,

it must be conducted in a way that is procedurally fair. When identifying property for expropriation it should consider the suitability of such property, keeping in mind the above factors. The banking sector has raised several concerns around the determination of compensation for expropriated property, including nil compensation, and these concerns remain.

As the Banking Association, together with our members we, remain committed to playing a leading role in collaborating with key stakeholders, including Government towards creating a better life for all South Africans. A sound and secure banking and regulatory framework is essential to enable faster and inclusive economic growth. Property rights and prosperity are inextricably linked, where banks place reliance on property as security for loans. Banks are also required in terms of the Banks Act (1990) and Regulations thereto to value their assets at market value. A marked decrease in the value of properties, caused by either amendment to legislation and/or market uncertainty, and/or a reduced interest in property from property buyers could destabilise the banking sector, and have a negative impact on the credit rating of the sector as well as the country.

The Banking Association respectfully requests that it be permitted to make an oral submission on the Bill at the envisaged National Council of Provinces hearings.

Our key message below is followed by a more detailed commentary.

Key message

1. Property owners with mortgages and other bonds on properties that may be expropriated at below market value or without compensation face severe liabilities as their loan agreements remain valid and binding irrespective of the value realised for the property used as security in support of the loan. The reason for this is because loan agreements with banks are secured by mortgages over the property and therefore borrowers will still be liable for the full debt on a property.

Banks have extended approximately R1,6 trillion in residential, commercial and agricultural mortgages to borrowers. Many other forms of credit are premised on a customer's financial standing, which in the majority of cases is supported by the equity in their property. Currently, the market value of land-based property in South Africa is estimated at R7 trillion, representing the homes and savings of ordinary people. Any legislation that threatens the repayment of loans owing to banks will undermine a critical sector of the economy and put depositor's funds at risk.

Banking crises often start with a decline in the value of land-based property and the impact this has on market confidence, as was evident in the global financial crisis of 2008. A sound banking and financial system is essential for inclusive economic growth.

The South African Banks Act and Regulations thereto (these are in turn aligned to the global Basel framework for the financial sector – South Africa as a member of the G20 is obliged to adopt this framework) require that banks have sufficient capital and liquidity to return depositors and investors funds – with interest – on demand. If the value of land is reduced by expropriation to nil compensation, or at below market value, banks will have reduced capital against which to extend credit for entrepreneurs and personal development. They will have to adopt more conservative loan policies, which will affect not only loans on property, but all credit extension.

2. If 'just and equitable' compensation for expropriated land is below market value, this will inhibit the ability of banks to provide credit where property serves as security for a loan. To mitigate this, government should automatically guarantee the difference between 'just and equitable' compensation and market value. The difference should be paid to affected financial institutions to eliminate losses. This approach was approved by Cabinet, in October 2012, when it adopted the Department of Rural Development and Land Reform (DRDLR) policy: 'A framework for land acquisition and land valuation in a land reform context and for the establishment of the Office of the Valuer General'. However, this has since been ignored in subsequent versions of the Expropriation Bill and the Property Valuation Act and Regulations thereto (despite BASA's requests for this to be included).

The possibility of expropriation at below market value or without compensation has already started discouraging essential investment by farmers into their property, increasing food insecurity, as well as investment into the general economy and in particular into property. It must be made clear as soon as possible what land may be subject to expropriation, and which will be excluded.

3. We recognize the need for the State to align the Expropriation Act (No. 63 of 1975) to Section 25 of the Constitution of the Republic of South Africa (No. 108 of 1996).

Of concern is that South Africa's definition of expropriation excludes the deprivation of property for the benefit of the nation where it is not transferred into the name of the state (Constitutional Court ruling) as well as compensation below market value. This conflicts with global norms, including that of the OECD. As the Protection of Investment Act (2015) subjects' international investors to the prescripts of South African legislation, and as aggrieved parties are now prevented from turning to the international arbitration court, the Bill in its current format may discourage international investment into South Africa and result in capital flight should international investors incur losses due to expropriation at below market value. The Bill is also at variance to existing Trade Agreements.

4. We also highlight that South African case law in respect of expropriation does not fully align to international norms, as the Constitutional Court interpreted deprivation as not constituting expropriation in instances where the State does not acquire the property (*Agri SA v Minister of Minerals and Energy* (2013) refers). The Organisation for Economic Co-operation and Development (OECD), which consists of 36-member countries, including our biggest trading partners in Europe, the United States of America and Canada, amongst others, hold the view that expropriation or “wealth deprivation” could take various forms. This could be direct or “dispossession”, “taking”, “deprivation” or “privation” as constituting expropriation. Even in instances where a property is not seized or legal title is not affected, but the state restricts use or the enjoyment of the benefits, it is classified by the OECD as expropriation, as the measures taken by the state have a similar effect to expropriation or nationalisation (termed “indirect” or “creeping” expropriation).
5. Whilst some amendments were proposed to the definition of “public purpose” we are of the view that further enhancements are necessary. Other key definitions which have not been clearly defined within the Bill, namely “just and equitable” compensation, and “public interest”, introduces policy uncertainty and opens the Bill for injudicious expropriation.

Further, the definition of property is viewed in the broadest sense within the Constitution and so the Bill is aligning to this definition. Property can therefore include intangible property (intellectual property, patents etc.). The definition of property within the Bill should therefore be restricted to tangible property only and this should be further confined to only include the country’s resources (land, water, mineral resources).

6. The Bill conflicts with some existing legislation e.g., expropriation can occur before ownership is transferred in the deed’s registry (this is at variance to the Deeds Registries Act (1937)) and undermines a property owner’s rights. The Bill provides for a property to be expropriated even if it is being disputed in the courts.
7. Section 12 of the Bill which seeks to identify 5 instances where nil compensation may be justified, is ill defined and given that the preamble to this section states “but is not limited to” makes this section irrelevant. Further, as a principle we are opposed to the inclusion of this section as it represents a dilution of property rights.
8. Unless the Bill provides policy certainty, aggrieved parties resorting to the courts for “just and equitable” redress will exacerbate public uncertainty in an area that is both highly emotional and sensational. There is therefore a need for the Bill to be crisp and clear and to provide definitive guidance to the 256 odd state entities which possess expropriation rights, and which will ensure

that expropriation is implemented prudently and equitably, failing which local and international investment into property (and in particular land) will be threatened.

9. We believe that there is a need for inclusion of definitions for a Mortgage bond, a secured creditor, Financial Institutions and Mortgage Debt. Suggested definitions:
 - i. Mortgage Bond: means a bond attested by the Registrar of Deeds (appointed in terms of the Deeds Registries Act (1937) specially hypothecating immovable property;
 - ii. Secured creditor: means, in relation to any property, a creditor which has a right to payment of its claim out of the proceeds of that property in preference to other claims, by virtue of any mortgage bond, landlord's legal hypothec, pledge, cession or right or retention;
 - iii. Financial institutions: means any person or institution referred to in the definition of "financial institutions" as set out in the Financial Sector Regulations Act (2017); and
 - iv. Mortgage Debt: means any monies advanced by a financial institution against security of a mortgage bond over the property.
10. We previously recommended that a clear obligation needs to be placed on the expropriating authority to purposefully engage with financial institutions as a registered rights holder (secured creditor/cessionary) prior or simultaneously to discussions with an expropriated owner. We note the proposed amendments in this regard which are welcomed. We propose some consequential amendments to the Bill to deal with the rights of secured creditors to the benefit of the property mortgage market, among others.
11. The Bill does not distinguish between local and foreign ownership, which may negatively impact foreign investor confidence and bilateral trade agreements with foreign countries.
12. "Just and equitable" expropriation needs to be consistently applied to all, including state owned institutions.
13. A holder of a right needs to reference both registered and unregistered rights throughout the Bill.

Our more detailed comments on the Expropriation Bill follow below.

CHAPTER 1: DEFINITIONS AND APPLICATION

” Holder of a right”

The definition is not updated to include holders of registered rights but have added an exclusion for 'unregistered owner'. It is not clear whether the exclusion pertains to purchasers not yet registered or owners of rights to property that is not yet 'registrable'.

Recommendation

We recommend that the definition of a “holder of a right” should read: “Means a holder of a registered or an unregistered right in property.”

“Land Parcel”

‘Land parcel’ is updated in some provisions but still not used consistently. Land’ and ‘Land Parcel’ are still used interchangeably without including a definition for ‘Land’ to clarify the distinction. We support the definition of “land parcel” and are of the view that this wording should be used consistently throughout the Bill for clarity of interpretation of all provisions.

Recommendation

If the intention of the Bill is to apply an alternate interpretation when referencing “land”, then “land” should also be clearly defined.

“Owner”

It is unclear whether the current definition of “owner” is intended to include a holder of registered rights in property, such as a bondholder (although it appears that it might). It is important to understand whether this is the case and for the wording to clearly define this as so, as subsequent sections in the Bill specifically reference to the rights of owners and holders of unregistered rights, and do not include reference to holders of registered rights. As an alternative to our recommendation that the definition of an “expropriated holder” and a “holder of a right” be amended to include registered rights holders, it is imperative to clarify whether “owner” includes the holders of registered rights. It is also imperative that definitions are used consistently throughout. For example, section 7 (2) (h) (i) invites “any person who may be affected by the intended expropriation” to raise any objections to the intended expropriation.

Recommendations

The definition of “owner” to be amended as follows with a concomitant addition of a definition for “real right”.

“**owner**”, means the owner of property or the holder of a real right in property at common law and where the ownership of the property or real_right in question is registered, means the person in whose name such property or real_right is registered, and—

“**real right**” includes any right which becomes a real right upon registration with the appropriate registration authority.

“Property”

“Property” is defined as “property as contemplated in section 25 of the Constitution”, which definition does not limit property to only land. While we support an interpretation that “property” should include both registered and unregistered rights in land, we do not support a broader application that could include intellectual property or personal rights.

Recognized types of property include:

- Moveable and immovable property
- Tangible and intangible property;
- Corporeal and incorporeal property.

South Africa recognises certain types of rights in property. These are:

- Real rights, which apply to immovable and moveable property (land and improvements, shares in companies, usufructs etc.);
- Personal rights, for example, personal security, liberty etc.;
- Immaterial property rights, which apply to intellectual property;
- Limited real rights which refer to a restrictive right that a person has over another’s property e.g. a servitude;
- Statutory rights, which refers to legal rights created by the state through legislation.

Recommendations

The Bill should be aligned specifically to the references made to “Land Reform and equitable access to all South Africa’s natural resources” in Section 25 (4)(a) of the Constitution. Therefore, the definition of “property” should be restricted to only reference “registered and unregistered rights in land parcels and equitable access to all South Africa’s natural resources”.

The Bill should therefore provide a definition of property beyond merely referring to Section 25 of the Constitution i.e., the definition should explicitly define the classes of property that can be expropriated.

“Public Interest”

“Public interest” is defined in the Bill as “includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources in order to redress the results of past racial discriminatory laws or practices”.

We submit that this definition should be redefined within the context of Section 25(2) of the Constitution as:

- “Public interest” could be interpreted to include both ‘for profit’ and ‘not for profit’ entities. Outside of land reform and reforms that bring about equitable access to South Africa’s natural resources, where beneficiaries would benefit from for profit initiatives, “public interest” should otherwise be restricted to consumptive and non-profit use purposes only. This would be in accordance with the principles of fairness. This would include public facilities and public welfare undertakings that do not aim for profit, but rather to serve the public, and where benefits are shared by society, e.g., roads, military installations, public facilities, government buildings etc. Any other land use should be excluded from the scope of land expropriation.
- Private and public companies as per the definitions (Chapter 1, Interpretation, Purpose and Application) of the Companies Act (2008) and Amendments thereto, that generate profits are not allowed to expropriate property and natural resources to generate profit but can acquire such property and natural resources through the normal operations of the market. Similarly, state-owned companies that generate profits should not be allowed to expropriate property and natural resources in order to benefit from such expropriation for profit generation purposes but should only be allowed to expropriate property if the proposed definition of “public interest” is met.
- Third party transfers that benefit a private person (excludes land reform/equitable access to natural resources) but which does not benefit the public in any way should not be allowed and the Minister/the courts should always ensure that this is the case in any expropriation that seems to

benefit a third party. Further, expropriations that benefit a third party that provides a public utility should only be allowed as far as they satisfy the “public interest” requirement.

There are numerous international examples where failure to define “public interest” more accurately has led to third party transfers that benefit a private person but not the public. Internationally, expropriation law for “public interest” purposes is therefore strictly defined, listing those entities that may expropriate property and defining the methodologies that must be adopted by them for doing so.

This would include:

- Generalisation (defining the “public interest” need e.g., public engineering construction, state subsidy housing etc.);
- Enumeration (for setting up various social public undertakings e.g., roads, parks etc.);
- A combination of the above two focus areas e.g., setting up public undertakings such as a water conservancy, land reform, or equitable access to natural resources etc.;
- Elimination (exclusions are specified).

Further, if the expropriation of a property/portion of a property will have a negative impact on the market value of the remaining portion of a property or adjacent properties, the owner/s of such properties should have the right to request that these properties should also be expropriated e.g., a property/portion of a property is expropriated for usage as a national road. This would negatively impact on the market value of the remainder of the property/properties adjacent to the road and such an owner/s would be unfairly prejudiced were they unable to request that these properties too be expropriated.

Recommendations

The definition of “public interest” should be aligned to Section 25 (4)(a) and (b) of the Constitution.

We therefore recommend the definition of “public interest” should be amended to read, “includes the nation’s commitment to land reform, **with an obligation on the state to take appropriate measures to ensure that equitable land reform is for the benefit of the recipients of expropriated land, to empower them with access to capital, skills and resources, to be successful, as further prescribed in the Regulations to the Bill, and to reforms ...**”.

New insertion into the Bill:

“The owner/s of the remaining portion of a property/adjacent property have the right to request that these properties be expropriated if the initial expropriation negatively impacts on the market value of

their property/properties. Disputes as to whether the initial expropriation has impacted on such property values or expropriation compensation levels are to be resolved through the courts”.

“Public Purpose”

“Public purpose” is defined as *“includes any purposes connected to the administration of any law by an organ of state, in terms of which the property concerned will be used by or for the benefit of the public”*. We submit that this definition is incomplete as there is a need for clear regulation of the “public purpose” requirement in legislation to ensure conformity with Section 25(2) of the Constitution. This would also align the definition to international norms where the principle of requiring a strong indication of public necessity in applying the “public purpose” requirement is scrutinised by the courts and it places an onus on the state to provide a detailed and specific motivation as to the necessity for an expropriation to occur. The UN (United Nations Conference on Trade and Development (2012)) states that there is no single definition to effectively capture the meaning of “public purpose”. However, the UN report also states that the concept of “public purpose” is the pursuance of a legitimate welfare objective, as opposed to private gain or an illicit end.

Recommendations

The definition for “public purpose” should be aligned to Section 25(2) of the Constitution and should also include circumstances provided for in the current Expropriation Act (1975) and related land tenure & restitution of land rights legislation. Moreover, there is a need for clarity to ensure conformity with Section 25(2) of the Constitution which demonstrates public necessity. Constitutional Court cases: *Fnb v SARS* (2002), *Bissett v Buffalo City Municipality* (2003), amongst others have reference.

A provision for Regulations which detail qualifying activities for “public purpose” should be added into the Bill.

We recommend that the definition should be amended to include **“any purpose that results in an outcome of economic development for the recipient of land expropriation and the economy, connected with the administration of the provisions of any law by an organ of state”**.

In addition, we recommend that Regulations which articulate the proposed definition of “public purpose” are drafted.

APPLICATION OF THE ACT

Section 2(2)

The Bill remains vague around the meaning of “without success”.

How will it be determined if the Expropriating Authority (EA) has “without success attempted to reach an agreement with the owner...?”

The Bill should clearly state what process should be followed to demonstrate that no agreement could be reached with the owner or holder of an unregistered/registered right.

Recommendation

We recommend that the phrase “without success” be deleted and the following phrase be added at the end of the clause “and the parties have failed to reach agreement regarding the acquisition...”

CHAPTER 2: POWERS OF THE MINISTER TO EXPROPRIATE

Section 3(5)

This section provides that ownership of property expropriated by the Minister will vest in the State. This however poses the question as to whether the property use will be restricted to the stated purpose of the expropriation, as the intended use of the property impacts the amount of compensation that is deemed to be “just and equitable”. The Bill should therefore state that the expropriated property must be used for the purpose it was expropriated and that it cannot be used for any other purpose without the State reviewing the quantum of the compensation paid to reflect “just and equitable” compensation based on the alternative property use.

Recommendation

We propose that a clause be added that emphasises that the expropriated property must be used for the purpose it was expropriated and that it cannot be used for any other purpose without the State reviewing the amount of the compensation paid to reflect “just and equitable” compensation based on the alternative land parcel use.

Section 3(5)(a)

This section is in contravention of the Deeds Registries Act (1937) as it provides for:

1. Ownership before transfer of the property is effected;
2. There is no alignment to the requirements for the valid transfer of immovable property.

Although it is acknowledged that ownership can vest by operation of the law, we believe that the current well-established system of transfer of ownership, as contained in the Deeds Registries Act, is the appropriate method of determining ownership. Additionally, the section provides for:

- no alignment to the requirements for the valid transfer of immovable property.

Recommendation

“The ownership of the property vest in the relevant organ of state on the date on which transfer of ownership of the property is registered by the relevant deeds registry office in terms of the Deeds Registries Act (1937);”

The words “of expropriation” should be deleted.

Section 3(5)(b)

We recommend that possession should only be given on transfer of ownership to the relevant organ of state and not prior to that.

Recommendation

“Possession of the property will vest in the relevant organ of state on the date of registration of transfer of ownership of the property in the name of the State.”

CHAPTER 3: INVESTIGATION AND VALUATION OF PROPERTY

Section 5(1)(b)

It is not only the impact of intended use that should be considered but also the impact on the current use of the property.

Recommendation

This clause to read as follows “the existence of registered and unregistered rights in such property and the impact of such rights on the current and intended use of the property.”

Section 5(2)

We believe that the consent of the owner must be obtained and that in the absence thereof, a court order should be obtained. Here and in numerous other sections, we recommend that the words “if the property is land” be removed (our previous request that the definition of “property” must be limited to land / immovable property refers).

Recommendation

This clause to read as follows: “Subject to subsection (3), an expropriating authority **must with the prior written consent of the owner or an applicable court order**, in writing... “

Section 5(4)(a)

The documents, which the owner, tenant or occupier are required to make available to a valuer, should be limited to official documents (such as title deeds, building plans for improvements, servitudes, liens over the property, usufructs etc.), contracts relating to unregistered expropriated rights, dams and other infrastructure and any other documents which a court on application by the relevant expropriating authority may order the owner or occupier to make available.

Furthermore, the documents envisaged in this sub-section may include any internal valuation of the property (adopting a fair value measurement in accordance with IFRS 13) (which may be incorrect) or an external valuation (which may not have been accepted because e.g. it is incorrect). The result could be that the owner, right holder etc could wind up essentially prejudicing itself by disclosing a document that is incorrect and/or that it has not accepted. Other documents that may be relevant include say an environmental impact assessment report reflecting environmental degradation of the property, non-compliance with the applicable town-planning scheme or any encroachment by improvement on the property onto a neighbouring property etc.

If the owner or occupier is engaged in a legal dispute with a third party about that that issue, this disclosure might pose the risk of the owner or occupier being obliged to incriminate itself and/or disclose prejudicial information. This is not only a risk for banks as property owners or mortgagees but also for Provincial Public Entities and Provincial Government Business Enterprises contemplated in Schedule 3 to the Public Finance Management Act, 1999. S5(9) and the Bill in its current form does not provide significant comfort in this regard.

Recommendation

The documents need be limited to those required for the valuation to be undertaken and those that are not subject to legal privilege, confidential of the subject of a dispute. The Property Valuation Act (2014) states that the valuer must write a report which must be made available to the owner. The availability of such a report to the owner, registered and unregistered rights holders should be included in the Bill.

We believe that the value of the property is affected by an intended expropriation. As soon as an expropriation notice is published, a property’s market value is impacted. We therefore recommend

that the valuation process should commence prior to the publication of the expropriation notice in terms of s7 so that the value of the property is not unnecessarily negatively affected (the valuation of the property will materially guide the State in objectively determining whether it should proceed with an expropriation notice).

Section 5(7)

This section refers to the property being repaired to a “reasonable standard” if it has been damaged. It is not clear what a “reasonable standard” entails in this context.

The clause also provides that if the property in question is damaged through an act contemplated in subsection (2), an affected person may deliver written demand to the expropriating authority and the latter must repair the damage to a reasonable standard or compensate for the damage “without undue delay”. It is unclear as to what would constitute “without undue delay”, it is recommended that a period be legislated in this regard as well.

Recommendation

We recommend that the section be re-phrased to read “S5(7) If the property in question is damaged through an act contemplated in subsection (2), an affected person may deliver written demand to the expropriating authority and the expropriating authority must confirm within 15 days receipt as well as the acceptance of notification. If the expropriating authority has accepted the written demand, the expropriating authority must repair and/or restore the property to the state it was in prior to the damage taking place within the confines of the National Environmental Management Act (1998) and any other environmental legislation with similar requirements or compensate the owner to repair and/or restore the property to the state it was in prior to the damage taking place or compensate for the damage within 90 days after the above notification date.”

CHAPTER 4: INTENTION TO EXPROPRIATE AND EXPROPRIATION OF PROPERTY

Section 7

The Bill contains no express provisions regarding a property owner/rights holder challenging the expropriation itself.

Recommendation

The Bill should expressly provide details concerning the process to be followed for a property owner/rights holders to challenge an expropriation.

Section 7(1)

In terms of this section, the notice of intention to expropriate land is not filed with the Registrar of Deeds. This will have a major impact on lenders in instances where they are seeking to take the property as security for a loan e.g. whilst the owner is aware of the intended expropriation and has reached agreement with the expropriating authority on the amount of compensation to be paid, he/she could allow the bank to take the property as security prior to the expropriating notice, provided for in section 8, being filed with the Registrar of Deeds.

Recommendation

Filing notices of intention to expropriate a property with the Registrar of Deeds is recommended to allow banks to timeously identify potential risk/losses.

Section 7(1)(a)

As previously highlighted, there is a need for the “holder of right” to include a reference to registered rights.

This section has been updated to include ‘Mortgagee’ which is a welcome change to the Expropriation Act 63 of 1975 as well as prior versions of this Bill.

Recommendation

This clause should read as follows: “serve a notice of intention to expropriate on the owner and any known holder of a right in the property; **and on the Registrar of Deeds.**”

Section 7(2)(f)

Temporary use is not defined within the Bill and the circumstances under which property will be temporarily used is also not defined. This contradicts Section 25 of the Constitution in that it deprives the owner of the right to property without clearly defining the circumstances under which this will occur.

It is also noted that the intended date of expropriation could differ from the date the authority will take possession of the property, thus the effect on the bank and the owner could effectively be earlier – on date of possession, which would be earlier than the actual expropriation date.

Recommendation

We recommend that temporary use and the circumstances under which property will be temporarily used be defined.

Section 7(2)(j)

The clause provides that a person who may be affected by the intended expropriation will have to 30 days after publication of the Notice to object of the intended expropriation. It is recommended that this period to object should be 90 days. This will afford affected person sufficient time to prepare the submission as contemplated in clause 7(2)(h).

Recommendation

We recommend that 30 days be changed to 90 days to allow affected parties to lodge an objection.

Section 7(2)(g)

Is an important subsection as Section 9 indicates that the liability for the costs and municipal charges will only pass to the expropriated authority upon possession, even though ownership could have passed at an earlier date in time (date of expropriation). Ownership and the liability for costs should follow norms i.e., possession and liability for the costs and municipal charges should only take place on transfer of ownership.

Recommendation

We recommend that the existing subsection be deleted and substituted with the following: “the expropriating authority will only take possession of the property after transfer of ownership has been registered in the name of the relevant organ of state.”

Section 7(4)

The person responding to the notice contemplated in s7(1) may be an owner, a mortgagee (or a “secured creditor” as proposed) or holder of a right. It is not appropriate for a mortgagee/secured creditor to accept or decline an offer of compensation. The mortgagee/secured creditor would with any disposal of a property, whether voluntarily or forced (e.g. a sale in execution) only be entitled to recovery of amounts owing to it and any excess above such amounts would be due and payable to the owner/holder of a right.

The mortgagee/secured creditor would, at most be entitled to provide its cancellation figures. Likewise, the mortgagee/secured creditor may be in possession of some or all of the information contemplated in s7(1)(b), but this would be client confidential information, which would not be appropriate for the mortgagee/secured creditor to disclose, inter alia because of obligations relating to client confidentiality, protection of personal information etc

Recommendation

Amend s7(4)(a)(i) to include the underlined wording:

- (i) stating whether he or she accepts the offer of compensation or in the case of a [mortgagee/secured creditor] [select appropriate reference] provide to the expropriating authority an indication of the amount that would be required to procure cancellation of the mortgage bond, landlord's legal hypothec, pledge, cession or right or retention in the ordinary course of business;

Amend s7(4)(b) to include the underlined wording:

- (b) if the property is land, the owner or holder of a right (other than a secured creditor) give the name and address of—

Section 8(3)(f)

In our view, this cannot be a pre-selected or determined date, as possession should only be given once transfer of ownership has been registered in the relevant deed's office.

Recommendation

We recommend the existing subsection be deleted and substituted with the following:

“the expropriating authority will only take possession of the property after transfer of ownership has been registered in the name of the relevant organ of state or recipient of land expropriation.”

Section 8(5)(a)

“Holder of rights” needs to include holders of registered rights.

Notices to unregistered and registered rights holders should be separated and individualised as these notices will display the owners' personal information (The Protection of Personal Information Act (2013) provides for confidentiality of personal information).

Recommendation

This clause should read as follows: “Rights in a property may be expropriated from different owners and holders of unregistered **and registered rights** in separate notices of expropriation being provided **to each respective owner or holder of a registered and unregistered right.**”

Section 8(2)(c)

The clause provides that if the expropriating authority decides not to expropriate, it must inform the owner, mortgagee, or holder of a right in writing “within a reasonable time”. To provide certainty to the owner, mortgagee, or holder of a right, it is recommended that the decision to expropriate must be communicated within 30 days after the decision not to expropriate as contemplated in clause 7(4) of the Bill.

Recommendation

Delete “a reasonable time” and replace with “30 days”

Section 8(5)(b)

The clause refers to accounting authority. It is worth noting that the PFMA makes reference to accounting officers as well.

Recommendation

If it is the intention of the legislature to cover all officers overseeing organs of state as defined in section 239 of the Constitution, it is recommended that reference to “accounting officers” be included where reference to accounting authority is used.

Section 9(1)(a)

This clause is at variance with the Deeds Registries Act (1937) as well as property ownership fundamentals in that transfer of a property needs to precede ownership. It is therefore not clear when risk and benefit in and to the expropriated property passes from the expropriated owner or expropriated holder to the expropriating authority. Entitlement to rental income and other fruits of the property are dependent on this as is liability of losses suffered or damage caused. Ownership may only vest upon transfer of a property is registered in the relevant deeds office.

Recommendation

We propose the following wording: “the ownership of the property ... ***vests in the relevant organ of state on the date on which transfer of ownership of the property is registered by the relevant deeds office in terms of the Deeds Registries Act (1937).***”

Section 9(1)(c)

Temporary use needs to be defined. Recommendation We suggest that the requirements and process for temporary use be detailed in the Regulations to the Bill.

Recommendation

We suggest that the requirements and process for temporary use be detailed in the Regulations to the Bill.

Section 9(3)(a)

The requirement to take “all reasonable steps to maintain” is wide and can be onerous as what would constitute “all reasonable steps...” as these would differ from party to party. In the case of properties in the possession of banks (i.e., where the bank was forced to buy a property at a sale in execution to maximise its monetary recovery via a subsequent sale (protects the bank’s and client’s interest)), the expropriated owner/holder will be the bank itself. This is especially onerous for banks as expropriated owners/holders as it would be unreasonable for them to maintain these properties which are often unoccupied / illegally occupied and vulnerable to possible vandalization despite their taking reasonable steps to try guard these properties.

Recommendation

We recommend that in relation to expropriated owners/holders, the requirement should be limited to the steps that they currently take in cases where a property is abandoned, repossessed or for whatever other reason the property may fall into the possession of the expropriated owner/holder. In essence the requirement should be that the steps taken must not be less than that which is ordinarily taken to safeguard the property.

Section 9(3)(b)

The balance between rights and obligations is not considered here, as this section should not apply if the expropriation is for nil value. We submit that this would not be an issue if possession is only granted simultaneously with transfer of ownership in the deed’s office.

Recommendation

This clause should read as follows: “If the expropriated owner or expropriated holder willfully or negligently fails to maintain the property and as a result thereof the property depreciates in value, excluding where the compensation amount is determined to be nil, the expropriating authority may recover the amount of depreciation from the expropriated owner or the expropriated holder, concerned. provided that the amount so recovered shall not exceed the difference between the compensation paid or to be paid and the aggregate of all amounts payable by the expropriated owner or expropriated holder, as the case may be, to the municipality where the property is situated and all amounts payable to any [mortgagee/secured creditor] in respect of the property.”

Section 10(6)

This provision may place a burden on owners to know exactly who is exercising what rights on their farms (some farms are very large) and knowing which of these rights qualify for compensation upon expropriation. It is important that landowners know what kind of rights are included in the definition of "unregistered rights". If they omit to inform an expropriating authority of a right which they thought is excluded but later appears to be included, the financial consequences for them could be harsh.

Based on the definition, "unregistered right" means a right in property, including a right to occupy and use land, which is recognized and protected by law, but is neither registered nor required to be registered". It is assumed, for example, that any rights which land invaders and "unlawful occupiers" as defined in the Prevention of Unlawful Occupation Act (1998) may have to remain on the land until they are evicted by order of a court, are not included? This section should therefore be expanded to provide certainty to landowners.

Recommendation

Consideration could be given to replacing the words "including a right to occupy and use land" in the definition of "unregistered right" by the words "including a registrable real right and a non-registrable form of land tenure".

Section 11

Unlike holders of registered rights, the holders of an unregistered right are "entitled to compensation". The rationale for the different treatment of holders of registered rights versus holders of unregistered rights is discriminatory and should be amended accordingly.

The inclusion of "mortgagee" under Section 7 provides scope for banks to be involved in determining the compensation. The definition of "owner" could be interpreted to include holders of registrable real rights.

Recommendation

In terms of equality as enshrined in our Constitution as previously referenced, all holders of rights should be treated the same. We therefore recommend that this sentence should either be deleted or worded to reflect fairness and equality for all rights holders be inserted into this sentence.

CHAPTER 5: COMPENSATION FOR EXPROPRIATION

Section 12(1)

The Bill aims to align this section to section 25(3) of the Constitution, which determines the quantum of compensation paid by the expropriating authority to the owner. This may adversely affect financial institutions who provide credit based on market value, as the Banks Act (1990) and Regulations related to this Act (Regulations 23 & 24 of 2012) compel financial institutions to value property as an asset class at market value. In turn, the Banks Act and its Regulations are aligned to global international regulatory frameworks and prudential frameworks (Basel), which South Africa as a member of the G20 is obliged to adopt.

Should the compensation paid by the expropriating authority be less than market value, in some cases outstanding loan balances would exceed the compensation amount paid and financial institutions and owners would therefore suffer a loss. The inadequate management of credit risk can lead to systemic consequences for the economy and the financial system as evidenced by the 2007 global financial crisis. A critical consequence of the Bill would therefore be a negative impact on the stability of or losses suffered by commercial banks.

Should lenders incur losses due to expropriation compensation being below market value, this would in turn result in:

- Lenders adopting a more conservative approach to the extent of loans they would be prepared to provide as compared to property values; and/or
- Lenders increasing borrowing interest rates to compensate for the additional risk (and potential losses) in the event of expropriation;
- If losses are severe enough, private sector lenders withdrawing from providing loans where property is being offered for security, thus sterilizing the market.

In turn, this would promote food insecurity, job losses, financial exclusion and consequently result in adverse pricing for first time property owners and be especially contrary to progress being made in relation to land reform. In stakeholder engagements with the Department of Rural Development and Land Reform (DRDLR), DRDLR recognised the need for the state to avoid such a situation. Cabinet therefore approved the DRDLR policy framework document styled: "A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the Office of the Valuer General dated 18 October 2012".

Extracts from this paper are the following:

“The market value of property be aligned with the international definition and be interpreted to exclude prices paid by Government as evidence for market value. This will have the immediate effect of aligning prices paid by Government with private lenders.

The change to “just and equitable” which was provided for in the document would have negative implications on the collateral value of existing debt. This has a domino effect as the capital adequacy of these institutions and their ability to provide loans to the agricultural sector is negatively affected, thus having serious implications on food, security, and employment.

In order to mitigate these negative implications, Government should automatically guarantee the difference between “just and equitable” compensation as contemplated in s25(3) of the Constitution and “market value” for private sector lenders.

The Bill should provide for the Cabinet approved policy framework.”

Recommendation

A clause should be added to this section as approved by Cabinet that would allow the state to guarantee the difference between ‘just and equitable’ compensation and “market value” for private sector lenders, which payment is restricted to the shortfall between the level of outstanding monies and the quantum of “just and equitable” compensation.

Section 12(1) continued

This clause provides for the factors to be considered when determining compensation. We highlight that s12(1)(d) refers to “the market value of the property”. The term “market value” is not defined in this Bill.

Recommendation

We recommend that “market value” as defined in the Property Valuation Act (2014) be used and that this section of the Bill should specifically detail that the Office of the Valuer General is responsible for determining the market value of property intended for land reform as envisaged by s12(1)(a) of the Property Valuation Act. In keeping with this objective, stakeholders should be able to challenge the valuation especially if the land parcel is mortgaged.

Section 12(3)

The clause provides for expropriation at nil compensation, which may be regarded as “just and equitable” in certain cases. The wording “... including but not limited to...” is problematic. Whilst

several specific categories of land that can be expropriated at nil compensation is listed, it is clear from the wording of clause 12(3) that any land expropriated in the public interest can potentially be targeted for nil compensation. This includes, for example, land which is the subject of a restitution claim. The scope for expropriation at nil compensation is therefore broad and the implication is that this would have a devastating impact on property rights and land being viewed as an attractive asset class, and consequently local and foreign investment into land. We are of the view that it would be appropriate to have a definitive list of instances which can only be extended on good cause shown and if such an extension is for a “public purpose” or in the “public interest” and which is aligned with the objectives of the Bill and Section 25 of the Constitution.

In 2018, The Banking Association made a substantive submission to the Constitutional Review Committee in this regard, where we argued that based on the opinions expressed by subject matter experts, including retired Constitutional Court judges, that there is no need to change Section 25 of the Constitution, as section 25(3) already makes provision for “just and equitable” compensation to be paid, which compensation could range from R nil (e.g. in instances where outstanding municipal rates and taxes/utility arrears are greater than the market value of the property) to above market value. For the State to highlight five categories but not necessarily confine expropriation for nil compensation to be paid for these categories is we believe unnecessary and problematic, as it creates unnecessary local and international investor angst. In all instances, compensation levels following expropriation should be subject to a formula-based calculation methodology aligned to Section 25(3) of the Constitution, with the detailed methodology contained within Regulations to this Bill as well as Regulations to the Property Valuation Act (2014).

Recommendations

As a principle we are opposed to the insertion of this section as this represents a material dilution of property rights which we are opposed to, and we recommend that this section be deleted.

Further, the current list is not limited to the circumstances listed and affords the court a discretion to, on a case-by-case basis, consider any other circumstance it deems relevant. This creates uncertainty concerning circumstances under which a court will make a determination that an amount of nil compensation is payable.

We accordingly propose that the wording “including but not limited to” be deleted and for the list of circumstances be a closed list to ensure policy certainty.

We further propose an insertion referencing the need for a methodology for the calculation of “just and equitable” compensation through Regulations to this Bill and the Regulations to the Property valuation Act (2014).

[alternative proposal below]

Section 12(3) and (4)

Ss12(3) & 12(4) seek to prescribe circumstances in which it may be just and equitable for nil compensation to be paid. Such circumstances may already apply in terms of s25(3) of the Constitution and s12(1) of the Bill, but the equitable balance test contained in s 25(3) of the Constitution requires consideration of all relevant circumstances and would preclude one from privileging, say, the purpose of the expropriation (e.g. land reform) over other considerations, including e.g. the market value of the property.

S12(3) & 12(4) can therefore not ignore the equitable balance test and should not seek to specify separate considerations from those specified in s12(1) of the Bill. The circumstances enumerated in ss12(3) & 12(4) could be relevant circumstances contemplated in s 25(3) of the Constitution but to privilege the outside of the context of s 25(3) of the Constitution or s12(1) seems to be ultra vires s 25(3) of the Constitution.

Recommendation

Ss12(3) and 12(4) should become sub-sections 12(3)(a) and (b) respectively (with their respective subsections renumbered accordingly) to a new s 12(3) to read as follows:

(3) Subject to the provisions of clause 12(1)—

Section 12(3)(a)

This clause makes provision for nil compensation to be paid in instances where land parcels are “not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value”. Placing such a broad restriction on land parcels reflects a dilution of property rights, as one of the fundamental rights of property ownership and a free-market economy is one in which property owners have the autonomy to decide how best to use one’s own property. This is particularly important for the agricultural sector where the type of farming necessitates that land lies fallow for extended periods of time. It also discriminates against the lawful investment in land as an asset class to benefit from the appreciation of its market value, as opposed to other classes of assets where such investment is not penalized or outlawed.

Recommendation

This clause should be removed from the Bill, or at the very least provide clear parameters for the circumstances where unused land would be included, e.g., restrict the failure to use/develop the land only to the circumstances referenced in sub-paragraphs (b) to (e).

Section 12(3)(b)

This clause makes provision for the land of a state-owned corporation or entity to be expropriated at nil compensation. However, clause 2(2) Application of Act, severely limits the potential for state-owned land to be expropriated at nil compensation unless this is consented to by “the executive authority responsible for that corporation or entity”. State-owned land, including that of land parcels owned by state-owned entities constitutes 25,2 million hectares, with 2.9 million hectares being unused. It follows that a major land redistribution opportunity exists within this ambit of land. It is highly unlikely that “executive authorities” will consent to their land being expropriated at nil compensation if they would be able to sell this in the market at market value.

Recommendation

Minister should be able to decide without the consent of the executive authority to expropriate state-owned land. The executive authority should however be able to review the decision based on municipal Spatial Development Plans which are required in terms of the Spatial Planning and Land Use Management Act (2015)

Section 12(3)(c)

There is no definition for abandoned land other than to reference “failure to exercise control over it”. This Bill does not consider the reasons why land could be abandoned, or the owner is unable to exercise control over it. There are instances where owners cannot access their land or have lost control of their property due to circumstances outside of their control e.g., land occupied by informal dwellers/hijacked buildings, land invasions etc.

Recommendation

Reference to “failing to exercise control” should be removed and clear parameters should be included for the circumstances under which land is considered as having been abandoned by the owner.

Section 12(3)(d)

This clause makes provision for nil compensation to be paid in circumstances where the State has invested a greater or equal amount in the property than its market value. This clause is ambiguous as it does not clarify the circumstances under which this clause may apply.

Further, the clause does not differentiate between State investment into a property for “public interest” as opposed the sole benefit of the property owner e.g., the provision of a dam to provide food and water security to a district.

Moreover, the clause does not provide clarity in respect of property owners who acquired a property at market value and where previous owners had benefitted from State investment into the property.

Recommendation

This clause should detail what constitutes State investment into a property and circumstances where this would be applied to remove any ambiguity.

Section 12(3)(e)

The context and application of this section is not clear. Municipal by-laws exist that deal with the management and rectification of property that pose health and environmental risks, and which allows for remediation to be taken place in such instances.

Although municipal planning and building regulations are a function and responsibility of local government and they have by-laws and regulations to enforce compliance i.e., in instances where a property may pose environmental and health risks and they might decide to afford the property owner an opportunity to remedy the situation before seeking to expropriate the property. If national/provincial government are of a different opinion and they elect rather to expropriate the property, subject to Section 151(4), a municipal by-law or its land use management is deemed in terms of this section to be invalid. The Bill in such an instance therefore seeks to render municipal by-laws and their land use management invalid. This conflicts with the ruling in the Constitutional Court case (CTT 117/13), which deemed municipalities to be solely responsible for municipal by-laws and land use management.

Recommendation

We recommend that this section be reworded to align with the ruling of the Constitutional Court case. We further recommend that a clear methodology be included within municipal by-laws that informs municipal assessments in this regard.

Section 12 (4)

While section 12(4) of the Bill has provided for the determination of compensation in terms of Section 23 of the Land Reform (Labour Tenants) Act, 1996, we note that no similar provision has been included for when it may be just and equitable for nil compensation to be paid in terms of Section 42E of the Restitution of Land Rights Act, 22 of 1994. Section 42E(2) of the Restitution of Land Rights Act states that “The Expropriation Act, 1975 (Act No. 63 of 1975), shall, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation”. Section 42E (3) further states that “Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the Court in accordance with section 25 (3) of the Constitution”.

Recommendation

To ensure alignment with existing legislation, we are of the view that a section 12(5) should be added to the Bill to provide for “just and equitable” compensation in the event of expropriation under the provisions of Section 42E of the Restitution of Land Rights Act (1994). This provision should mirror that provided in section 12(4) for compensation payable under the provisions of section 23 of the Land Reform (Labour Tenants) Act (1996).”

Section 12 (5)

The amount of outstanding municipal property rates, taxes, levies and charges relating to the property are irrelevant to the determination of the amount of just and equitable compensation. The amount of just and equitable compensation should be calculated first and then, then the undisputed amount of such municipal rates etc could (if undisputed) be paid to the municipality in reduction of the amount of compensation, the balance of which should be paid to the expropriated owner or expropriated holder (if applicable). On present drafting the amount of the outstanding municipal property rates etc. could reduce the amount of the just and equitable compensation but not reduce/extinguish the liability of the expropriated owner or expropriated holder (if applicable) to the relevant municipality, which could not be said to be either just or fair.

Recommendation

Amend s12(5) to include the underlined wording:

(5) If the property is land, the expropriating authority must not consider, unless there are special circumstances in which it would be just and equitable to do so, the amount of outstanding municipal property rates, taxes, levies and charges relating to the property when making an offer or just and equitable but must pay outstanding municipal rates, taxes, levies and other charges out of the compensation money in accordance with the provisions of section 17.

Section 13

The clause provides that interest will accrue from the date the expropriating authority, or the person whose behalf the property was expropriated, takes possession of the expropriated property. It is recommended that interest shall accrue from the date a Notice of expropriation is published or a decision to expropriate is taken and communicated to affected persons.

It is recommended that the compensation payable must include damages for all losses resulting from the expropriation. Such damages would include moving costs, any loss of income, and any outstanding balance on a mortgage bond which the compensation paid would otherwise not be enough to cover. The finance interest rate should be that levied by the mortgagee and not that of the PFMA.

Recommendation

Amend s13 to include the underlined wording:

Interest, at the rate determined from time to time in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999) or at the rate determined from time to time on such terms that have been agreed upon between the expropriated owner or expropriated holder and the mortgagee, from the date the expropriating authority, or the person on whose behalf the property was expropriated, takes possession of the expropriated property, accrues on any outstanding portion of the amount of compensation payable in accordance with section 12 and becomes payable in the manner contemplated in section 15:

Section 13(a)

If there is a dispute on the amount payable, the expropriated owner or expropriated holder cannot issue a VAT invoice. It would be iniquitous to deprive it of the ability to recover interest if the claim were resolved in its favour.

Recommendation

Amend s13(a) to include the underlined wording:

... is not regarded as an outstanding amount, provided that if the expropriated owner or expropriated holder disputes the amount of compensation it shall be entitled to issue a provisional tax invoice for the amount of compensation offered without prejudice to its right to dispute the amount of compensation offered by the expropriating authority;

Section 13(b)

With the issuing and the acceptance/collection of cheques having ceased, effective from 31 December 2020, how is payment by prepaid registered post expected to be effected? We propose that payment via electronic funds transfer (EFT) would minimise opportunities for fraud given the obligation on banks in terms of the Financial Intelligence Centre Act, 2001 etc..

Recommendation

Delete reference to “prepaid registered post” from s13(b).

Section 14(1)

S5(4) requires the owner, mortgagee or holder of a right essentially to make full disclosure to the representatives of the expropriating authority, however s14(1) only requires the expropriating authority to make reasonable particulars about the offer of compensation available and then only upon written request. They should be entitled not only to the reasons for the offer of compensation but also for the reasons why the expropriating authority intends to expropriate the property without having to resort to the provisions of the Promotion of Administrative Justice Act, 2000.

Recommendation

Amend s14(1) to include the underlined wording and delete the word indicated by strikethrough:

(1)...may request the expropriating authority, in writing, to provide ~~reasonable~~ full and further particulars about the offer of compensation and the reason for the intended expropriation of that particular property and particulars so requested

Section 15(3)

The right to possession must take place simultaneously with payment of compensation or at least on receipt of sufficient undertakings securing payment of compensation. The Constitutional Court has held that compensation is not a pre-requisite to expropriation. The Constitutional Court has also held that eviction following expropriation may not take place unless agreed upon between the parties to the expropriation or in the absence of agreement, under court supervision. In order to protect the rights of all parties, we propose that the right to possession must take place on receipt of sufficient undertakings securing payment of compensation. This will still meet the Constitutional Court's findings of not unduly burdening the State but also provide a level of protection to the expropriated owner/holder or the holders of registered rights that that compensation will be paid.

Recommendation

This clause should be deleted or modified to indicate that if payment has not been agreed to or paid prior to the passing of possession, then the right to possession can only take place on receipt of sufficient undertakings securing payment of compensation.

Section 16(1) and 16(2)

Registered mortgage or deed of sale seems to apply *eiusdem generis* to property that is a land parcel. As pointed out above, property may be subject to other forms of registered and unregistered security.

Also, S16(1) provides that *the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee.*

S16(1) is meant to deal with instances where expropriated property is subject to a mortgage or a deed of sale and provision to be made as to whom payment of the amount of compensation must be paid. i.e., whether to the mortgagee or the owner. Even though it does not provide a definite answer as to who the compensation must be paid to, it does not provide for pre-existing agreements between the expropriated owner or expropriated holder and the mortgagee or buyer. The existing agreement between the mortgagee and the expropriated owner may not be novated by any subsequent agreement between the parties, unless specifically agreed.

We propose an amendment to provide for the notice to the expropriating authority to be advanced by all parties concerned as opposed to claimant (which could be a 3rd party) only.

Recommendation

Amend s16(1) and s16(2) to include the underlined wording and delete the wording indicated by strikethrough:

- (1) ... immediately prior to the date of expropriation, encumbered ~~by a registered mortgage~~ in favour of a secured creditor or, if the property is land, subject to a deed of sale alienation as contemplated in the Alienation of Land Act, 1982 (No. 68 of 1981), the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant or the expropriated owner or expropriated holder and the mortgagee or buyer has notified the expropriating authority of the agreement.
- (2) The claimant or the expropriated owner or expropriated holder or the mortgagee or buyer, as the case may be, must notify the expropriating authority.

Section 16

S9(1), read with s8(3)(e), provides that on the date of expropriation nominated in the s8(3) notice of expropriation, the property vests in the expropriating authority (ito s9(1)(a)) and is effectively released from the mortgage (ito s9(1)(d)). This means that save for the pledge over the title deed a mortgagee loses its security in respect of the property. The risk arises, particularly, but not only, with mortgagors subject to the National Credit Act, 2005 (“NCA”) that they may stop paying their bond instalments once they receive a notice of intention to expropriate ito s7 of the Bill (not even a notice of expropriation ito s8).

If the period between the notice of expropriation (when the property vests in the expropriating authority free of the mortgage) and the date on which the right to possession passes to the expropriating authority and by which payment of the compensation must take place (s15(1)), the mortgagee could lose a significant amount of money since interest only accrues on the compensation after the date on which the expropriating authority takes possession and then only at the government rate (s13).

The longer the period between publication of the notice of intention to expropriate or the notice of expropriation (on the one side) and the date on which possession of the property passes to the

expropriating authority and payment of the compensation is required, the greater the mortgagee's potential loss. The mortgagor does not have the ability to accelerate the date that possession of the property passes to the expropriating authority as the mortgagee is able to do ito s8(4) of the Bill. Moreover, it is highly unlikely that, particularly banks, will be able to proceed against mortgagees subject to the NCA for mortgage debt when their properties have been expropriated without a level of reputational risk. Whilst it seems unlikely that private residences will be expropriated, if say a residential, commercial or industrial area were expropriated for say a new highway, extension to the Gautrain, etc these losses could add up across various banks.

[Proposed new 16(4) to follow preference on liquidation.]

Recommendation

Amend s16 by adding the following provisions:

- (4) The compensation payable by the expropriating authority in respect of a property to the expropriated owner or expropriated holder shall be applied as follows: firstly, to the South African Revenue Service in terms of the Income Tax Act, 1962 (Act No. 58 of 1962) or the Value-Added Tax Act, 1991 (Act No. 89 of 1991); secondly, to the expropriating authority in terms of this Act; thirdly, to municipal property rates, taxes, levies and other charges; fourthly, to secured creditors in accordance with the ranking and in an amount not exceeding the amount secured by the mortgage bond, landlord's legal hypothec, pledge, cession or right or retention, all as at the date on which possession of the property passes to the expropriating authority; lastly, to the expropriated owner or expropriated holder or their nominee.
- (5) The agreement contemplated in section 16(1) and (2) shall not be binding on the parties thereto unless reduced to writing and signed by the parties thereto or by their agents acting on their written authority.
- (6) If the property expropriated in terms of this Act is land subject to a registered mortgage bond and the mortgagee is a bank or other registered financial institution and delivers to the expropriating authority a certificate under the hand of a manager of the mortgagee certifying that the expropriated owner or expropriated holder is in arrears with payment obligations secured by such mortgage bond, and that it has, notwithstanding demand failed to make payment, the mortgagee shall be entitled to demand that the right of possession passes to the expropriated authority on prior written notice of at least 20 days.

Section 17(4)

The expropriated owner continues to be liable to the municipality for outstanding rates and taxes up to the date of possession notwithstanding transfer of ownership. Recommendation It is suggested that this clause be re-considered to align with the prescripts of Section 118 of the Municipal Systems Act (2000) if it is to be “just and equitable”.

Section 17(4)(a)

This clause is in contravention of the Deeds Registries Act (1937) as there is no mention of the need to obtain a clearance certificate. The expropriated owner will therefore be unfairly prejudiced if there is failure on the part of the municipality to accurately calculate this amount.

Recommendation

We submit that a clearance certificate should be obtained.

Section 17(4)(b)

This contradicts subsection (c) as it states the owner will only be liable up to date of possession, and this section states that the owner will be liable up to registration/transfer. Recommendation We submit that the use of language be consistent to avoid confusion and misinterpretation. Section 19(4)(c) Possession is currently used as the date for determining the amount of outstanding rates and utility charges to the municipality.

Recommendation

We recommend that the Bill also uses the date of registration to determine the amount of outstanding rates and utility charges to the municipality.

This section should also clarify the amount of arrears payable ie. It should align to the provisions of **s118(1) of the Municipal Systems Act** that caters for arrears payable for purposes of effecting transfer of the property.

Section 18

The clause does not set out what will happen to settlement of a mortgage if nil compensation is payable. Further, it should not be a pre-requisite that the mortgagee and the owner reach agreement prior to payment of compensation. The mortgagee should automatically be entitled to receipt of its outstanding balance on presentation of a statement of outstanding account.

Should mortgages not be settled, the mortgagee will have to write off the debt shortfall in the case of a nil compensation outcome, or if the compensation amount is less than the outstanding debt. The effect of this approach could have wide-ranging consequences, for example it would lead to an increase in the cost of credit due to increased credit losses, deteriorating credit or payment behaviour of clients due to the threat of expropriation, and impaired credit profiles of individuals whose properties have been expropriated.

Recommendation

For the stable functionality of the property mortgage market (to the benefit of borrowers and lenders), it is imperative that there are clear provisions in the Bill indicating that mortgagees will be compensated in full in relation to the outstanding amount owed and set out in a statement of outstanding balance, regardless of the amount of compensation to be paid to the owner of the property who is not the mortgagee and without the need to conclude an agreement between the mortgagee and the expropriated owner.

It is proposed that if the amount of compensation offered to the owner, who is not a mortgagee or buyer, is lower than the outstanding amount owed to the mortgagee or buyer, the expropriating authority ought to make good the difference.

CHAPTER 6: MEDIATION AND DETERMINATION BY COURT

Section 19(1)

What happens if the “public interest” is mala fide?

The Bill does not allow for an owner/rights holder to contest the merits of an expropriation. Rather it seeks to confine a contestation to only compensation for nil consideration. Does the court then deal with this within its inherent jurisdiction?

Recommendation

Section 19(1) needs to provide guidance in instances where “public interest” is mala fide.

Section 19(8)

A dispute concerning compensation does not affect the operation of clause 9.

Recommendation

Section 19(8) needs to be amended accordingly.

CHAPTER 7: URGENT EXPROPRIATION

Section 20(1)

This section reflects the deprivation of a constitutional right. Further, this Section does not provide criteria to determine whether the expropriation on an urgent basis is justified.

Recommendation

The criteria for determining what constitutes the need for an urgent expropriation needs to be clearly set out within this section of the Bill.

Section 20(10)

This is a new addition providing that Expropriating Authority is responsible for 'repair to a reasonable standard' in the event of damage during urgent expropriation – 'reasonable standard' is not defined anywhere, leaving owner/security holder negatively impacted if not restored to condition prior to urgent expropriation.

Recommendation

We welcome the inclusion of payment as an alternative to repair, however, only where initiated by the owner by way of a letter of demand. Owners will be better protected if the provision is updated to dictate that 'the Expropriating Authority may either repair or compensate'.

CHAPTER 8: WITHDRAWAL OF EXPROPRIATION

Section 21

Regulates the rights of the Expropriating Authority to issue notices of withdrawal of expropriation but the Chapter does not afford the expropriated owner/rights holders any rights or recourse in circumstances where the Expropriation Authority fails to proceed with or does not use the expropriated property for the purpose for which expropriation was earmarked. While recourse to the courts is always an option, this is a costly process and is thus not equally available to all South Africans.

Recommendation

This Chapter of the Bill should include provisions to regulate timeframes (not exceeding 12 months), within which the Expropriating Authority should proceed with and/or finalize the use of the expropriated property for the purpose for which expropriation was earmarked. In addition to this timeframe, this Chapter should also include rights afforded to an expropriated owner/rights holder to

reclaim ownership of the property where the Expropriation Authority has failed to meet its obligations with regard to the use of the expropriated property for the purpose for which expropriation was earmarked, within the timeframes provided.

Section 21(2)(a)

It is not clear why withdrawal of an expropriation needs the consent of both the expropriated owner and all expropriated holders to be effective. For instance the expropriation could be withdrawn in respect of the expropriated owner but not in respect of the expropriated holders or vice versa or in respect of some, but not all or the expropriated holders. It is inefficient if say the expropriated owner and all but one of the expropriated holders consent to withdrawal of the expropriation, for the expropriation to only be capable of being withdrawn after embroiling the persons in legal proceedings before the court and convincing the court that withdrawing the expropriation is in the public interest notwithstanding

Recommendation

Amend s21(2)(a) by adding the following proviso at the end thereof:

... provided however that the expropriated owner and all expropriated holders have not consented to withdrawal of the expropriation in writing, the expropriating authority shall be entitled to withdraw the expropriation in respect of those of the expropriated owner or the expropriated holders who have consented to the withdrawal of the expropriation in writing

Section 22(4)(c)

See concerns raised in comments in respect of the definition of “deliver” in respect of the South African Post Office’s average delivery times. More people in South Africa may have RICA'ed cellphone numbers or access to email via mobile phone than may have access to reliable postal delivery.

Recommendation

Delete s22(4)(c) and replace with the below wording:

(c) deliver by electronic communication to the recipient’s email address;

Section 27

Who decides whether a breach is material or immaterial? The onus should be on the party that did not follow the correct procedure to seek condonation. If the owner thinks something is a material aspect

and the authority disagrees, then the matter should go to court and the party who did not comply must initiate the court process.

Recommendation

If the parties are unable to reach agreement, the matter should be determined by a court, with the onus being on the non-compliant party to initiate the court process.

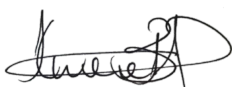
CONCLUSION

Upon reviewing our members position regarding the legislation there is a need for thorough consideration of the operational impacts and processes that will need to be managed when this Bill is promulgated as an Act. We reiterate that the envisaged expropriation interventions should not dilute property rights or be applied injudiciously, failing which local and international investor confidence in property as an attractive asset class will be undermined and which in turn could destabilise the financial system, detract from benefiting intended beneficiaries and ultimately threaten the greater economy of the country.

The Expropriation Bill is an extremely important key piece of legislation where a uniform approach to expropriation, prudence and objectivity in its implementation is essential. The Bill therefore needs to provide crisp and clear policy guidance to some 255 state entities who are empowered through legislation to expropriate property, together with property owners and rights holders alike. As we have demonstrated in our comments, the Bill is ambiguous and silent in several key areas and in parts it conflicts with existing legislation. We therefore urge the Department to comprehensively review the Bill to remove any policy uncertainty, as the need for aggrieved expropriated owners/rights holders to resort to the courts for guidance will exacerbate what is already a sensitive and emotional matter.

Additionally, we are of the view that it is also important for the Bill to also consider envisaged legislative land reform processes, including among others, the Land Court Bill, the Preservation and Development of Agricultural Land Bill and the Land Donations Policy.

Kind Regards



Bongki Kunene
MANAGING DIRECTOR