

EXPROPRIATION LAW: THE SOUTH AFRICAN SCENARIO

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Hierdie artikel ondersoek die onteiening van grond vir openbare doeleindes op sentrale, provinsiale en plaaslike owerheidsvlakke en die prosedures om billikheid teenoor die betrokke partye te verseker.

This article examines the expropriation of property for public purposes at central, provincial and local government levels and the procedures followed to ensure fairness to those concerned.

1.0 INTRODUCTION

The acquisition and expropriation of property by the State for public purposes is a controversial issue. The Government for its part is desirous of acquiring or expropriating the property so that the community in general will benefit. Generally the benefits derived by the populace from the expropriated property far exceed the hardships experienced by the expropriated owner in particular. However, in order to ensure fairness to both parties, certain regulations and procedures have to be followed in the expropriation of property. This article sketches the legislative enactments relative to the expropriation of property at the central, provincial and local government levels in South Africa.

2.0 STUDY AREA AND METHODOLOGY

The right to expropriate is the power of Government to take private property for public purposes. The ever-changing and growing nature of the economy makes it imperative for the Government to exercise its power of expropriation, whenever necessary. Such power is exercised to acquire *inter alia*, property for highway-construction, public building sites, flood control projects and airport expansion. Just compensation should be paid to the owner for any property taken under this power (Ring and Dasso, 1977, p. 109).

This study is a combination of literature review and empirical research. The principal data source was the *Expropriation Act, 1975 (Act 66 of 1975)*

and the provincial legislation relative to the acquisition and expropriation of property in the four provinces. In addition the authors also interviewed Mr J W Waldeck (Assistant City Valuator and Estates Manager) of the Durban City Council's Estates Department.

3.0 DEFINING TERMS: EXPROPRIATE AND EXPROPRIATION

Jacobs states that the ordinary meaning of the word "expropriation" is to "... dispossess of ownership; to deprive of property". (Jacobs, 1982, p. 1). Similarly, the *Standard Dictionary of the English Language* (1968, p. 449) defines the word "expropriate" as follows:

- to take from the owner, especially for public use; and-
- to deprive of ownership or property

In the South African statutory context the word "expropriate" not only refers to dispossession or deprivation, but also appropriation by the expropriator of the particular right, and abatement of extinction, as the case may be of any other existing right held by another which is consistent with the appropriated right. (Jacobs, 1982, p. 1)

From the aforementioned exposition of the word "expropriate" it is clear that property may be expropriated by agreement. Such expropriations are exceptional and expropriation may be effected whether the expropriatee agrees to it or not. Furthermore, unless specifically provided for in the relevant statute, the expropriatee has no

right to compensation in South African Law (Gildenhuys and Grobler, 1980, p. 3)

The payment of compensation for expropriated property is also provided for in other countries. Attention by way of example is invited to Nigerian constitutional law which stipulates that no movable or immovable property may be possessed by compulsion except by provisions of a law that:

- i) requires the payment of adequate compensation; and
- ii) allows any person claiming such compensation a right of access to the High Court having jurisdiction over the area in question (Umeh, 1973, pp. 30-31).

Expropriation

Arising from the aforementioned definitions of the term "expropriate", it can be deduced that the concept "expropriation" refers to:

- the process or result of expropriating; and
- the act of acquiring land for public use by the right of eminent domain (Funk and Wagnall, 1968, p. 449). In fact, the process "compulsory purchase", "compulsory acquisition", "expropriation", "eminent domain" or "resumption", as it is referred to in various jurisdictions, ensures that, "... the good of the individual, ... yields to that of the community". (Knetsch, 1983, p. 35).

While writers in England and South Africa have likened expropriation to sale the English and South African

courts have rejected such an analogy. In England for example; a prominent author on the subject of expropriation has written:

“The analogy with the common law goes much deeper than the question of rules evolved by judges, thrown back on their own resources by statute, when solving compensation disputes. The entire process of compulsory purchase itself rests on an analogy with common law. Indeed virtually the only course of difference is the element of compulsion; and so the factors which distinguish the process of compulsory acquisition from that of a sale of land by agreement at common law traceable to the need for compulsion”. (Davies, 1984, p. 24).

In South Africa, on the other hand, the Appellate Division of the Supreme Court has stated:

“A party to a contract may safeguard his interests by seeing to it that adequate provisions are incorporated in it, . . . In expropriation that is obviously not the case. The purchaser pursues his private interests and is himself to blame if he ineptly neglects them; the expropriating authority aims at the well-being of the State or community and the conditions governing expropriation are beyond the control of either party. Consequently the analogy of sale is completely false, . . .” (Jacobs, 1982, pp. 1-2; citing *Pahad v Director of Food Supplies and Distribution* 1949(3) SA 695 (A)).

From the afore-mentioned discussion, it can be concluded that the term “expropriation” refers to the dispossession of an owner of his property or rights by lawful authority and for some public purpose and is usually subject to compensation (Shand, 1971, p. 271).

4.0 DEVELOPMENT OF EXPROPRIATION LEGISLATION

In 1965, Parliament promulgated the *Expropriation Act, 1965* (Act 55 of 1965). Amendments to the Act followed in 1968, 1970 and 1971. The 1965 Act, as well as the subsequent amendments, were then repealed by the Act

presently in force, the *Expropriation Act, 1975* (Act 63 of 1975). This Act, in turn, has been subject to further amendments, *inter alia*, by the Expropriation Amendment Acts of 1977, 1978, 1980 and 1982. (Jacobs, 1982, p. ix).

4.1 Expropriation Act, 1975 (Act 63 of 1975)

4.1.1 Determination of compensation

The fundamental measure of compensation relating to expropriation is the market value of property. Besides the provision regarding the payment of the solatium², financial loss and interest, the Act contains *inter alia* the following provisions with regard to the determination of compensation:

“In determining the amount of compensation . . . the following rules shall apply namely:”

- a) no allowance shall be made for the fact that the property, . . . has been taken without the consent of the owner in question;
- b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account for it is unlikely that the property would have been purchased for that purpose on the open market . . .” (Section 12(5) (a) and (b)).

The main purpose of the afore-mentioned enactments is to ensure that the State is not held to ransom where a property is urgently required. (Jonker, 1984, p.147). However, it does not mean that the “suitability” of the property should be completely ignored. The State often purchases property in the open market for specific purposes. In fact, the State often negotiates with the owner for the purchase of his property and only where the price required by the owner is deemed unreasonable will expropriation proceedings be instituted. Since an expropriation is usually costly, owners under the threat of expropriation, are prepared to dispose of their property to the State at prices below market value. Consequently they cannot be regarded as willing sellers. The reverse is equally valid since purchases by the State should necessarily be accepted as comparable sales. (Jonker, 1984, p.147).

PAYMENT OF COMPENSATION

4.1.2 Appropriation of compensation

The following provision (Section 12(5)(f) of the *Expropriation Act, 1975* (Act 63 of 1975), may have a profound effect upon the valuer's valuation of property:

“. . . any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform, . . . in connection with such purpose, shall not be taken into account”.

It is evident that the afore-mentioned provision prescribes that other considerations besides the actual market value of property should be considered. Expropriation legislation of many foreign countries contain a similar provision.³

The primary objective of the afore-mentioned provision is that the direct influence of an act caused by the expropriation which is the only factor that influences the value of property, should be ignored. Usually, this provision is narrowly interpreted and is viewed as the specific purpose for which the property is being expropriated. Should a State development be enlarged at a later date the increase in the value created by the original development may be taken into account. Similarly, this situation is equally applicable to a decrease in value. (Jonker, 1984, p.149).

4.1.3 Statutory Limits on Compensation

Moreover, the *Expropriation Act, 1975* (Act 63 of 1975), imposes statutory limitations on compensation (Gildenhuys, 1979, pp. 50-52). Should the special usefulness of the property for the purpose of, for example a bridge have value for other possible buyers on the open market, such value should be taken into account in determining the compensation. Account should also be taken of any benefit which will enure⁴ to such person as a result of the expropriation of property. (*Expropriation Act, 1975*, section 12(5)(h)(ii)).

This section of the *Expropriation Act*, 1975 (Act 63 of 1975), concerns the unexpropriated portion of the owner's property and requires the valuer to project a future benefit that may be derived from the expropriation. Should this provision be put into effect, it could mean that an owner will receive nothing for his expropriated property if the balance of the property is so enhanced that it may increase in value to a greater amount than the value of the expropriated portion. This provision appears unfair since the owner is penalised through the expropriation of portion of his property but the adjacent owner, who has lost nothing stands to benefit fully from the use of the expropriated land. (Jonker, 1984, p.150)

4.1.4 Compensation for financial loss

The quantification of actual financial loss caused by the expropriation, in so far as it relates to valuation principles, is also considered (Section 12(1) of the *Expropriation Act*, 1975 (Act 63 of 1975). Compensation is payable with regard to financial loss only if it is caused by the expropriation.

There should be a direct causal relationship between the expropriation and the loss. It is insufficient to prove that the expropriation was a *causa sine qua non* of the alleged loss. (Gildenhuys, 1979, p.37).

Loss caused by the expropriator's anticipated future use of the expropriated land e.g. for an airport or a highway is not loss caused by the expropriation because the concept of expropriation does not include use after expropriation. Claims for damage in respect of possible future acts by the expropriator's employees or agents on the expropriated land, or on land adjoining the expropriated land, cannot be taken into account (Gildenhuys and Grobler, 1980, p. 112). Such damage would be caused by the illegal acts, not by the expropriation.

4.1.5 Trial of an expropriation matter

Failure to reach agreement between the owner and the *Minister of Public Works and Land Affairs* results in the determination of compensation by a court. In cases of claims comprising R100 000 or more the compensation is determined by the *Supreme Court*. If the claim is less than R100 000, the

matter is adjudicated upon by a Compensation Court, (*Expropriation Act*, 1975 section 14 (1).)

Proceedings of the Supreme Court shall be instituted and conducted by way of action. The trial takes place before a judge (Gildenhuys, 1979, p.52).

The *Expropriation Act*, 1975 (Act 63 of 1975 Section 16(1)) states that there shall be a *Compensation Court* for the area of jurisdiction of every Provincial Division of the *Supreme Court*. Since the *Compensation Court* is a creation of the statute its jurisdiction is limited to the powers given expressly in terms of the statute.

The *Compensation Court* is probably the only Court with powers to determine compensation in cases where the amount of the claim is less than R100 000. A Compensation Court also has the power to determine the compensation in cases of claims exceeding R100 000 if it obtains the consent of all parties. (*Expropriation Act*, 1975 section 14).

A prescribed formula is used in determining orders of costs in the *Supreme Court*. If the compensation awarded by the Court in such proceedings:

- i) is equal to or more than the amount last claimed by the owner one month prior to the date for which the proceedings were for the first time placed on the role, costs shall be awarded against the expropriator;
- ii) is equal to or less than the amount last offered by the expropriator one month prior to the date contemplated in paragraph (1), costs shall be awarded against the owner in question; and
- iii) is less than the amount last so claimed by the owner in question, but exceeds the amount last so offered by the expropriator, a proportion of the costs shall be awarded against the expropriator, namely an amount

“... as bears to (the Owner's) costs the same proportion as the difference between the compensation so awarded and the amount so offered, bears to the difference between the compensation so awarded and the amount so claimed.”⁵ (*Expropriation Act*, 1975, section 15 (2).)

From the afore-mentioned formula, it can be inferred that unless the owner is awarded at least the full amount of his claim, he will be unable to recover his full legal costs. Such a situation is contrary to the generally accepted rule that a substantially successful litigant is entitled to the full party and party costs incurred (Gildenhuys, 1979, p.53).

4.2 Ordinances pertaining to acquisition and expropriation of property

Local authorities usually derive their power to expropriate from their constituting ordinances. Such powers of expropriation can be exercised only after all the pre-requisites prescribed by these ordinances have been fulfilled and then only for purposes *intra vires* the local authority and within the parameters of its legal capacity. If a local authority has the power to expropriate this power may be exercised *mutatis mutandis* in accordance with the provisions of the *Expropriation Act* and subject to the approval of, and the conditions imposed by the executive committee of the province concerned. The expropriator is not the executive committee, but the local authority. Should the executive committee impose conditions, these conditions must be directly complied with, otherwise the expropriation will be void.

As indicated above, the acquisition and expropriation of property at the local government level in South Africa are governed by specific ordinances in each province. Each ordinance prescribes a different approach and is implemented in accordance with different principles. (Jonker, 1984, p.153). The relevant provincial legislation relative to the acquisition and expropriation of property in the four provinces includes *inter alia*, the following:

- i) Cape Province: *Cape Municipal Ordinance*, 1974 (Ordinance 20 of 1974) (sections 122 and 123);
- ii) Natal: *Local Authorities Ordinance*, 1974 (Ord. 25 of 1974) (sections 190, 191 and 240);
- iii) Transvaal: *Local Government Ordinance*, 1939 (Ord. 17 of 1939) (Sections 79 (24(A) and 25).
- iv) Orange Free State: *Local Government Ordinance*, 1962 (Ord. 8 of 1962) (sections 74, 75 and 76).

The different legislative enactments authorising the expropriation of immovable property, and the different procedures and methods of calculating compensation are simplified by the *Expropriation Act, 1975* (Act 63 of 1975). If an enactment previously used was repealed by the above-mentioned Act, the latter now becomes the applicable legislation and the Act must be consulted to ensure which enactment is of application. Furthermore, where a local authority has power to

expropriate property or to take a right temporarily to use property, it must act in terms of the *Expropriation Act, 1975* (Act 63 of 1975), unless some other legislative enactment authorises it to act otherwise (section 5 read with section 26).

5.0 CONCLUSION

The compulsory acquisition of property via the *Expropriation Act, 1975* (Act 63 of 1975), seems to affect

the expropriated owner adversely, particularly in terms of just compensation. However, the expropriation can be justified in order to accommodate growth which is essential for a developing country such as South Africa. Consequently, in weighing the advantages and disadvantages of property expropriation, it can be concluded that the benefits derived by the community in general outweigh the disadvantages experienced by the expropriated owner in particular.

NOTES.

¹ The terms "eminent domain" and "expropriation" can be used interchangeably, the former being commonly used in American property language whilst the latter is a familiar South African term.

² According to the *Roster Oxford Dictionary* (1974, p.2043), a solatium refers to:

- a sum of money paid to a person to make up for loss or inconvenience; and
- a sum of money paid, over and above the actual damages as compensation for injured feelings - *vide* (Onions, 1974, p. 2043).

With regard to the solatium section, (12) (2) of *Expropriation Act, 1975* (Act 63 of 1975), reads as follows: "Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable . . . in respect of all land, including any portion of a piece of land, expropriated in terms of the notice of expropriation in question, an amount equal to ten percent of such total amount but not exceeding ten thousand rand". The solatium mentioned in the above quotation is not a mere arithmetical calculation but has to be determined by the Court. Actually, it is part of the compensation awarded by the Court and will in an appropriate case, affect costs. The holder of rights such as registered leases, and servitudes expropriated under the Act does not become entitled to payment of any solatium - *vide* (Jacobs, 1982, p.152).

³ In Australia, the former owner of an expropriated property would not be adequately compensated for his loss on dispossession merely by the payment to him of the current market value of the property. Other factors which may have to be considered in determining compensation can include, *inter alia* loss of occupation, loss of profits and removal expenses. (Rost and Collins, 1981, p.464).

In Britain, an owner is entitled to compensation not only for the market value of the property taken, but also for all other loss he may suffer in consequence of its acquisition. For example, the occupier of a private house acquired by compulsion will be able to claim the expense incurred of moving to other premises. (Lawrence, Rees and Britton, 1971, p.333).

⁴ The word "enure" has, *inter alia*, the following meanings:

- to be available; and
- to be applied to the use of. (Onions, 1973, p.666).

⁵ This ambiguously worded section can be explained as follows: Suppose the last claim of the owner was R200 000 and the last offer by the expropriator was R100 000. If the court awards R120 000 compensation, the claim of the owner is R80 000 in excess of the award and the offer of the expropriator is R20 000 less than the award. The owner thus receives 20 percent of his costs, that is R20 000 expressed as a percentage of R100 000.

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