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EXPROPRIATION ACT

A solution to country's land reform challenges?

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THE Expropriation Act (the Act) has sparked mixed reactions from various groupings across the country. Some, probably influenced by certain misconceptions, remain strongly opposed to the Act's purport, while some have strongly defended the Act. Of particular concern to those opposed to the Act is the provision for nil compensation when it is just and equitable. The key objective of the Act, as explained in its preamble, is to give effect to the constitutional promise of land reform; a promise which, over 30 years post the Constitution's adoption, has not really materialised. Is the Act a solution?

Section 25 of the Constitution prescribes in section 25(1) that no one may be deprived of property, except in terms of a law of general application, and any such law may not authorise the arbitrary deprivation of property (deprivation of property without due process). Section 25(2) permits the expropriation of property for a public purpose or public interest, and section 25(4) clarifies that "public interest" includes the country's commitment to land reform.

Section 25(3) provides for the payment of just and equitable compensation in the event of expropriation, "reflecting an equitable balance between the public interest and the interests of those affected". Section 25(3) also prescribes the circumstances to be considered when determining just and equitable compensation. These include the use of the property, the history of the property's acquisition, the market value, the extent of state support in the acquisition and improvement of the property and the purpose of the expropriation. This provision is mirrored in the Act to determine just and equitable compensation.

The main point of contention is that the Act provides for nil compensation when it is just and equitable. However, this aligns with the Constitution, as Section 25 does not prescribe what just and equitable compensation ought to be but rather provides guidance for its determination. It is therefore conceivable that compensation could be nil.

According to the Act, the Minister of Public Works is granted the authority to expropriate on behalf of other organs of state, upon the request of the minister responsible for that organ of state. Ostensibly then, the Land Claims Commission may request through the Minister of Rural Development and Land Reform, the expropriation of land. If circumstances permit, this could be for nil compensation.

The implementation of this is, however, at the discretion of the Minister of Public Works, who may or may not be satisfied with a particular request from the Department of Rural Development and Land Reform. In our assessment, it may perhaps have been preferable for the expropriation power to reside with the Minister of Rural Development and Land Reform.

On the issue of informal land rights holders, the Act appears to treat informal land rights holders as ordinary land rights holders. The terminology used is "unregistered rights", which the Act defines as "right[s] in property, recognised and protected by law [...]" which does not require registration and includes a right to occupy or use land.

Overall, the Act operationalises the Constitution's property clause, and on a balanced and simple reading, it does not grant the state any additional powers than what is already constitutionally prescribed. Additionally, those aggrieved by any decision to expropriate, whether with nil compensation or otherwise, have the Constitution's protection and access to the courts. What remains unclear is whether the Act will achieve its stated goals in relation to land reform. Based on our initial reading and understanding of the Act, we have concerns it may not achieve its stated goals in respect of land reform, and may potentially further slow the process.

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