

EXPROPRIATION:

What's fair compensation?

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LEGAL BRIEF

Michael Jackson



A Kamberg, KZN farm... will such properties be hit by law changes?

THE state has indicated it now intends to use statutory mechanisms to achieve land reform. Currently before Parliament are the Expropriation Bill and the Promotion and Protection of Investment Bill. The state has also published a draft bill on the Preservation and Development of Agricultural Land. These bills are likely to be used by the state to achieve its aims of land reform. What does this mean to investors and the owners of property? At the Polokwane and Mangaung Conferences, the ANC resolved to replace the willing buyer, willing seller principle with a just and equitable clause as contained in the constitution. The current Expropriation Act

requires the state to pay compensation based on what a willing buyer would pay a willing seller. The property clause contained in the Bill of Rights is more complex. It provides that compensation must be just and equitable. In determining what is just and equitable, all relevant circumstances must be taken into account, including the market value of the property and the purpose of the expropriation. The Expropriation Bill mirrors the provisions of the constitution. It is a big improvement on earlier versions that were unconstitutional and allowed the state to acquire property at a discount if the purpose was to redress inequalities. The question which now arises

is whether just and equitable compensation is any different from market value. Deputy Minister Jeremy Cronin has deliberately avoided this issue, saying it will be for the courts to determine. From policy documents, the ANC is of the view that just and equitable compensation should be at a discount to market value if the purpose of expropriation is to redress past discrimination. Legal commentators, however, believe that the court will invariably interpret the clause to mean market value. The Investment Bill is meant to allay the concerns of foreign investors resulting from the

government's decision not to renew bilateral investment treaties. Some of the state's reform initiatives have been challenged as being in violation of undertakings contained in bilateral investment treaties. The Investment Bill falls short of addressing the concerns. Although it states that foreign investors will have the same rights to property as contained in the constitution, this is qualified by the state having the available resources to pay. Probably of more concern are attempts to declare that natural resources belong to all South Africans and are not capable of

being privately owned. This has already been done with water and minerals and the new Agricultural Bill, published in March, seeks to do the same with agricultural land. It proposes that the Department of Agriculture will be the custodian of all agricultural land that will have to be used in a manner authorised by the department. The continued limitation of rights to property and resources should be regarded as creeping expropriation for which compensation should be payable. As land reform initiatives step up, there are likely to be many legal challenges. ● Michael Jackson is the managing partner at Cox Yeats Attorneys and head of the commercial and natural resources law team. His specialist practice areas are business Law, natural resources and energy, and empowerment and transformation. Jackson is a member of the International Bar Association and is listed among the world's leading natural resources lawyers and energy lawyers. He can be contacted at 031 536 8500 or via e-mail: mjackson@coxyeats.co.za