

Unpacking new property legislation

With a few significant changes on the cards for the South African property sector in 2017, Just Property recently caught up with Cor Van Deventer of Greyvensteins to ask him for some of his insights on the Expropriation Bill and the Protection of Investment Act.



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The Expropriation Bill

“The Expropriation Bill has received a great deal of attention in the media of late, particularly due to the controversial push from various parties to have this Bill passed as soon as possible,” shared Van Deventer. “Expropriations by the state, or organs of the state, are done on a very regular basis in the public’s interest. Government intends to speed up land reform with the new proposed legislation,” he added.

“The Bill’s definition of property is so wide open to interpretation that it could include residential and commercial property, other moveable property, as well as intangible property such as intellectual rights. The definition of expropriation, as it currently stands, implies that the organ of the state or state itself can expropriate property on behalf of a private individual, or a private company. As compared to the Expropriation Act of 1975, which only makes provision for expropriation for public purposes, the new Bill goes a step further by including ‘public purpose’ and ‘public interest’ definitions. The new version of the Bill opens the door for expropriation of land for people who would like to undertake economic developments, such as low-income housing – in fact, it encourages it,” said Van Deventer.

Office of the Valuer-General

According to Van Deventer, previously, if government expropriated land for roads, farmland or electricity usage, it was on the ‘willing seller, able buyer’ principle, where, if owners did not really want to sell, they didn’t have to. If government didn’t offer enough compensation, property owners could refuse to sell and the land could not be expropriated.

With the establishment of the Office of the Valuer-General, the government can now expropriate property and pay out what the valuers have determined the price of the property to be. This amount will be based on market value. To be considered will also be the property's history of acquisition, current use and the purpose of expropriation.

"The new Bill does require that the state first exhaust all efforts to purchase the property on reasonable terms in the open market before it can even consider expropriating it. This layer of protection is remarkable, even in comparison to countries like Canada or Australia," said Van Deventer.

The Promotion of Protection of Investment Bill

Despite strong opposition, Protection of Investment Act was passed in November 2015.

"The first draft of the Promotion and Protection of Investment Bill was prompted by the case of Piero Foresti, Laura de Carli and others versus the Republic of South Africa. Here, foreign investors challenged the South African policy of Black Economic Empowerment (BEE) in international arbitration. The matter was presided over by international arbitrators and government lost. Government then became concerned that its policies, in this case BEE, would not be protected through the international arbitration mechanism," explained Van Deventer.

This led to government reviewing its investment laws and regulations. "According to this Act, government may take measures, in accordance with the Constitution and legislation, to redress historical inequalities, uphold the values and principles of the Constitution, foster economic development and protect the environment," said Van Deventer. He added that this section is very vague and may be faced with a Constitutional challenge in the future.

"In its first draft, the Bill did not allow for international arbitration. It has tried to downplay concerns by stating that international arbitration may be resorted to, only if such arbitration is consented to by government and only once all domestic remedies have been exhausted.

Bilateral investment treaties

"With regards to equal treatment of foreign investors, previous bilateral investment treaties (BITs) operated on the basis that all parties were treated equally in the investment relationship. The Act makes provision that foreign investors will not be treated less favourably than South African investors," explained Van Deventer.

He highlighted that the South African government has left very little room when it comes to taking into account foreign investor's interests. "The investment security provision also states that foreign investors will get the same level of security as domestic investors, but this is subject to the state's available resources and capacity. We need to take into account that the majority of BITs were entered into before our Constitution came into effect and therefore did not adequately protect the interests and values of our Constitution."

Van Deventer also shared that it is still very early to predict what influence this Act will have on future foreign investment into South Africa. "It is clear that the Act protects South African interests above those of foreign companies. Proponents of this Act argue that it is in keeping with international trends, but other countries that have cancelled BITs, like Australia and Canada, have vastly different economic environments to ours. We need to strike a balance between protecting foreign interest and that of our own and only time will tell if this Act will achieve this."

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