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A new Expropriation Bill by another name

Media coverage of the Promotion and Protection of Investment Bill of 2013 (the Investment Bill) has focused on its role in replacing South Africa's bilateral investment treaties with various European states. Representatives of these countries have broken their usual diplomatic silence to warn against the reduced protection it gives investors from their states. However, the true significance of the Bill goes very much beyond this.

The Investment Bill is, in fact, a new expropriation measure that will apply to all property owners in South Africa, both local and foreign. It is also likely to result in many people receiving zero compensation on the loss of their property, provided the State takes this, not as owner, but rather as 'custodian' for the disadvantaged. In combination with the Restitution of Land Rights Amendment Bill of 2013, it could see property of many kinds taken by the State as 'custodian' for land claimants and without any compensation to its former owners. Yet most commentary on the Investment Bill has overlooked this risk, helping to lull all property owners into a false sense of security.

A new bill tabled for comment

A misleadingly named Promotion and Protection of Investment Bill of 2013 was gazetted by the Department of Trade and Industry (DTI) in November last year. The three months allowed for public comment expired at the end of January 2014. Since then, media coverage has been sanguine or absent, helping to obscure the threat posed by the Investment

Bill to the property rights of every person, whether local or foreign.

A risk of zero compensation

Under the Investment Bill, the rights of domestic property owners will be much reduced. The current Expropriation Act of 1975 gives them the right to full compensation on expropriation, which must include not only the market value of their properties but also compensatory damages for consequential loss. The Act also guarantees them immediate payment of 80% of the compensation due, with interest on the outstanding balance.

Under the Investment Bill, by contrast, expropriated owners will receive less than market value and will have no right to damages for consequential loss. They will also have to wait for the State to make payment in what it regards as 'a timely manner'.

However, the real danger in the Investment Bill is not that domestic property owners will be confined to 'just and equitable' compensation falling somewhat short of market value – but that they will receive no compensation at all.

This danger stems from a key clause in the Investment Bill stating that various actions 'do not amount to acts of expropriation'. According to the Bill, there will thus be no expropriation where the Government's actions result 'in the deprivation of property' but 'the State does not acquire ownership' and 'there is no permanent destruction of the economic value of the investment'.

The real danger in the Investment Bill is that property owners will receive no compensation at all.

The origins of this key clause

The wording of this provision can be traced back to a majority judgment of the Constitutional Court in April 2013. Penned by Chief Justice Mogoeng Mogoeng, this ruling was concerned with whether expropriation had occurred when an unused (and unconverted) private mining right 'ceased to exist' under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Judge Mogoeng found that Sebenza Pty Ltd, which used to own the coal mining right in issue, had suffered a 'compulsory deprivation' of its right under the MPRDA. In addition, 'the custodianship' of this resource was now 'vested in the State on behalf of the people of South Africa'.

Since the deprivation of ownership had not been matched by the acquisition of ownership by the State, no expropriation had occurred, the chief justice ruled.

However, the State had not acquired ownership of the mining right. Instead, it was simply a 'custodian' or 'conduit' through which 'broader and equitable access to mineral resources could be realised'. Since the deprivation of ownership from Sebenza had not been matched by the acquisition of ownership by the State, no expropriation had occurred, the chief justice ruled. It followed that no compensation was payable.

Echoing this judgment, a key provision in the Investment Bill states that various actions 'do not amount to acts of expropriation'. Among the actions it lists are 'measures which result in the deprivation of property, but where the State does not acquire ownership of such property'. One of two provisos must be fulfilled for this result to follow: either there must be 'no permanent destruction of the economic value of the investment', or 'the investor's ability to…use or control his investment [must not be] unduly impeded'.

Once the Investment Bill becomes law, the Government could use its rules to take further measures to vest all mining land, mining equipment, and other mining assets in the State as the custodian of the nation's mineral resources, while simultaneously inviting black South Africans, in particular, to apply to the Department of Mineral Resources for a licence to use a portion of these assets for a specified period.

In these circumstances, mining companies would be deprived of their property, but the State would acquire it as custodian rather than as owner – and there would be 'no permanent destruction of the economic value' of these assets. This means there would be no 'act of expropriation' under the principles established by the Investment Bill, and no compensation would be payable.

The Investment Bill will apply to everyone, including 'natural persons' and 'regardless of nationality'.

The implications of this clause

Similar measures, intended to generate a similar outcome, could be taken as regards all other 'investments' covered by the Investment Bill. These are broadly defined to include companies, equities, land, movables, and intellectual property, along with mining rights and similar 'licences, authorisations, or permits…to carry out economic and commercial activities'.

Moreover, the Investment Bill applies equally to domestic and foreign investors, for the need to ensure equal treatment for both categories of investor is a key theme of the measure. Yet media coverage has downplayed this, suggesting that only foreign investors will be affected by the Bill.

The Bill's reference to 'investors' is also misleading, for it suggests that the new law will apply solely to companies and other commercial enterprises. In fact, the Investment Bill will apply to everyone, including 'natural persons' and 'regardless of nationality'.

Any black or white South African who owns a home, a car, or unit trusts is vulnerable to the Investment Bill's provisions. So, too, are enterprises of every size and in every sector of the economy, from mining to agriculture, banking, manufacturing, and services.

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Once the Investment Bill is in place, the current Expropriation Act is likely to be overtaken or repealed. The Government, which has encountered stiff resistance to its draft expropriation bills of 2008 and 2013, will also have no further need to try and push a replacement expropriation law through Parliament.

Instead, all South Africans will find that their rights on expropriation are already governed by the rules laid down in the Investment Bill. And this, of course, will give the State the power to take measures to acquire property of virtually any kind as 'custodian' for the poor — and without the need to pay any compensation.

When Chief Justice Mogoeng handed down the Constitutional Court's ruling on Sebenza's rights last year, two judges on the court — Johan Froneman and Johann van der Westhuizen — disagreed with the majority's conclusion that no expropriation had taken place. They also cautioned against the implications of Judge Mogoeng's ruling, saying it could lead to 'the abolition of the private ownership of…all property' without the payment of any compensation.

Two judges caution that Judge Mogoeng's ruling could lead to 'the abolition of the private ownership of all property'.

'Any legislative transfer of property from existing property holders' would no longer be 'recognised as expropriation' if it was 'done by the State as custodian of the country's resources', they said.

The warning sounded by these Constitutional Court judges could prove prescient if the Investment Bill is enacted into law in its current form. Yet business, civil society, the media, and most South Africans seem oblivious to this threat.

The Investment Bill in the context of the Restitution Bill

The Investment Bill needs also to be read in the context of the Restitution of Land Rights Amendment Bill of 2013 (the Restitution Bill), which the Government is intent on pushing through Parliament before the May 2014 general election.

The Restitution Bill extends the deadline for lodging land restitution claims from December 1998 to December 2018. In this extended period, some 379 000 new land claims are likely to be submitted, according to the Government's own regulatory impact analysis. Settling these claims could cost the State some R179bn, the analysis notes. Yet in the 2013/14 financial year, the restitution budget was roughly R3bn. How, then, is the State to find the money to settle all these new claims, especially when some 8 000 existing claims have yet to be resolved?

The Investment Bill could, of course, provide a solution. Provided that the State takes land under claim as a 'custodian' for land claimants, there will be no expropriation flowing from this deprivation — and hence no compensation to be paid.

The new land claims lodged under the Restitution Bill could extend far beyond agricultural land. In the words of the deputy chief land claims commissioner, Thami Mdontswa, in September 2013, 'people might think, "Hey, there's a coal mine out there, let me place myself within its reach [by lodging] a claim"'.

Given the limited investigative capacity of the Land Claims Commission and the police, there may also be little to prevent people from lodging false claims. Mr Mdontswa has acknowledged that 'there are many people out there who will want to take a chance', but says the penalties in the Restitution Bill will help deter this.

Under the Restitution Bill, some 379 000 new land claims are likely to be submitted.

However, the penalties referred to in the Restitution Bill will apply only where a person 'lodges a claim with the intention of defrauding *the State*' (emphasis supplied), rather than the current property owner. The common law of fraud will still apply in this second situation — but successful prosecutions may not be easy to secure. Nor will they compensate property owners for losses suffered via false claims.

As the Institute of Race Relations (IRR) has pointed out, the Investment Bill, in combination with the Restitution Bill, could 'spell the end of private property rights in South Africa — not just in agriculture but across the economy'. Adds the IRR: 'We believe that the Government and the African National Congress (ANC) are preparing the ground to seize private property and distribute it to poor communities if and when they feel the need to do so. That time will come when the political pressure on the ANC is so great that it fears losing a future election.'

A false sense of security

Media coverage has focused mainly on the impact of the Investment Bill on foreign investors, helping to lull all property owners in South Africa into a false sense of security. Many South Africans no doubt also believe that the property clause in the Constitution will protect them in the event of any expropriation. But the property clause could count little when a majority on the Constitutional Court has already ruled that expropriation requires not only a deprivation of property but also a matching acquisition of ownership by the State — and that the State does not acquire ownership when it takes property as custodian for others.

Many South Africans no doubt believe that the property clause will protect them, but this clause could count little.

This Constitutional Court judgment is now being written into what is effectively a new expropriation bill. The measure might speak of 'promoting' and 'protecting' investment in its title, but its real impact is likely to be quite the opposite.

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