

COMPENSATION: AGRI SA POSITION: MARKET VALUE REMAINS THE POINT OF DEPARTURE

Agri SA is of the view that market value should remain the point of departure in the event of expropriation. There are certain commentators who ignore the finer nuances and tend to reach incorrect conclusions. A proper breakdown of the legal issues could help to address this uncertainty.

The current debate around expropriation without compensation has already had an impact on land prices. Policy uncertainty has contributed towards lower farm prices, with a negative effect on production loans against property value. Agriculture continues to be hurt by the uncertainty, but this is merely a prelude to the damage that can be expected if the wrong policy decisions are made.

The broader debate must be approached with clinical accuracy. There are many legislative instruments and technical questions that arise – it is not simply a case of ‘stop any amendment to the Constitution’.

To this end, Agri SA is involved in every official process relating to expropriation, including section 25 of the Constitution, the Expropriation Bill and the valuation of properties. In each instance, Agri SA adopts a policy position that is properly discussed and decided on by its structures. Agri SA works in terms of a mandate received from approximately 28 000 commercial farmers.

This is an attempt to unpack the different elements of debate.

Agri SA believes that market value is in most cases just and equitable, especially when considering international law (to which the government and courts are bound) and international best practice.

Terms such as ‘market-related compensation’ complicate the debate unnecessarily. Ultimately, the Constitution requires that the result should be just and equitable, with due consideration of both the public interest and the interest of those affected. Compensation is payable in the case of expropriation because an individual alone cannot be expected to bear the burden of a public interest (such as land reform) from which everyone benefits.

1. Current discourse on expropriation

There is a perception that the main reason why progress made with land reform has not been satisfactory relates to the price the state has to pay for the land it acquires. The so-called willing-seller-willing-buyer principle is blamed for the failure of land reform, and populists create the impression that if land is expropriated, land reform will be achieved overnight.

2. Market-value compensation

Market-related compensation is essentially market-value-based compensation. Internationally, use is made largely of four standards of compensation, namely full compensation; fair compensation; equitable compensation; and adequate compensation. The 2017 international valuation standards define market value as follows: 'Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and willing seller in an arm's-length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion'. The standards provide no definition of market-related compensation.

3. The real reasons for slow progress made with land reform

The real reasons for the failure of land reform are set out clearly in the 2017 report of the High-Level Panel on Key Legislation. This includes corruption, an inadequate budget, lack of political will and lack of training and capacity on the part of public officials who have to implement the land reform programmes. An inadequate budget is a major part of the problem – since 1994 the average annual allocation for land reform has been limited to between 0.15 and 0.44% of the national budget.

4. Valuation and compensation

The Constitution works with the concept of just and equitable compensation. It is difficult in practice, however, to link a monetary value to the other factors listed in section 25(3) of the Constitution. Market value is the only factor of which the value can fairly easily be determined objectively.

The Courts have not yet had sufficient opportunity to rule on how just and equitable compensation for land reform purposes should be calculated.

In terms of the Property Valuation Act of 2014, all land acquired by the state for land reform purposes must be valued by the Office of the Valuer-General.

Regulations on how these valuations should be performed were recently published. These regulations aim to prescribe how valuers are supposed to go about determining just and equitable value. A formula is proposed according to which the current use value of property is determined, after which the market value and historical value of any benefits can be deducted. The application of these draft regulations by the Valuer-General is currently causing serious problems, and Agri SA intends to have it tested in the courts.

It is important to remember that land owners are by no means obliged to accept the state's offer. The Act and regulations merely serve as a guideline for the government. If a land owner refuses to accept the sum offered, the state will have to decide whether it wishes to expropriate the property. Expropriation can only be used if legislation is in place which makes provision for expropriation for the specific purpose, for example the Restitution of Land

Rights Act, which provides for expropriation in the case of a valid land claim and where the parties are unable to agree on the compensation payable.

5. International guidelines for compensation

Compensation for land owners whose land is expropriated for land reform purposes should be calculated based on fairness and equitability and in line with international best practice. International best practice is based on the principle of equivalence in shouldering public burdens. In 2008, the Land Ownership Studies Desk of the United Nations' Food and Agriculture Organisation (FAO) published a guide on best practice for compulsory acquisitions. In this guide, the FAO stipulates, as follows:

“Compensation, whether in financial form or as replacement land or structures, is at the heart of compulsory acquisition. As a direct result of government action, people could lose their home, their land, and at times their means of livelihood. Compensation is intended to repay them for these losses and should be based on principles of equity and equivalence. The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition.”

In all its submissions on expropriation, Agri SA relies strongly on this principle of equivalence and the so-called Hull standard of prompt, adequate and effective compensation.

6. Agri SA's position on expropriation

Although Agri SA recognises the provisions of section 25 of the Constitution, we are of the view that just and equitable compensation should be as close as possible to market value. Agri SA became involved as friend of the court in the Appeal Court case *Msiza v Uys* and argued successfully against arbitrary (unfounded) deductions from market value. The Appeal Court also ruled that market value was the logical point of departure for calculating just and equitable compensation.

Agri SA's views on compensation are contained in its policy document on land. In this document Agri SA's position is summarised as follows:

- The state must use reasonable market value as point of departure when land is acquired for land reform purposes. This should also apply in the case of expropriation.
- The budget for land reform must be sufficient to meet the government's ambitions/targets in respect of the quality and amount of land, bearing in mind the principle of fair market value and post-settlement costs.

Agri SA had articulated its position on compensation very clearly during public hearings on the Expropriation Bill held in Parliament during 2015. Agri SA's views are again articulated clearly in our commentary on the latest (2019)

version of the Expropriation Bill. We refer, among others, to the United Nations' documents on expropriation.

7. Conclusion

The debate around compensation in relation to land reform will continue for some time. The Expropriation Bill will probably be tabled in the current Parliament but only be processed after the election by the new Parliament. It is very important that farmers clearly understand the principles and concepts relating to compensation.

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