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LAND REFORM – PRESERVATION & DEVELOPMENT OF AGRICULTURAL LAND OR IS IT A FORM OF EXPROPRIATION?

INTRODUCTION

The Subdivision of Agricultural Land Act was passed in 1970 to prevent the subdivision of agricultural land into uneconomic land units. The Act provided that land, which historically fell outside the area of a municipality or town, could not be subdivided without the consent of the Minister of Agriculture.

In 1998, Parliament passed a law repealing the Subdivision of Agricultural Land Act but the implementation of this law has not yet been brought into effect.

In the Government Gazette of 13 March 2015, the Minister of Agriculture published the Draft Policy and Bill on the Preservation and Development of Agricultural Land. Comment on the Policy and Bill must be submitted before 30 May 2015. The Bill is to replace the Subdivision of Agricultural Land Act and its aim is to protect agricultural land. Unfortunately, the Bill goes far beyond this. Role players should submit comment on the Bill so as to prevent it being passed into law in its current form.

Whilst the general principle of protecting agricultural land is to be supported, the Bill, in its present form, is unconstitutional, violates the rule of law, contains unworkable provisions and constitutes a form of expropriation without compensation.

WHAT IS AGRICULTURAL LAND?

Like the old Act, the Bill defines agricultural land as to include all land outside of a proclaimed township. It then categorises agricultural land into eight different classes depending upon the agricultural potential of the land.

Land which is categorised in classes 1 to 3 is defined to be high potential cropping land and land categorised in classes 4 to 8 is defined to be medium potential agricultural land.

The Bill states that the subdivision of high potential cropping land is prohibited unless approved by the Minister. The process of approval requires input from various role players including municipalities, other government departments and traditional communities.

Before the Minister considers the application, various reports have to be prepared and submitted. Most important, is an agro-eco system report. The report is to analyze the impact of the development on any change in food production and on the farming sector. The application will only be granted if exceptional circumstances can be found.

In regard to medium potential agricultural land, the approval of the MEC is required. The exceptional circumstances criterion does not apply to medium potential agricultural land.

There are no objective criteria against which the Minister or the MEC must grant an application or must refuse an application. Granting a complete discretion to the Minister or the MEC is against the rule of law.

THE STATE IS CUSTODIAN OF AGRICULTURAL LAND

The National Water Act of 1998 and the Mineral & Petroleum Resources Development Act of 2002 introduced the concept of natural resources being part of the common heritage of all South Africans and provide that the State was the custodian of natural resources.

The New Bill now states that agricultural land is the common heritage of all people of South Africa and that the Department of Agriculture is the custodian thereof, for the benefit of all South Africans.

By declaring that all agricultural land is the heritage of all of the people of South Africa, the argument is raised that imposing controls and restrictions on the use of agricultural land does not constitute an expropriation leading to claims of compensation. These provisions raise questions as to whether the deeming of natural resources, including agricultural land, as being the common heritage of the people, and that the State is the custodian thereof, constitutes a form of expropriation without compensation.

The controls over agricultural land, going beyond restricting the subdivision of agricultural land, are far reaching.

If a farmer is found not to be using agricultural land to its optimal agricultural potential, then the Minister is entitled to expropriate the land at below market value. There are no objective criteria for determining what the optimal agricultural potential of agricultural land may be.

A farmer may only use high potential cropping land for the production of food and food crops for human consumption. In other words, he or she may not use the land for animal feed purposes or, for example, the production of crops used as a feedstock for clean energy. The farmer also may not convert high potential cropping land to eco-tourism related game farming or other agricultural production initiatives without the permission of the Minister.

A farmer may not sell high potential cropping land if the land is then to be used for a non-agricultural purpose. Foreigners may not purchase high potential cropping land or medium potential agricultural land.

The Minister of Agriculture is given the power to expropriate agricultural land if it is required for agricultural production. This is deemed to be expropriation for a public purpose or in the public interest.

THE BILL IS UNCONSTITUTIONAL

Apart from the Bill breaching the rule of law, it is unconstitutional because it seeks to confer upon the National Minister of Agriculture, the power and control of land when the Constitution vests that power in Local Government and Municipalities. The decision as to whether land should be converted from agricultural use to another form of use is a decision to be made by town planning authorities at local government level. At present, it is unconstitutional for the Minister of Agriculture to make all of these decisions.

THE WAY FORWARD

Measures by the State to preserve agricultural land and the production of food should be supported. The new Bill however is misconceived and role players should be taking steps to ensure that it is not taken further.

National legislation on the preservation of agricultural land should set norms and standards and the framework against which decisions by local authorities are to be made relating to the preservation of agricultural land.

The attempt to control land by vesting all agricultural land with the people of South Africa, attempts to control exactly what crops are to be grown on agricultural land and the onerous provisions regarding entitlements to expropriate should be removed from any proposed legislation. As too, the requirement that no agricultural land may be owned by foreigners.

FURTHER ADVICE

Should you require advice or assistance on the preservation and development of agricultural land, please contact Michael Jackson (031 – 536 8512 mjackson@coxeats.co.za) or Keren Watson on 031 - 536 5818, email : kwatson@coxeats.co.za or Simon Watson on 031 - 536 8530, email : swatson@coxeats.co.za or Jason Goodison on 031 - 536 8517, email : jgoodison@coxeats.co.za or Jenna Padoa on 031 - 536 8529, email : jpadoa@coxeats.co.za or Wade Ogilvie on 031 - 536 5827, email : wogilvie@coxeats.co.za or Sybil Mvulane on 031 - 536 8580, email : smvulane@coxeats.co.za or Callum Cox on 031 - 536 8586, email : ccox@coxeats.co.za.

