



## Commercial Law Team

Client Circular  
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*Our Cox Yeats Commercial Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.*

### EXPROPRIATION AND PUBLIC TRUST

The final Constitution of 1996 brought about a compromise between the protection of private property and the need to achieve fundamental land reform.

Section 25 of the Constitution protects the ownership of private property and provides that property may only be expropriated for a public purpose or in the public interest and the amount of compensation must be just and equitable. Just and equitable compensation must reflect an equitable balance between the public interest and of those affected having regard to all relevant circumstances.

The ANC, at its 2017 Nasrec conference, resolved that expropriation without compensation was a possibility.

Section 25 of the Constitution allows expropriation to occur without the payment of compensation in limited circumstances. Just and equitable compensation encompasses the equivalence principle which must not be transgressed in instances where no compensation is paid. The equivalence principle is on the basis that where one or more individuals have to bear a sacrifice in the form of the loss of property for the common good, their individual and excessive burdens should be compensated by the community. That burden should not partially or wholly be imposed on expropriated landowners.

It is for this reason that, in international law and in most democratic countries, compensation on expropriation is the market value. In the South African context, where there is a need to redress past imbalances, it can legitimately be argued that it is fair and equitable in certain limited circumstances for less than market value to be paid but subject always to the equivalence principle.

Although section 25 of the Constitution allows in limited circumstances no compensation to be paid on expropriation when the purpose is for land reform, the ANC have stated that section 25 should be expressly amended "*to make explicit that which is implicit therein*".

This approach is opposed by all political parties, save for the ANC and EFF.

In order to change the Bill of Rights in the Constitution, a 75% majority of the National Assembly and a supporting vote of at least six provinces in the National Council of Provinces is required. The ANC is not able to obtain this majority vote without the support of the EFF.

In July, Parliament reached a deadlock. Various bilateral meetings took place between the ANC and EFF to see if consensus could be reached.

The EFF was only prepared to support an amendment to the Constitution if this resulted in State ownership of land. They believed that land is the common heritage of all citizens, and the State should become the custodian of all land.

Instead of this applying to all land, the ANC proposed that the Constitution be amended to provide that the State become the custodian of certain land in order for citizens to gain access to land on an equitable basis.

A revised amendment to section 25 of the Constitution was published on 16 July 2021 and comment had to be submitted to Parliament by 13 August 2021.

The property sector is extremely important to our economy and it is currently estimated to be valued at R8 Trillion Rand, excluding agriculture.

The proposed amendment will, if passed, significantly undermine this investment.

The concept of State custodianship is totally foreign to South African law. It was introduced in 2002 with the Mineral and Petroleum Resources Development Act (the **MPRDA**). This Act states that mineral and petroleum resources within South Africa belong to the nation and that the State is the custodian thereof. The MPRDA destroyed the concept of mineral rights and substituted it with rights granted by the State as custodian of the nation's mineral resources.

In regard to this arrangement, the minority judgment of the Constitutional Court warns as follows:

*"This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the State as custodian of the country's resources, from being recognised as expropriation. This is done without the thorough examination of what the entirely legal concept of State custodianship holds for our law or whether the transfer will be just and equitable. In that way, one of the crucial aspects of our historical compromise, the equitable balance between the protection of property rights and the public interest under section 25, is bypassed."*

The introduction of State custodianship into our law of property is highly undesirable. It is a concept which has not been properly legally analysed, and which is foreign to South African law and the Constitution itself. It leaves the way for the legislature to confiscate ownership of land without compensation, based on so called regulatory measures contained in a statute. It also opens the way to a creating expropriation without compensation which is contrary to international law.

It is hoped that the most recent proposed amendment to the Constitution does not go any further.

Should you require advice or assistance, please contact Michael Jackson on 031 – 536 8512, email: [mjackson@coxyeats.co.za](mailto:mjackson@coxyeats.co.za), or Jason Goodison on 031 - 536 8517, email: [jgoodison@coxyeats.co.za](mailto:jgoodison@coxyeats.co.za), or Wade Ogilvie on 031 - 536 8527, email: [wogilvie@coxyeats.co.za](mailto:wogilvie@coxyeats.co.za), or Benjamin Meadows on 031 - 835 3109, email: [bmeadows@coxyeats.co.za](mailto:bmeadows@coxyeats.co.za), or Adrian Krige on 031 – 536 8567, email: [akrige@coxyeats.co.za](mailto:akrige@coxyeats.co.za), or Robyn Bronstring on 031 – 536 8568, email : [rbronstring@coxyeats.co.za](mailto:rbronstring@coxyeats.co.za), or Andrew Seymour on 031 536 8527, email: [aseymour@coxyeats.co.za](mailto:aseymour@coxyeats.co.za) or Savannah Buys on 031 – 835 3134, email: [sbuys@coxyeats.co.za](mailto:sbuys@coxyeats.co.za)



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Visit us at: [www.coxyeats.co.za](http://www.coxyeats.co.za)

**DURBAN OFFICE:**

Tel: 031 536 8500 | Fax: 031 536 8088 | Address: Ncondo Chambers, Vuna Close, Umhlanga Ridge, Durban, 4320

**JOHANNESBURG OFFICE:**

Tel: 010 0155 800 | Address: 4 Sandown Valley Crescent, Sandton, 2196



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