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Foreign Ownerships of Land and Landreforms

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Foreign Ownership of Land and Landreforms

There are two topics that caused heated debates and a lot of uncertainty amongst foreigners who already invested in South African properties or consider doing so. These topics have to be strictly separated and we will try to shed some light on the respective backgrounds.

Foreign Ownership of Land

In the wake of the weakening Rand and the stabilising democracy in South Africa, a huge increase in property sales that started in 2003 caused a property boom especially in the Cape. Since then annual property price increases of sometimes 30% and more have sparked worries among local South Africans and the government that the foreign demand for properties will drive the property prices out of the reach for locals and the South African soil may move uncontrollably into foreign hands to an extent that may be to the detriment of the young democracy's interests.

In 2004 the Minister of Land and Agricultural Affairs, Thoko Didiza, formed a committee to investigate foreign land ownership. This committee came back with their report in February 2006 and reported that 2% of all land sales in the previous year were attributed to foreign buyers in their personal capacity with the total percentage of transaction in foreign owned companies, close corporations and trusts not being accounted for as yet. The number of foreign buys could therefore be as high as 10% which demands a moratorium for foreign property purchases until the government has implemented rules and regulations under which foreign ownership could be allowed in future.

"There is a very strong public perception that an unregulated ownership of land such as housing by foreigners contribute significantly to the lack of readily available and affordable land for land reform."¹

These comments and suggestions are merely part of a proposal by the committee and not a new law tabled in front of parliament, though the South African president in his

¹ Joe Matthews, deputy-chairman of the committee, in The Cape Argus on 17 February 2006

State of the Nation Address in February 2006 said that the government will "regulate conditions under which foreigners buy land. This will be done in line with international norms and practices." Some of the overseas' press releases have taken this comment too far beyond its meaning in expressing worries that foreigners might as well be expropriated and their land might be seized by the state. This is totally false while Chapter 2 of the South African Constitution, the Bill of Rights, protects the property and its owner from expropriation excepts where land reform² legislation restores unjust expropriation of previously disadvantaged communities.³ Any regulation that may be imposed by the government will have to measure up to the constitutional boundaries and would be contested in front of the constitutional court if doubts exist that they would be unconstitutional.

Beside this legal background the findings of the committee have already been widely contested. Though the Pan African Congress, an insignificant political communist party, has welcomed the suggestions of the committee, there are a lot of voices that the findings not only just apply to "small pockets in the Western Cape but that property prices in South Africa had increased not because of foreign interest but because they were at last catching up with prices elsewhere in the world."⁴

Another indication that the committee's findings are wrongly based is the fact that the property prices also increased in areas, where no foreign buyer will invest.⁵ While clearly favourable areas for foreign buyers such as Somerset West are not even among the top ten areas, where prices increased more than 40% per year.⁶

Further more the reasoning behind possible regulations could only be seen in the context of vacant land not being developed, because it is held for investment and speculation purposes.⁷ Here the interest of the state in developing vacant land would indeed overweigh the interest of a speculator in his investment.

² See below the comment on Land Reforms in South Africa

³ Article 25 of the Constitution

⁴ Keith Wakefield, CEO of Wakefield's Estate Agents

⁵ e.g. the Cape Flats, Mitchell's Plane, Strandfontein, Brackenfell or Rugby and Brooklyn

⁶ The FNB Property Barometer showed 64.19% price increase for Pinelands in 2004 with hardly any foreign buyers responsible

⁷ Barbara Becker, Pam Golding KwaZulu Natal

Finally even the expert panel admits that foreigners own an insignificant portion of South Africa's fixed property. "Of the country's estimated R2-trillion worth of property, only R22,5-billion is owned by foreigners. Nevertheless the panel felt that the public outcry and perception about foreign ownership's influence on sky-rocketing property prices should be addressed, despite lack of evidence to support this."⁸

In summarising the current situation, no regulations or limitation has been tabled for parliament and it is very doubtful that the Minister will recommend a moratorium for foreign land buys. Unanswered is also the question who would be considered a foreigner in this debate and how foreign institutional investors would be protected along the policy of increased foreign direct investment. Thus the dialogue between all parties will be further monitored and if any substantial news are forthcoming will be reported to all effected parties.

Land Reforms

Land reforms in South Africa address the unjust expropriation of members of the previously disadvantaged communities and are in place since 1994. Since the constitution protects property in South Africa⁹ exceptions have to be governed by the constitution. Such exception is provided for in Article 25 (4) (a) of the Constitution as far as Land Reforms are concerned. Paragraph 7 of the same article clearly states that

"a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

In turn the person that would be expropriated under the current laws would be - contrary to the practice in Zimbabwe - compensated with the market value of the expropriated land. Quite a few farmers have welcomed their compensated expropriation in the past as

⁸ Shadrack Gutto, UNISA Academic and chairman of the committee

⁹ See Article 25 of the Bill of Rights

it eased their cash flow and predominantly they only had to part from fractions of their property.

In total 69 000 claims under the laws for land reform had been received and up to date there are only 7 000 land claims left, of which the majority concerns properties in Limpopo, Mpumalanga, North West and KwaZulu Natal.¹⁰ In the last two years alone the government restituted more than two million hectares of land formerly expropriated under the Native Land Act as well as 18.28 million hectares, where families had been forced of their land under the Forestry Act of 1941.¹¹

In 2005 the period in which all the land claims should have been dealt with lapsed, with 7 000 claims being unanswered predominantly due to failed or fruitless compensation negotiations. The "willing buyer, willing seller" model will now no longer apply to land restitution claims as many white farmers wanted more money than the government was prepared to pay.¹² In consequence the remaining land owners will be expropriated and compensated as the government sees fit.

As unsettling as this sounds one has to weigh the effected rights against the determination of the government to right previous wrongs. Where greed is the motor for year-long fruitless negotiations with the government, surely the right to the property has to be infringed for the greater good. But the question remains, if compensation by the government as determined by them will satisfy the requirements of the most important property protection, the South African Constitution. Paragraph 3 of Article 25 of the Constitution clearly states that:

"The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

- a. the current use of the property;

¹⁰ There are no unanswered land claims for the Western Cape remaining

¹¹ For the extensive history on land reforms: J Moore "Land Restitution in South Africa", www.pbs.org

¹² Tozi Gwanya, South Africa's chief land claims commissioner

- b. the history of the acquisition and use of the property;
- c. the market value of the property;
- d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e. the purpose of the expropriation. "

So even, if an outcry goes through the media that land claims will be restituted against the owners will and the possibility of unfair compensation might come to mind, the expropriated owner will find his rights in the Constitution and the means of enforcing his rights by contesting the compensation in front of the Constitutional Court. So one would have to respect the aim of the South African Government to finalise the remainder of the claims for the higher course of bringing finally peaceful and just answers to those land-related questions that were raised during the last 90 years!

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