

Renewable energy and land claims conflict

The introduction of independent power producers in South Africa is essential for the government to be able to "keep the lights on" and avoid the rolling blackouts of a few years ago.

Solar and wind-energy plans, however, require large tracts of land in order to be sustainable and successful and the Mpumalanga and Limpopo areas are facing the greatest demand from renewable energy investors - yet these are also the two areas where the most land claims have been lodged.

However, Bulelwa Mabasa, director at Werksmans Attorneys and an expert in land restitution law says renewable energy investors need not fear that land claims in these areas will scupper their investment plans. Even if a land claim is found to be valid, the worst that could happen is that the state could offer to purchase the land from the landowner on the basis of fair and just compensation, including any other costs that may have been incurred by any investors.

"The land restitution processes are fair and constitutional. At the very worst, independent power producer investors would get their money back," says Mabasa,

Expropriation is highly unlikely, however, considering the stance of the Land Claims Commission towards projects that will help to create jobs and develop communities - as is clearly the intention of projects under government's Independent Power Producers Renewable Energy Programme (IPP REP).

"The commission has learned from past experience and is not willing simply to hand out land without support and infrastructure, leaving the claimants to their own devices," says Mabasa. "Renewable energy is, in effect, foreign direct investment, and the commission has, in most cases, been co-operative and forthcoming in support of renewable energy projects."

Co-exist

Limpopo and Mpumalanga are two of the provinces that have the best sun and wind in South Africa, making them ideal for renewable energy projects. They also happen to be the provinces with the most unresolved land claims.

"Rather than being a huge hurdle to investment, land claims and renewable energy projects could co-exist to the benefit of communities and investors alike," says Mabasa, adding that the Land Claims Commission has successfully facilitated agreements among funders, landowners and land claimants. She has not yet encountered a case where the commission has objected to investments that will benefit communities - but this does not mean its consent can be taken for granted.

"There are still hurdles to be crossed and procedures to follow and the commission, landowners and competing land

claimants are all lawfully able to interdict the development of a project, for various reasons. These include the fact that the project may potentially defeat the purposes or objects of the Restitution of Land Rights Act."

Good practice

Mabasa says the act requires that anyone with plans to develop a piece of land subject to a land claim must notify the relevant Regional Land Claims Commission of the intended project.

"But even if an investor is not aware of the existence of a land claim, it is good practice to notify the commission of intended projects on any and all land," she says. This is despite the fact that the act requires a party to notify the commission only in circumstances where there is a published claim.

The reason why Mabasa recommends going further than the strict legal requirement is that there are two types of land claims: those that have been lodged and published in the Government Gazette and those that have been lodged or submitted, but are as yet unpublished.

"Claims are published only when the claimants have shown to the commission's satisfaction that they were deprived of land after 1913 due to discriminatory laws and without compensation," Mabasa says.

"The fact that a claim has not been published does not mean that it does not exist. The claim might have been submitted but not yet researched, and therefore is not public knowledge."

She says investors should not be concerned that they will wake up one morning and find that their investment has been expropriated as a result of a land claim that has been found to be valid.

"Even when expropriation is a possibility, any interested and affected party, such as an investor, still has the right to present its case, and to receive just and equitable compensation," she says.

Mabasa says most investors see land claims as a risk, but this is largely unfounded. "In my experience, the existence of a land claim does not present a hurdle to investors, provided they have sought appropriate advice from experienced advisers in the field of land claims."

Source: *The Times* via I-Net Bridge

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