


The Expropriation Bill 2015 and section 25 of the Constitution

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ABSTRACT

The land issue in the Republic of South Africa has been a contentious area of focus in both legal as well as political circles. Since the remnants of democracy becoming visible, the land issue has been the subject of much scrutiny by all stakeholders involved. However, since the birth of constitutional democracy there has not been a framework for expropriation that follows the letter of the Constitution. South Africa has inherited a framework of expropriation that was enacted during one of the most trying times the nation has gone through, an era of segregation and ownership of land based on racial bounds.

The negotiation process birthed the Constitutional property clause, a clause somewhat sui generis since it both protects existing rights to property as well as mandates the state to take effective means to address the dispossession of land during apartheid. A framework for expropriation that has at its heart this tension between protection and reformation is needed. This framework for expropriation comes in the form of the Expropriation Bill B4 – 2015. The Expropriation Bill B4 – 2015 should be able to carry the burdens placed by the Constitution in the form of both protection and reformation. This Bill should be able to address the plight of the majority of South Africans to provide redistribution of land, and also the plight of those that were dispossessed of land post the enactment of the Natives Land Act 1913.

This Bill should be able to undo the legacy of inequality that plagues South Africa today by using the Constitutions guiding principles under the provisions of section 25 to heal the divisions of the past and create a future generation that is united. This dissertation investigates the provisions of the Expropriation Bill B4 – 2015 and tests them for compliance against the provisions of the Constitutional property clause. Cognisance should be taken of the fact that the current framework for expropriation is highly deficient when tested for compliance against the property clause hence the need for a new framework for expropriation.

OPSOMMING

Die grondkwessie in die Republiek van Suid-Afrika is 'n omstrede fokusarea in beide regs-sowel as politieke kringe. Sedert die ontstaan van die grondwetlike demokrasie is daar egter nie 'n raamwerk vir onteiening wat voldoen aan die vereistes van die letter van die Grondwet nie. Inteendeel, Suid-Afrika het 'n onteieningsraamwerk geërf van die Apartheidsjare, 'n era van segregasie en eienaarskap van grond gebaseer op rassegrense.

Uit die onderhandelingsproses is die Grondwetlike eiendomsklausule gebore, 'n klousule wat 'n *sui generis* is, aangesien dit beide bestaande eiendomsregte beskerm asook die staat verplig om effektiewestappe te neem om die herverdeling van grond aan te spreek. 'n Raamwerk vir onteiening wat hierdie spanning tussen beskerming en hervorming weerspieël is nodig. Hierdie raamwerk vir onteiening kom in die vorm van die Wetsontwerp op OnteieningB4 - 2015. Die Wetsontwerp op Onteiening B4 - 2015 moet die laste wat deur die Grondwet geplaas word in die vorm van beskerming en hervorming kan dra. Hierdie wetsontwerp moet in staat wees om die lot van die meerderheid Suid-Afrikaners wat van grond, asook die mense wat na die inwerkingtreding van die Naturelle Land Wet 1913 verdryf is, aan te spreek.

Hierdie wetsontwerp moet die nalatenskap van ongelykheid wat Suid-Afrika vandag teisteraanspreek, deur gebruik te maak van die Grondwetlike beginsels soos vervat in die bepalinge van artikel 25, om die verdelings van die verlede te herstel en 'n toekomstige geslag te skep wat verenig is.

Hierdie proefskrif ondersoek die bepalinge van die Wetsontwerp op OnteieningB4 - 2015 en toets hulle vir nakoming van die bepalinge van die Grondwetlike eiendomsklausule. Daar moet kennis geneem word van die feit dat die huidige raamwerk vir onteiening hoogs gebrekkig is wanneer dit getoets word vir nakoming van die eiendomsklausule, en dat daar dus die behoefte aan 'n nuwe raamwerk vir onteiening is.

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LIST OF ABBREVIATIONS

SRV	Separate Representation of Voters Act
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1 Introduction

1.1 Background

The idea of expropriating property for any given purpose is not a novel phenomenon. Bianca¹ makes mention of the fact that expropriation "is as old as the bible itself", given specific references to actions that resemble expropriation in biblical scriptures although specific reference is not made of the fact that the action would be expropriation.²

In South Africa expropriation describes the process where a public authority or public institution acquires and takes property for a stated public purpose with the payment of compensation in return for the property so expropriated.³ Expropriation as a result can be described as the loss of a thing, moveable or immoveable to the expropriator, in this case a public authority or a defined institution in the absence of consent on the part of the initial owner and accompanied by the payment of compensation.⁴

Although the consent of the owner of the property is not required at expropriation, it is nonetheless a legitimate way for the state to acquire property. This is especially the case since the Constitution grants these powers to the state and is a legitimate means of attaining property.⁵ In South Africa, this means of original acquisition, i.e. expropriation is intended to be used to reverse the consequences of apartheid, which has left in its stead a legacy that has created inequality predicated along racial lines.

1.2 Reversing a distorted legacy

Apartheid legislation and policies that dealt with rights in land have left behind a much-distorted legacy, especially with regards to land ownership. One important piece of

¹ Bianca *The development of a new expropriation framework for South Africa* 1.

² The learned author makes reference to Kings 1: 21 and relates the history of Naboth and the vineyard. In this case, the king, King Ahab wanted a vineyard that belonged to Naboth because it was close to his house. He attempted to negotiate with Naboth about his vineyard and proposed payment for the vineyard or a better vineyard. Naboth refused to give up the vineyard and the king's wife arranged for the vineyard owner, Naboth to be killed so that the king can have the vineyard 1.

³ Miller and Pope *Land Title in South Africa* 301.

⁴ *Beckenstrater v Sand Irrigation Board* 1964 4 SA 510 (T) 515 A – C.

⁵ Hopkins and Hofmeyer 2003 *SALJ* 51.

legislation that perpetuated a distorted legacy is the Natives Land Act,⁶ also referred to as the Black Land Act. The effect of the Natives Land Act was to preserve and strengthen the racially discriminatory underpinnings of local government.⁷ This Act regulated the acquisition of land by the natives.⁸ Describing the effect of the *Natives Land Act*, Mahlangeni⁹ states that:

The Natives Land Act, 1913 is of importance for both legal and historical reasons. It is the single most important apartheid legislative instrument that resulted in the present under-development of the country especially in the former Africa-designated areas; then known as the homelands. The Act created a system of land tenure that deprived the majority of South Africans the right to own land. It was accompanied by major socio-economic repercussions and, it was meant to perpetuate land dispossession on the part of the African majority.

The land policies that followed as well as measures and regulations were all intended to guarantee the progressive implementation of the Natives Land Act¹⁰ with disastrous consequences for the ownership of land by the black majority. This state of affairs has perpetuated grave injustices for the ownership of land by the black majority. Any attempt aimed at correcting this distortion as created by apartheid land policy is very complex. Numerous legislative and other policies have since the dawn of constitutional democracy attempted to address the disastrous consequences as perpetuated by apartheid land policy.¹¹

The Constitution¹² itself is an attempt to rectify the distortions in relation to land ownership. Of particular relevance is section 25. Section 25 has a dual function in that it both protects existing rights to property as well as mandating the state to instigate measures of land and other related reforms to correct the distortions created by

⁶ 27 of 1913.

⁷ Mahlangeni *Reflections on the impact of the Natives land Act 1913, on local government in South Africa* 20 May 2013.

⁸ This was a term used to refer to the African inhabitants.

⁹ Mahlangeni *Reflections on the impact of the Natives Land Act 1913, on local government in South Africa* 20 May 2013.

¹⁰ Mahlangeni *Reflections on the impact of the Natives Land Act 1913, on local government in South Africa* 20 May 2013.

¹¹ Pienaar 2009 *PER/PELJ* 18 the learned author states that "The *Restitution of Land Rights Act* 22 of 1994 based on sections 121-123 of the 1993 Interim Constitution and section 25 (7) of the 1996 Constitution, provides for an opportunity for specific persons or communities whose land was taken away after 19 June 1913 without adequate compensation by apartheid land measures, including racially discriminatory legislation or practices, to institute a land claim for the restitution of such property or for equitable redress".

¹² *Constitution of the Republic of South Africa*, 1996.

apartheid. The protective function of section 25 manifests itself in section 25(2) wherein property maybe expropriated sanctioned by a law of general application with a public purpose or the public interest being the rationale that justifies the expropriation and subject finally to the payment of compensation.

For purposes of conducting an expropriation, the *Expropriation Act*⁶³ of 1975 (hereafter the Expropriation Act) is still applicable. The problem is that the *Expropriation Act* predates the Constitution. It is not surprising therefore that the provisions of the *Expropriation Act* are likely to fail to capture the essence of the principles contained in the Constitution. However, the inception of the Constitution has had a huge bearing on the interpretation of the *Expropriation Act* in that legislation that is applicable has to remain in compliance with the Constitution and be applied in conformity with the Constitutions fundamental values.¹³

Expropriations must further comply with the provisions of section 25 of the Constitution.¹⁴ The requirements for a valid expropriation in terms of the Constitution as enumerated above, the existence of a valid public purpose or public interest and the payment of compensation all have to be complied with to regard the act of expropriation as being valid. The *Expropriation Act* fails to meet the constitutional requirements in various respects.

Firstly, the *Expropriation Act* does not make reference to an expropriation being conducted in the public interest. The *Expropriation Act* only makes reference to an expropriation being conducted for a public purpose.¹⁵ This provision falls short of the requirement to expropriate either for a public purpose or in the public interest in terms of section 25(2)(a) of the Constitution.¹⁶

As will be discussed later¹⁷ the public purpose requirement has been defined at length in case law and has been described as being a purpose that dictates the existence of a direct benefit to be derived by the public from the expropriation either through direct

¹³ *Du Toit v the Minister of Transport* 2006 1 SA 297 (CC) para 26.

¹⁴ *Du Toit v the Minister of Transport* 2006 1 SA 297 (CC) para 26.

¹⁵ Section 2 of the *Expropriation Act*.

¹⁶ *Constitution of the Republic of South Africa*, 1996.

¹⁷ Para 3.2.1 below.

use or direct access to the expropriated property.¹⁸ Public purpose in terms of section 1 of the *Expropriation Act* is defined as any purpose connected with the provisions of any law by an organ of state. The Constitution defines public interest broadly as inclusive of the nation's commitment to land reform and reforms aimed at bringing about equitable access to all of South Africa's natural resources.¹⁹

Secondly the Constitution further reflects the determination of the amount of compensation payable upon expropriation as being different from that as enumerated in the *Expropriation Act*. In terms of the Constitution, compensation payable upon expropriation has to reflect an equitable balance between the interests of the public and the interests of the individual property owner.²⁰ In terms of the *Expropriation Act*, the amount of compensation payable upon expropriation is to be computed at market value.²¹ The Constitution further provides guidelines that can be used to determine just and equitable compensation reflecting an equitable balance between the two competing interests.²² Within the list, market value is enumerated as one of a number of factors in a non-exhaustive list of factors to consider in the weighing exercise.

Thirdly, the scope of what property entails has been broadened by the Constitution. In terms of section 25(4), property is not in any way limited to land. This means that a novel conception of what property is and/or what it entails has been defined. Fourthly, the *Expropriation Act* fails to recognise the existence of insecure rights to land whose insecurity was the result of past discriminatory practices during apartheid. Section 25(6) mandates the recognition of the said insecure rights to land by mandating legally secure tenure or comparable redress. The Constitution therefore, demonstrates an awareness of other rights to land. Given the lack of specific recognition of other rights to land in the *Expropriation Act*, the latter falls foul of constitutional compliance. The Constitution's recognition of other rights in land means that in the event of an expropriation, the said rights to land have to also be compensated. The *Expropriation*

¹⁸ *Administrator Transvaal v Van Streepen (Kempton Park)* 1990 4 SA 644 (A).

¹⁹ Section 25(4)(a) of the *Constitution of the Republic of South Africa*, 1996.

²⁰ Section 25(3) of the *Constitution of the Republic of South Africa*, 1996.

²¹ Section 12 of the *Expropriation Act*.

²² Kleyn 1996 *SAPL/PR* 413 learned author making reference to the two competing interests states that: "the balancing of private and societal interests will, as in German law, lie at the heart of the interpretation and application of the South African property clause".

Act fails to recognise this state of affairs by not including other rights to land within the rights eligible for compensation upon expropriation.

Given the disparities that exist between the *Expropriation Act* and section 25 of the Constitution, a new framework for expropriation is needed. This framework should be in line with the spirit and purport of the constitutional property clause. Previous attempts to align the framework of expropriation with the terms of the Constitution have proven futile. In 2008, there was drafted the *Bill* B16-2008. The Bill was withdrawn after much public outrage pertaining to its compliance with the provisions of the Constitution particularly section 25.²³ An attempt to bring expropriation in line with the Constitution is the *Bill* B4 – 2015 (hereafter referred to as the Bill). This Bill attempts to sanction expropriation and infuse said expropriation with the values that underpin the Constitution. This dissertation is aimed at analysing to what extent the Bill is in compliance with the provisions of section 25 of the Constitution specifically with the implied mandate of correcting a distorted legacy as perpetuated by apartheid.

1.3 Purpose of the study

The Constitution has introduced a novel dimension to the South African legal landscape. This state of affairs mandates an understanding of the application of the law in a manner that owes allegiance to the provisions of the Constitution.

As earlier made reference to,²⁴ the *Expropriation Act* is constitutionally deficient in multiple areas. The Constitution is the supreme law and any legislation that is inconsistent with it, to the extent of the inconsistency shall be rendered null and void. This state of affairs will apply to the provisions of the *Expropriation Act*. To underpin its legitimacy, expropriation legislation has to be in compliance with the Constitution. It is for this reason that new legislation is needed.

As enumerated above,²⁵ the focus of this study hinges on the extent to which the Bill is constitutionally sound when its provisions are tested for compliance against the

²³ South African Press Association (SAPA) 2008 <http://www.iol.co.za>.

²⁴ Para 1.2 above

²⁵ Para 1.2 above

provisions of section 25 of the Constitution. The inconsistencies inherent in the *Expropriation Act* will also be investigated to underpin the necessity for the promulgation of new expropriation legislation. Further, criticism levelled against the Bill will also be discussed so as to arrive at an informed conclusion as regards its constitutionality.

1.4 Framework of the study

Property, particularly land was used as a means to divide South Africans on the basis of colour for many a years. With the dawn of constitutional democracy looming, the dismantling of these institutions that kept a nation divided for years would form the core of the negotiations. The issue of property would undoubtedly be a contentious issue in the negotiations that birthed democracy and united South Africa. To understand the significance of a new expropriation framework for South Africa, it is crucial to understand the Constitutional property clause and the reason it is formulated in the manner it is. Thus chapter 2 will endeavour an exposition of the Constitutional property clause and its function in democratic South Africa.

The *Expropriation Act* was promulgated twenty one years prior to the coming into effect of the Constitution. The *Expropriation Act* therefore is likely to not have infused in it the same values and aspirations as the Constitution. The Constitution being the supreme law of the country mandates that the *Expropriation Act* be compliant with it. Chapter 3 will be aimed at analysing the *Expropriation Act* in its current state. This exercise will be aimed at highlighting the inconsistencies that the *Expropriation Act* is likely to possess when it is considered along the demarcations of section 25 of the Constitution. This in the final analysis will highlight the need for new expropriation legislation one that is in line with the Constitution.

The Bill has been the subject of much critique with some people arguing that it is unconstitutional. Chapter 4 will be an investigation into the terms of the Bill to determine its compliance with section 25 of the Constitution. Some of the concerns the different stakeholders expressed about the Bill will be analysed and discussed.

In the final analysis, conclusions will be drawn about the varying aspects that affect the constitutional compliance or non-compliance of the Bill with the provisions of section 25. This will be done by a holistic summary of firstly, the character of the property clause, secondly, the need for a new expropriation framework given the lack of compliance of the *Expropriation Act* with the property clause and finally the Bill's compatibility with the property clause. All of this will be discussed in chapter 5.

2 Section 25

2.1 *The Constitution as an instrument of transformation*

2.1.1 *Introduction*

The effect of the promulgation of the Constitution of the Republic of South Africa was a shift in the legal landscape in South Africa.²⁶ The Constitution in the preamble talks about a recognition of the injustices of the past, the adoption of the Constitution as the sovereign law of the land, the healing of the divisions of the past, establishing a society based on set principles of democratic values, social justice and fundamental human rights and finally the construction of a society that is united and democratic in nature.²⁷

The preamble to the Constitution of the Republic of South Africa²⁸ demonstrates the aspirations of change. The aim is to never have a situation such as that which persisted during the enactment of the Natives Land Act²⁹ or other instances that perpetuated the injustices that characterised apartheid South Africa.

The *Bill*³⁰ is one attempt at correcting some of the injustices that characterised apartheid South Africa. The preamble to the Bill recognises and gives creed to the provisions of section 25 of the Constitution and states that it is intended to ensure that expropriation follows the letter of the law.³¹ At the heart of the new South African order is the pledge to transform society.³² This being the case, the attempt at transformation will manifest itself properly in light of the enactment of legislation to address disparities in wealth perpetuated by the subsistence of apartheid, hence the birth of transformative constitutionalism. The Bill coupled with the sentiments of the Constitution demonstrate the aim and insight into a future rooted in transformation. It is crucial to underpin the significance of transformation as being rooted to the

²⁶ Du Plessis *Compensation for Expropriation under the Constitution* 70.

²⁷ *Constitution of the Republic of South Africa*, 1996.

²⁸ 108 of 1996.

²⁹ 27 of 1913.

³⁰ B4 – 2015.

³¹ *The Bill* B4 – 2015.

³² Moseneke 2002 *SAJHR* 309 315.

Constitution because it is through transformation that the distorted legacy left by apartheid can be reversed.

2.1.2 Transformative constitutionalism³³

The transformative nature of the Constitution lies at the heart of achieving the constitutional goal of an all-inclusive society that renounces the principles of apartheid South Africa. Budlender AJ in *Rates Action Group v The City of Cape Town*³⁴ stated that the South African Constitution is one that is transformative in nature. The Constitution provides a context for the transformation of the South African society from a racist and largely unpleasant past to a society in which everybody can live with dignity.

Former Chief Justice Pius Langa³⁵ addresses transformative Constitutionalism within the context of South Africa and applauds the salient aims that underpin the Constitution saying that "it is a magnificent goal for a Constitution to heal the divisions of the past and guide us to a better future".³⁶ Within the South African context, transformative constitutionalism alludes to a substantial improvement in the material state of affairs of individuals coupled with a tangible change in legal culture.³⁷

Brickhill and Van Leev,³⁸ making reference to the inception of the Constitution and its transformative intent, state that a distinction is drawn between the situation that persisted in apartheid South Africa where the law was used as a tool to oppress and a constitutional democracy that embraces the power of the law to sanction and transform. The birth of constitutional democracy came with the promise of a reduction in poverty and inequality which were traits that characterised apartheid South Africa.

³³ Klare 1998 *SAJHR*146 the learned author gives an exposition of legal culture and how same would fit in a transformative context, a context of which South Africa is specifically when the sentiments of the South African constitution are taken into account. The sentiments that demonstrate South Africa's commitment to transformation will be further elucidated below.

³⁴ 2004 12 *BCLR* 1328 par 100.

³⁵ Langa 2006 *Stell LR* 352.

³⁶ Langa 2006 *Stell LR* 352.

³⁷ Brickhill and Van Leev 2015 *Acta Juridica* 143.

³⁸ Brickhill and Van Leev 2015 *Acta Juridica* 143.

The hope had been that it would be done within a legal framework that exemplified commitments to social justice, dignity, equality and freedom.³⁹

What can be said about the transformative essence of the Constitution is that it was to be viewed as a bridge between an history premised on division and the promise of a future that embraces all individuals alike without regard to any characteristics, racial or otherwise.⁴⁰

The Constitution as a bridge has been the subject of much debate. Some view the bridge as a means of getting to the opposite end, a means to close the gap between a racially divided past and a united South Africa.⁴¹ The question then is what happens when reaching the end of the bridge? The most logical conclusion is that transformative constitutionalism the bedrock of the Constitution loses its valour. This is because the purpose behind viewing the Constitution as a bridge, namely, healing the divisions of the past and paving the way for a united and democratic South Africa would have been achieved and there is no longer a need to view the Constitution as a bridge because the end would have been achieved, hence the loss of the spirit of transformative constitutionalism.⁴²

Van Der Walt,⁴³ however, cautions against viewing the Constitution as a bridge with an eventual end to it. Rather, he suggests that transformation itself should be the permanent ideal⁴⁴ and that it should always be aspired to. He describes it as a novel manner in which to view the world. He states that viewing the world in this manner creates a space in which debate and constant interactions ensue, the result of which is that we frequently discover and either reject or accept new ways of being. The learned author succinctly states that in this world "change is unpredictable but the idea of change is constant".⁴⁵

³⁹ Brickhill and Van Leev 2015 *Acta Juridica* 143.

⁴⁰ Van Der Walt 2001 *SALJ* 296.

⁴¹ Albertyn and Goldblatt 1998 *SAJHR* 249.

⁴² Minister of Finance v Van Heerden 2004 11 BCLR 1125 (CC)

⁴³ Van Der Walt 2001 *SALJ* 296.

⁴⁴ Van Der Walt 2001 *SALJ* 296.

⁴⁵ Van Der Walt 2001 *SALJ* 296.

Viewing the Constitution as a means to an end in itself is not a novel precept. For instance, the court in *Minister of Finance v Van Heerden*,⁴⁶ although discussing the ideal behind the Constitution from an equality perspective, held that the approach to a question addressing the constitutionality of a given measure is not whether the measure treats all those it affects identically. Rather the inquiry hinges on whether the measure serves to improve or halt the equal enjoyment in practice of the rights and freedoms the Constitution affords but which have not as yet been realised.

Although the *Van Heerden* case discussed transformation from an equality perspective, the sentiments expressed therein are none the less very relevant. Viewing an equality enquiry from the perspective of whether the measure treats all those it affects identically has the potential to halt the transformative essence of the Constitution if it is determined that the said measure treats all those it affects identically.⁴⁷ An enquiry such as this should rather be understood from the view that transformation or change has no end to it. Instead, the idea of change should continue and take multiple characteristics overtime which will create a platform for the constant exchange of ideas.

In the context of equality, Sibanda⁴⁸ further argues that if the question is whether the Constitution treats all those affected by it in an identical manner, we risk embedding the current structural forms of domination and vulnerability within society. From an equality point of view, the transformative goal is to view the Constitution from the broader societal context and not just view the Constitution as a means to achieving equality. In this way, particularly in line with the assertions by Van Der Walt, the Constitution remains the proper and best platform for further contestation particularly because of the manner in which it would remain open.⁴⁹

Viewing the constitution as an instrument of transformation is crucial towards understanding the constitutionality of any Act of parliament. This state of affairs is

⁴⁶ 2004 11 BCLR 1125 (CC).

⁴⁷ And as a result, end the goal of transformation because the journey to the opposite end of the bridge will have been reached. This is specifically what Van Der Walt cautions against since according to him such an enquiry will treat transformation as the equivalent of a journey with an eventual destination. Rather transformation as a goal is a journey in itself without an end to it, wherein we constantly seek to transform and define novel means of existing.

⁴⁸ Sibanda 2005 SAPR/PL 160.

⁴⁹ Van Der Walt 2001 SALJ 296.

particularly relevant when regard is had to the fact that the Bill will foster and use the same dictates as those enumerated in the Constitution to justify its existence.

2.2 The Birth of the Property Clause

To understand the provisions of the property clause, it is important to understand the rationale behind its present formulation. This can be done by a brief elaboration of the history leading up to its adoption.

The Constitution as a whole and not just the property clause is the result of negotiation and compromise.⁵⁰ The negotiation and compromise were as per the terms of the preamble to the Constitution intended to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights as well as improve the quality of life for all citizens.⁵¹

Before the dawn of constitutional democracy, what had been central to the apartheid government's aim of implementing racial division was the use of land law. Land law was used to implement and maintain spatial race segregation.⁵² This objective of spatial segregation was achieved through the enactment of such legislation as the Native Land Act (hereafter the *Native Land Act*).⁵³ The latter Act⁵⁴ achieved this aim of spatial racial segregation by designating black and white areas, where people were statutorily prevented from owning areas of land that had not been designated for their race.

Du Plessis,⁵⁵ making reference to this Act and other similar pieces of legislation, describes the effect these pieces of legislation had on black land rights as having downgraded these rights and effectively leaving the said land rights more insecure than the rights belonging to their white counterparts in the other designated areas. Apartheid

⁵⁰ Du Plessis *Compensation for Expropriation under the Constitution* 70.

⁵¹ Preamble to the *Constitution of the Republic of South Africa*, 1996.

⁵² Du Plessis *Compensation for Expropriation under the Constitution* 70.

⁵³ 27 of 1913.

⁵⁴ Solomon Tshekeisho Plaatjie *Native life in South Africa, before and since the European war and the Boer Rebellion* famously wrote describing the day the Native Land Act was promulgated: "Awaking on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth".

⁵⁵ Du Plessis *Compensation for Expropriation under the Constitution* 70.

land law consequently became very pivotal to the advancement of a divided South Africa with a white minority rule.

The process of negotiating a property clause was not straight forward. At the negotiations, one of the most contentious issues was that of constitutionally protected property rights.⁵⁶ It was contentious because on the one hand the African National Congress (hereafter the ANC) was aware that a constitutional entrenchment of property rights should not thwart the government of a democratic South Africa from implementing legislation that addresses the large disparities in wealth that were perpetuated by apartheid.⁵⁷ On the other hand, the National Party (hereafter the NP) wanted to ensure that existing property rights would be adequately protected from the clutches of a future democratically elected South African government intent on transformation.⁵⁸

Chaskalson⁵⁹ in his discussion of the two conflicting concerns of the parties at the negotiations process draws attention to the policy documents on a Bill of Rights presented by both parties to the negotiations.⁶⁰ One of the proposals in the policy documents by the NP that demonstrated the conflicting interests as far as the protection of property was concerned was its focus on subjecting the states powers to tax to individual rights to property. This had the effect of placing the state's ability to tax secondary to the supremacy of individual rights to property. Further, all taxes which had the effect of confiscating property would be declared invalid.⁶¹

In direct contrast to the proposal by the NP, the ANC sought a different vision of property rights. On this vision, the individual rights to property are subject to the needs

⁵⁶ Chaskalson 1995 *SAJHR*223.

⁵⁷ Chaskalson 1995 *SAJHR*224.

⁵⁸ Du Plessis *Compensation for Expropriation under the Constitution* 71.

⁵⁹ Chaskalson 1995 *SAJHR*224.

⁶⁰ Each party at the multi-party negotiating process came up with what would be the focus of the negotiations. The National Party drafted what was termed *The Republic of South Africa Government's proposals on a charter for fundamental human rights* dated 2nd February 1993 and the African National Congress drafted the African National Congress *A Bill of Rights for a new South Africa*, a preliminary revised text May 1992.

⁶¹ Chaskalson 1995 *SAJHR*223.

of the general public.⁶² From these types of interactions between the then government of the day, the NP and the ANC the Interim Constitution was born.⁶³ With the Interim Constitution ushering in democracy and permitting multiple interactions between the parties at the negotiating table, there would eventually be the Final Constitution.⁶⁴

The entire negotiation process resulted in a negotiated Constitution to properly govern a post-apartheid and democratic South Africa.⁶⁵ The negotiations⁶⁶ surrounding the adoption of the Bill of Rights birthed section 28 of the Interim Constitution⁶⁷ and finally section 25 of the Final Constitution.⁶⁸ These were inserted in the Bill of Rights in the Final Constitution⁶⁹ as the property clause.

The property clause is therefore the result of constant negotiation and compromise. This is the point of view from which the property clause has to be understood. It has to be understood as the product of a constant pull effect to protect existing rights to property and a constant push effect to attempt instigating land reform to realise the Constitutional goal of healing divisions of the past and improving the quality of life for all. Most matters considered in terms of section 25 will inevitably be characterised by this tension.

⁶² Chaskalson 1995 *SAJHR* 223, the learned author goes further making reference to the proposal by the ANC and says that: "...Thus the land and property clause of the ANC bill were conceived, not as devices to protect the title of existing property owners but rather as one to drive a legislative programme of land restoration and rural restructuring".

⁶³ The *Constitution of the Republic of South Africa* 200 of 1993 and more specifically section 28 (the equivalent of section 25 of the Final Constitution) was reached at the Multi-Party negotiations from May to November 1993. The Interim Constitution was intended to usher in an era of democratic governance, and the Interim Constitution would guide the entire process.

⁶⁴ The preamble to the *Interim Constitution* Act 200 of 1993 makes reference to the fact that: "We the people of South Africa declare that- ...WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;...AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;..."

⁶⁵ Henrard 2002 *the Global Review of Ethno Politics* 1.

⁶⁶ Chaskalson 1995 *SAJHR* 222.

⁶⁷ Act 200 of 1993.

⁶⁸ Chaskalson 1995 *SAJHR* 222.

⁶⁹ *Constitution of the Republic of South Africa*, 1996.

2.2.1 Analysis of Section 25

2.2.1.1 Introduction

The Bill will be tested for compliance against the provisions of section 25 of the Constitution. For the Bill to possess constitutional compliance, its provisions must be in line with the dictates of the property clause. As shall be seen in the dissertation, the property clause envisions the same attributes of transformation that characterise the Constitution in its entirety, namely, transformation. Because of these aspirations of transformation, the Constitution and more specifically for this discussion, the property clause will demonstrate the manner in which any Act of parliament must be interpreted so as to reach the aspirations of transformation. The structure of the property clause will be discussed separately below to understand the manner in which it has to be understood and applied.

2.2.1.2 Structure of Section 25

As explained earlier,⁷⁰ the property clause is the result of negotiations between the former ruling government of South Africa under the NP and the ANC. Both these parties had two very contradictory aims that they wanted to be included within the Constitution, one intended to protect existing property rights and the other was aimed at a systemic but progressive attempt at transformation by granting equitable access to land for all those who had been deprived of land under the apartheid regime.⁷¹

In democratic South Africa, the inclusion of a property clause within the Constitution will undoubtedly bring about complications. These complications are a result of the ramifications that the constitutional protection of property has on the political, economic and social structures of any society and also the effect these will have on the dignity, equality and freedom of the individual.⁷² The structure of section 25 as well does not avert this difficulty.

⁷⁰ Para 2.1 above.

⁷¹ Van Der Walt Constitutional Property Law 16.

⁷² Kleya 1996 *SAPR/PL* 404.

Section 25 of the Constitution contains four broad clusters of provisions. These four clusters of provisions can be further broken down to accommodate two primary aims behind the provisions of the property clause, that is, the protective and reformative aims of the Constitutional property clause.⁷³

The first cluster of provisions is in the form of section 25(1) which deals with deprivation. The second cluster is section 25(2) and 25(3) which deals with expropriation. The third cluster is in the form of section 25(4) and deals with the interpretation of the provisions of the property clause and lastly section 25(5) to 25(9) dealing with the reformative aims of the Constitutional property clause.⁷⁴

The aim behind the first three sub sections⁷⁵ is the protection of existing rights to property primarily "but not exclusively against unconstitutional interference by the state".⁷⁶ The purpose behind the final five provisions⁷⁷ of the property clause is to promote land and other related reforms.⁷⁸ Of importance is the fact that, section 25(4) is the interpretation provision and this provision affects both the protective and reformative clusters of the property clause and these two clusters lend support from the interpretation section.⁷⁹ Van Der Walt⁸⁰ states that:

The four clusters of provisions and the two main parts into which they belong dictate the framework within which the property clause has to be interpreted and applied... a single provision in section 25 should not be interpreted or applied without reference to this structure, which in its turn should be read within the broader historical context and the context of the Constitution as a whole.

These different clusters of the provisions of section 25 will now be discussed separately below.

⁷³ Van Der Walt *Constitutional Property Law* 16.

⁷⁴ Para 2.2.4 which deals with the creative tension as found and maintained within the Constitutional Property clause.

⁷⁵ Section 25(1) to (3) of the *Constitution of the Republic of South Africa*, 1996.

⁷⁶ Van Der Walt *Constitutional Property Law* 16.

⁷⁷ Section 25(5) to (9) of the *Constitution of the Republic of South Africa*, 1996.

⁷⁸ Van Der Walt *Constitutional Property Law* 16.

⁷⁹ Van Der Walt *Constitutional Property Law* 16.

⁸⁰ Van Der Walt *Constitutional Property law* 17.

2.2.2 Deprivation

2.2.2.1 General background

Section 25(1) of the Constitution⁸¹ states that a person may not be deprived of property except as sanctioned by a law of general application. Further no law may be promulgated that authorizes arbitrary deprivation of property. This section loosely termed "the deprivation provision"⁸² underpins the fact that property is protected as a part of the Bill of Rights.⁸³ Nevertheless, cognisance should be paid to the fact that the protection as afforded by this section does not mean that property is shielded against regulatory deprivation.⁸⁴

These provisions of the property clause and their justification are given credence to by virtue of the state's regulatory power or police power.⁸⁵ This power of regulation exists to enable government to regulate property in the furtherance or realisation of the public interest.⁸⁶ Deprivation in its general sense has been described as "an uncompensated, regulatory restriction or limitation on the use, enjoyment and exploitation of property".⁸⁷ Emphasis should be placed on the fact that all of the restrictions or limitations on the use and enjoyment of the property is done in accordance with legislation or other law.⁸⁸

Since the state has to regulate individual property for the benefit of realising the public interest, the provisions of section 25(1) clearly provide for the deprivation of property as well as setting out requirements that have to be complied with so as to make deprivations constitutionally compliant.⁸⁹

⁸¹ *Constitution of the Republic of South Africa, 1996.*

⁸² Van Der Walt *Constitutional Property Law* 17.

⁸³ Van Der Sijde *Reconsidering the relationship between property and regulation: A systemic Constitutional approach* 97.

⁸⁴ Van Der Sijde *Reconsidering the relationship between property and regulation: A systemic Constitutional approach* 97.

⁸⁵ Murphy 1993 *Comparative and International law journal of Southern Africa* 228.

⁸⁶ Van Der Sijde *reconsidering the relationship between property and regulation: A systemic Constitutional approach* 98.

⁸⁷ Van Der Sijde *reconsidering the relationship between property and regulation: A systemic Constitutional approach* 98.

⁸⁸ Van Der Walt *Constitutional Property Law* 17.

⁸⁹ Van Der Sijde *reconsidering the relationship between property and regulation: A systemic Constitutional approach* 98.

Section 25(1) is the equivalent of section 28(2) of the Interim Constitution.⁹⁰ The deprivation provision in the Constitution⁹¹ is phrased negatively as opposed to section 28(2) of the Interim Constitution that contained a positive guarantee of property.⁹² Van Der Walt succinctly captures the function of the section within the entire make-up of the Constitution, by saying that:

The function of the deprivation provision in section 25(1) is twofold. Firstly, the section confirms that the property clause does not render property absolute or inviolate. For this purpose, the provision establishes the constitutional police power principle that regulatory deprivations, in the form of state interferences with and limitations of the use, enjoyment and exploitation of property are legitimate provided they comply with the requirements set out in section 25(1). Secondly, the provisions ensure that necessary and legitimate regulatory limitations are not imposed on property rights arbitrarily or unfairly. For this purpose the provision requires that the deprivations should comply with the requirements in section 25(1).⁹³

The term deprivation has been seen in some circles to be somewhat misleading. This is because it denotes an instance of a taking of property from an individual that owned it.⁹⁴ The confusion regarding the definition of deprivation is as a result of the meaning that is attributed to expropriation which also denotes a taking of property from an individual that owns it.⁹⁵ The interpretation and eventual assertion of deprivation from the precepts of expropriation is of significance given the different roles that these two aspects of section 25 will play in instances of the taking of rights in property or property itself. Van Der Walt⁹⁶ in this regard states that the most distinct factor that differentiates expropriation from a deprivation is compensation. This he contends is

⁹⁰ 200 of 1993.

⁹¹ *Constitution of the Republic of South Africa*, 1996.

⁹² Van Der Walt *Constitutional Property Law* 17.

⁹³ Van Der Walt *Constitutional Property Law* 17.

⁹⁴ *First National Bank v the Commissioner the South African Revenue Services* 2002 4 SA 768 (CC) par 58 the court held that: "the term deprivation or deprive is as Van Der Walt (1997) points out, somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact "the term deprivation is distinguished very clearly from the narrower term expropriation in constitutional jurisprudence worldwide".

⁹⁵ *First National Bank v the Commissioner the South African Revenue Services* 2002 4 SA 768 (CC) par 57. The court further held that: "Viewed from this perspective, section 25 (1) deals with all property and all deprivations (including expropriation) if the deprivation infringes (limits) section 25 (1) and cannot be justified under section 36 that is the end of the matter, the provision is unconstitutional... the starting point for constitutional analysis, when considering any challenge under section 25 for the infringement of property rights must be section 25(1)".

⁹⁶ Van Der Walt *Constitutional Property Law* 19.

because compensation is a prerequisite only with an expropriation and not with a deprivation.

Deprivation as earlier stated⁹⁷ is a legitimate means of acquiring property by a public authority. It is sanctioned by dictates of the law and recognised as a legitimate action that can be taken by the state in the furtherance of a legitimate public interest.⁹⁸ What the property clause does not permit though is an arbitrary taking of property with no realisable public interest that needs furtherance. An exposition will be endeavoured in the sections that follow which will attempt to outline the distinction between an arbitrary taking of property and a legitimate taking of property that complies with the provisions of section 25(1) of the Constitution.⁹⁹

The concept of deprivation has been considered in a number of decisions dealing with property or rights in property.¹⁰⁰ Of significance is the Constitutional Court's decision in *First National Bank v the Commissioner of the South African Revenue Services*.¹⁰¹ The *First National Bank case* has to be understood in light of the particular distinction between deprivation of property on the one hand and expropriation of property on the other.¹⁰² Any intrusion with the use of and exploitation of property will almost always invariably amount to a deprivation of a right to property.¹⁰³ Deprivation amounts to a wider species of intrusion while expropriation refers to a narrower class of interference with the rights to property.¹⁰⁴

At this juncture it is important to understand the fact that the state as confined within the bounds of the Constitution with regard to property and the police powers they

⁹⁷ See page 19 above.

⁹⁸ Van Der Sijde *reconsidering the relationship between property and regulation: A systemic Constitutional approach* 98.

⁹⁹ *Constitution of the Republic of South Africa*, 1996.

¹⁰⁰ What could be gleaned from most of these judgements is the fact that most of them were not transformation sensitive or were not threshed out specifically with the precept of transformation in mind but rather were more aimed at underpinning and enforcing already existing rights to property. However, as will be seen later, this is not of significance since the principles set out by the courts were all embracing and their application could be seen to have properly anticipated an aspect of transformation in future matters that would fall to be decided that deal with transformation.

¹⁰¹ 2002 4 SA 768 (CC).

¹⁰² Strydom 2012 *without Prejudice* 71.

¹⁰³ Strydom 2012 *without Prejudice* 71.

¹⁰⁴ Strydom 2012 *Without Prejudice* 71.

possess is obliged to weigh up and consider the public good to be served by the deprivation and at the same time avert trampling individual rights to property. Defining this concept De Waal¹⁰⁵ describes this as the social state. Justifying the existence of police power regulation he states that the social state is characterised by an obligation incumbent upon the state to assure a life that is dignified. The intention being to minimise the gap between those who have and those who do not have as well as to further regulate alternatively to eradicate the relationships of reliance within society.¹⁰⁶

In this regard the fact that the state will have to in some instances dispossess individuals of property is justified in a social state such as that which South Africa is and in some instances the indemnification of an individual for such dispossession is not done.¹⁰⁷ The deprivation provision and the property clause as a whole are ideally placed for the purposes of justifying such an acquisition of property by a public authority.¹⁰⁸

2.2.2.2 Arbitrary deprivation of property

Section 25(1) "prevents the capricious exercise of discretionary power to deprive people of property".¹⁰⁹ Even though parliament is granted the authority to make legislation, they are prohibited from making laws that whimsically affect property rights or any rights that are protected in terms of the Bill of Rights.¹¹⁰ The bounds of the prohibition against the enacting of arbitrary legislation was considered in *S v Lawrence*, *S v Negal*; *S v Solberg*.¹¹¹ Even though the case was concerned primarily with the provisions of the

¹⁰⁵ De Waal 1995 *SAJHR* 8.

¹⁰⁶ De Waal 1995 *SAJHR* 8.

¹⁰⁷ *Mobile Telephone Networks v SMI Trading CC* 2012 6 SA 638 (SCA).

¹⁰⁸ Kleyn 1996 *SAPR/PL* 409. The learned author goes even further to allude to instances that brought the precept of individual rights to property, He says that: "The right to private property obtained its character as a human right (freedom) in the 18th century enlightenment philosophy, which eventually culminated in the French revolution. As a human right, the right to private property was developed; and as a means of freeing the individual from the bondage of medieval feudalism, from ownership as an instrument of political domination. It served to counteract the political powers of the landlord and to make individual ownership of land possible, as well as permit the individual to participate in a free market economy... For society, private property forms the foundation of private interests in a decentralised economy. But at the same time the property guarantee imposes a duty on the state to limit and control dangerous and harmful property usage and the allocation of goods that result from private autonomy".

¹⁰⁹ Chaskalson and Lewis *Constitutional Law of South Africa*.

¹¹⁰ Chaskalson and Lewis *Constitutional Law of South Africa*.

¹¹¹ 1997 4 SA 1176.

Interim Constitution¹¹² and dealt with section 26 (the right to economic activity) the court had occasion to deal with aspects of arbitrariness in legislation and held that legislation is arbitrary when it bears no rational relationship to the legislative goal it intends to achieve.¹¹³

Although the court in *First National Bank*¹¹⁴ dispelled the definition of arbitrary as used in *S v Lawrence* and disregarded its employment in section 25, it is my assertion that the interpretation granted in terms of *S v Lawrence* to arbitrary is relevant for purposes of asserting a rudimentary understanding of arbitrary in the interpretation of legislation that is contended as bearing no rational connection between the means employed and the ends the legislation seeks to achieve.

2.2.2.3 Arbitrariness in terms of *First National Bank v The Commissioner of the South African Revenue Services*

The Constitutional Court in *First National Bank v The Commissioner of the South African Revenue Services*¹¹⁵ passed a very important ruling as regards the interpretation of the property clause in its entirety. To assert instances of arbitrariness in the interpretation of the property clause, an analysis of the decision in *First National Bank v The Commissioner of the South African Revenue Services* is warranted. An evaluation of the decision in *First National Bank* will reveal the manner in which to interpret the provisions of the property clause and measure same against the provisions of any Act of parliament so as to determine constitutional compliance of the latter.

What can be drawn from the entire decision is the fact that deprivation of property could be arbitrary in instances where the legislation that provides for the deprivation lacks adequate reason to warrant the deprivation or in some instances is procedurally flawed.¹¹⁶ Arbitrariness of a particular state action sanctioned by a law of general application is determined by conducting an evaluation of the relationship that exists between the purpose for the regulation and the means employed to achieve the said

¹¹² Act 200 of 1993.

¹¹³ Chaskalson and Lewis *Constitutional Law of South Africa*.

¹¹⁴ *First National Bank v the Commissioner of the South African Revenue Services* par 69.

¹¹⁵ 2002 4 SA 768.

¹¹⁶ *First National Bank v the Commissioner of the South African Revenue Services* par 100.

purpose.¹¹⁷ An evaluation of the relationship that persists between the purpose of the deprivation and the person whose property is being affected and also between the purpose of the deprivation, the nature of the property as well as the degree of the deprivation have to be taken into consideration when assessing the arbitrariness of state action.¹¹⁸

From a reading of the above, it becomes clear that in instances wherein the deprivation affects all aspects of ownership then a more persuasive purpose would have to be asserted to justify the expropriation.¹¹⁹ This means that if the expropriation affects the vast interplay of rights inherent in the property (the effect being a complete disposal of those rights) then a much more compelling reason for the deprivation must exist.¹²⁰

It is in this regard that the decision in *First National Bank v The Commissioner of the South African Reserve Bank* becomes even more important. The decision stipulates the fact that enough reason for the deprivation could in some instances simply be determined by an evaluation of a mere rationality review. This means establishing a rational connection between the means employed and the end that is intended to be achieved.¹²¹ The decision goes further to demonstrate that in some instances there is a need to go above just this mere rationality review. In some cases, what is required is a proportionality review akin to that which is propounded in terms of section 36 of the Constitution.

Determining which between the two (the rationality review or the more enhanced proportionality test in terms of section 36) is to be used, one needs to consider the reasons for the deprivation and that will depend on what the court termed “the interplay between variable means and ends, the nature of the property as well as the extent of the deprivation”.¹²²

¹¹⁷ *First National Bank v the Commissioner of the South African Revenue Services* par 100.

¹¹⁸ *First National Bank v the Commissioner of the South African Revenue Services* par 100.

¹¹⁹ *First National Bank v the Commissioner of the South African Revenue Services* par 66.

¹²⁰ An instance of this is such cases as expropriation which will affect all rights in the property that is the subject of the expropriation, all registered and unregistered rights in the property.

¹²¹ *First National Bank v the Commissioner of the South African Revenue Services* par 66.

¹²² *First National Bank v the Commissioner of the South African Revenue Services* par 66.

In the finality therefore, to avoid arbitrarily depriving individuals of their right to property, the Bill must possess adequate reasons that warrant the deprivation as well be procedurally intact. This is what the decision in *First National Bank* demonstrates.

2.2.2.4 Arbitrariness in terms of Cool Ideas 1186 CC v Hubbard¹²³

In *Cool Ideas 1186 CC v Hubbard*¹²⁴ the Constitutional court applied the test for arbitrariness as propounded in *First National Bank v the Commissioner of the South African Revenue Services*. In terms of section 10 of the Housing Consumers Protection Measures Act¹²⁵ there exists a prohibition against an unregistered home builder from payment of compensation in the event that the unregistered home builder constructs a home. It surfaced that Cool Ideas 1186 CC was an unregistered home builder when it initially approached the High court to make an order of court an award they had been awarded by the National Homebuilders Regulation Council. Before judgment in that matter was handed down Cool Ideas 1186 CC registered as a home builder and the High Court made the award an order of court. The Supreme Court of Appeal set aside the order of the High Court and Cool Ideas 1186 CC went before the Constitutional Court claiming arbitrary deprivation of property.

Multiple issues arose for determination before the Constitutional Court however; of relevance for purposes of this discussion was the interpretation of section 10(1) (b) of the Housing Consumers Protection Measures Act and whether the said section infringed on Cool Ideas 1186 CC's right not to be arbitrarily deprived of property. The said section reads:

No person shall—

- (a) carry on the business of a home builder; or
- (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder.”

The court stated that an interpretation of section 10 of the Housing Consumers Protection Measures Act mandated a very cautious consideration of the entire scheme

¹²³ 2014 ZACC 16.

¹²⁴ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16.

¹²⁵ 95 of 1998.

of the Act as measured against the rights enshrined in section 25.¹²⁶ Cool Ideas 1186 CC contended that an unregistered home builder is entitled to compensation for work done if registration was effected at the time payment is required. Majiedt AJ writing for the majority stated that in essence Cool Ideas 1186 CC contended that “registration is not a prerequisite for a home builder to commence (and complete) construction as long as registration is done by the time the home builder seeks payment”.¹²⁷ The court went into an analysis of the scheme of the entire Act noting specifically the fact that the Act had been promulgated with the specific intention of protecting housing consumers.¹²⁸ The court held that registration is a requirement before work on a house can commence and that failure to do same renders the home builder (in this case, Cool Ideas 1186 CC) ineligible to seek compensation for work done in terms of an underlying contract.

Assessing whether this interpretation amounts to arbitrary deprivation of Cool Ideas 1186 CC’s property the court first determined in terms of the decision in *National Credit Regulator v Opperman*¹²⁹ that the right to restitution of money paid based on unjustified enrichment constitutes property in terms of section 25(1). The court therefore held that there had in fact been a deprivation of property.

The court then had to determine whether a refusal to permit Cool Ideas 1186 CC to instigate legal action on the basis of unjustified enrichment was arbitrary.¹³⁰ The court stated the position set out by the Constitutional Court in *First National Bank v The Commissioner of the South African Revenue Services* and stated that an arbitrary deprivation will manifest if the law of general application alluded to in section 25(1) does not provide sufficient reason for the deprivation or lacks procedural fairness.¹³¹

The court found further that the deprivation had the effect of depriving Cool Ideas 1186 CC of its right to payment and in this sense affects all aspects of ownership. In the

¹²⁶ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 27.

¹²⁷ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 27.

¹²⁸ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 29.

¹²⁹ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 63.

¹³⁰ This is what in essence section 10 of the the Housing Consumers Protection Measures Act did by excluding payment if home builders such as Cool Ideas 1186 CC had not registered before commencing construction on a home.

¹³¹ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 40.

result, there had to exist compelling reasons for the deprivation.¹³² The court asserted the protection of housing consumers as an essential and legitimate legislative objective. The court described how the consumer is protected and stated that the protection is done through the establishment of a fund intended to compensate the housing consumer in the event of defective work having been done by a registered home builder. The court further asserted the importance of registration of the home builder aside from its aim at protecting the consumer as being to bring within the confines and jurisdiction of the National Homebuilders Regulation Council as well as to contribute towards helping finance the National Homebuilders Regulation Council with the use of registration fees.¹³³

The primary issue as far as deprivation was concerned was whether, since section 10 clearly deprived Cool Ideas 1186 CC of its right to consideration for work done, there was a proportionate nexus between the purpose of the deprivation and the means of achieving the said purpose. The court found that there was. In this regard the court advanced the argument that the reason for the deprivation is persuasive.¹³⁴ The persuasive character of the deprivation the court drew from the fact that registration aside from protecting a housing consumer would have the effect of contributing to the fund as well as financing the National Homebuilders Regulation Council. The court stated that the importance of registration manifests itself further in the undesirable results that could befall a housing consumer that has unknowingly contracted an unregistered home builder to construct a home for them. The court stated that:

There would be no safeguards under section 13, which places certain important obligations on the home builder and which also provides evidentiary aid to the housing consumer by way of the deeming provisions in section 13(2)(a). Most importantly, the housing consumer would have no recourse to the NHRBC fund and no claim for restitution against the unregistered home builder. The deprivation effected by section 10(1)(b) is aimed at a limited target, namely, those home builders who fail to register.

The court concluded that section 10(1)(b) does not violate section 25 of the Constitution because there exists a rational connection between the provisions of

¹³² *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 the court stated that: "Proportionality between the means and the end would therefore have to feature prominently in this enquiry" par 41.

¹³³ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 42.

¹³⁴ *Cool Ideas 1186 CC v Hubbard* 2014 ZACC 16 par 42.

section 10 and the purpose it aims to achieve, there was therefore no arbitrary deprivation of property.

2.2.2.5 Conclusions on arbitrariness

In the final analysis therefore, even though section 25(1) does permit the deprivation of property and recognises such deprivation as a legitimate means of taking property, the deprivation will not pass constitutional muster in the event that it is seen as being arbitrary. The test for arbitrariness denotes an evaluation of the relationship that exists between the means employed to achieve the deprivation and the ends the said deprivation intends to achieve. Very important for the interpretation of arbitrariness as used in section 25 is context. As alluded to in *First National Bank* arbitrary as used in section 25 is not limited merely to the existence or absence of a rational connection between means and ends, rather arbitrary in section 25 takes a wider character and becomes what the court termed “a broader controlling principle”¹³⁵ in that it requires more than just an enquiry into mere rationality but not so broad and wide an interpretation that it exceeds the proportionality evaluation in section 36.¹³⁶

To avoid arbitrariness, the law of general application (which would in this case be the Bill) must possess a proportionate nexus between the means employed and the aim that it seeks to achieve. If this nexus is achieved then the specific legislation would be in compliance with the provisions of section 25 of the Constitution and would avoid a finding of arbitrariness.

2.2.3 Expropriation

Expropriation is usually contrasted with deprivation and is regarded a specific form of deprivation. This is because an expropriation is usually accompanied by compensation.¹³⁷ Expropriation is governed by the provisions of section 25(2) and (3) of the Constitution¹³⁸ and it states that:

¹³⁵ *First National Bank v The Commissioner of the South African Revenue Services* par 65.

¹³⁶ *Constitution of the Republic of South Africa*, 1996.

¹³⁷ Van Der Walt *Constitutional Property Law* 335.

¹³⁸ *Constitution of the Republic of South Africa*, 1996.

- 1) ...
- 2) Property may be expropriated only in terms of law of general application
 - a) for a public purpose or in the public interest; and
 - b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- 3) 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;
 - 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

With expropriation being a sub species of deprivation, there has always been an attempt at asserting the most defining characteristics behind these two concepts to define and properly articulate the make-up of both. Many decisions before the Constitutional Court have attempted this assertion but no concise definition has been reached as to the distinction between the two.¹³⁹ Van Der Walt¹⁴⁰ makes reference to the fact that the deprivation clause (section 25(1)) addresses taking of property in the form of unremunerated regulatory prohibitions on the utilisation of property be it in the strict sense of use, enjoyment or exploitation. On the other hand, section 25(2) and (3) are more concerned with expropriation which has as its primary defining characteristic compensation by the state because of the latter's acquisition or even destruction of the said property. The state has two powers as far as property is concerned, namely, the power of regulation (police powers) and acquisitory powers of eminent domain.¹⁴¹ This distinction between deprivation and expropriation is in direct consonance with the regulatory and acquisitory power of eminent domain as incumbent upon the state.¹⁴²

Attempting a method of asserting the distinction between deprivation and expropriation, Van Der Walt is of the view that what is crucial to assert the

¹³⁹ *Harksen v Lane* 1998 1 SA 300 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Du Toit v The Minister of Transport* 2006 1 SA 297 (CC); *Davies v The Minister of Lands* 1997 1 SA 228 and most recently the constitutional Court just gave creed to a precept akin to constructive expropriation in *Arun Properties Development v the City of Cape Town* 2015 2 SA 584 (CC) which precept had failed to gain recognition in the *Steinberg v the South Peninsula Municipality* (2001) ZASCA 93.

¹⁴⁰ Van Der Walt *Constitutional Property Law* 335.

¹⁴¹ Van Der Walt *Constitutional Property Law* 335.

¹⁴² Van Der Walt *Constitutional Property Law* 335.

constitutional validity of either or both is the source of authority that informs the two. This, he contends, is a better approach than finding means to set them apart by employing approaches that conflate the two and blur the defining characteristics that exist between them.¹⁴³ He goes on to argue that the source of the power is more crucial than its effect on the holders of the property in distinguishing between the two.¹⁴⁴

The difficulty in distinguishing between deprivation and expropriation is further exacerbated by instances wherein regulatory limitations are treated as expropriation in light of their excessive effect, even in instances where the state had not anticipated they would constitute expropriation.¹⁴⁵ The court in *Harksen v Lane*¹⁴⁶ attempting to differentiate these two instances held that expropriation primarily consists of the state acquiring the property compulsorily while deprivation falls short of such acquisition.¹⁴⁷ Van Der Walt¹⁴⁸ drawing attention to the significance of keeping in mind the transformative intent behind the constitution and the bearing such an appreciation could have on interpretation of the property clause stated that:

[T]he Harksen court made a bold move to establish an orthodoxy, but it also closed down further debate and critical discussion about the function of a constitutional property clause in a transformative Constitution. The fact that this attitude (of drawing a fine line between expropriation and deprivation) in what could superficially be described as a transformation insensitive context concerning purely personal/commercial interest could either support or undermine criticism of the court's jurispathic approach to meaning.

The distinction between expropriation on the one hand and deprivation on the other is crucial, particularly when regard is had to the transformation oriented nature of the South African Constitution. As alluded to above, the context within which the property clause is interpreted is very crucial.¹⁴⁹ Van Der Walt asserts the premise of context being crucial even further when he refers to the fact that both the decisions in *First National Bank* and *Harksen* were not transformation sensitive but were premised primarily on

¹⁴³ Van Der Walt *Constitutional Property Law* 192.

¹⁴⁴ Van Der Walt *Constitutional Property Law* 192.

¹⁴⁵ *Arun Properties Development v The City of Cape Town* 2015 2 SA 584 (CC).

¹⁴⁶ 1998 1 SA 300 par 32-33.

¹⁴⁷ The court in *Harksen v Lane* drew this definition from a decision in the Zimbabwe Supreme Court in *Beckenstrater v the Sand River Irrigation Board* 1964 4 SA 510 at 515A-C.

¹⁴⁸ Van Der Walt 2004 *SALJ* 863.

¹⁴⁹ Van Der Walt 2004 *SALJ* 863.

commercial or private interests that were completely removed from the obvious transformation issues such as land reform.

Van Der Walt¹⁵⁰ states that the property clause has to be seen in light of the purpose behind the clause in its entirety, namely to protect existing rights to property as well as serving the public interest, such as land reform.¹⁵¹ He states that reverence to being context specific provides the framework for interpreting the property clause and that such a context will always be a crucial factor in the said interpretation.¹⁵² He further states that a reading of the *First National Bank* case particularly where reference is made to the purpose of the property clause as well as its scope suggests that one abstract interpretation of the property clause is impossible.¹⁵³ Rather context always has to be the overarching factor which will help feed into the interpretation of the property clause in every different case.¹⁵⁴

The distinction between deprivation and expropriation is very difficult to ascertain with certainty because of the overlaps that are bound to arise in the practical application of these two. This does not mean that the Constitutional property clause is rendered moot. On the contrary, this inability to properly ascertain the difference between the two will be an advantage primarily in a matter where transformative notions incubated by the Constitution are presented before a court. What will be the guiding factor is what the Constitutional Court asserted in *First National Bank* as the centrality of context and the interpretation of the property clause being done within the bounds of a particular context depending on the characteristics of each case.¹⁵⁵

2.2.4 The creative tension in the property clause

The *first Certification case*¹⁵⁶ described the state of South Africa during apartheid as one that was “characterised by strife, conflict, untold suffering and injustice”. Most notably South Africa during apartheid spawned a legacy of gross inequality, the effects of which

¹⁵⁰ Van Der Walt 2004 *SALJ* 863

¹⁵¹ Van Der Walt 2004 *SALJ* 863.

¹⁵² Van Der Walt 2004 *SALJ* 863.

¹⁵³ Van Der Walt 2004 *SALJ* 863.

¹⁵⁴ Van Der Walt 2004 *SALJ* 863.

¹⁵⁵ *First National Bank v Commissioner of the South African Revenue Services* par 66.

¹⁵⁶ *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

are still felt twenty-plus years into democracy. Reversing this gross inequality that has been perpetuated for years in South Africa was an ambitious task for those involved in the negotiations into democratic rule. Given the compromise that eventually birthed the Constitution as a whole, a property clause such as section 25 was to be expected.

An attempt to right the wrongs of the past, and endeavour to pave a way forward and create life in a democratic South Africa that is no longer plagued by divisions but a state characterised by elements of justice would not be easy to attain even through dialogue. As demonstrated, by the provisions of section 25(1), (2) and (3) the aim therein is the protection of existing property rights. Section 25(4) is the interpretation section of the entire property clause and demonstrates how the property clause should be interpreted in conjunction with all other aspects of interpretation as enumerated by case law. Section 25(4) states that:

- 4) For the purposes of this section
 - a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b) Property is not limited to land.

This section is said to affect both the reformatory¹⁵⁷ and protective¹⁵⁸ aspects of the property clause.¹⁵⁹ Section 25(5) to (9) makes reference to aspects of land reform and other related reforms. Sections 25(5) to (9) further seems to be in direct conflict with the opening provisions of the property clause that make reference to the protection of existing property rights from state interference. From section 25(5) to (9) the provisions read:

- 5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- 6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- 7) 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.
- 8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of

¹⁵⁷ Section 25 (5) to (9).

¹⁵⁸ Section 25 (1) to (3).

¹⁵⁹ Van Der Walt *Constitutional Property Law* 16.

past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

9) Parliament must enact the legislation referred to in subsection (6).

At first glance the distinction between the four clusters of provisions¹⁶⁰ and the two main parts¹⁶¹ under which they can be divided into are a cause of major concern when regard is had to the push effect of one part and the pull effect of the other. This problem is dispelled when cognisance is taken of the possible function of such a tension. Van Der Walt states that this tension, "decrees the framework within which the property clause has to be interpreted".¹⁶² He states that:

...a single provision in section 25 should not be interpreted or applied abstractly without reference to this structure, which in its turn should be read within the broader historical context and the context of the Constitution as a whole.

Kleyn¹⁶³ comparing the German and South African constitutional property clauses says that, with any constitutional protection of property, the aim is not for the protection of individual property rights alone. Rather, there is an essence of attempting to balance out these individual rights to property with the public interest. This, he describes as being two sides to the same coin.¹⁶⁴

The question at this juncture would be how to interpret the provisions of the property clause considering this conflict between the different provisions. It is possible and necessary to read the provisions of the Constitution as a coherent whole, and embrace the tension inherent therein without severing any provision from the property clause.¹⁶⁵ The reading of the Constitution as a coherent whole demands a purposive reading of the entire property clause, bearing in mind all aspects that could affect such a reading, historical or otherwise.¹⁶⁶

¹⁶⁰ The four main clusters would be section 25(1) dealing with deprivation, section 25(2) and (3) dealing with expropriation, section 25(4) dealing with the interpretation of the property clause as a whole and finally section 25(5)-(9) dealing with the reformatory aspects to the constitution.

¹⁶¹ The two main parts would be the protective (section 25(1) to (3)) and reformatory 25(5) to (9) parts.

¹⁶² Van Der Walt *Constitutional Property Law* 16.

¹⁶³ Kleyn 1996 *SAPL/PR* 410.

¹⁶⁴ Kleyn 1996 *SAPR/PL* 410.

¹⁶⁵ Van Der Walt *Constitutional Property Law* 22.

¹⁶⁶ Van Der Walt *Constitutional Property Law* 22.

Van Der Walt¹⁶⁷ further advocates for a purposive reading of the property clause. This interpretation must hinge on the creative tension (protective and reformative aspects of section 25) inherent in the property clause. He further states that the protective and reformative purposes of the property clause find support in the history and the overall contextual background of the property clause as well as in the discourse concerning the property clause's nature and purpose.¹⁶⁸

The court in *Port Elizabeth Municipality v Various Occupiers*,¹⁶⁹ also referring to this unique tension, contended that the historical context within which conflicting land rights are to be adjudicated should be set out and that the beginning and end point of analysing the property clause has to be to give creed to human dignity, equality and freedom. A reading of the property clause demonstrates the fact that the legislature is tasked with creating a social order that will respect not only the interest of the public but also the individual rights to property as guaranteed by the Constitution.¹⁷⁰ What lies at the heart of the Constitutional property clause is the attempt at balancing private and societal needs.

The creative tension in the property clause demonstrates the very important context within which any Act of parliament has to be interpreted and understood particularly when tested against the Constitution. It has to be understood as a constant tug of war between the protection of existing rights to property as well as a progressive move towards advancing the interests of the public. This is the point of view from which the Bill has to be understood as well as interpreted.

2.2.4.1 The creative tension as demonstrated in *Agri SA v the Minister of Minerals and Energy*

An example of the creative tension in the property clause and its proper application in practice can be seen from the decision of the Constitutional Court in *Agri South Africa v*

¹⁶⁷ Van Der Walt *Constitutional Property Law* 22

¹⁶⁸ Van Der Walt *Constitutional Property Law* 22.

¹⁶⁹ 2005 1 SA 217 par 15.

¹⁷⁰ Kleyn 1996 *SAPR/PL* 425 the learned author goes further to make reference to the fact that: "The object is to balance these conflicting interests... A limitation must therefore, reflect a proportional balance between its purpose and the restrictive means resorted to. The limitation must be reasonable and not excessive".

the Minister for Minerals and Energy.¹⁷¹ This decision demonstrates the practical application of the creative tension as well as the manner in which the Constitutional Court went about retaining this tension as well as extrapolating its importance for the interpretation of Acts of parliament.

The issue before the court was the effect of the Minerals and Petroleum Resources Development Act and the constitutionality of the Act.¹⁷² The commencement of this piece of legislation had the effect of "freezing the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy".¹⁷³ Mogoeng CJ, writing for the majority of the court made reference to the fact that this should come as no surprise in a country that aspires to precepts of transformation with a high unemployment rate and a yawning gap between the rich and the poor, a gap which could be closed through the exploitation of the country's mineral and petroleum resources.¹⁷⁴

The MPRDA had the effect of seriously altering the common law so that mineral rights were now vested in the state as custodian of the minerals for the benefit of the public at large. The question then was whether the advent of the MPRDA had the effect of expropriating the mineral rights enjoyed before its advent from its initial owners. The court in *AGRI SA* stated that if the common law is in conflict with legislation then the legislation should take precedence so as to avoid the "preservative" attribute of the common law which preservative attribute would be contrary to the transformative aims of the Constitution.¹⁷⁵

The court drawing a distinction between deprivation and expropriation held that expropriation is a lesser form of deprivation as understood within the context of section 25. While expropriation almost inevitably takes place when rights in property or property itself is taken away or significantly interfered with, the same is not so true of deprivation. As regards deprivation, certain burdens are incumbent upon private

¹⁷¹ 2013 4 SA 1 (CC).

¹⁷² 28 of 2002.

¹⁷³ *Agri SA v the Minister for Minerals and Energy* par 2.

¹⁷⁴ *Agri SA v the Minister for Minerals and Energy* par 2.

¹⁷⁵ *Agri SA v the Minister for Minerals and Energy* par 2.

property holders which burdens they have to carry without compensation. Expropriation on the other hand entails acquisition by the state of property in the public interest and must always be accompanied by compensation. The court noted in the final analysis that there is in actual fact more required to be established to justify an expropriation than there is for deprivation even though no clear line of differentiation can be seen between section 25(1) and 25(2).¹⁷⁶

The decision in *Agri SA* demonstrates an instance wherein the need to protect existing rights to property is balanced out against the transformative aims and aspirations of the Constitution. In its balancing exercise the court stated that an interpretation of section 25 particularly as regards expropriation requires one to pay particular attention to the role the property clause plays in fostering nation building and reconciliation responsibilities that are incumbent upon all the citizens of the country.¹⁷⁷ This is done by recognition of the necessity to open up economic opportunities to everyone.¹⁷⁸ The court succinctly highlighted the creative tension in the property clause by stating that:

This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all...We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country and by design the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.¹⁷⁹

2.3 Conclusions

South Africa's transition into democracy was peaceful and there is an attempt as demonstrated by the property clause to try and sew together the divisions of the past and move on as a nation to an enlightened future that is based on constitutional principles. To assist in this transition, an understanding of the characteristics that make up expropriation and deprivation of property is for purposes of the Constitution is

¹⁷⁶ *Agri SA v the Minister for Minerals and Energy* par 48.

¹⁷⁷ *Agri SA v The Minister for Minerals and Energy* par 48.

¹⁷⁸ *Agri SA v The Minister for Minerals and Energy* par 48.

¹⁷⁹ *Agri SA v The Minister for Minerals and Energy* par 60.

crucial. Expropriation is regarded as a type of deprivation specifically when regard is had to the provisions of section 25. While expropriation will manifest almost invariably in instances wherein property or the rights that attach to the property are taken or are to a large extent hampered with that state of affairs does not persist in the instance of a deprivation. Further, in instances of deprivation private owners of property are mandated to carry the burdens that come with deprivation without payment of compensation, while expropriation if found to be expropriation will always be accompanied by compensation since the property is acquired by the state in the pursuance of a legitimate public interest. In the final analysis, owing to the consequences that attach to an expropriation, more is required to justify an expropriation than it would be to justify a deprivation.

South Africa is a democracy still in its infancy. The application of such crucial provisions as the property clause in practice will present some challenges. These provisions are yet to prove themselves as provisions that embody and reflect the true compromise character of the negotiations reached by the NP and the ANC during the negotiation stages of the Constitution. The road to achieving such a balance will without a doubt not be easy and there is a need to enact legislation to cure and sew together the divides created by the past.

The legislature is at the heart of this task. Their work while such a formidable aspect of the entire transformation goal is not an easy one but their guiding principles always have to be the principles that underlie the Constitution. Such key pieces of Legislation as the Minerals and Petroleum Resources Development Act have in some instances, case in point the Agri SA decision, been seen to apply squarely within the bounds enumerated by the property clause and perpetuate what the Constitution describes as its guiding principles. The Bill is itself a very contentious piece of legislation yet to be effected which is yet to be subjected to intense debate before the courts of law when its provisions are tested for compliance with the property clause.

The structure of the property clause demonstrates the aspirations of transformation. This is especially the case when regard is had to the protective and reformative aspects of the property clause that make up the creative tension and by extension the property

clause in its entirety. This creative tension and its interpretation as enumerated above¹⁸⁰ demonstrate the fact that there is a need to keep the bounds of such tension open. The Bill to be constitutionally compliant has to keep this specific tension open. The Bill should be able to accommodate the aspirations of transformation as envisioned by the Constitution as a whole and the property clause in particular. If the Bill is able to keep the aspirations of transformation as envisioned alive, then the Bill will itself be constitutionally compliant.

This will not be the end of the enquiry however since the following chapter will discuss the *Expropriation Act* so as to determine where the *Expropriation Act* falls short of constitutional compliance which will mandate the need for a new framework of expropriation, one that embraces all the requirements of the Constitution. The succeeding chapter will investigate the circumstances that lead to the enactment of the *Expropriation Act* under the old South African order of parliamentary supremacy and why following that specific order will not be conducive for a Constitutional order such as that which South Africa has become.

3 The Constitutionality of the *Expropriation Act*

3.1 Introduction

3.1.1 Parliamentary supremacy in South Africa

Before the enactment of the Constitution,¹⁸¹ South Africa had parliamentary sovereignty. While the government was elected, the enactment of legislation such as the Separate Representation of Voters Act¹⁸² (hereafter referred to as the *SRV Act*) excluded the majority of the population from partaking in elections, and thereby issues that affected the entire country.¹⁸³ Saunders and Dziedzic,¹⁸⁴ making reference to the intention

¹⁸⁰ See para 2.2.4 above.

¹⁸¹ *Constitution of the Republic of South Africa*, 1996.

¹⁸² *Separate Representation of Voters Act* 46 of 1951.

¹⁸³ Saunders and Dziedzic 2012 *the Sri Lankan Republic at 40 Reflections on Constitutional History, theory and practice* 400, the learned authors state that: "The territory of South Africa was colonised by both the Dutch and the British. Its diverse population include a large African majority, descendants of colonisers and immigrants from elsewhere. The four British colonies were united in a unitary dominion by the South Africa Act 1909 (U.K). The Act was passed by

underlying the enactment of the *SRV Act* by the parliament stated that the early 1950's saw the NP translate its stance on racial segregation into practice by instigating further restrictions on non-whites participation in the political process. This they did by enacting the *SRV Act* and providing for separate electoral rolls for non-Europeans and Europeans and they limited the participation and representation of non-Europeans in parliament.

Because of parliamentary supremacy, the requirement of public purpose that was satisfied by a compulsory acquisition of property was determined in the debates in parliament and not in the courts of law.¹⁸⁵ Slade goes further to allude to the fact that the legislature had the ability to dictate the purpose for which the property may be taken and this decision was regarded as the primary authority for the expropriation.¹⁸⁶ This state of affairs under parliamentary supremacy coupled with the influence of English law created a situation where the South African governments were rather reverent to the decisions of parliament.¹⁸⁷

There is a sharp distinction between political rule in South Africa during apartheid and South Africa in a constitutional democracy. As opposed to the exclusion of a majority that persisted during parliamentary supremacy in South Africa, Constitutional South Africa is characterised by universal inclusion.¹⁸⁸ Former Chief Justice Mahomed¹⁸⁹ stated that what characterised the previous apartheid regime was the unrestricted denial of a people the ability to participate in the process of governance on the basis of race.

the British parliament following a national Convention in South Africa and provided the South African Constitution until 1961. The institutional arrangements established by the South Africa Act were broadly modelled on those at Westminster and provide for parliamentary government with the important exception of a racially discriminatory franchise".

¹⁸⁴ Saunders and Dziedzic *the Sri Lankan Republic at 40 Reflections on Constitutional History, theory and practice* 490.

¹⁸⁵ Slade *The justification of Expropriation for Economic Development* 19.

¹⁸⁶ Slade *The justification of Expropriation for Economic Development* 19.

¹⁸⁷ Slade *The justification of Expropriation for Economic Development* 19.

¹⁸⁸ Saunders and Dziedzic *the Sri Lankan Republic at 40 Reflections on Constitutional History, theory and practice*, the learned author states that: "When apartheid finally collapsed in the early 1990's parliamentary sovereignty was deliberately and comprehensively repudiated. The new Constitution of 1996 was enacted by special majorities in a Constitutional Assembly that also functioned as a Parliament, elected by universal suffrage. An imaginative constitution-making process that still provides a world-bench mark encouraged public participation and sought popular support for the new regime" 494.

¹⁸⁹ Mahomed *Constitutional Court of South Africa* 168.

The advent of parliamentary supremacy in South Africa birthed a disparaging constitutional and political impotence that could not do anything to prevent manifestly unjust laws.¹⁹⁰ A supreme parliament, resolute in its attempt to enact unjust laws was free to do so by virtue of its uncontrolled supremacy. The former Chief Justice went further to state that the new Constitution intended to cure these defects that plagued that previous regime by granting to each citizen the ability to participate in the process of governance regardless however sovereign a ruling regime is.¹⁹¹

Constitutional South Africa renounces all attributes that fuelled apartheid South Africa. This is exemplified by the renunciation of parliamentary supremacy for the adoption of a Constitution. Most statutes enacted during the subsistence of parliamentary supremacy are unlikely to be in line with the provisions and aims that underpin the Constitution. This includes the *Expropriation Act*.

3.2 The Expropriation Act

The *Expropriation Act* is legislation that was enacted under parliamentary supremacy, and is therefore likely to be inconsistent with the provisions of the Constitution. What should be remembered when interpreting any Act of parliament is that the Constitution¹⁹² under section 39 requires that, the courts must promote the spirit, purport and objects of the Bill of Rights. This in no uncertain terms denotes the fact that legislation must be so interpreted in a manner that promotes values that underpin a democratic South Africa as enshrined within the terms of the Constitution. Du Plessis¹⁹³ makes mention of the fact that the Constitution makes provision for a novel framework of interpretation. This framework denotes a purposive interpretation of the Constitution itself as well as legislation and state action.

A few problematic aspects of the *Expropriation Act* include the lack of a reference to public interest requirement, the manner in which the *Expropriation Act* determines the

¹⁹⁰ Mahomed *Constitutional Court of South Africa* 168.

¹⁹¹ Mahomed *Constitutional Court of South Africa* 168.

¹⁹² *Constitution of the Republic of South Africa*, 1996.

¹⁹³ Du Plessis *Compensation for Expropriation under the Constitution* 76.

amount of compensation payable in the event of an expropriation as well as the lack of protection for unregistered rights in land. These will be discussed separately below.

3.2.1 The public purpose and public interest requirement

3.2.1.1 Introduction

The *Expropriation Act* refers to an expropriation being conducted only for a public purpose. Slade¹⁹⁴ states that given that the *Expropriation Act* is still applicable today, the public purpose requirement as enshrined in the *Expropriation Act* is still of relevance. This interpretation however, must be in harmony with the terms of the Constitution and if such harmony is lacking then the particular provision will be invalid to the extent of its inconsistency.¹⁹⁵

A historical outline of the public purpose requirement through case law will assist in understanding the public interest or public purpose requirement as enshrined in the Constitution. This will serve to outline the inconsistencies in the *Expropriation Act* with the Constitution.

3.2.1.2 Public purpose before the Constitution

An analysis of case law before constitutional democracy is important even if a majority of these were decided with reference to other pieces of legislation, and not necessarily the *Expropriation Act*. They are important because the interpretation of public purpose as interpreted then is the interpretation that is still relevant under the *Expropriation Act*. One of the very first decisions to elaborate on the meaning of public purpose was *Rondebosch v The Trustees of the Western Province Agricultural Society*.¹⁹⁶ The respondents in this case had contended that they are not eligible to pay municipal taxes because the land they were using was being used for a public purpose. The Appellate Division was faced with interpreting the word public purpose as alluded to in the Municipal Act 45 of 1882.

¹⁹⁴ Slade *The justification of Expropriation for Economic Development* 16.

¹⁹⁵ Slade *The justification of Expropriation for Economic Development* 16.

¹⁹⁶ 1911 AD 271.

The court made reference to the fact that the word public purpose had a very wide import and could be eligible to a number of interpretations. The court here made reference to the word public purpose as being eligible for interpretation either in its broad sense or its narrow sense. In its broad sense, the word public could include things that are in direct reference to the entire public or a local community.¹⁹⁷ In its narrow sense public could preclude the public but could refer to things that pertain to the state, such as public revenue or public lands.¹⁹⁸ The court in this case interpreted public purpose in its narrow sense and held that property that would be exempt from municipal taxes would be only that property that was used for a government purpose.

Slade¹⁹⁹ makes reference to the fact that this case is of significance because it introduced public purpose in terms of its narrow and broad interpretation. Subsequent decisions followed the interpretation of the *Rondebosch* decision by outlining the broad and narrow sense that could be attributed to the requirement of public purpose.

In *Minister of Lands v Rudolph*²⁰⁰ the court had to decide whether expropriating a right of way from an individual and creating a right of way over his property was for a public purpose. The government had inserted a condition in a deed of grant that permitted it to resume possession of certain land for a public purpose. Government eventually offered compensation to the plaintiff to accompany the expropriation and argued that the expropriation was for a public purpose.²⁰¹

Plaintiff's argument centred around the fact that the creation of the right of way would not serve to benefit the entire community but only a certain portion of the township and was consequently not for a public purpose. The court followed the approach in *Rondebosch* and made reference to a narrow and broad interpretation of the public purpose requirement. The court held that, public purpose could be all purposes that instead of benefiting an individual go towards benefiting the public, in this regard a narrow understanding of the public purpose requirement. Public purpose could as well

¹⁹⁷ *Rondebosch v Trustees of the Western Province Agricultural Society* 283.

¹⁹⁸ *Rondebosch v Trustees of the Western Province Agricultural Society* 283.

¹⁹⁹ Slade *The justification of Expropriation for Economic Development* 22.

²⁰⁰ *Minister of Lands v Rudolph* 1940 SR 126.

²⁰¹ *Minister of Lands v Rudolph* 129.

be much more restricted and relate to the purposes that affect the state. The court held that the creation of the right of way was for a public purpose as understood in the broad sense.²⁰²

Another decision of significance is the decision in *African Farms and Townships Ltd v Cape Town Municipality*.²⁰³ In this case the acquiring of the property was done in terms of an Ordinance.²⁰⁴ The Cape Town Municipality had acquired the property in terms of an ordinance. As per the Ordinance, a council that is within the municipality could acquire property for any municipal purpose.²⁰⁵ Applicant's argument was that the expropriation could not be justified as being for a public purpose since only half of his property would be used to widen the road. The other half would be combined with property that belonged to the respondent and resold either as a whole or in lots.²⁰⁶ It was as a result of this that the applicant felt the expropriation would not be used for planning purposes.²⁰⁷

The court held that the applicant's argument could not succeed because he had to view the town planning scheme in its entirety.²⁰⁸ The court held that the purpose behind the expropriation was to implement the town planning scheme. Slade,²⁰⁹ referring to this decision, states that the court first considered whether the purpose of the expropriation had been to further a planning purpose or was in any way connected with a planning purpose, which determination they held to be in the affirmative. The court therefore held that expropriating the applicant's property would be for planning purposes. This was the case despite the fact that the municipal council would later resell the land. The expropriation of the applicant's property was therefore for a public purpose because the legislation permitted the municipal council to expropriate property for planning purposes.

²⁰² *Minister of Lands v Rudolph* 129.

²⁰³ *African Farms and Townships Ltd v Cape Town Municipality* 1961 3 SA 392 (C).

²⁰⁴ Ordinance 19 of 1951 as amended by s 33 of Ordinance 14 of 1953.

²⁰⁵ Slade *The justification of Expropriation for Economic Development* 22.

²⁰⁶ Slade *The justification of Expropriation for Economic Development* 22.

²⁰⁷ According to the applicant had it been for a planning purpose then the public purpose requirement would be satisfied, instead in this case the applicant felt that the expropriation was for a purely economic purpose and did not meet the public purpose requirement.

²⁰⁸ *African Farms and Townships Ltd v Cape Town Municipality* 395.

²⁰⁹ Slade *The justification of Expropriation for Economic Development* 22.

In *Slabbert v Minister van Lande*²¹⁰ the applicant was the owner of a portion of the farm Rietfontein which was adjacent to the official residence of the Prime Minister of the Republic. The *Expropriation of Land and Arbitration Clauses proclamation of 1902*²¹¹ authorised the expropriation and the applicant was given a notice of intention to expropriate. The minister made reference to the fact that the intention behind the expropriation was to guarantee the safety of the Prime Minister. The applicant contended that the expropriation was not for a public purpose as anticipated in the *Expropriation of Lands and Arbitration Clauses Proclamation of 1902*.

The court had to interpret the public purpose requirement and held that public purpose was not limited to the definition propounded in the *Expropriation of Land and Arbitration Clauses Proclamation of 1902*. The court drew its interpretation of the public purpose requirement from that as enunciated in *Rondebosch*. The court held that the definition of public purpose has to be interpreted and contrasted with private purpose, which would be a purpose that is aimed at assisting the individual in contrast to the broader public. The court felt that the expropriation of the applicant's property would not be for the benefit of the prime minister as an individual but was for a public purpose which broadly alluded to the benefit of the country's administration.

Another case that dealt with the public purpose requirement was the decision in *Fourie v The Minister van Lande*.²¹² In this case the applicant's property was to be expropriated in the town of Vrede. It was common cause that the town was ideally placed to promote the country's expansion and maintenance of telephone network. This was in turn very crucial to the country's activities as well as improving the private sector and the individual citizens. To do this, the government had to provide affordable accommodation to its technicians that lived in the town and maintenance was required from time to time.

The government would purchase dwellings and then rent them to the technicians at reduced prices. The dwellings remained the property of the government when they were rented to the technicians. An agreement was concluded between the state and

²¹⁰ 1963 3 SA 620(T).

²¹¹ Proclamation 5 of 1902.

²¹² 1970 4 SA 165.

the owner of the property that the department would have the first option to buy the property. Being under the impression that the agreement had lapsed the applicant decided to sell the property. The department on the other hand sought to execute its option in terms of the agreement. Applicant refused to uphold the option and the government decided to expropriate the property.²¹³

The applicant opposed the expropriation contending that the expropriation cannot be for a public purpose since it is intended to house technicians of the respondent and that was a private matter. The court had to determine whether the expropriation of the applicant's property was for a public purpose. The court held that the interpretation of public purpose would be in line with the interpretation already accorded to the public purpose in terms of previous decisions.²¹⁴

The court confirmed the broad interpretation of the public purpose requirement as enunciated in decisions such as *Slabbert*. The public purpose, according to the court is served when the expropriation serves one of the two categorizations of the principle, that is, either the broad meaning or the narrow meaning. The court stated that, the mandate placed unto the department of telecommunications to maintain the country's telecommunications network served a crucial public purpose of maintaining the safety of the Republic as well as economic growth.²¹⁵ Consequently, public purpose in this case should be interpreted in its broad form. The court explained the requirement as it applied in this case by stating that if the country's telecommunications network is not properly maintained, it could also affect the public at large negatively.²¹⁶

In that sense, the public purpose could be seen from a broad understanding as well in as far as the housing of the technicians is crucial to the maintenance of the telecommunications network. The court held that the expropriation of the applicant's property for the purposes of housing the technicians was for a public purpose in terms of section 2 of the Expropriation Act 65 of 1965, which was the predecessor to the *Expropriation Act*. This decision was the first decision to apply the Expropriation Act 65

²¹³ *Fourie v Minister van Lande* 167.

²¹⁴ *Fourie v Minister van Lande* 169.

²¹⁵ *Fourie v Minister van Lande* 169

²¹⁶ *Fourie v Minister van Lande* 169.

of 195. Before then, expropriation was conducted in terms of its specific mention in the different legislation²¹⁷ that had been enacted but had not been specifically enacted to give effect to expropriation.

In *White Rocks Farm v The Minister of Community Development*²¹⁸ the Minister of Community Development sought to expropriate the property belonging to the plaintiffs. The purpose underlying the expropriation was to establish a catchment area in the Drakensberg. Plaintiff's contention was that the expropriation was not for a public purpose as defined in section 2(1) of the *Expropriation Act*. The minister outlined the purpose of the establishment of the catchment as being to protect the upper catchment of some rivers that flow from the Drakensberg, protection of the plant species within the area and to further guarantee the flow of silt free water from the area.²¹⁹

The court held that the preservation and conservation of the water systems would be of benefit to the country as a whole. The establishment of a catchment area falls within the broad interpretation of the public purpose requirement.²²⁰ It was in this case that the court made a very interesting finding. One of the arguments put forward by the applicants had been the fact that the only reason the minister does not declare the area a mountain catchment in terms of the Mountain Catchment Areas Act but instead opts for the *Expropriation Act* was a purely financial one. This is because, so the argument went, it would be expensive to declare a mountain catchment so they would opt for the expropriation instead which would be a cheaper option.²²¹

The court held that the applicants confuse motive with purpose.²²² Owing to the fact that the expropriation was for a valid public purpose, the motive that underpins the decision is completely irrelevant.²²³ As evinced by the decision in *White Rock Farms*, the

²¹⁷ For instance legislation such as *Expropriation of Lands and Arbitration Clauses Proclamation* 5 of 1902.

²¹⁸ *White Rocks Farm v The Minister of Community Development* 1984 3 SA 785.

²¹⁹ *White Rocks Farm v the Minister of Community Development* 791.

²²⁰ *White Rocks Farm v the Minister of Community Development* 792.

²²¹ *White Rocks Farm v the Minister of Community Development* 792.

²²² *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 at 270 In this case the court held that if it is found that an expropriation is for a valid public purpose and is exercised without malice, the motive is not of any relevance to the enquiry whether the power of expropriation was exercised.

²²³ Slade *The justification of Expropriation for Economic Development* 22.

interpretation of public purpose takes the same shape as that which was established in the decisions before it. In this case, the court held that the interpretation to be given to the public purpose should be a broad interpretation wherein public purpose manifests itself in the establishment of a catchment area not for the benefit of the state rather the conservation and preservation of the water system of the country as a whole which would fit the description of a public purpose.

*Administrator Transvaal and Another v Van Streepen (Kempton Park)*²²⁴ traced the manifestation of the public purpose requirement into what the court termed “public interest”. The case concerned the expropriation of property for the benefit of a third party. The question that persisted was whether the expropriation could be said to serve the public purpose requirement.

The court held that an expropriation must generally speaking be for a public purpose or in the public interest.²²⁵ The court held that the administrator had to consider practical and economic implications of a project as a whole for purposes of deciding what would best assist the public interest. The court held that the third party’s activities were of importance to the entire public and would benefit the public in its entirety.

Slade,²²⁶ making reference to the decision in *Van Streepen*, stated that given that the court did not make reference to either the broad or narrow meaning attributed to the public purpose requirement it can be argued that the court regarded the broad meaning of the public purpose requirement to mean public interest. Reference to public purpose would be a reference to the narrow understanding of the public purpose requirement as it manifested in earlier decisions.

The interpretation advanced by the courts over the years as far as the public purpose requirement is concerned is very important. However with the dawn of constitutional democracy in place for parliamentary supremacy, those interpretations in as far as they will have a bearing on its understanding in post-apartheid South Africa the

²²⁴ *Administrator Transvaal and Another v Van Streepen (Kempton Park)* 1990 4 SA 644 (A).

²²⁵ It must be noted that this was the first reference to the notion of public interest as opposed to the decisions initially making reference to the public purpose requirement either as broad or narrow in its stature.

²²⁶ Slade *The justification of Expropriation for Economic Development* 22.

interpretations therein cannot merely be adopted in a constitutional South Africa. Slade²²⁷ is of the opinion that replacing parliamentary supremacy with constitutional supremacy is bound to force certain adaptations of the public purpose requirement with the current constitutional dictates.

In the final analysis therefore, the introduction of the Constitution in South Africa birthed a novel aspect to the manner in which property and other rights to property are viewed, understood and interpreted. To begin with, the myopic understanding that characterised the interpretation of the public purpose into one of the two characters of either broad or narrow is dispelled and a different understanding of public purpose is born. The characterisation of public purpose for either of the two characters created an avenue for state action that would in the constitutional era be regarded as arbitrary. All of this seemed to be characteristic of a state wherein decisions of the courts owe reverence to Acts of parliament and the intention was to keep in line with parliamentary supremacy.

The renunciation of parliamentary supremacy for constitutional democracy now means that the courts are unlikely to pay decisions of parliament the same deference they did in the apartheid era. This of necessity means that the character of the public purpose requirement will be scrutinised in heightened detail because of its importance for purposes of assessing government conduct.²²⁸

3.2.1.3 Public purpose and Public interest under the Constitution

As alluded to in chapter 2, the Interim Constitution²²⁹ came into effect before the Final Constitution in 1996.²³⁰ There are significant distinctions between these two especially with regard to the public purpose requirement. Section 28(3) of the Interim Constitution required expropriation to be only for a public purpose. If the interpretation as alluded to

²²⁷ Slade *The justification of Expropriation for Economic Development* 22.

²²⁸ Slade *The justification of Expropriation for Economic Development* 19 the learned author puts it succinctly thus: "However, given that parliamentary sovereignty was replaced with constitutionalism in 1994, it is argued... that courts may no longer be able to continue applying a mere rationality test when considering the public purpose requirement. The exact meaning of phrases like 'public purpose' and 'public interest' therefore becomes more important than it used to be.

²²⁹ *Interim Constitution* 200 of 1993.

²³⁰ *Constitution of the Republic of South Africa*, 1996.

in earlier decisions was to be followed, it would be far more difficult to justify expropriation for land reform since it would be much more difficult to place such expropriation under the banner of public purpose.²³¹ This is because the interpretation as accorded to public purpose in terms of case law does not cater for an expropriation that would be for the sole benefit of an individual such as would be the case for expropriation for land reform. As a result the Constitution²³² now includes within it reference to an expropriation being effected either for a public purpose or in the public interest.²³³

In terms of the Constitution, it could be possible to infer that there is a distinction between public purpose and public interest as alluded to in section 25(2) of the Constitution.²³⁴ Slade²³⁵ argues that the inclusion of public interest in section 25(2) of the Constitution points to the broad interpretation given to public purpose, while public purpose as made reference to alludes to the narrow reading as set out in the case law discussed above. This reading he believes stems from the court's interpretation as stated in *Van Streepen*. He proposes therefore that interpretation should no longer take the route of dividing public purpose into the narrow and broad meaning, rather the public purpose should reflect the narrow reading of public purpose while, the broad reading is explained by the public interest requirement.²³⁶

This is the proper manner in which to interpret the public purpose and public interest requirement in the constitution. This is because section 25(4) makes reference to the fact that inclusive in the term public interest is land reform coupled with reforms "aimed at bringing about equitable access to all of South Africa's natural resources". In the final analysis therefore, expropriations for the benefit of a third party are recognised as legitimate especially when regard is had to the transformative nature of the Constitution.²³⁷

²³¹ Slade *The justification of Expropriation for Economic Development* 22.

²³² *Constitution of the Republic of South Africa*, 1996.

²³³ Section 25(2) of the *Constitution of the Republic of South Africa*, 1996.

²³⁴ *Constitution of the Republic of South Africa*, 1996.

²³⁵ Slade *The justification of Expropriation for Economic Development* 22.

²³⁶ Slade *The justification of Expropriation for Economic Development* 22.

²³⁷ *Constitution of the Republic of South Africa*, 1996.

The *Expropriation Act*, like the interim Constitution, only makes reference to expropriation being conducted for a public purpose and defines public purpose as “any purpose connected with the administration of the provisions of any law by an organ of state”.²³⁸ No reference is made to the public interest in the *Expropriation Act* and it is in this regard that the Expropriation Act lacks conformity with the Constitution.²³⁹

In terms of the Constitution particularly section 25(2), public purpose or public interest is regarded as the justification for the expropriation, all other considerations are merely a result of and not the primary reason for a valid expropriation.²⁴⁰ Central to the expropriation should be the advancement of the public interest. To properly articulate the significance of the public purpose and public interest requirement reference should be made to the fact that some greater common good must be served in order for the expropriation to pass the constitutional muster.²⁴¹

In *Bartsch Consult (Pty) v Mayoral Committee of the Maluti-A-Phofung Municipality*²⁴² the court had occasion to accept that an expropriation for the benefit of a third party cannot be for a public purpose. However the expropriation could pass the constitutional muster if placed under the realm of public interest. The public purpose requirement as solely placed in the Expropriation Act, in the absence of the public interest cannot be used to justify an expropriation for third parties such as land reform. This situation should however be distinguished from instances where property is transferred to third parties to serve a public purpose²⁴³ such as was the case in decisions such as *Administrator Transvaal v Van Streepen (Kempton Park)*.²⁴⁴

In the *Van Streepen* decision, property had not been transferred to a third party solely for the benefit of the third party. Instead it was transferred to benefit and satisfy a particular public purpose. The transfer of land to a land reform beneficiary would satisfy the public interest requirement as defined in terms of section 25 (4) regardless of the

²³⁸ Section 1 of the *Expropriation Act*.

²³⁹ *Constitution of the Republic of South Africa*, 1996.

²⁴⁰ *Harvey v Umhlathuze Municipality* 2011 1 SA 601 (KZP) par 82.

²⁴¹ *Harvey v Umhlathuze Municipality* par 114.

²⁴² 2010 ZAFSHC 11 4 (February 2010).

²⁴³ *Offit Enterprises (Pty) Ltd v Coega Development Corporation and another* 2011 1 SA 293.

²⁴⁴ *Administrator Transvaal v Van Streepen (Kempton Park)* as discussed above para 3.2.3.

fact that the said transfer will benefit a land reform beneficiary alone. In *Msiza v the Director General Rural development and land reform*²⁴⁵ the court had occasion to deal with an expropriation for land reform, which land would be transferred to a third party solely to satisfy the public interest requirement in terms of section 25(4). The court stated that expropriation in South Africa was initially only conducted for a public purpose and although the public purpose was wide, it would not be wide enough to encompass an expropriation for the benefit of third party.²⁴⁶

In *Offit Enterprises v Coega Development Corporation*²⁴⁷ the Supreme Court of Appeal stated that the identity of the party that undertakes to realise the public purpose is irrelevant if the character and purpose that underpins the development is ascertained.²⁴⁸ As a result, if a public purpose such as the building of railways or roads is realised by the expropriation and the ensuing transfer of the property to a third party, then said expropriation and transfer is for a public purpose.

3.3 Conclusions

The *Expropriation Act* would frustrate legitimate attempts at land reform for which section 25 of the Constitution is aimed at. It is my submission that the *Expropriation Act* as currently placed would not make expropriation for purposes such as Land reform very easy. This is because of the lack of reference to the public interest as a ratio for an expropriation. This state of affairs as earlier mentioned is in contrast to the provisions of section 25 which makes reference to an expropriation being for either a public purpose or public interest.

²⁴⁵ *Msiza v the Director General Rural development and Land Reform* LCC133/2012) [2016] ZALCC 12 (5 July 2016).

²⁴⁶ *Msiza v the Director General Rural development and Land Reform*, the court went on to state that: "Public interest was added herein to cure the status quo as far as the interpretation of expropriation for a third party was concerned. Public purpose had the potential to be interpreted too narrowly and would not permit an expropriation for the benefit of a third party. Public interest guarantees the ability to expropriate property for a third party in line with land reform" par 13.

²⁴⁷ *Offit Enterprises (Pty) Ltd v Coega Development Corporation and another* 2011 1 SA 293 the court succinctly put it thus: the purpose that that underpins the expropriation is the realization of a public purpose. Because the public purpose is to be realized by a third party is neither here nor there, rather the benefit to be derived by the third party is merely incidental to the realisation of the public purpose.

²⁴⁸ *Offit Enterprises (Pty) Ltd v Coega Development Corporation and another* par.

It is possible to cure the discrepancies that could exist in the *Expropriation Act* by reading into the Act the provisions of the Constitution that are lacking in the *Expropriation Act*. This state of affairs however cannot be what the Constitution itself anticipated with the provisions of section 39(2) of the Constitution. This section states that in the interpretation of the provisions of legislation the courts must endeavour to promote “the spirit, purport and objects of the Bill of Rights”. This section anticipates the starting point in the task of legislative interpretation to be the Act itself and not the provisions of the Constitution. The Constitution will act as a type of guide when interpreting the legislation itself to determine whether or not the interpretation as granted to the Act of parliament is in line with the requirements of the Constitution.

The Bill seeks to change this by including within it the public interest requirement as alluded to in section 25 of the Constitution. This will guarantee that in the interpretation of the legislation, in this case, the Bill, will begin with the legislation itself and will be so interpreted to promote the spirit, purport and objects of the Bill of rights as enshrined within section 39. The Constitution will not be the starting point of such an enquiry, rather, the Bill will be interpreted and the interpretation will be tested against the requirements of section 39(2).

3.4 The Determination of compensation

3.4.1 Introduction

At the outset, it should be made clear that the rationale behind the payment of compensation is the same as it existed in pre-constitutional South Africa. In this regard Du Plessis²⁴⁹ states that compensation in the constitutional era is the same as in the pre-constitutional era wherein the aim had not been to burden the individual with what is essentially intended to be for the benefit of the public.

In the constitutional era, such as was the case before the Constitution, the rationale behind the payment of compensation is predicated on the fact that it cannot be the intention of the legislative authority to divest a person of his rights to property for a

²⁴⁹ Du Plessis *Valuation in the Constitutional Era* 1731.

public purpose without contemplating some form of compensation.²⁵⁰ In the event that doubt persisted as to whether or not there should be compensation payable in the event of an expropriation then the scales tipped in favour of the payment of compensation.²⁵¹ The intention behind compensation therefore is to place the individual in the same position as he or she would have been in the absence of the expropriation.

3.4.2 Compensation under the Expropriation Act

Section 12 of the *Expropriation Act* provides the basis upon which the amount of compensation to be paid must be determined. The *Expropriation Act* states that the amount of compensation that is to be paid for expropriated property is an amount the property would have fetched on the open market "by a willing seller selling to a willing buyer".²⁵² The same section 12 further states that compensation to be paid shall not exceed an amount intended to "make good any actual financial loss suffered because of the expropriation".²⁵³

The determination of compensation payable in terms of the *Expropriation Act* has been described as the amount of money that a seller that intends to but is not obliged to sell property would pay to a purchaser of property that intends to but is not obliged to purchase the property.²⁵⁴ The phenomenon that is market value has been described as an irony that is placed at the core of the law of compulsory acquisition of land.²⁵⁵

²⁵⁰ Du Plessis Valuation in the Constitutional Era 1728.

²⁵¹ *Krause v South African Railway and Harbour* 1948 4 SA 554, 562-563.

²⁵² Section 12(1)(a)(i) of the *Expropriation Act*.

²⁵³ Section 12(1)(a)(ii) of the *Expropriation Act*.

²⁵⁴ *Katzoff v Glaser* 1948 4 SA 630, 637; *Andrew Kiddie v Valuation Court Kimberley* 1956 4 SA 402, 407E.

²⁵⁵ Davies *Law of compulsory purchase and compensation* the learned author goes on to explain the reason for referring to market value as a paradox and states that: "Market value as a concept means a purely natural phenomenon, namely a price-level reached between buyers and sellers bargaining with the minimum of artificial constraints. But this condition of the "free market" is the very opposite of the condition of a compulsory purchase, which is *ex hypothesi* a situation of a constraint. Therefore, to say that compulsory purchase compensation is to be assessed at market value is to say that a state of affairs is to be visualized in terms of its direct opposite" 136.

In terms of the *Expropriation Act*²⁵⁶ the amount of compensation that accompanies the expropriation is at market value. The *Expropriation Act* directs the determination of compensation to be solely based on market value. The determination of the amount of compensation payable in this manner seems to be central to the *Expropriation Act*.²⁵⁷

3.4.3 Compensation in terms of the Constitution

The reference to market value as the central factor to consider when assessing the amount of compensation payable in the *Expropriation Act* is in direct contrast to the terms of section 25 of the Constitution.²⁵⁸ Section 25(3) of the Constitution states that:

The amount of 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;
- (b) The history behind 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.

The exact meaning and interpretation of these factors is beyond the scope of this dissertation, however it is crucial to pay attention to the fact that market value is only one of five considerations to pay attention to when determining the amount of compensation payable in terms of the Constitution.²⁵⁹ This is a clear detraction from

²⁵⁶ Section 12(1) outlines how expropriation is to be determined with particular emphasis being placed on the fact that compensation would be determined in accordance with the value of the said property on the open market, i.e. market value.

²⁵⁷ *Estate Marks v Pretoria City Council* 1969 3 SA 227, 254.

²⁵⁸ Modipane *A critical Exposition on the Determination of a just and equitable compensation for Expropriation in South African Law* 6. The learned author explaining what market value is states that: "In terms of the Expropriation Act the value of land is the amount that a hypothetical seller would have sold on the open market to a hypothetical purchaser at the time of the expropriation. This is the corner-stone of expropriation as applied in expropriation law in South Africa" 6.

²⁵⁹ Further cognisance should be taken of the fact that the list as given in terms of section 25(3) is not exhaustive and further factors aside from those enumerated to be considered can be included.

the terms of the *Expropriation Act* that only refers to market value as a factor to consider when determining the amount of compensation payable.²⁶⁰

The effect of regarding other factors apart from market value alone to determine the amount of compensation payable should be viewed from the broader scheme of the Constitution vis-à-vis reference to market value alone in the *Expropriation Act*. This will clearly outline the necessity to depart from the standard set out in the *Expropriation Act* as far as compensation is concerned. The *Expropriation Act* only had a keen focus on recompensing the individual hence reference to the value of the compensation to be at market value whereas the Constitution is clear in that market value, along with other factors should be considered in the event of an expropriation and the need to determine the amount of compensation payable.

The Constitution,²⁶¹ emphasises not only recompensing the individual to avoid burdening him or her but also demonstrates an awareness of the need to balance the interests of the public that are intended to be served against the interests of the affected owner.²⁶² Modipane²⁶³ states that the *Expropriation Act* governed the expropriation process in South Africa before the enactment of the Constitution and never had within its character the promotion of such crucial principles of constitutional South Africa as land redistribution and restitution as are specifically provided for in the Constitution. As the *Expropriation Act* stands, especially when specific reference is made to market value compensation, which is central in terms of the *Expropriation Act*, it lacks compliance with the terms of the Constitution. This is because the Constitution does not only require a consideration of market value as a central consideration in the computation of the amount of compensation payable, rather the Constitution further

²⁶⁰ Section 12 also makes reference to actual financial loss as a factor to consider but the list of factors to consider only stops there it does not go further to outline anymore factors to consider when evaluating the amount of compensation payable.

²⁶¹ *Constitution of the Republic of South Africa*, 1996.

²⁶² Du Plessis *Valuation in the Constitutional Era* 1733 the learned author states that: "Despite the focus on recompensing the individual the central principle should remain that the amount of compensation should reflect an equitable balance between the public interest and the interest of those affected... A decision of what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation, but should take into account the broader scheme of the constitution".

²⁶³ Modipane *A critical Exposition on the Determination of a just and equitable compensation for Expropriation in South African Law* 8.

requires “just and equitable” compensation keeping in mind all relevant circumstances that are inclusive of but are not limited to the factors listed in section 25(3).

Existing rights to property can only be protected if and to the extent that they are consistent with the terms of the Constitution.²⁶⁴ Du Plessis refers to the fact that:

[I]n laying the foundation for transformation, the Constitution requires that both existing rights and reforms must promote the spirit, purport and objects of the Bill of rights in line with section 39(2) ...If the existing rights conflict with reform measures, then the Constitution requires a balancing of these rights and measures.

The *Expropriation Act* is not compliant with the provisions of the Constitution as far as the computation of the amount of compensation payable in the event of an expropriation is concerned. The Constitution requires a consideration of other factors aside from just the fact that compensation should be at market value. There is a need therefore for a new framework of expropriation. This framework of expropriation should be one that takes cognisance of the need to consider other factors aside from just market value when computing the amount of compensation payable.

The issue of compensation to be paid in the event of an expropriation has been considered in a number of decisions, however only the decision in *Msiza v Director General Rural Development and Land Reform* shall be considered specifically for addressing why market value is not the central basis upon which compensation is to be paid, instead the other factors listed in section 25(3) must also be considered.

3.4.3.1 *Msiza v the Director General Rural Development and Land Reform*²⁶⁵

This decision was concerned with the determination of the amount of compensation payable in terms of the Land Reform (Labour tenants) Act.²⁶⁶ The provisions of the Land Reform (Labour tenants) Act reflect the provisions of section 25 of the Constitution.

What had been in issue in this decision was the precise definition of what just and equitable compensation would be for purposes of this case. The court stated that the point of departure in assessing just and equitable compensation would be through the

²⁶⁴ Du Plessis *Valuation in the Constitutional Era* 1726.

²⁶⁵ (LCC133/2012) [2016] ZALCC 12 (5 July 2016).

²⁶⁶ This was in terms of section 23(1) of the *Land Reform (Labour tenants) Act* 3 of 1996.

lens of section 25 of the Constitution.²⁶⁷ The court reiterated the purpose that underpins section 25(1) to (3) and held that the said section possesses a dual mandate in that it both protects existing rights to property and permits acquisition of property in the form of expropriation.²⁶⁸ The court then went on to discuss section 25(3) and stated that reference to public interest in section 25(3) is given further substance by reference to public interest in section 25(4) which mentions public interest as inclusive of the nation's commitment to land reform.²⁶⁹ This, the court felt underpins the rationale behind permitting an expropriation solely for the benefit of a third party.

In evaluating what would constitute just and equitable compensation, the court addressed one of the contentions by the landowners which was the fact that the jurisprudence of the court had "installed market value as a preeminent consideration"²⁷⁰ in the determination of the amount of compensation payable. To dispense with this argument the court stated that market value does not form the basis of the determination of the amount of compensation payable in terms of section 25 of the Constitution.²⁷¹ Instead, the primary point of departure in such an inquiry is "justice and equity". Market value manifests itself as merely one of several factors to be considered in the endeavour to achieve just and equitable compensation.²⁷²

The confusion behind market value being considered a central criterion to determine compensation seems to be because courts have used market value as a point of departure when assessing the amount of compensation payable since the courts felt it is easily quantifiable.²⁷³ This however does not clothe market value with a sense of superiority over other factors to consider in the evaluation of the amount of compensation payable.

At the heart of assessing compensation in the constitutional era is justice and equity. To assert what exactly constitutes just and equitable compensation, a balancing exercise

²⁶⁷ *Msiza v the Director General Rural Development and land reform* par 24.

²⁶⁸ *Msiza v the Director General Rural Development and land reform* par 24.1.

²⁶⁹ *Msiza v the Director General Rural Development and land reform* par 24.2.

²⁷⁰ *Msiza v the Director General Rural Development and land reform* par 29.

²⁷¹ *Msiza v the Director General Rural Development and land reform* par 29.

²⁷² *Msiza v the Director General Rural Development and land reform* par 29.

²⁷³ *Former Highlands Residents, in re Ash v Department of Land affairs* 2000 2 ALL SA 26 (LCC).

must be endeavoured, which exercise will balance the interests of the owner of the land against those of the public. This decision demonstrates the move away from market value as the primary basis upon which compensation is to be determined. It demonstrates in practice the balancing exercise towards determining what constitutes "just and equitable" compensation in the promotion of the spirit, purport and objects of the Bill of Rights as required by section 39(2).

3.4.4 Conclusions

The *Expropriation Act* lacks compliance with the provisions of the Constitution as far as the determination of the amount of compensation payable is concerned. Pre-constitutional legislation now has to be interpreted in light of the Constitution,²⁷⁴ which will in effect mean that we interpret any Act of parliament by applying the norms as laid down under the Constitution.²⁷⁵ In light of the provisions of the Constitution, the *Expropriation Act* with its specific focus on market value as the central criterion for determining the amount of compensation payable runs counter to the provisions of section 25(3) of the Constitution and is to that extent unconstitutional.

It has been suggested that what the *Expropriation Act* lacks, the courts can read into the *Expropriation Act* the provisions of section 25(3). This means that the courts would factor in those other considerations as enumerated in section 25(3) although the *Expropriation Act* does not refer to them as factors to consider when determining compensation payable. It is my submission that such a reading-in will fail to promote the spirit, purport and objects of the Bill of Rights as required by section 39(2). This is because section 39(2) denotes the point of departure in interpretation to be the Act of parliament itself that is the subject of the interpretation and not the Constitution. In that way, the interpretation of the Act will demonstrate whether section 39(2) is being or will be complied with. What is required therefore, to properly adhere to the requirements of the Constitution is not a mere adjustment of the provisions of the *Expropriation Act* to comply with the Constitution, rather what is needed is a new legislation that infuses the same spirit that is contemplated by the Constitution.

²⁷⁴ Du Plessis *Compensation for Expropriation under the Constitution* 76.

²⁷⁵ *Constitution of the Republic of South Africa*, 1996.

3.5 The protection of unregistered rights in land

3.5.1 Introduction

The property clause does not specifically draw attention to what exactly property is. Apart from section 25(4) of the Constitution stating that property is not limited to land, there is no solid definition of what property entails. The court in *FNB* cautioned against the formulation of an exhaustive definition of what property entails, stating that it would be both judicially unwise if not practically impossible.²⁷⁶ It must be noted however that the constitutional conception of property states that the focus is on the function the alleged property has in the society as opposed to the traditional, pre-1994 notions of property.²⁷⁷

3.5.2 The Expropriation Act

In terms of the *Expropriation Act* provision is made for the rights that have been registered against a title deed, as well as lessees in some instances.²⁷⁸ The *Expropriation Act* provides further for the termination albeit without compensation of all other rights in land. The *Expropriation Act* does not provide for compensation of unregistered rights in land even though protection of these unregistered rights in land is provided for and protected by the Constitution.²⁷⁹ Examples of individuals with unregistered rights in land could be farmworkers who have been permitted to farm on a piece of land as part of their remuneration but who as a consequence of their farming the land possess unregistered rights in the land.²⁸⁰ The *Expropriation Act* does not protect this class of individuals.

3.5.3 The Constitution

Gildenhuys²⁸¹ referring to these unregistered rights as enumerated in the *Expropriation Act* states that in an instance wherein a holder of the unregistered rights in land does

²⁷⁶ *First National Bank v The Commissioner South African Revenue Services* 49.

²⁷⁷ Van Der Walt and Shay *PER/PELJ* 2014 58.

²⁷⁸ Section 22 of *Expropriation Act*.

²⁷⁹ *Constitution of the Republic of South Africa*, 1996.

²⁸⁰ Du Plessis *Stell LR* 2011 2.

²⁸¹ Gildenhuys *Onteieningsreg* 193.

not receive compensation for the expropriation of such a right then he or she can have recourse to the Constitution for the protection of such rights. In terms of section 25(6) of the Constitution, a person whose occupancy of land has been rendered insecure by past racially discriminatory practices or laws is entitled to one of two things, namely, legally secure tenure or equitable redress. This will be done to the extent provided by an Act of parliament. The *Expropriation Act* does not provide for the protection of these unregistered rights to land and in this regard lacks compliance with the terms of the Constitution.

Unregistered rights in land are protected by the terms of the Constitution. The entire structure of section 25(4) to (9) mandates a protection of these unregistered rights in land. In *First National Bank v The Commissioner of the South African Revenue Services* the court stated that the intention behind the provisions of section 25(4) to (9) is to make amends for the undesirable legacy that has been perpetuated by apartheid, which is the unequal distribution of land in South Africa.²⁸²

3.5.4 Conclusions

A concise definition of what property entails in terms of the Constitution has not been pronounced upon. In fact, the court has stated that defining such a list is neither desirable nor practical.²⁸³ The constitutional conception of property is the function the said property has within society.²⁸⁴ Unregistered rights in land play a rather critical role within South African society. This is especially the case when regard is had to the intention that underpins the provisions of section 25(4) to (9), namely, the reversing of a distorted legacy as created by apartheid. Section 25(4) to (9) underpins the importance of unregistered rights in land and highlights the need to protect said rights in land.

The *Expropriation Act* does not recognise unregistered rights in land. Consequently, it does not provide for the protection of the said rights in land. This is in direct contrast to the provisions of the Constitution which recognises and protects such unregistered

²⁸² *First National Bank v the Commissioner of the South African Revenue Services* 49.

²⁸³ *First National Bank v the Commissioner of the South African Revenue Services* 49.

²⁸⁴ Van Der Walt and Shay *PER/PELJ* 58.

rights in land. It is in this regard that the *Expropriation Act* lacks compliance with the provisions of the Constitution and is unconstitutional.

3.6 Conclusions

The *Expropriation Act* was enacted during the reign of parliamentary supremacy. The sentiments that propelled the enactment of any piece of legislation were discussed and concluded in parliament and their veracity for truly benefiting the population in its entirety was not tested before the courts of law.

The *Expropriation Act* still persists as the current prevailing framework for expropriation in South Africa. However it is constitutionally deficient in multiple areas. The lack of a reference to a public interest as forming the rationale behind an expropriation is lacking in the *Expropriation Act*. This is in direct contrast to the provisions of the Constitution which requires an expropriation to be conducted for a public interest. Case law before the Constitution demonstrates the reverence that Acts of parliament owed to the parliament and the courts were not able to so reverse any Act of parliament even if it was manifestly unfair or was not for a public purpose. The interpretation granted to the public purpose requirement in pre-constitutional South Africa is not likely to pass constitutional muster in Constitutional South Africa because, reverence is owed to the Constitution as opposed to parliament as was the case.

The determination of the amount of compensation payable in the event of an expropriation has as well changed in Constitutional South Africa, with the Constitution requiring other factors, aside from just market value to be considered in the computation of the amount of compensation payable. As it stands the *Expropriation Act* is constitutionally deficient because it emphasises compensation to be at market value alone.

The Constitution requires the protection of unregistered rights in land. The Expropriation Act on the other hand does not. This protection afforded by the Constitution makes the said unregistered rights in land eligible to compensation in the event of an expropriation. The *Expropriation Act* does not provide for same and is to that extent as well unconstitutional.

It has been suggested that courts can read into the *Expropriation Act* what is lacking and make the said *Expropriation Act* constitutionally compliant. This state of affairs is not likely to promote the spirit, purport and objects of the Bill of Rights as required by the provisions of section 39 of the Constitution because the primary point of departure in interpreting the *Expropriation Act* will be the Constitution and not the Expropriation Act itself. Such a reading is not likely to promote the spirit, purport and objects of the Bill of rights.

With that conclusion in mind, the only other logical course of action is the enactment of a new framework of expropriation. This framework should be one that infuses within it the principles that are enumerated by the Constitution. This state of affairs is being attempted by the Bill, whose provisions will be discussed in the succeeding paragraph.

4 The Constitutionality of the Bill

4.1 Introduction

In preceding chapters, it was shown that the *Expropriation Act* does not pass all the requirements of section 25. This necessitates the formulation of a new framework of expropriation to guide expropriation in line with the dictates of the Constitution. A new framework for expropriation has to be underpinned by the features as outlined in the policy on expropriation that was published on the 13th November 2007.²⁸⁵

4.2 The Policy on Expropriation

The *Bill* should underpin the remnants that make the *Expropriation Act* inconsistent with the Constitution.²⁸⁶ As per the policy on expropriation²⁸⁷ the following must be addressed in the new *The Bill*.

Expropriation must be conducted in the public interest and for a public purpose. The definition and interpretation of public purpose and public interest was dealt with in chapter 3. While the Constitution refers to the public purpose as well as the public interest, the *Expropriation Act* on the other hand only refers to public purpose as a requirement for a valid expropriation. In this regard the *Expropriation Act* lacks compliance with the provisions of the Constitution and legislation is required to place expropriation in line with the Constitution by including both the public purpose and public interest as requirements for a valid expropriation.

The policy on expropriation further addresses the expansion of the scope of protected rights. The current *Expropriation Act* does not protect unregistered rights in land. Section 25(7) of the Constitution states that any individual whose tenure to land has been rendered insecure by racially discriminatory practices or legislation is entitled to secure rights to land through provided by an Act of parliament. The Bill must comply with the principles of the Constitution by protecting existing unregistered rights in

²⁸⁵ GN 1654 GG 30468 of 13 November 2007.

²⁸⁶ *Constitution of the Republic of South Africa*, 1996.

²⁸⁷ GN 1654 GG 30468 of 13 November 2007.

land. This means that as regards the expansion of the scope of these rights, compensation must be properly placed to compensate these existing rights although unregistered.

One of the most contentious topics as far as expropriation is concerned will be the amount of compensation to be paid for an expropriation.²⁸⁸ As discussed in chapter 3 the amount of compensation is to be one that reflects a just and equitable balance between the public interest and the interests of those affected by the expropriation, regard being paid to all relevant factors of which market value is one. This denotes the fact that compensation will be one of the factors to consider but not the sole one. The *Expropriation Act* places the determination of compensation solely on the market value of the property being expropriated. This is clearly not in line with the requirements of the Constitution. An evaluation of the compliance of the Bill with the provisions of section 25 of the Constitution will now be endeavoured.

4.3 A section 25 analysis of the The Bill

4.3.1 Introduction

The Bill in terms of its preamble states that it is intended to provide for expropriation of property in the public interest or for a public purpose and further provide for matters connected therewith.²⁸⁹ The Bill acknowledges the provisions of section 25 of the Constitution in its entirety.

The background to the *The Bill* as enumerated in the memorandum on the objects of the Bill²⁹⁰ states that it is recognised that expropriation is a legitimate tool for the state to acquire another's property in the name of public purpose or in the public interest subject to just and equitable compensation.

The objects that underpin the Bill are enumerated as being intended to align the *Expropriation Act*, with the terms of the Constitution as well as provide a common

²⁸⁸ GN 1654 GG 30468 of 13 November 2007 par 24.2.

²⁸⁹ Preamble to the *The Bill* B4 – 2015.

²⁹⁰ *Memorandum on the Objects of the The Bill* 2015 para 1.1.

framework for the purposes of guiding the process and the procedures to be followed in the event of an expropriation by the different organs of state.²⁹¹

The preamble to the *Bill* captures the essence of what would underpin a valid expropriation keeping in mind the provisions of the Constitution.²⁹² To properly outline whether the Bill²⁹³ is in line with the requirements set out by section 25 of the Constitution an evaluation of the sections that comply with section 25 is warranted. This will constitute an endeavour into aspects that relate to compensation, the public purpose and public interest requirement as well as determining whether the Bill caters for the protection in the form of compensation of unregistered rights to land in the event of an expropriation.

Reference as well will be made to some of the submissions by the different stake holders in their response to calls about the Bill, noting specifically where they regard a lack of compliance with the terms of section 25 of the Constitution.

4.3.2 Public Purpose and Public Interest in the Bill

4.3.2.1 Introduction

In terms of section 25(2)(a) of the Constitution²⁹⁴, expropriation may only be conducted in terms of a law of general application and only for a public purpose or in the public interest. In the preceding chapter²⁹⁵, mention was made of the differences between the public purpose and public interest criterion in evaluating an expropriation. From the outset, it should however be mentioned that the use of public purpose in section 25(2) is different from its use in section 25(3)(e). Public purpose in section 25(2)(a) is a

²⁹¹ *Memorandum on the Objects of the The Bill* 2015 para 1.3.

²⁹² *The Memorandum on the objects of the The Bill*, 2015 par 1.2, makes mention of the fact that: "The Constitution is the supreme law of the Republic, legislation or conduct inconsistent with it is invalid, and the obligations it imposes must be fulfilled. The peremptory terms of section 2 of the Constitution strengthen the case for the redrafting of the Expropriation Act, 1975, in order to ensure consistency with the spirit and provisions of the Constitution. The provisions of the Bill alluded to are: the right to equality (section 9), property rights (section 25), access to information (section 32), and lawful, reasonable and procedurally fair administrative decision making (section 33)".

²⁹³ B4D – 2015.

²⁹⁴ *Constitution of the Republic of South Africa*, 1996.

²⁹⁵ See para 3.

requirement for a valid expropriation, to justify a valid expropriation the expropriation must be for a public purpose.²⁹⁶ In section 25(3)(e) public purpose is a factor to consider when determining the amount of compensation payable.²⁹⁷ In this instance public purpose is discussed in line with its interpretation in section 25(2)(a).

4.3.2.2 Public Purpose

Du Plessis,²⁹⁸ referring to the requirement in section 25(2) of public purpose, states that the inclusion of the requirement in both the Constitution and its inclusion again in the Bill²⁹⁹ can lead to difficulties in interpretation. The learned author cautions against an interpretation of public purpose too narrowly stating that it should not just be interpreted to mean simply “public use”. On the other hand, it should not be interpreted too widely to include “any purpose that is vaguely of benefit to the public”.³⁰⁰

The interpretation of public purpose in the Constitution, if not interpreted too narrowly functions in one of two ways. It serves to justify the expropriation and as authority for the expropriation underpinning why the expropriation should be conducted.³⁰¹ It also guarantees that the normal purpose of the requirement does not impede land reform as perpetuated in terms of the Constitution.³⁰²

Public purpose in the Bill³⁰³ is defined as including “any purpose that relates to the administration of the provisions of any law by an organ of state”. This definition of the public purpose requirement mirrors the definition of public purpose in terms of the *Expropriation Act*. It has been contended that the definition of public purpose is too wide since it grants to the minister the ability to obtain authorisation for expropriation in one Act and then conduct the exercise of the said authority in terms of another Act.³⁰⁴

²⁹⁶ Du Plessis *Stell LR* 372.

²⁹⁷ Du Plessis *Stell LR* 372.

²⁹⁸ Du Plessis *Stell LR* 372.

²⁹⁹ In this instance the learned author was referring to the 2008 Bill that was later shelved.

³⁰⁰ Du Plessis *Stell LR* 372.

³⁰¹ Du Plessis *Stell LR* 372.

³⁰² Du Plessis *Stell LR* 372.

³⁰³ *The Bill* B4C – 2015.

³⁰⁴ Pienaar 2009 *TSAR* 347.

This fear could be brought about by the decisions such as that in *White Rocks Farm v The Minister of Community Development*³⁰⁵ wherein the court interpreted public purpose and held that the expropriation therein was for a public purpose even though the applicants made mention of the fact that the expropriating authority had a motive for conducting the expropriation apart from expropriating for a public purpose. The court in *White Rock Farms* stated that the applicants were confusing motive with purpose. So long as the expropriation is for a valid public purpose then the motive that underpins the decision to expropriate is not of relevance.³⁰⁶

Allaying the fears of people that maintain that the interpretation could be too wide if placed in the Bill in the way it is placed, Du Plessis³⁰⁷ states that because the expression of public purpose in the Bill mirrors that used in the *Expropriation Act*, then the problem of constitutionality is not a result of the *The Bill*. The learned author proposes adopting a German approach, wherein, if property is expropriated for a defined purpose but it later emerges that the property will not be used for that purpose then the initial owner before the expropriation can re – expropriate the property for the price for which it was initially expropriated.³⁰⁸

Section 25 hinges on protecting individual rights to property as well as perpetuating land reform measures in the public interest or for a public purpose. Pienaar's³⁰⁹ assertion that the definition given to public purpose could be too wide and could permit the minister to expropriate land for one purpose and if the former purpose does not materialise he can validly expropriate it for another purpose is valid. However, it is my assertion that in the same way we can interpret and read into the *Expropriation Act* the public interest requirement, the same can be done to limit the scope of the public purpose requirement and its interpretation.

This contention I hold because, it is possible to read legislation in line with the terms of the Constitution to save the said legislation from a finding of a lack of Constitutional

³⁰⁵ *White Rocks Farm v Minister of Community Development* 791 - I.

³⁰⁶ See also *Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 at 270.

³⁰⁷ Du Plessis *Stell LR* 373.

³⁰⁸ Du Plessis *Stell LR* 373.

³⁰⁹ Pienaar *TSAR* 347.

compliance.³¹⁰ As earlier mentioned, the entire structure of section 25 demonstrates a constant push and pull between the protection of existing rights to property on the one hand and the instigation of land reform measures on the other. To limit the reach of the public purpose requirement in the Bill in situations where it is regarded as being too wide, the said Bill can be read in conformity with the Constitution and be understood to promote the spirit, purport and objects of the Bill of Rights. Promoting the spirit, purport and objects of the Bill of rights will entail a balancing of the two competing interests as between the owner of the property and the need to give effect to a public purpose. The Bill could be read down, which reading down considers the individual land owner's interests if the reasons for the initial expropriation change and balances same interests against the public purpose sought to be achieved by the second expropriation.

As earlier alluded to, Du Plessis³¹¹ cautions against interpreting the public purpose too wide or too narrow and in an instance such as the one proposed by Pienaar that will be too wide an interpretation. The courts will be left with reading the public purpose requirement as not being too wide as to cover merely all activities that could be beneficial to the public. Instead the courts could interpret the requirement in such a way that it limits the public purpose requirement and orders that the initial owner of the property purchase the said property at the price he was initially compensated for. In this manner, it is my assertion that a balance will have been achieved between balancing the interests of the owner and the instigation of the public purpose. As will be shown later, the courts could as well order an amount of compensation higher than had initially been intimated because the public purpose that was considered for purposes of section 25(3)(e) has changed and could warrant compensation higher than before. This will be discussed in the section to follow.

4.3.2.3 PublicInterest

Public interest in the Bill³¹² is defined as including the nations' commitment to land reform, and reforms aimed at bringing about just and equitable access to all of South Africa's natural resources to redress the results of past racially discriminatory laws and

³¹⁰ *Daniels v Campbell* 2004 5 SA 331 (CC).

³¹¹ Du Plessis *Stell LR* 373.

³¹² B4D – 2015.

practices. This definition is in line with that as propounded by section 25 (4) of the Constitution. The distinction between these two definitions is found in the *The Bill's* specific mention of the need to redress the results of past racially discriminatory laws and practices.

The Bankers Association of South Africa³¹³ contended that the definition of public interest should be kept strictly aligned to the Constitution. Since the Constitution does not refer to “other related reforms in order to redress the results of past racially discriminatory laws or practices” the said added wording should not be included in the definition of public interest.

It is my contention that it is unlikely that the Bill’s constitutionality can be challenged on this aspect alone. The definition of the public interest in this regard simply further underpins the transformative intent that underpins section 25 of the Constitution by including and propounding further the need to redress the results of past racially discriminatory practices. This contention is further given creed to by the provisions of section 25(4)(b) which extends the definition of property as not being limited to land. This means that the transformation project is not limited only to access to land but rather it takes a holistic shape and points to all other practices or laws that perpetuated inequality as is seen in South Africa today especially property.

The fear on the part of Banking South Africa is that this additional wording opens up the public interest requirement to wider interpretation than is warranted which becomes a concern for local and international investors. These fears by Banking South Africa are not justified. What should constantly be remembered is the fact that the power of the expropriating authority to instigate an expropriation will be restricted by the public purpose or public interest requirement.

4.3.3 The determination of Compensation in the Bill

The Constitution states that the amount of compensation payable for an expropriation has to reflect an equitable balance between the public interest to be satisfied and the

³¹³ Bankers Association of South Africa *Submissions to the Portfolio Committee on Public Works Regarding the The Bill* 28 July 2015.

interests of the individual property owner.³¹⁴ The Bill³¹⁵ quotes the provisions of the Constitution and requires that the amount of compensation to be paid must as well be just and equitable and reflect an equitable balance between the expropriated owner and the public interest.³¹⁶ The Bill goes further to reflect all the relevant circumstances that should be taken into account when determining the amount of compensation payable as reflected in section 25(3) of the Constitution.

By capturing the provisions of the Constitution in the manner that it has, the Bill restates the position that the amount of compensation payable has to take account of all factors and not place market value at the centre of the entire enquiry into the amount of compensation payable.³¹⁷ Differently stated, the amount of compensation payable could be less than the market value the property is likely to realize on the open market.

Some stakeholders³¹⁸ contend that an interpretation of the amount of compensation payable potentially being at less than market value could result in adverse effects. This is because, so the argument goes, financial institutions offer credit based on market value because the Acts and regulations that govern financial institutions mandate the offering of credit to be based on market value.³¹⁹ Further, these Acts that govern South Africa's banks and their regulations are aligned to global international regulatory frameworks and prudential frameworks.³²⁰ Their contention is that in the event that compensation is paid at less than market value, in some instances the loans granted would exceed compensation amount paid and the owners as well as the financial institutions would suffer a loss.³²¹

³¹⁴ *The Constitution of the Republic of South Africa, 1996* section 25(3)

³¹⁵ B4D – 2015.

³¹⁶ *The Bill* B4D – 2015 clause 12.

³¹⁷ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 9.

³¹⁸ *The Bankers Association of South Africa Submissions to the Portfolio committee on Public works regarding the The Bill B4 – 2015.*

³¹⁹ *Financial Institutions (protection of funds) Act* 28 of 2001.

³²⁰ *The Bankers Association of South Africa Submissions to the Portfolio committee on Public works regarding the The Bill B4 – 2015.*

³²¹ *The Bankers Association of South Africa Submissions to the Portfolio committee on Public works regarding the The Bill B4 – 2015.* The Association goes further to allude to the fact that a critical consequence of the Bill is that the banks would suffer a negative impact on stability or

The adoption of the Bill would lead to what the Bankers Association of South Africa term an “inadequate management of risk”, which the Association maintains would lead to a “systemic consequence for the economy and financial systems as evidenced by the advent of the recent global financial crisis”.³²²

The assertion by the Bankers Association is flawed in several key regards. To begin with, the *Expropriation Act* is interpreted in line with the provisions of the Constitution. This means that the potential to downgrade market value in the evaluation of compensation has always existed.³²³ This is not a characteristic that is brought about by the potential promulgation of the Bill.³²⁴ The primary reason market value is still central to the enquiry when calculating the amount of compensation payable despite the existence of the Constitution³²⁵ is because of the courts’ adherence to the two step approach propounded in *Khumalo v Potgieter*³²⁶ wherein the court made reference to the fact that for the calculation of compensation the primary point of departure is the market value of the particular property.

The court justified this stance by stating that market value is the only factor that can be determined with certainty.³²⁷ Subsequent to this evaluation then the court is free to adjust the amount of compensation payable upwards or downwards in line with the other factors prevalent in section 25(3) of the Constitution.³²⁸ Placing market value at the centre of the expropriation enquiry will undoubtedly render the expropriation counter-transformative in that it fails to take account of the other factors placed in section 25(3). This is because in that case then the rights of the individual property

losses which could result in “Private sector lenders withdrawing from providing loans where property is offered for security, Banks are likely to adopt a more conservative approach to the extent of loans they would be prepared to provide as compared to property values and finally, banks are likely to increase the borrowing interest rates to compensate for the additional risk in the event of expropriation. Cumulatively in the final analysis this state of affairs could promote food instability, job losses and financial exclusion.”

³²² *The Bankers Association of South Africa Submissions to the Portfolio committee on Public works regarding the The Bill* B4 – 2015.

³²³ Du Plessis *Stell LR* 371.

³²⁴ B4D – 2015.

³²⁵ *Constitution of the Republic of South Africa*, 1996.

³²⁶ 1999 ZALCC 59. This case was later applied in *Du Toit v The Minister of Transport* 2006 1 SA 297 (CC).

³²⁷ Du Plessis The public purpose requirement in the calculation of just and equitable compensation 9.

³²⁸ *Constitution of the Republic of South Africa*, 1996.

owner would have not been balanced against the public interest. Central to the entire enquiry is the attempt to attain a just and equitable amount, which amount will be reached at if the competing interests are balanced against each other.

The fear that the Bill will discourage investment in South Africa is unwarranted. Du Plessis states that these sentiments are the result of a misinterpretation of the Bill.³²⁹ Du Plessis states that the panic of a discouraging of investment by the Bill is closely tied to the contention that the Bill is likely to threaten food security because it is contended that expropriated farms are not farmed productively. The learned author goes further to state that if these contentions hold then the problem is not with the Bill rather it lies with the implementation of the land reform policies which should be addressed in the applicable forum.³³⁰

As earlier alluded to, a distinction should be made between public purpose as used in section 25(2)(a) and section 25(3)(e). Using case law as evidence, it has been seen that the courts tend to confuse the two.³³¹ In striving to achieve transformative results, a confusion of these two in practice has led to counter – transformative results.³³² A proper interpretation of section 25 can assist in allaying most of the fears expressed by the stakeholders in the entire expropriation conundrum. In this regard a critique of two decisions that failed to distinguish the public purpose in both sections 25(2)(a) and section 25(3)(e) is warranted. This critique will assist in applying the public purpose as a factor to consider in the event of an expropriation in terms of section 25(3)(e) to justify a lower or higher amount of compensation, and its application as a requirement to justify expropriation in terms of section 25(2).

4.3.3.1 Du Toit v The Minister of Transport³³³

The Minister of transport in this case had intended to expropriate the applicants gravel to build a public road. The public purpose is evident here where the minister of

³²⁹ Du Plessis *Stell LR* 372.

³³⁰ Du Plessis *Stell LR* 371.

³³¹ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 9.

³³² Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 9.

³³³ 2006 1 SA 297 (CC).

transport was taking the gravel from the applicant's private pit to use for the upkeep of a national asset, namely, the public roads which were to be used by the public. Compensation was calculated using the *Expropriation Act*. In this case the courts read into the *Expropriation Act* the provisions of the Constitution that were not prevalent in terms of the *Expropriation Act* and contended that the latter should apply with proper regard to the terms of the Constitution.

In this case the court adopted the two-step approach to calculating compensation. This it did using the sentiments from the decision in *Khumalo v Potgieter*.³³⁴ The court first calculated the value of the property to be expropriated and then moved onto an enquiry in terms of section 25(3) by considering all factors listed therein. In its assessment, the court held that the public purpose, namely the building of the national roads should not be frustrated by awarding compensation at market value thus compensation that was awarded to the applicant was far less than the market value.³³⁵

The *Du Toit* decision by awarding compensation at a discounted rate is flawed in several regards. From the outset, it must be made clear that just and equitable in terms of the provisions of the Constitution must be informed by a proper understanding and appreciation of the historical context within which the Constitution was concluded, namely transformation and restoration.³³⁶

For a case such as *Du Toit*, compensation for a "business as usual"³³⁷ expropriation such as the building of roads or the upkeep thereof, just and equitable compensation would be compensation at market value. The applicant was unfairly burdened with the expropriation by receiving less than market value compensation for a business as usual type of expropriation. Du Plessis referring to this decision states that:

[I]f the reasoning in *Du Toit* stands, the state can always expropriate resources from private citizens for the upkeep of national assets, paying substantially less than market value. This should not be the case. Normal run-of-the-mill expropriations can justifiably require market value compensation, paid from the fiscus, which relies on taxpayers'

³³⁴ 1999 ZALCC 59.

³³⁵ *Du Toit v Minister of Transport* 301.

³³⁶ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 9.

³³⁷ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 10.

money for the upkeep of public roads. When tax money is used, the cost of building or maintaining a national asset that will be used by the general tax-paying public is spread amongst the citizens in an indirect way.³³⁸

In this case therefore, the burden of maintaining national roads or national assets was not spread among the taxpayers. The public purpose as a factor in terms of section 25(3)(e) will warrant the payment of compensation at full market value. Public purpose as a requirement for a valid expropriation in terms of section 25(2) draws attention to the fact that proper regard should be had to the context within which the individual rights to property are being affected by the expropriation.³³⁹ In this case, just and equitable compensation was not achieved since the interests of the expropriated land owner were not properly weighed against the interests the public had in the expropriation. In the final analysis, if an expropriation can be justified because it serves a public purpose in line with section 25(2), the same public purpose should not be used to justify a lower award of compensation as per section 25(3)(e). Public purpose as per section 25(3)(e) is used in an entirely different context.³⁴⁰

4.3.3.2 Mhlanganisweni Community v The Minister of Rural Development and Land Reform.³⁴¹

This was one of the most expensive land claims cases that involved the world renowned eco – tourism destination the MalaMala game reserve.³⁴² This case demonstrates an example of an expropriation for land reform purposes. The court in this case had to give a rough estimate of how much compensation would be payable in the event of an expropriation of the said game reserve.

The court considered the impact that section 25(8) of the Constitution would have on the factors listed in section 25(3). The court held that land reform is a specific and legitimate part of the state's duties and cannot rank higher than any other legitimate

³³⁸ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 10.

³³⁹ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 10.

³⁴⁰ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 10.

³⁴¹ 2012 ZALCC 7 commonly referred to as the MalaMala case.

³⁴² Mabuza 2014 <http://www.bdlive.co.za/business/agriculture/>

purpose for which property may be expropriated. This means that the court felt that land reform takes the same form as the other purposes for which the state can expropriate property, for example in instances such as the upkeep of national roads (such as was the case in *Du Toit*). The court held in the finality that no rationale exists that would underpin the fact that an expropriatee for land reform purposes should be granted less than market value compensation.³⁴³

The court in *MalaMala* failed to distinguish between public purpose as a requirement in section 25(2) to justify a valid expropriation and public purposes in section 25(3)(e) as a factor that has the potential to influence the amount of compensation payable by the expropriating authority. *Du Plessis*³⁴⁴referring to this decision stated that with the benefit of hindsight, acknowledging how land owners during apartheid were privileged and contrasting same with the constitutional imperative to transform, it should be acknowledged that market value cannot be as strict a requirement as was the case in *MalaMala*.³⁴⁵

4.3.3.3 Conclusions

These two decisions demonstrate the dangers of failing to distinguish between public purpose as a factor in section 25(3)(e) and public purpose as a requirement in section 25(2) of the Constitution.³⁴⁶ *Du Plessis* states that as regards section 25(2), public purpose as a requirement can reflect in both cases that assert land reform as well as normal expropriation cases.³⁴⁷ The question then becomes, “can the property be taken for that specific purpose”.³⁴⁸ If answered in the affirmative, the same purpose plays a role in the calculation of the amount of compensation payable, albeit the catch this time

³⁴³ *Mhlanganisweni Community v The Minister of Rural Development and Reform*9.

³⁴⁴ *Du Plessis The public purpose requirement in the calculation of just and equitable compensation* 10.

³⁴⁵ *Du Plessis The public purpose requirement in the calculation of just and equitable compensation* 10.

³⁴⁶ *Constitution of the Republic of South Africa*, 1996.

³⁴⁷ *Du Plessis The public purpose requirement in the calculation of just and equitable compensation* 10.

³⁴⁸ *Du Plessis The public purpose requirement in the calculation of just and equitable compensation* 10.

is the fact that public purpose is assessed in a different context.³⁴⁹ This would therefore justify expropriation at less than market value, which is in line with the provisions of section 25 of the Constitution.³⁵⁰

In conclusion, a conception of what is to be regarded as just and equitable has to be informed by the benefit of hindsight, wherein on the one hand there is an appreciation of a history of grave dispossession and on the other hand the envisioned goal of transformation. These two do not have to stand opposed to one another rather, they constitute part of the same constitutional goal.³⁵¹

This distinction between section 25(2) and section 25(3)(e) can assist further in curbing some of the fears that have been voiced against the definition of public purpose in the Bill.³⁵² It was asserted that the definition of public purpose in the Bill is too wide.³⁵³ If an applicant contends that the purpose for which his property was expropriated has not taken effect, he or she could successfully justify the payment of compensation at market value if for instance initially his property was taken at less than market value. This is of course in the event that the minister expropriates property for one purpose and does not use it for that stated purpose and elects instead to use it for another public purpose, which would also pass the constitutional muster since it will as well be a valid public purpose.

The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*³⁵⁴ stated that when evaluating compensation claims, the choice lies nowhere between protecting the owner of the property so expropriated or advancing transformation to the detriment of the individual property owner by making land reform possible. Rather, the process involves promoting the spirit, object and purport of the Constitution by weighing up the

³⁴⁹ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation*. The learned author goes further to state that: " If it is a gravel for roads case, then the likelihood of compensation being paid at a discounted rate is less than if it is for a reform purpose 10."

³⁵⁰ *Constitution of the Republic of South Africa*, 1996.

³⁵¹ Du Plessis *The public purpose requirement in the calculation of just and equitable compensation* 18.

³⁵² *The Bill* B4D – 2015.

³⁵³ Pienaar *TSAR* 2009.

³⁵⁴ 2005 1 SA 217 (CC) par 23.

two conflicting interests and reconciling the two to arrive at a just and equitable conclusion.

It is my contention that it would not be just and equitable to permit the minister to expropriate property for one purpose and then elect to use the said property in another valid public purpose. This should warrant the payment of a larger amount of compensation to the initial owner of the property given the fact that the initial purpose for the expropriation has changed. This balance can only be achieved by a proper interpretation of the provisions of section 25(2) which is a requirement for a valid public purpose and section 25(3)(e) which is a factor to consider when granting an award for compensation.

4.4 Unregistered rights in property in the Bill

In terms of section 25(6) of the Constitution³⁵⁵ any individual or community that has insecure rights to land because of past discriminatory laws or practices, is entitled to secure tenure or similar redress to the extent that is provided by an Act of parliament. The Constitution therefore, recognises the existence of informal rights to land that could be brought about by anything from occupation of the land as a farm labourer to improvements to the land that justify a right to the land.

The Bill draws a parallel between the holder of an unregistered right to the property and the owner of the expropriated property. The Bill³⁵⁶ defines the holder of a right as an individual that holds an unregistered right in property. Owner is defined as the individual in whose name the property or right to property is registered and goes further to outline an exhaustive list of individuals that may qualify to be regarded as the owners of the property that is the subject of the expropriation.

The Bill³⁵⁷ defines an unregistered right as “a right in property” and includes the right to occupy or use land as recognised and protected by law, but which is neither registered with the relevant authorities or is not required to be registered as such. At this

³⁵⁵ *Constitution of the Republic of South Africa, 1996.*

³⁵⁶ *The Bill B4 – 2015.*

³⁵⁷ *B4D – 2015.*

juncture, it is clear that the Bill acknowledges the existence of unregistered rights in land in accordance with the provisions of the Constitution.³⁵⁸

The Bill makes extensive provision for the recognition of an unregistered right in land. The holder of an unregistered right to land is given a separate notice of expropriation if the said holder of the unregistered right in land is known.³⁵⁹ This means the said holder of an unregistered right to the property is entitled to compensation.

Clause 9(1)(b) of the Bill,³⁶⁰ defines vesting and possession of expropriated property. This clause stipulates that all unregistered rights at the date of expropriation are at the same time as the property that is the subject to the expropriation expropriated. This conclusive expropriation happens subject to two exceptions, namely the unregistered rights will not be expropriated if they are specifically excluded in the notice of expropriation³⁶¹ or the said unregistered rights are permits or permissions³⁶² that exist because of the Mineral and Petroleum Resources Development Act (hereafter the MPRDA).³⁶³

In clause 10, the Bill provides for the verification of existing unregistered rights in property after the date of expropriation. Clause 11 provides the results of an expropriation of unregistered rights as well as defines the duties incumbent upon the expropriating authority. Clause 11(1) outlines the fact that individuals that possess unregistered rights to property and said rights have been expropriated in terms of clause 9(1)(b) subject to the provisions of clause 10 are entitled to compensation.

Clause 11(5) places a duty on the expropriated owner to inform the expropriating authority of the existence of unregistered rights to the property. Should the owner of the property so expropriated fail to do so then he or she will be liable to the expropriating authority to pay any loss that flows from the failure to inform the expropriating authority of such an existence.

³⁵⁸ *Constitution of the Republic of South Africa, 1996.*

³⁵⁹ *The Bill B4D – 2015 clause 8(2)(b)*

³⁶⁰ B4D – 2015.

³⁶¹ *The Bill B4D – 2015 clause 9(1)(b)(i).*

³⁶² *The Bill B4D – 2015 clause 9(1)(b)(ii).*

³⁶³ 28 of 2002.

The Bill clearly distinguishes between the owner of the expropriated property and the holder of an unregistered right in the property. From a land reform context, the Bill gives effect to the provisions of the Constitution by enforcing land reform, specifically tenure reform and is in this vain a radical departure from the provisions of the *Expropriation Act*³⁶⁴ that does not provide compensation for unregistered rights to property.

The Legal Resources Centre³⁶⁵ (hereafter the LRC) submitted to the portfolio committee for public works that the current Expropriation Act falls short when it is applied in conjunction with the MPRDA.³⁶⁶ The LRC contends that the MPRDA entrenches historical discrimination against customary forms of ownership contrary to the decision of the Constitutional Court in *Alexkor v Richtersveld Community*.³⁶⁷

Their contention is held because the MPRDA only recognises ownership that existed before its enactment and the said rights which were eligible for conversion into new order mining rights.³⁶⁸ The LRC contends that this favours predominantly white land owners that possess common law title.³⁶⁹ This, the LRC maintains runs counter to the constitutional provisions that cater for restitution and security of tenure. Regarding the MPRDA, security of tenure is still not guaranteed in terms of section 25(6).³⁷⁰ The LRC goes further to show why there is a need to afford community rights distinct treatment and concludes that:

The Constitution requires a shift in the legal regime and the recognition of ownership and customary rights which invoke a) the consent principle under customary law, which requires community permission for any mining and development on communal

³⁶⁴ Section 22.

³⁶⁵ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights*.

³⁶⁶ 28 of 2002.

³⁶⁷ 2004 5 SA 460(CC).

³⁶⁸ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 2.13.

³⁶⁹ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 2.13.

³⁷⁰ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 2.13. The centre maintains that as regards restitution most communities continue to wait for land to be transferred to them.

land and the possibility of expropriation of such land. b) High standards of redress and reparation for historic taking of customary land and mineral rights.³⁷¹

Reconciling the provisions of the MPRDA and the *The Bill*, the LRC states that under the MPRDA, if a minister has satisfied himself that there is a public purpose to be satisfied, he can expropriate property and such expropriation will be permissible. The LRC states that their major concern is predicated on the fact that communities that reside on communal land presently suffer discrimination because their ownership rights have, not been recognised and their formal rights are not clear and immediately apparent. As a result, the LRC continues, potential losses and damages that are a direct consequence of an expropriation must be properly evaluated and considered.³⁷²

The LRC notes that section 55 of the MPRDA provides for expropriation by the minister. Section 54 offers compensation, but said compensation is offered to the holder of a mining right for loss of surface use.³⁷³ The contention by the LRC seems to hinge on a lack of meaningful engagement with the holders of informal land rights.

As mentioned earlier, the Bill³⁷⁴ provides extensively for the expropriation of unregistered rights to property. In this regard the Bill is in compliance with the Constitution.³⁷⁵ The LRC's reference to the consent principle seems to denote a situation wherein the government could be persuaded to abandon expropriation should they endeavour such consultations with the community and they refuse. The assertions by the LRC completely miss the intention that underpins an expropriation which is the realisation of a public purpose using individual property. The *The Bill* as it stands cannot face unconstitutionality on the basis that it fails to take account of the consent principle

³⁷¹ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 2.19.

³⁷² *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 3.

³⁷³ *Legal Resources Centre Submission on the The Bill B4 – 2015: Communal land and Informal unregistered rights* par 3. The centre goes further to state that: "But the heads of damages are limited to the productive value of the land and do not take account of the real losses of a community and its dislocation. Already explained above is the fact that mining companies or the state are not mandated to meaningfully negotiate with the communities on communal land".

³⁷⁴ B4D – 2015.

³⁷⁵ *Constitution of the Republic of South Africa, 1996.*

that stems from the acknowledgement of customary law as a distinct source of law not subject to the common law.³⁷⁶

4.5 Conclusions

The Bill is in compliance with the provisions of section 25 of the Constitution. The Bill provides for and in some instances goes above what is required to nurture its constitutionality.³⁷⁷ The workings of the Bill in practice will manifest themselves in due course, but as it is presently formulated, the Bill is not in need of any adjustments. The Bill as it stands is infused with the values, spirit and objects which underpin the Constitution.

The Bill seeks to address the problems that underpin the *Expropriation Act* especially in areas where it fails to meet the requirements of section 25. The Bill provides for compensation and notice of the expropriation of unregistered rights to land. This is one key instance wherein the Bill becomes instrumental towards curing the defects that plague the *Expropriation Act*. To a large extent, the Bill mirrors the provisions of section 25 of the Constitution and is in that regard in line with what section 25 requires.

³⁷⁶ As was alluded to in *Alexkor v Richtersveld Community*.

³⁷⁷ This is especially true of the definition of the public interest which further states the “need to redress the results of past racially discriminatory laws or practices”.

5 Conclusions

5.1 Introduction

The research question this dissertation seeks to answer is to what extent is the Bill consistent with the provisions of section 25 of the Constitution. The Bill captures the sentiments expressed by the property clause. However, this is not on its own enough to avoid subverting the provisions of section 25.

In this chapter, final conclusions regarding the compliance of the Bill to the provisions of section 25 will be made. A summary of all the different chapters so far assessed and the multiple observations that have been drawn will also be made. Given the fact that multiple observations concerning the Bill and the workings of the Constitution have been made conclusions herein will be limited to the most defining features about the Bill, The current expropriation Act and section 25 of the Constitution.

5.2 Conclusions in respect of the Property clause

5.2.1 Introduction

Of significance, as far as the property clause is concerned is the framework within which it is to be understood. The property clause has to be understood within a specific historical context and should not just be understood in isolation of the said context. This historical context must be understood as having resulted in a compromise that birthed the property clause. In essence, the property clause has to be understood as the result of a constant push to assert the protection of existing rights to property and a relentless attempt to instigate land reform and transformation in general to attain the constitutional goal of healing the divisions that characterized the past.

The property clause has as already been seen maintained a creative tension within itself. This tension is manifested by the protection of existing rights to property on the one hand (protective provisions)³⁷⁸ and the need to instigate land reform measures to correct the distortions perpetuated by apartheid on the other hand(reformative

³⁷⁸ *Constitution of the Republic of South Africa*, 1996 section 25(1) – (3).

provisions).³⁷⁹ This tension as evinced in the property clause draws attention to the framework within which the property clause has to be understood. An attempt at interpreting the property clause will never take place outside of the tension therein. The effect of the creative tension is to make it possible to balance out competing interests in the exercise to determine constitutionality or lack thereof of a given scenario.

The courts have made mention of the significance of maintaining this creative tension in the property clause. The courts have held that the beginning and end of a property clause analysis such as that which South Africa embraces in section 25 should be to enhance human dignity, equality and freedom.³⁸⁰ The creative tension in the property clause is not a tension that needs a resolution. On the contrary, the tension as seen in section 25 needs further embracing and should be left open. The need to keep this tension open is for the purposes of furthering discourse and finding better and more informed means of balancing societal and private needs to heal the divisions of the past and create a South Africa informed by human dignity, equality and freedom. For that purpose, the property clause is properly placed to further such a mandate.

5.3 Conclusions in respect of the Expropriation Act

5.3.1 Introduction

The *Expropriation Act* came into existence nineteen years before the emergence of constitutional democracy and consequently the Constitution. Because of this it is not surprising therefore that the *Expropriation Act* is unlikely to capture the essence of the Constitution.³⁸¹ The Constitution requires legislation to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of rights. Failure to reach this threshold then the said legislation to the extent of its inconsistency with the Constitution will be null and void. An interpretation of the *Expropriation Act* reveals that the said Act falls short of promoting the spirit, purport and objects of the Bill of rights in several respects.

³⁷⁹ *Constitution of the Republic of South Africa*, 1996 section 25(5) – (9).

³⁸⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 par 15.

³⁸¹ *Constitution of the Republic of South Africa*, 1996.

5.3.2 *The significance of public interest in the expropriation framework*

In terms of the *Expropriation Act*, an expropriation can only be conducted for a public purpose. The *Expropriation Act* does not make mention of an expropriation being conducted in the public interest, while the Constitution specifically mandates the expropriation to be conducted for a public interest or for a stated public purpose.

Within the broad context of the expropriation framework, an expropriation specifically aimed at transformation, namely, an expropriation for land reform purposes for instance is likely to be frustrated by the lack of specific reference to an expropriation being in the public interest as it is defined within the Constitution. This was referred to in *Bartsch Consult v Mayoral committee of the Maluti-A-liphofung Municipality*.³⁸² The court went on to qualify that assertion by stating however that an expropriation that will benefit a third party could pass the constitutional muster if the said expropriation is conducted under the banner of public interest.

Cognisance should be taken of the fact that in the interpretation of an Act of parliament such as the *Expropriation Act* such interpretation should be conducted with the Constitution in mind. This is to say that the *Expropriation Act* and its interpretation should promote the spirit, purport and objects of the Constitution. This means that the public interest requirement can be read into the *Expropriation Act* where circumstances warrant such a reading in.

However, as per section 39(2) of the Constitution, when interpreting legislation the courts have to promote the spirit, purport and objects of the Bill of rights. Section 39 dictates the fact that the starting point when interpreting legislation should be the legislation itself and not the Constitution. To promote the spirit, purport and objects of the Bill of rights as required by section 39, the primary point of departure should be the Act of parliament and not the Constitution. Any interpretation that mandates the point of departure as being the Act of parliament falls short of meeting the requirements of section 39 and will thus fail to promote the spirit, purport and objects of the Bill of Rights and the Constitution.

³⁸² 2010 ZAFSHC 11 4 (February 2010).

It becomes significant therefore to make specific mention of the public interest requirement in an expropriation legislation such as that which the *The Bill* is intended to become. This will better promote the spirit, purport and objects of the Bill of Rights instead of a mere adjustment that has the potential to distort interpretation by failing to adhere to the need to promote the spirit, purport and objects of the Bill of Rights.

5.4 Conclusions regarding compensation in the Expropriation Act

The *Expropriation Act* fails to align itself with the Constitution when regard is had to the determination of the amount of compensation payable for an expropriation. The fundamental goals and values that underpin the Constitution make it impossible to regard market value compensation as the only yardstick to consider in determining the amount of compensation payable. As earlier stated in terms of section 25(3), market value is but one consideration in the calculation of the amount of compensation payable. The *Expropriation Act* on the other hand regards market value as the only factor to consider in the calculation of the amount of compensation payable.

The rationale that underpins the payment of compensation is the same as it was under the pre-constitutional dispensation.³⁸³ The aim is still to avoid burdening the individual alone with something that will benefit the public. However, the introduction of the Constitution brought with it novel aspirations and infused said aspirations within the South African legal landscape. Unlike the *Expropriation Act* the Constitution mandates a consideration of other factors apart from market value alone in the determination of the amount of compensation payable.

By making the determination of the amount of compensation payable at market value alone, the *Expropriation Act* seems to place a strict emphasis on the individual and recompensing the individual to holistically avoid burdening him or her with something that will benefit the public. This is a stark difference from the requirements that are mandated by the Constitution. The Constitution places emphasis not only on the individual but on the interests of the public to be served as well. The Constitution requires a balancing of the competing interests. In the case of an expropriation these

³⁸³ Du Plessis *PER/PELJ* 1731.

interests would be the interests of the affected owner and the intended reforms that will be brought about by the expropriation. The Constitution requires just and equitable compensation considering, but not limited to the factors enumerated in terms of section 25(3).

5.5 Conclusions regarding unregistered rights in land in the Expropriation Act

Section 22 of the *Expropriation Act* provides for the expropriation of rights registered against a title deed. Any other rights in land are terminated without compensation in the event of an expropriation. This in terms of the *Expropriation Act* leaves owners of unregistered rights in the land without recourse.

This is contrary to the spirit and purport of the Constitution.³⁸⁴ Although there is no positive affirmation of what property is in terms of the Constitution, the latter does refer to property not being limited to land.³⁸⁵ Unregistered rights in land constitute property for purposes of the property clause and their expropriation without compensation flies directly in the face of the Constitution. These unregistered rights in land are likely to manifest in instances such as where a person has been permitted to farm a piece of land as remuneration for his work on the farm.

This assertion is further given credence by the provisions of section 25(6)³⁸⁶ which affirms the need to secure tenure that was rendered insecure by past racially discriminatory practices or laws. The section entitles said individual to tenure that is legally secure or redress that is akin to such security of tenure. The failure to protect the unregistered rights in land renders the *Expropriation Act* unconstitutional. This is because the unregistered rights in land are clearly property for purposes of section 25 of the Constitution.

³⁸⁴ *Constitution of the Republic of South Africa, 1996.*

³⁸⁵ *Constitution of the Republic of South Africa, 1996* section 25(4).

³⁸⁶ *Constitution of the Republic of South Africa, 1996.*

5.6 Conclusions in respect of the Bill and section 25

Given the failure by the *Expropriation Act* to pass constitutional muster, the need for a new expropriation legislation prevails. This expropriation legislation is the Bill which addresses the faults that are endemic in the *Expropriation Act*. The Bill draws from the policy on expropriation that was drafted in November 2007 and addresses the discrepancies that are evident in the *Expropriation Act* and attempts to address same.

5.6.1 Public interest and public purpose in the Bill

The provisions of the Bill to all intents and purposes capture the provisions of the property clause and at least prima facie retain the essence of the property clause and what it demands of an expropriation or a deprivation.

The Bill captures the definition of public interests as propounded within the Constitution. In terms of the Bill, public interest is inclusive of the nation's commitment to land reform and other reforms aimed at granting equitable access to South Africa's natural resources. Further, and very interestingly, public interest is also defined as inclusive of other reforms intended at addressing past racial injustices. This added wording raised concerns about the definition of public interest but most significantly it was contended that the wording differs from the definition granted to public interest in the Constitution.

On the strength of this wording alone it is unlikely that the Bill can be declared unconstitutional. This is because, the added wording further underpins what the Constitution in its entirety propounds, namely, transformation. This contention is further given credence by the provisions of section 25(4) of the Constitution.³⁸⁷ This section extends the ambit of property as not only being limited to land, rather, it extends to all reforms that could be endeavoured to address inequality in South Africa.

By the Bill stating that public interest extends to other reforms that are intended at addressing past racial injustices, it simply cements what the property clause itself denotes. The expropriations that will be conducted under the auspices of the *The Bill* will

³⁸⁷ *Constitution of the Republic of South Africa, 1996.*

be so conducted to give effect to transformation which is what the Constitution itself strives for.

Public purpose under the Bill mirrors that as propounded under the *Expropriation Act*. It has been contended that this definition is too wide and could permit the minister to expropriate for any purpose just as long as it fits under the banner of public purpose as propounded by the Bill. This fear is without substance since the definition granted to public purpose in the Bill mirrors that in the *Expropriation Act*. This fear is not a novel one brought about by the impending enactment of the *The Bill*.

The possibility of the minister expropriating property if it fits under the banner of public purpose has always existed, even in the *Expropriation Act*. Further the entire legislative construct behind section 25 is predicated on balancing the two competing interests. If a minister expropriates property for one purpose and later decides to use it for another different stated purpose (which purpose is still for a public purpose) section 25 will demand a balancing of the individual rights to property and the public purpose so intended to be conducted.

The balancing of these two competing interests could happen by the court ordering that compensation at market value be paid if the initial purpose changes, or as Du Plessis³⁸⁸ suggests, that the owner of the property re-expropriate the property at the price he was initially compensated for. In that case, then a balancing of the two competing interests will have occurred.

5.6.2 Compensation in the Bill

Compensation in terms of the Bill is the same as it persists in the Constitution, namely, it must reflect an equitable balance between the interests of the expropriated owner and the public purpose to be fostered. In this regard, the Bill mirrors the provisions of the Constitution. This is a far cry from the requirements of the *Expropriation Act*, which simply demands that compensation be at market value.

³⁸⁸ Du Plessis *PER/PELJ* 1731.

The Bill removes market value as a central factor to consider in the determination of the amount of compensation payable in the event of an expropriation. This it does by stating that the amount of compensation payable must reflect an equitable balance between the two competing interests. It is in this regard that the Bill will be constitutionally compliant. This draws attention to the possibility of compensation being at less than market value. Some stakeholders have raised reservations about this and state that the possibility of compensation at less than market value is untenable because, financial institutions offer credit based on market value of property and the potential to downgrade market value could lead to an “inadequate management of risk” which could prove detrimental to the economy.

This potential detriment to the economy by a potential downgrade to market value of the property will not be a result of the impending enactment of the Bill. This is because the potential to downgrade market value in the *Expropriation Act* has always existed. This possible downgrade is not brought about by the Bill. It is without substance therefore to attribute this potential economic downturn to the Bill since the potential for said downturn has always existed.

5.6.3 Unregistered rights to property in the Bill

The *Expropriation Act* fails to take cognisance of the existence of unregistered rights to land. The Constitution does not specify exactly what property entails. It simply states that property is not limited to land. However, section 25 (6) mandates secure tenure or similar redress for individuals whose security of tenure was rendered insecure by past racial discriminatory practices. All of this should however be done through an Act of parliament. The Constitution thus takes cognisance of the existence of informal rights to land that are worthy of protection.

The Bill provides extensively for the protection of these unregistered rights to land. This it does by among other things drawing a parallel between the existence of the rights of the expropriated owner and the existence of informal rights to land. The Bill defines a property right as inclusive of the right to occupy or use land as recognised and protected by law, but which is neither registered nor required to be registered. The Bill

thus, in conformity with the Constitution recognises and protects unregistered rights to land.

In the final analysis, the Constitution recognises unregistered rights to land as property for purposes of section 25 of the Constitution. Unregistered rights to property are not protected in terms of the *Expropriation Act*. The Bill however attempts to cure this by recognising the existence of unregistered rights to property and giving creed to said rights by endeavouring protection of these rights.

5.7 Conclusion

The Bill is in compliance with the provisions of section 25 of the Constitution.³⁸⁹ The constitutionality or lack thereof of the Bill is yet to be tested before the courts of law however, as the Bill stands it is in conformity with the requirements of the section 25 of the Constitution.

The fears voiced regarding the enactment of the Bill in its current form can and have been allayed because as has been stated the Bill to all intents and purposes mirrors the provisions of section 25 of the Constitution. The Bill should be viewed as a step in the right direction towards advancing the transformation project as embedded within the terms of the Constitution. This pledge to transform society as embedded within the Constitution becomes even more apparent when the terms of the Bill are tested for compliance against the provisions of the property clause.

This dissertation endeavoured to highlight the Bill's compliance with the provisions of the property clause. It is contended that the Bill is in actual fact in conformity with the property clause and in some instance goes even further than what the provisions of the property clause dictate. This is a very ambitious endeavour that the Bill seeks to achieve, especially in South Africa where the land issue once used to divide, will be a tool used to unite.

³⁸⁹ *Constitution of the Republic of South Africa, 1996.*

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