

The development of a new expropriation framework for South Africa

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English summary

The word expropriation is used in South Africa to describe the process whereby a public authority or institution takes property from a private person for public purposes against payment of compensation.

The current Act regulating expropriations in South Africa is known as the *Expropriation Act* 63 of 1975. However, it has three primary inconsistencies with the *Constitution*. Firstly it predates the *Constitution* – therefore, it does not infuse the values of equality, human dignity and the achievement of freedom. Secondly it is not consistent with comparable modern statutes elsewhere in the world. The last issue is that this *Act* is inconsistent with the *Constitution* in the sense that the *Act* only provides for expropriation for public purposes and the *Constitution* provides for expropriation in the public interest as well as for a public purpose. For these reasons it is crucial to establish a new legislative framework.

In an attempt to rectify the above difficulties, an expropriation policy and a draft Bill were introduced. The primary purpose of the Bill is to harmonise the considerable amount of legislation in South Africa on the subject of expropriation, and to fill the gaps of the current *Act*.

However, the new proposed Bill was referred back to cabinet as it had various difficulties. According to newspaper commentators, one of these reasons was that market value would not be used when determining the amount of compensation. This is not true, as market value is one of the listed factors in section 25(3) of the *Constitution*, and it is provided for in the Bill. Another reason was that the role of the courts will also be restricted in the new Bill. Parties will no longer be able to refer disputes concerning the amount of compensation to court. Once again this is not true, the courts role is only restricted in the sense that it would no be able to determine the amount of compensation as provided for in the *Constitution*, but will only be allowed to approve or decline the amount the

Minister determined. This is one of the aspects that may be debatable constitutionally.

After an in-depth study of the proposed Bill, the author came to the conclusion that there are actually only three aspects that might be unconstitutional namely; the definition of public interest which is to be included that widens the capacity to expropriate; departure from the notice procedure; and the fact that the courts may no longer determine the amount of compensation, but only approve or decline.

Expropriation is one of the most important tools to speed up land reform in South Africa, and it is, therefore, of the utmost importance that the procedure must take place in a fair, equitable and constitutional manner. The purpose of this study will be to identify the aspects which result in expropriations that is not done on this basis, to scrutinize them and to make recommendations to these aspects.

Afrikaanse opsomming

The woord onteiening in Suid-Afrika word gebruik om die proses waardeur 'n openbare entiteit of instansie die grond van 'n private persoon ontnem vir 'n openbare doel teen die betaling van vergoeding te beskryf.

Die Wet wat tans onteienings in Suid-Afrika reguleer, is die *Onteieningswet* 63 van 1975. Hierdie *Wet* het egter drie teenstrydighede met die *Grondwet*, naamlik dat dit die *Grondwet* vooruitdateer wat dus beteken dat dit nie die waardes van gelykheid, menswaardigheid en vryheid nastreef nie. Tweedens kan dit nie vergelyk word met buitelandse onteieningsraamwerke nie. En laastens maak die *Wet* slegs voorsiening vir onteienings in die openbare belang, terwyl die *Grondwet* voorsiening maak vir onteienings in die openbare belang en onteienings vir 'n openbare doel. Weens die teenstrydighede is dit noodsaaklik dat 'n nuwe raamwerk vir Suid-Afrikaanse onteienings geformuleer moet word.

In 'n poging om hierdie teenstrydighede reg te stel, het die kabinet verlede jaar 'n konsep beleid en 'n konsep wet ter tafel geplaas. Die primêre doel van hierdie wetsontwerp sou wees om die magdom wette wat in Suid-Afrika bestaan en onteienings reguleer saam te voeg tot een wet en die leemtes wat die huidige *Wet* voorsoorsaak te vul.

Die nuwe voorgestelde wetsontwerp is egter deur die Parlement terugverwys na die Kabinet, weens die feit dat dit baie probleme en ongelukkigheid veroorsaak het. Volgens populêre pers is van hierdie probleme dat markwaarde nie meer as 'n faktor gebruik sal word om die waarde van die eiendom te bepaal nie. Hierdie uitgangspunt is egter nie korrek nie, aangesien markwaarde een van die faktore is wat in die *Gondwet* gelys word en die Wetsontwerp ook spesifiek vir markwaarde as 'n faktor voorsiening maak. 'n Verdere aspek was dat die rol van die hof ook verander word. Die voorgestelde wet beoog dat ontevrede partye nie meer hof toe kan gaan oor die bedrag vergoeding wat betaalbaar is nie, maar

slegs die hele proses op hersiening kan neem. Hierdie uitgangspunt is egter ook nie korrek nie, die rol van die hof word slegs beperk deurdat die hof nie meer die bedrag vergoeding soos voor voorsiening gemaak is in die *Grondwet* mag bepaal nie, maar slegs die bedrag soos vasgestel deur die Minister kan goedkeur of afkeur.

Tydens die studie het die outeur tot die gevolgtreking gekom dat daar inderwaarheid slegs drie aspekte is wat tot ongrondwetlikheid van die Wetsontwerp kan lei naamlik; die toevoeging van die term openbare belang wat die onteieningsbevoegdheid baie wyd maak, afwyking van die kennisgewingsprosedure en die feit dat die hof slegs die bedrag vergoeding mag goedkeur of afkeur.

Eiendomsonteiening is 'n belangrike manier van grondhervorming in Suid Afrika, en daarom is dit noodsaaklik dat die proses op 'n regverdige, billike en grondwetlike metode moet plaasvind. Tydens die studie sal daar gepoog word om aspekte wat daartoe lei dat onteienings nie op hierdie basis plaasvind te identifiseer, te ontleed en aanbevelings daaromtrent te maak.

Keywords/sleutelwoorde

English

Administrative action - appropriation – capacity to expropriate - compensation - constructive expropriation – deprivation - decision – draft Bill - draft policy - expropriation - market value - notice of expropriation - passing of ownership - property - public purpose – public interest - role of the courts - section 25

Afrikaans

Administratiewe proses - toe-eiening - bevoegdheid om te onteien - vergoeding - konstruktiewe onteiening - ontneming - besluit - onteiening - konsep Wet -konsep beleid - markwaarde - kennisgewing om te onteien - oordrag van eiendom - eiendom - openbare doeleindes – openbare belang - rol van die hof - artikel 25

List of abbreviations

<i>Act</i>	:	The <i>Expropriation Act</i> 63 of 1975
<i>Constitution</i>	:	The <i>Constitution of the Republic of South Africa</i> 108 of 1996
CILSA	:	Comparative and international Law Journal of Southern Africa
ELACP	:	The <i>Expropriation of lands and Arbitration Clauses Proclamation</i> 5 of 1902
Harv LR	:	Harvard Law Review
LAWSA	:	<i>Law of South Africa</i>
LCCA	:	The <i>Land Clauses Consolidation Act</i> of 1845
LCCL	:	The <i>Lands Clauses Consolidation Law</i> 16 of 1872
LQR	:	<i>Law Quarterly Review</i>
SAJHR	:	<i>South African Journal of Human Rights</i>
SALJ	:	<i>South African Law Journal</i>
SAPL/PR	:	<i>SA Public Law/Publiekreg</i>
Stell LR	:	<i>Stellenbosch Law Review</i>
THRHR	:	<i>Tydsrif vir die Hedendaagse Romeins-Hollandse Reg</i>
TRW	:	<i>Tydskrif vir Regswetenskap</i>
TSAR	:	<i>Tydskrif vi die Suid-Afrikaanse reg</i>

Chapter 1

Introduction

1.1 Background

Expropriation is as old as the Bible itself. In fact, one of the instances of expropriation is referred to in 1 Kings 21, relating the history of Naboth and the vineyard. King Ahab wanted Naboth's vineyard as it was next to his house. He approached Naboth and asked him for his vineyard in return for a better one, or against payment. Naboth declined, as the vineyard has been in his family for generations. The king's wife, Jezebel, was not in favour of this and had Naboth murdered so that the king could take the vineyard.¹ However, today it is a constitutional imperative that compensation is paid for any form of expropriation in order for the end to meet the purpose.

In South African law the word expropriation is used to describe the process whereby a public authority or institution takes property for public purposes in return for payment of compensation.² Thus it can be said that expropriation occurs when the ownership of a thing, movable or immovable, vests in the expropriator and the previous owner loses his ownership without his consent against the payment of compensation.³ Expropriation is often described as the compulsory acquisition of private property through state power and, therefore, constitutes a legitimate taking.⁴ Expropriation is an important method to

¹ *Die Bybel* 1 Konings 21.

² Miller and Pope *Land Title* 301.

³ Southwood *Compulsory Acquisition* 14-15; Gildenhuys *Onteieningsreg* 8; *LAWSA* 3; Badenhorst 1989 *THRHR* 130 where it is stated that expropriation is the ending or limitation of a right through the state; *Beckenstrater v Sand River irrigation Board* 1964 4 SA 510 (T) 515 A-C; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Minister of Defence v Commercial Properties Ltd and Others* 1955 3 SA 324 (N) 327G and *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) 314.

⁴ Hopkins and Hofmeyr 2003 *SALJ* 51; Van der Walt *Constitutional Property* 182.

expedite land reform in South Africa whereby land is distributed more equally and in some cases restored to its rightful owner.

1.2 Purpose of the study

The *Expropriation Act* 63 of 1975 (hereafter referred to as the *Act*) has been applied for more than three decades. It is important to recognize and appreciate that, since the commencement of the *Constitution of the Republic of South Africa*,⁵ (hereafter referred to as the *Constitution*), all laws need to comply with the *Constitution* to reach fundamental goals and values. Whenever property is to be expropriated it is the *Constitution* and not the *Act* that sets the principles, values and standards.⁶

After promulgation of the *Constitution*, three inconsistencies between the *Act* and the *Constitution* surfaced. These inconsistencies are, firstly, that the *Act* predates the *Constitution*, secondly that the *Act* is inconsistent with comparable modern statutes elsewhere in the world and thirdly, that the *Act* is inconsistent with the *Constitution* in the sense that the *Act* only provides for expropriation for public purposes and the *Constitution* provides for expropriation in the public interest as well as for public purposes.⁷ For these reasons it is crucial to establish a new legislative framework.

The focus of this research is whether the present *Act* complies with the constitutional requirements as set out in section 25 of the *Constitution*, infused with the values of equality, human dignity and freedom and whether the draft Bill⁸ is constitutionally sound. The criticism against the Bill, which led to the withdrawal thereof in Parliament, will also be examined to determine the constitutionality of the Bill.

⁵ The *Constitution of the Republic of South Africa* 1996.

⁶ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par 26.

⁷ GN 1654 GG 30468 of 13 November 2007 par 23.

⁸ Bill 16 of 2008.

1.3 Framework of the study

Expropriation has been a point of discussion for many centuries, which has led to many debates and the drafting of many different legislative measures regulating expropriations and takings through state power. To understand the concept of expropriation it is important to know where and how expropriation became part of the South African law. Thus a short background of the history of expropriation and the application of different expropriation laws in different provinces, which led to the formulation of one uniform expropriation act, will be given in Chapter 2.

Since the current *Act* was promulgated prior to the drafting of the *Constitution*,⁹ it is surprising that inconsistencies exist which need urgent attention as the current *Act* in its present form does not fulfill the fundamental values and guarantees of the *Constitution*. The aim of Chapter 3 will be to analyse the *Act* in its current form and to highlight the problems/inconsistencies it brings about. Important sections in the *Act*, which have to be amended or replaced by a new Bill, will be discussed in detail to indicate the shortfall of a particular section and its consequences. Important aspects which will change in the future, as it does not promote the constitutional values and delays land reform, and will enjoy attention in this chapter, are the capacity of the expropriation authority to expropriate, the notice of the expropriation (in the future a requirement will be added that the expropriatee will have to be informed of the decision to expropriate before the actual expropriation takes place), the requirement of appropriation, and compensation in terms of the *Act*. Compensation is one of the most important aspects which will most probably be changed in the future. Various aspects of compensation will be discussed, such as the role of the courts, market value and the willing buyer and willing seller principle, as these concepts will no longer be applicable and applied as known, as soon as a new Bill is promulgated. Although the proposed Bill was withdrawn from Parliament, it will still be discussed for purposes of this dissertation, as it was only the draft Bill that was

⁹ The *Constitution of the Republic of South Africa* of 1996.

withdrawn and the Draft Policy still stands. The draft Bill is most likely to feature again after the elections in April 2009 in a refined form and, therefore, a discussion will follow in following chapters.

The terms expropriation, property and *Constitution* are three words which are interrelated and goes hand in hand. Because these three terms are so important and interrelated with each other, the focus of Chapter 4 will be the constitutional property clause in terms of section 25¹⁰ and the scope thereof and the difference between expropriations, deprivations and constructive expropriation. The importance of the inclusion of the terms public purpose and public interest in the draft Bill will also be discussed in Chapter 4, as this is also one of the reasons for the drafting of a new Bill.

As expropriation takes place through state authority and the decision to expropriate is taken by an organ of state, it is seen as an administrative action. Expropriation as an administrative act and the term organ of state will also receive attention in Chapter 5.

The draft Bill¹¹ caused great uproar, not only in the public sphere, but also in Parliament. In Chapter 6 the expropriation Policy will be discussed and some of the questions which caused the uproar regarding the draft Bill will be analysed. The position and capacity of the Minister to determine the amount of compensation in collaboration with the advisory board, and the payment thereof will be discussed. Whether the draft Bill is unconstitutional in terms of section 34 of the *Constitution* by restricting court intervention in the expropriation process will also be discussed as one of the reasons for the withdrawal of the new Bill.

Finally the author's opinion, conclusion and recommendations will be stated and final remarks concerning expropriation and the draft Bill will be dealt with in

¹⁰ The *Constitution of the Republic of South Africa* of 1996.

¹¹ Bill 16 of 2008

Chapter 7. Whether the current *Act* should just be amended, or if the draft Bill should just be revised in order to make it constitutionally compatible will be also discussed in Chapter 7.

Chapter 2

The history and development of expropriation

2.1 Introduction

For one to understand expropriation in context, it is necessary to know where expropriation originates from, how it developed over time and became a part of the South African law over the years. The aim of this chapter is to give a brief overview on the history of expropriation, the development thereof in the different provinces of South Africa over the years and how it led to one uniform statute, which is still applicable and known as the *Expropriation Act* 63 of 1957 (hereafter referred to as the *Act*).

2.2 Historical background:

From the earliest of times the right of expropriation has been a necessary incident of sovereign power.¹ The issue regarding property, especially access to land, has been in the centre of debate for many centuries. Land issues in South Africa can be traced back as far as 1659, when disputes regarding land started between Jan van Riebeeck and the Khoisan. Autshumao, leader of the Khoi, and Van Riebeeck started with peace negotiations when Van Riebeeck told him that there was not enough grazing land for both the colonies and the Khoi-Khoi.² Autshumao then raised the important question: "If the country is too small, who has the greater right; the true owner or the foreign intruder?"³ Van Riebeeck replied "We have won this country in a just manner through defensive war, and it is our intention to keep it."⁴

¹ Jacobs *Law of Expropriation* 2.

² GN 1654 GG 30468 of 13 November 2007 par 1 and 2.

³ GN 1654 GG 30468 of 13 November 2007 par 2.

⁴ GN 1654 GG 30468 of 13 November 2007 par 3.

It was evident that law regulating expropriation was necessary. Many acts have been promulgated and amended but none of them were sufficient. Although not conclusive, but for purposes of this dissertation, these acts are: the *Land's Clauses Consolidation Act* of 1845; the *Lands and Arbitration Clauses Act* 6 of 1882; the *Lands Clauses Consolidation Law* 16 of 1872; the *Expropriation of Lands and Arbitration Clauses Proclamation* 5 of 1902; the *Codification of Statutes of the Republic of the Orange Free State* 16 of 1891 and the *Expropriation Act* 55 of 1965. These acts form the centre point of discussion of this chapter.

2.3 Common law

2.3.1 Roman law

In the early years of Roman law there was no need for expropriation. Although large tracts of land were not open for private ownership, they were as *ager publicas* accessible to any member of the public. Furthermore, public works could be constructed on such land.⁵ Although little reference was made to expropriation, the *Codices*⁶ of Justinianus and Theodosius⁷ did mention cases where private owners could be compelled to hand over their land if the state needed it for public baths, defensive works or irrigation furrows.⁸ Frontinus wrote that materials which were taken from private landowners for public works had to be paid for, and the price had to be *virī boni aritratu aestimata*.⁹ The principle that the state should pay compensation when it interfered with private rights was confirmed in later writings.¹⁰ Through the development of expropriation in the

⁵ Gildenhuis *Onteieningsreg* 29.
⁶ C 8.11.18. C Th 15.1.50. C Th 15.2.1.
⁷ Th 15.1.50. C Th 15.2.1.
⁸ Gildenhuis *Onteieningsreg* 30.
⁹ Matthews 1920-1921 34 *Harv LR* 232.
¹⁰ Matthews 1920-1921 34 *Harv LR* 232.

Roman law it became evident that the requirement of compensation was not left untouched.

In Constantinople it was possible to acquire private buildings to establish schools against a *competens pretium*.¹¹ However, the *pretium* differs from term value as it is known today, as it was possible to mean price, cost or value. It could be that the principle of a willing buyer and willing seller stems from the Roman law, as they used the term *quanti venire protests* (what the property could be sold for) or the *quanti vendere potest* (what the owner could sell the property for) and *verum pretium* (the actual price) and in the absence of a buyer the price was regarded as *quanti venire protest*.¹²

Expropriation, as seen above, was unnecessary under the feudal system, and although indications exist that the state had power to expropriate, no rules or system concerning expropriation could be found.¹³ However, it is evident that the requirement of compensation was recorded in Roman law, and it is from this line of development that the requirements for a valid expropriation were laid down.¹⁴

Many years after Roman law was established, John W Robbins stated that:

Whoever needs property ought to possess it. Need makes another's goods one's own. Need is the ultimate and only moral title to property. Neither possession, nor creation, nor production, nor gift, nor inheritance, nor devine commandment (with the exception of Roman Church-Statute [i]) grants title to property that is immune to the prior claim of need.¹⁵

¹¹ Matthews 1920-1921 34 *Harv LR* 229; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 20.

¹² Matthews 1920-1921 34 *Harv LR* 238-240; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 21.

¹³ LAWSA 10 4; Jones 1929 *Quaterly Review* 512, 525.

¹⁴ Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 20-21.

¹⁵ Robbins *Ecclesiastical Megalomania* 1999 32.

by them in respect of the land. The notice must also state the particulars of the land required. Furthermore, this Act made provision for compensation based on the amount that the hypothetical seller would have or could have received if his land was sold in the open market – a keystone element of expropriation in South Africa.²⁷

Since the 1880's, the courts played a significant role in disputes regarding expropriation and compensation thereof. As the role of the courts is one of the aspects that will also be discussed in Chapters 3 and 5, reference needs to be made to this aspect in relation to the *LCCA*. In section 21, the provision is made that in the case where no agreement can be reached between the interested parties and the promoters, and the compensation claimed does not exceed fifty pounds, the dispute shall be settled by two justices. Section 64 also allows disputes regarding compensation to be referred to arbitration. One can, therefore conclude that if a party was dissatisfied with the amount of compensation, he was given the opportunity to have questions answered.

Expropriation provisions were enacted when the state required powers for the acquisition of land and the rights over such land in order to provide for public services and amenities.²⁸ Therefore, one finds legislation in the various provinces empowering certain bodies to expropriate land.

2.5 Early South African law

2.5.1 Cape Province:

The first expropriation transactions in South Africa were mainly for the purpose of roads and railways,²⁹ and the first general expropriation act was the *Lands and Arbitration Clauses Act* 6 of 1882 which prescribed procedures which had to be

²⁷ LAWSA 10 5. This hypothesis will be discussed in chapter 3.

²⁸ Jacobs *Law of Expropriation* 3.

²⁹ LAWSA 10 5; Gildenhuys *Onteieningsreg* 39; examples of this can be found in *Act* 9 of 1858 and *Act* 16 of 1833.

2.3.2 Roman-Dutch law

In the Roman-Dutch law expropriation was also well known, but could only occur when it was really necessary and it had to be accompanied by payment of just compensation, which was seen as a moral duty of the state.¹⁶

Compensation was also recognized in the Roman-Dutch law, when Grotius wrote that if the state takes property, the first requirement is public utility and if it is possible, compensation should be paid.¹⁷

The Roman-Dutch law arrived with Van Riebeeck in the Cape in 1652. In 1806 with the British settlement in the Cape, the Roman-Dutch law remained in force, but the English law modified and supplemented it.¹⁸

2.4 English law

It can be said that the history of expropriation law in South Africa is based on English law. Legislation concerning expropriation in England originated from the Great Charter in 1215, which protected individual liberty and freehold.¹⁹ The first statute to regulate compulsory acquisition for public purposes was enacted by parliament in 1541.²⁰ After this, many other legislations followed, regulating compulsory acquisition mainly for transportation purposes and the building of canals.²¹

¹⁶ LAWSA 10 4; Van Bijkershoek *Verhandelingen van Staatzaken* 215.

¹⁷ Du Plessis *Introduction to Law* 49; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 22; Mann 1959 75 LQR 188, 202.

¹⁸ Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 18.

¹⁹ LAWSA 10 5; Mann 1959 LQR 194; McNulty 1912 *Yale Law Review* 639, 643.

²⁰ Mann 75 LQR 188, 194.

²¹ Mann 75 LQR 188, 194.

The idea that an expropriation amounts to a forced sale was accepted in England and expropriation was, therefore, seen as a compulsory sale of land.²² Statutes served as an agreement between the parties, and by serving a notice of expropriation, a common law vendor/purchaser relationship was created. The state's capacity to expropriate was subject to the payment of just compensation, which served as a kind of replacement price. This idea of a forced sale was rejected by British courts, but followed in South Africa, which was later rejected by case law.²³

Land tenure rights was highly regarded in England and could only be violated by statute.²⁴ The act regulating expropriation in England at the time of reception of the principle of expropriation into South African law was the *Land's Clauses Consolidation Act* of 1845 (hereafter *LCCA*). This is also the Act that the South African as well as other commonwealth countries' expropriation legislation were modeled upon.²⁵

Sections 18 to 20 of the *LCCA* provides for the service of a notice of expropriation. As the notice of intention to expropriate in terms of the Expropriation Act 63 of 1975 will be discussed in Chapter 3, section 18 will only be referred to in order to compare the two sections.

Section 18 provides that when the promoters of the undertaking²⁶ require to purchase or take away any land, they shall give notice thereof to all the parties in such lands or to the parties enabled by this Act to sell, convey or release the land. The section further states that this notice will demand from the interested parties the particulars of their estate, their interest in the land and claims made

²² LAWSA 10 5. Gildenhuys 1977 TSAR 1.

²³ Gildenhuys 1977 TSAR 1; *Kirkness v John Hudson & Co* 1955 AC (Eng) 709; *Cullinan Properties Ltd v Transvaal Board for the Development of Peri-Urban Areas* 1978 1 SA 282 (T) quoted from Du Plessis "Compensation for Expropriation under the Constitution" (LLD Thesis Stellenbosch University 2009) 23.

²⁴ LAWSA 10 4.

²⁵ LAWSA 10 5; Badenhorst 1998 *De Jure* 252.

²⁶ Today known as the expropriator.

followed when expropriation took place in terms of other acts.³⁰ Although this is a very short Act, consisting of only 5 sections, it provided for notices to be served and the settling of disputes regarding compensation:

1(2) If the parties, respectively, shall not agree upon the purchase money, hire or other recompense to be respectively given and accepted, the minister, corporate body, or person acting therein as aforesaid, shall cause to be served upon the owner of the land or materials required to be taken or used a written notice, offering as recompense or compensation, whatever sum shall be deemed sufficient, and requiring such owner to state in writing within a limited time to be specified in such notice nor being less than fourteen days after the date of service thereof, whether he is willing to accept the sum offered or not.

(3) If such owner should however refuse to accept the sum offered, or neglect to reply to such notice within the time specified therein, the matter in difference shall be determined by arbitration under the provision of this Act.³¹

Although this Act provided for the procedure to be followed when expropriation took place in terms of other legislation, no principles of how the compensation should be determined was laid down, and any disputes concerning the amount of compensation received were to be referred to arbitration.³² This is the first reference to arbitrations that can be found in the South African law.

2.5.2 Natal:

Natal had its own expropriation act, namely the *Lands Clauses Consolidation Law* 16 of 1872,³³ (hereafter referred to as the *LCCL*) which was modeled on the English *Land's Clauses Consolidation Act* of 1845.³⁴

Just as in the English *LCCA*, section 15 of the *LCCL* provided for a notice to be served notifying the owners or interested parties of the land. The wording of this section is very similar to that of section 18 of the *LCCA*. If disputes arose concerning the amount of compensation and the amount was less than £100, it

³⁰ LAWSA 10 5; Gildenhuys *Onteieningsreg* 39-40; Van der Merwe *Sakereg* 291.

³¹ S 1(2) and (3) of *The Lands and Arbitrations Clauses Act* 6 of 1882.

³² LAWSA 10 5, Gildenhuys *Onteieningsreg* 40.

³³ Gildenhuys *Onteieningsreg* 40.

³⁴ LAWSA 10 6.

was referred to the Magistrate's Court³⁵ and if the amount exceeded £100 it was referred to the High Court or to arbitration,³⁶ depending upon the choice of the owner.³⁷

Section 40 and 41 provided for the method of how a surveyor should go about in determining the amount of compensation to be paid. Section 41 of this *LCCL* provided for compensation under three categories, namely, land value, severance and injurious affection.³⁸

Section 42 provided for dissatisfied parties to refer the matter to arbitration before applying to the Court:

... if such owner or party shall be dissatisfied with such valuation, it shall be lawful for him, before he shall have applied to the Court for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the company, to require the question of such compensation to be admitted to arbitration.³⁹

During the arbitration process the arbitrators had to answer the question whether the amount deposited was a sufficient sum and what further sum ought to be paid.⁴⁰ It is important to take note of section 65 of the *LCCL*, which provided for compensation payable to all affected parties and not only to the owner of the expropriated property.⁴¹ This provision was incorporated in subsequent legislation, even in the *Expropriation Act* 63 of 1975.⁴²

2.5.3 *Transvaal*:

Although there was no general act regulating expropriation, expropriation was sometimes contained in other acts. Usually expropriations were effected by

³⁵ S 19.

³⁶ S 20.

³⁷ *Gildenhuys Onteieningsreg* 41; *LAWSA* 10 6 .

³⁸ *LAWSA* 10 6; *Gildenhuys Onteieningsreg* 40.

³⁹ S 42.

⁴⁰ S 43.

⁴¹ *Gildenhuys Onteieningsreg* 40; *LAWSA* 10 6.

⁴² *Gildenhuys Onteieningsreg* 40.

resolutions of the Volksraad.⁴³ In 1902 the *Expropriation of Lands and Arbitration Clauses Proclamation* 5 of 1902, (hereafter referred to as the *ELACP*), which was based on the *Natal Lands Clauses Consolidation Law* 16 of 1872, was proclaimed.⁴⁴

The *ELACP* was one of the first expropriation acts which provided for expropriation for a public purpose.⁴⁵

The Governor may, for public purpose, acquire by voluntary or compulsory sale any land the property of private persons situated within this Colony.⁴⁶

The *ELACP* provided that if the Governor required land for a public purpose, notice must be given to the owners thereof, demanding the particulars of their interest and claims made in respect thereof. The notice also contained the particulars of the land so required and the compensation to be made for any damages that may be sustained.⁴⁷

Where no agreement occurred as to the amount of compensation between the secretary and the owner or interested parties, and the amount claimed did not exceed one hundred pounds, the dispute was settled by the resident magistrate of the district.⁴⁸ However, if the amount of compensation exceeded one hundred pounds, the matter could be settled by arbitration, and if the arbitrators failed to settle the matter within two months, the dispute regarding the amount of compensation was settled in the Supreme Court.⁴⁹

Section 48, was very similar to section 65 of the *LCCL*, it provided that all owners, occupiers and all other parties interested in any lands to be taken or

⁴³ LAWSA 10 6; Gildenhuys *Ontelieningsreg* 41.

⁴⁴ LAWSA 10 6, Gildenhuys *Ontelieningsreg* 41.

⁴⁵ Public purpose will be discussed in chapter 4.

⁴⁶ S 2.

⁴⁷ S 6.

⁴⁸ S 10.

⁴⁹ S 11.

used, or if they were injuriously affected by construction of any works, full compensation had to be paid to such persons.

Other important legislation regarding expropriation followed, namely, the *Johannesburg Insanitary Area Expropriation Ordinance* 19 of 1903, the *Municipalities Powers of Expropriation Ordinance* 64 of 1903 and the *Railway Expropriation of Lands Ordinance* 20 of 1903.⁵⁰

2.5.4 Orange Free State:

The Orange Free State had an exceptional comprehensive and modern expropriation Act, namely the *Codification of Statutes of the Republic of the Orange Free State* 16 of 1891. This Act provided for the process and the assessment of compensation for expropriation.⁵¹ In chapter LXXV, *Over de onteigening van eigendom ten algemeenen nutte*, it was stated in section 1 as follows:

De gevallen waarin onteigening ten algemeene nutte met vergoeding aan den eigeenaar kan bevolen worden zijn; de aanleg, het herstel, de verbetering, de uitbreiding of de vergroting.⁵²

It is thus clear that expropriation could only take place in instances where it would be useful for repair, improvement or expansion.

Section 8 contained the provisions for compensation and reads as follows:

De uitvoerende raad zal trachten minnelijk met belanghebbenden overeen te komen omtrent den prijs der tegen vergoeding te onteiegenen gronden, tot welke einde een of meer personen gemachtigd, indien vereischt, zich tot de belanghebbenden zullen bevegen, ten einde daaromtrent te onderhandelen.⁵³

⁵⁰ Gildenhuis *Ontheieningsreg* 42; LAWSA 10 6.

⁵¹ LAWSA 10 6; Gildenhuis *Ontheieningsreg* 42.

⁵² Wetboek van den Oranje Vrijstaat 1891 454. Cases where the expropriation took place for a public purpose act accompanied by compensation, cases such as installation, repair, improvements and expansion. (Own translation).

⁵³ Wetboek van den Oranje Vrijstaat 1891 455. The executive committee had to agree with the interested party regarding the amount of compensation to be paid of the expropriated land. (Own translation).

Before land could be expropriated the matter had to be investigated by a commission. Compensation was payable to all interested parties and not just to the owner. Any disagreement between the parties regarding compensation was referred to the Supreme Court.⁵⁴ However, the Codification of Statutes of the Republic of the Orange Free State was repealed by Act 1 of 1899.⁵⁵ In 1903 the *Railway Expropriation of Lands Ordinance*⁵⁶ was brought in existence which authorised the expropriation of land for railway purposes. A general expropriation act, *Expropriation of Lands and Arbitration Clauses Ordinance*⁵⁷ followed which was based on British laws and made no provision for the basis on which compensation should be determined.⁵⁸

2.5.5 South Africa 1910-1993:

After South Africa became a union in 1910, the legislature added more legislation to the existing ones, rather than consolidating those that already existed,⁵⁹ for example the Ordinance 19 of 1951 of the Cape Province, the Natal Ordinance 19 of 1945 and many more.⁶⁰

The first consolidated and comprehensive act to be passed by parliament was the *Expropriation Act* 55 of 1965.⁶¹ This Act provided for expropriation of land and other property for public purposes and the amendment of fourteen acts dating from 1936 up to 1962.

Section 2⁶² of this Act empowered the Minister to expropriate or take the right to use temporarily any property for a public purpose, subject to compensation.

⁵⁴ LAWSA 10 6; Gildenhuis *Onteieningsreg* 42.

⁵⁵ Gildenhuis *Onteieningsreg* 43.

⁵⁶ 46 of 1903.

⁵⁷ 11 of 1905.

⁵⁸ Gildenhuis *Onteieningsreg* 43.

⁵⁹ LAWSA 10 7; Gildenhuis *Onteieningsreg* 43.

⁶⁰ Gildenhuis *Onteieningsreg* 43.

⁶¹ LAWSA 10 7; Jacobs *Law of Expropriation* 4; Van der Merwe *Sakereg* 291.

⁶² *Expropriation Act* 55 of 1965.

Section 4⁶³ dealt with the notice of intention to expropriate, and provided that if the Minister had decided to expropriate, a notice of such intention must be served upon the owner of the property. The notice had to contain a clear and full description of the property, it had to state the date on which the expropriation would take effect, or the date as from which it will be used temporarily and the period of such use, and it also had to state the amount of compensation offered for the property.

Section 7⁶⁴ and section 8⁶⁵ dealt with compensation and disputes regarding the amount of compensation. Section 7 provided that, in the absence of an agreement as to the amount of compensation payable, the magistrate's court of the district in which the property was situated, would determine the amount on application of any party interested as long as the amount offered, or if no amount was offered, was less than three thousand rand (R3000,00). If the amount was R3000,00 or more, a provisional or local division of the Supreme Court was to determine the amount of compensation.

As it was this Act which was amended and later replaced with the current Act, the basis for the determination of compensation is very similar. The Act provided that the amount of compensation payable would not exceed the aggregate of the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer, and an amount to make good any actual financial loss or inconvenience caused by the expropriation.⁶⁶

It is clear from this Act that the willing seller and willing buyer concept has been applied as the most correct way of determining the amount of compensation payable for many years. This concept was also included in the current Act, which

⁶³ *Expropriation Act 55 of 1965.*

⁶⁴ *Expropriation Act 55 of 1965.*

⁶⁵ *Expropriation Act 55 of 1965.*

⁶⁶ S 8.

will be discussed in Chapter 3 and again in Chapter 5, as this concept will be done away with in the proposed Bill.

However, this Act was amended several years later by the *Expropriation Amendment Act* 53 of 1971, which was also repealed and replaced with the *Expropriation Act* 63 of 1975 that came into operation on 1 January 1977. This Act is currently applied in South Africa and was amended in 1977, 1978 and 1980.⁶⁷ The aim of this Act was to provide for a uniform way of expropriation procedures and methods to calculate compensation.⁶⁸ The Act must be regarded as the primary source of the South African expropriation law because of the fact that there is no common law of expropriation in South Africa

2.6 Conclusion

It is clear from the discussion that the *LCCA* was the basis on which the South African expropriation law was modeled, as there are many similarities between certain sections. These similarities can be summarized as follows:

- (i) Section 18 of the *LCCA* provided for the notice of expropriation, which was basically copied into section 15 of the *LCCL* of Natal,⁶⁹ and once again in the *ELACP* of Transvaal.⁷⁰ Section 21 of the *LCCA* provided that if no agreement could be reached regarding the amount of compensation, it could be referred to two judges, and section 64 provided for arbitration, whilst section 42 of the *LCCL* provided for arbitration in cases of disputes and section 10 and 11 of the *ELACP* correlated with these sections. Section 48 of the *ELACP* also originated from section 65 of the *LCCL* which provided that all parties interested should be notified of the expropriation. The basis of the

⁶⁷ Jacobs *Law of Expropriation* ix.

⁶⁸ Van der Merwe *Sakereg* 292.

⁶⁹ 27 years after the existence of the *LCCA*.

⁷⁰ 30 years after the existence of the *LCCL*.

provisions remained, but every time it was drafted into another act, it was refined as an attempt to prevent problems.

- (ii) The *ELACP* was probably the first piece of legislation to recognise the need for the requirement that expropriation should take place for a public purpose. This was contained in section 2, and adopted by the Orange Free State in section 1 of the *Over de onteigening van eiendom ten algemeenen nutte*. Once again the term public purpose was adopted in section 2 of the *Expropriation Act* 55 of 1965. The current *Act* also provides for expropriation for a public purpose.⁷¹

It is also clear how insufficiencies were identified over the years and the many attempts to rectify these insufficiencies. For example, the requirement that expropriation should take place for a public purpose which was adopted by evolving legislation, and the necessity to add the requirement that expropriation should also be in the public interest in legislation authorizing expropriation, in order to make it consistent with the *Constitution*.⁷²

Although so much effort and attention have been going into the drafting of expropriation legislation over the years, with frequent amendments and the promulgation of new acts, not even the current *Act*⁷³ is satisfying and fair to all,⁷⁴ and the drafting of a new act is underway.⁷⁵ However, in order to draft a new expropriation act, which will be widely acceptable while expediting land reform, it is important to identify and scrutinize exactly what sections and provisions in the current *Act* makes it inconsistent with the *Constitution* and difficult to fulfill the fundamental values of equality, human dignity and freedom.

⁷¹ This will be discussed in Chapter 4.

⁷² The *Constitution of the Republic of South Africa* 1996.

⁷³ *Expropriation Act* 63 of 1975.

⁷⁴ Jacobs *Law of Expropriation* ix.

⁷⁵ This will be discussed in Chapter 5.

In the next chapter the current *Act* will be examined in order to determine exactly what it is that makes the *Act* insufficient and inconsistent with the *Constitution*. Various aspects of the *Act*, which will change rapidly in the near future or which will be scrapped in a new Bill will be identified and discussed. The purpose of this examination of the *Act* is to indicate the gaps that still exist regarding expropriation laws in South Africa, despite the many attempts of amending previous acts.

Chapter 3

The current *Expropriation Act* 63 of 1975

3.1 Introduction

This power to override private rights appears to be in many respects analogous to a form of expropriation.¹

Acquisition of property in South Africa takes place in one of two ways, original or derivative.² Derivative acquisition can be described as the result of a bilateral transaction, as the acquirer acquires his title from the predecessor, and his title will thus be subject to any infirmities in the predecessor's title.³ Original acquisition is constituted by a unilateral act or series of such acts by the person who acquires it.⁴ With the original method of acquisition, the title of the acquirer is not derived from any predecessor and, therefore, not affected by infirmities in the title of a predecessor.⁵ Original acquisition includes appropriation, prescription, confiscation and expropriation.⁶ In *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*⁷ it was stated in the obiter that the rigid distinction between the two methods of acquisition of property might be questionable, in spite of its usefulness for the purposes of basic classification and explanation in textbooks. Expropriation is an original method of acquiring ownership⁸ and the title acquired by the expropriator is independent of the title of the expropriatee

¹ *Pretoria City Council v Blom* 1966 2 SA 139 (T) 144A.

² Van der Merwe *Sakereg* 216; Hijmans *Romeinsch Zakenrecht* 149; Silberberg and Schoeman's *Law of Property* 71.

³ Silberberg and Schoeman's *Law of Property* 72.

⁴ Silberberg and Schoeman's *Law of Property* 71.

⁵ Silberberg and Schoeman's *Law of Property* 71-72.

⁶ Van der Merwe *Sakereg* 215; Silberberg and Schoeman's *Law of Property* 72.

⁷ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 2 SA 986 (T) 1000E-F.

⁸ Gildenhuys *Onteieningsreg* 119; Van der Merwe *Sakereg* 294-295.

and any defects which may have occurred.⁹ It could be said that the expropriation of property amounts to the original acquisition of a public or private law patrimonial right without the consent of the holder thereof.¹⁰

As expropriation is a topic that is receiving much attention at present, the aim of this chapter will be to define expropriation as it is applied in South African law by scrutinizing the *Expropriation Act* 63 of 1975, (hereafter referred to as the *Act*), which is in current use.

3.2 The meaning of expropriation

When the word expropriation comes to mind, one's attention is immediately drawn to a taking of immovable property for a public purpose, whether it is for land reform, redistribution or restitution, or just simply to rectify the historical imbalance in land distribution. This is not always the correct way to go about it. Therefore, it is necessary to determine the true purpose of expropriation, the consequences thereof and what the correct procedure for expropriations is.

The word 'expropriation' is used in South African law to describe the process whereby a public authority or institution takes property for public purposes without consent being required in return for the payment or compensation.¹¹

⁹ Van der Merwe *Sakereg* 294; Silberberg and Schoeman's *Law of Property* 559; Jacobs *Law of Expropriation* 1-2; Carey Miller *Acquisition and Protection* 107; Gildenhuys *Onteieningsreg* 8,11,119; Olivier, Pienaar and Van der Walt *Statutêre Sakereg* 1; Badenhorst 1989 *THRHR* 136; *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) 315G-H; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515A and *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 423.

¹⁰ Badenhorst 1998 *De Jure* 251-270.

¹¹ *LAWSA* 10 3; Southwood *Compulsory Acquisition* 14-15; Chaskalson *et al Constitutional Law* 31-15. Gildenhuys *Onteieningsreg* 8; Carey Miller and Pope *Land Title* 299; Badenhorst 1989 *THRHR* 130 where it is stated that expropriation is the ending or imitation of a right through the state; *Beckenstrater v Sand River Irrigation Board* 1964 4 A 510 (T) 515 A-C; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-23; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Minister of Defence v Commercial Properties Ltd and Others* 1955 3 SA 324 (N) 327G and *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) 314.

However the state does not have general common law power to expropriate.¹² The expropriator is competent to expropriate property only for public purpose and against payment of compensation.¹³ When rights in property are acquired, whether all of them or only some of the rights, the person from whom it is acquired loses those rights, the compulsory acquisition of these rights is an involuntary loss, and it is this involuntary loss that is called expropriation.¹⁴

In the South African context the word 'expropriate' in ordinary meaning is "to dispossess of ownership; to deprive of property".¹⁵ 'Dispossess' also means to take away, divest or to leave without.¹⁶ It also refers to the deprivation of property.¹⁷ Expropriation, however, amounts to more than just the dispossession of property. It has the result that the expropriator must become the owner and acquire the property or the right in question.¹⁸ In South Africa, expropriation is the process whereby an owner is deprived of all or some of his rights in his property, and those rights become vested in the state or some other public *persona* who is authorized to acquire those rights,¹⁹ without the consent of the owner and against the payment of compensation.²⁰

¹² Silberberg and Schoeman's *The Law of Property* 101; Southwood *Compulsory Acquisition* 36; Gildenhuys *Onteieningsreg* 49; *Joyce v McGregor v Cape Provincial Administration* 1946 AD 658 671; *Van Niekerk v Bethlehem Municipality* 1970 2 SA 269 (O) 271E; and *Lenz Township Co v Lorentz and Stapylton-Atkins* 1959 4 SA 159 (T) 165-166.

Silberberg and Schoeman's *The Law of Property* 101 and s 2(1) of the *Expropriation Act* 63 of 1975.

¹⁴ Southwood *Compulsory Acquisition* 1.

¹⁵ *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515A; *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 975C-F; *Minister of Defence v Commercial Properties Ltd and Others* 1955 3 SA 324 (N) 327G; Chaskalson *et al Constitutional Law* 31-14,31-15.

¹⁶ Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University 2006) 155.

¹⁷ Gildenhuys *Onteieningsreg* 61. Deprivation will be discussed in Chapter 4.

¹⁸ Van der Walt and Botha 1998 *SAPR/PL* 17-41.

¹⁹ Southwood *Compulsory Acquisition* 14; Van der Merwe *Sakereg* 291; Witbooi May 2001 *Butterworths Property Law Digest* 3; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515C; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; and *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258.

²⁰ Van der Walt and Pienaar *Law of Property* 83.

The effect of expropriation is to vest ownership in the government.²¹ In *WF Osner Investments (Pty) Ltd v Buffalo City Metropolitan Municipality*²² Erasmus J held that "expropriation is not a physical act but a legal device whereby a person is deprived of his or her private rights in or to land or property". There are many aims that form the basis for expropriation, which may include the building of roads and railways, provisions for housing, provision for military services and protection of nature reserves.²³

If expressed in mathematical terms, it can be stated that expropriation equals the sum of a taking plus acquisition by the expropriator ($E = T + A$).²⁴ It is, however, the *Constitution of the Republic of South Africa*²⁵ (hereafter referred to as the *Constitution*) that provides the principles, values and standard for expropriation of property, and every expropriation act must comply with the *Constitution*, its spirit, purport and objects generally and section 25 in particular.²⁶

As mentioned above, the state does not have the power to expropriate and needs to be granted power to expropriate.²⁷ The act which grants this power and regulates expropriations in South Africa is the *Expropriation Act* 63 of 1975. The *Act* makes specific provision for the expropriation process in section 2, and section 8 embraces the element of acquisition.²⁸ Confusion often arises as to whether expropriation falls under private law or public law. The wording of section 2 often leaves the impression that expropriation is a one sided act from the state, with the result of many different opinions.²⁹ Many authors are of the

²¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 329.

²² *WF Osner Investments (Pty) Ltd v Buffalo City Metropolitan Municipality* 2005 JOL 14516 (E).

²³ Van der Merwe *Sakereg* 291.

²⁴ Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University 2006) 165.

²⁵ *Constitution of the Republic of South Africa* of 1996.

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

²⁷ Silberberg and Schoeman's *The Law of Property* 101.

²⁸ *Expropriation Act* 65 of 1975.

²⁹ Van Schalkwyk 1984 TRW 14.

opinion that expropriation falls under the public law, as the state has the authority to expropriate and it is a right that belongs to the state alone.³⁰ Other authors are of the opinion that it falls under private law because of the fact that the state is compelled to pay compensation and thereby makes it a compulsory contract.³¹ However, the author is of the opinion that it does fall under the public law, and the state is a public entity and not a private individual, as expropriation is seen as a government action.³²

The expropriation procedure consists of five steps, namely:

- a) the decision to expropriate;
- b) the notice of expropriation;
- c) the passing of ownership;
- d) the payment of compensation; and
- e) the withdrawal of the expropriation if cannot continue for a reason.³³

For purposes of this dissertation, it is of extreme importance to scrutinise the functioning of the *Act*, and by doing so, the most important sections of the *Act* and steps in the expropriation procedure will be discussed.

3.3 Capacity to expropriate:

In South Africa all expropriations are authorised by statute,³⁴ and all expropriation actions must take place in terms of statute. Only the Parliament has the power to

³⁰ Gildenhuys *Onteieningsreg* 9 and 75 where Gildenhuys states that an organ of state must receive its authority to expropriate from legislation; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258G.

³¹ Van der Merwe *Sakereg* 217, 295-296.

³² In the Dutch law expropriation falls under private law when it's merely a deprivation of ownership and only forms part of the public law if the expropriation is seen as a state or administrative action with negative implications. Badenhorst 1997 *THRHR* 651.

³³ Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 6.

³⁴ Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 2; Gildenhuys *Onteieningsreg* 49, Jacobs *Law of Expropriation* 3-4; Southwood *Compulsory Acquisition* 36; Carey Miller *Acquisition and Protection* 108; Du Plessis *Compensation for Expropriation under the Constitution* (LLD These Stellenbosch University 2009) 20-21.

enact expropriation statutes,³⁵ and expropriations not statutorily effected will be deemed void.³⁶ Section 25(2) of the *Constitution*³⁷ provides that expropriation may take place only in terms of law of general application.

The capacity of the expropriation authority is contained in various sections of the *Act*. As the capacity of the expropriation authority will change rapidly in the future it is of essence to discuss these sections of the *Act*.

3.3.1 Section 2 of the Act

Section 2(1) of the *Act* authorizes the Minister³⁸ to expropriate property for public and certain other purposes, and to take the right to use property for public purposes.³⁹ This implies that when expropriating, the Minister is the sole judge of that what is required and the decision to expropriate cannot be challenged, unless fraud is proven, or if it is proved that he/she did not act *bona fide*.⁴⁰ It is, therefore, clear that the right and decision to expropriate is an administrative action.⁴¹ This was also stated in *Pretoria City Council v Modimola*⁴²

In the absence of a provision prescribing a quasi-judicial enquiry as a prerequisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act.⁴³

It is important to keep the phrase "adversely effects the rights of any person and which has a direct, external effect" in mind, as this will also have an influence on the administrative procedure of expropriation.⁴⁴

³⁵ LAWSA 10 8. *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258-259 and .

³⁶ Gildenhuis *Onteieningsreg* 49; LAWSA 10 8;.

³⁷ *Constitution of the Republic of South Africa* of 1996.

³⁸ "Minister means the Minister of Public Works and, except for the purposes of section 3, includes an executive committee". *Expropriation Act* 63 of 1975 s1.

³⁹ *Expropriation Act* 63 of 1975 s 2. Southwood *Compulsory Acquisition* 37.

⁴⁰ *Jacobs Law of Expropriation* 17.

⁴¹ *Jacobs Law of Expropriation* 18; Gildenhuis *Onteieningsreg* 77.

⁴² *Pretoria City Council v Modimola* 1966 3 SA 250 (AD).

⁴³ *Pretoria City Council v Modimola* 1966 3 SA 250 (AD) at 263.

⁴⁴ The administrative nature of expropriation will be discussed in Chapter 5.

The Minister may also in terms of section 24⁴⁵ assign his/her power to expropriate to an officer in the service of the state, and may assign such power to any members of the executive committee.

3.3.2 Section 3 of the Act

The heading of section 3⁴⁶ reads "Expropriation of immovable property by the Minister on behalf of certain juristic bodies". It is clear that the Minister's power to expropriate in terms of section 3 differs from section 2, in the sense that section 3 limits the Minister's power to expropriate to immovable property only.⁴⁷

The expropriator may not act outside the framework of his authority.⁴⁸ The power must be exercised for the purpose it has been given and any expropriation that takes place for an ulterior motive will be set aside by court.⁴⁹ The expropriator cannot expropriate for a purpose which is *ultra vires* its framework, and it is stated in the *Act* that expropriation may only take place for public purposes.⁵⁰ If the expropriator takes possession of property invalidly, or if the expropriator infringes on the right of the owner or person entitled to occupy it, the expropriatee can have the expropriator ejected and claim for damages.⁵¹

⁴⁵ Expropriation Act 63 of 1975.

⁴⁶ Expropriation Act 63 of 1975.

⁴⁷ Jacobs *Law of Expropriation* 23. Southwood *Compulsory Acquisition* 38-39.

⁴⁸ LAWSA 10 8; *Administrator TVI v Quid Pro Quo Eiendomsmpy (Edms) Bpk* 1977 4 SA 829 (A) 841; *Gildenhuis Onteieningsreg* 57; *Johannesburg Diocesan Trustees v Johannesburg City Council* 1957 2 SA 367 (W).

⁴⁹ LAWSA 10 9.

⁵⁰ LAWSA 10 8-9. Southwood *Compulsory Acquisition* 45 and *Gildenhuis Onteieningsreg* 57-58.

⁵¹ Southwood *Compulsory Acquisition* 46. Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 4, states four instances where expropriation will be *ultra vires* and may be set aside; a) in cases where the prescribed procedure is not followed; b) expropriation in cases where it is not necessary; c) expropriation for a forbidden purpose and d) expropriations for other purposes which is not a public purpose; LAWSA 10 19 and *Bodasingh's Estate v Suleman* 1960 1 SA 288 (N).

In *Offit Enterprises (Pty) Ltd & Another v Premier, Eastern Cape Government & other*⁵² the applicants, who were farmland owners, received a notice of expropriation which was signed by the Premier of the Government of the Province. According to the notice the first respondent intended to transfer the expropriated properties to the second respondent, namely Coega Development Corporation (Pty) Ltd. The notice was issued in terms of section 2 of the *Eastern Cape Land Disposal Act*⁵³ and section 1 and 2 of the *Act*.⁵⁴ The applicants applied for the notice to be set aside on the following grounds:

- that the first respondent acted *ultra vires* in relying on these sections; and
- that the notice was invalid as it did not comply with the requirements of section 7.⁵⁵

The respondents argued that the expropriation was for a public purpose and it was in the public interest that the properties should be transferred to the second respondent. The court held that the notice was indeed invalid as it did not comply with the requirements of section 7, and that section 2(1) of the *Act*⁵⁶ did not give the first respondent the authority to expropriate the property. Only the Minister of Public Works had that authority, and the second respondent was not an organ of state, but a private company and, therefore, the property could not be transferred to it. Therefore, the first respondent acted *ultra vires*.

The decision to expropriate is that of the Minister's,⁵⁷ granted by statute, and there is no need to give any reasons for such decision, the importance of the expropriation or the fairness of such decision. The Minister does not have to base his/her considerations on damage, disadvantage or inconvenience of the

⁵² *Offit Enterprises (Pty) Ltd & Another v Premier, Eastern Cape Government & Other* 2006 JOL 16700 (SE).

⁵³ 7 of 2000.

⁵⁴ *Expropriation Act* 63 of 1975.

⁵⁵ S7 of Act 63 of 1975, which provides for the requirements a notice must fulfill in order to be valid.

⁵⁶ *Expropriation Act* 63 of 1975.

⁵⁷ *Gildenhuys Onteieningsreg* 77; *Southwood Compulsory Acquisition* 53.

expropriatee.⁵⁸ This decision, however, needs to be formulated in a notice to be served on the parties affected by the expropriation.⁵⁹

3.4 Notification of expropriation

As mentioned above, expropriation takes place according to authorising legislation, and a notice of expropriation that needs to fulfill the requirements provided by legislation.⁶⁰

In section 7 of the *Act* the requirements for the notification of the expropriation are set out:

7(1) If the Minister has decided to expropriate, or to take the right to use temporarily, any property in terms of the provisions of section 2, he shall, subject to the provisions of subsection (5), cause to be served upon the owner in question an appropriate notice in accordance with the provisions of subsection (3).

Expropriation is thus effected by a notice of expropriation which the Minister or his/her delegate must serve on the owner of the land or on the holder of a right in that land.⁶¹ Owner of the land or holder of a right means "in relation to land or a registered right in or over the land, the person in whose name such land or right is registered".⁶² The notice must also be served on any person who has any interest in that land according to the title deed, the registers of the registrar of mining titles or of any other government office, or if the land is in the area of local authority, notice to that local authority, and also where the land is the subject of sale, a notice on the buyer must be served.⁶³ It is important to state in the notice that an expropriation is taking place, as ownership is passed through

⁵⁸ Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 4.

⁵⁹ Gildenhuys *Onteieningsreg* 78.

⁶⁰ Gildenhuys *Onteieningsreg* 111; *Springs Town Council v MacDonald* 1968 2 SA 114 (T) 120H.

⁶¹ LAWSA 10 21.

⁶² S 1, for further description of who such owner may be, see the rest of s 1.

⁶³ S 7(3) and 7(4).

expropriation.⁶⁴ In *Pahad v Director of Food Supplies and Distributions*⁶⁵ it was said that:

...the notice must obviously be one signifying "I take" or "I have taken", not merely an intention of future and therefore ambulatory intentions.⁶⁶

However, the *Act* does provide for circumstances where an unregistered right is to be expropriated, *inter alia*, rent situations.⁶⁷ With the expropriation, the contract between the lessee and lessor comes to an end,⁶⁸ and the lessee will be entitled to compensation as if it was his registered right that was expropriated.⁶⁹ An interesting point to note is that the *Act* does not provide for compensation for labour tenants, who also have unregistered rights.⁷⁰

As mentioned above the notice of expropriation must fulfill certain requirements as set out in section 7. A description of the property, the right to use temporarily or a servitude to be expropriated must be in the notice, and where only a portion of such property is to be expropriated, a sketch indicating such portion must be attached.⁷¹ If a proper description is not given, confusion will arise and the notice of expropriation will be seen as invalid.⁷² The notice must state the date of expropriation, or the date from which the property will be used; the period it will be used; and also the date the state will take possession.⁷³ The notice must also draw the expropriatee's attention to section 9(1)⁷⁴ and section 12(3)(a)(ii)⁷⁵. The

⁶⁴ Gildenhuys *Ontelingsreg* 111.

⁶⁵ *Pahad v Director of Food Supplies and Distribution* 1949 3 SA 695 (A).

⁶⁶ *Pahad v Director of Food Supplies and Distribution* 1949 3 SA 695 (A) 709.

⁶⁷ S 22.

⁶⁸ *Evans v Schoeman* 1949 1 SA 571 (A) 578 and *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C).

⁶⁹ Gildenhuys *Ontelingsreg* 198-199.

⁷⁰ As the draft Bill aims at providing for the rights of all unregistered rights, including labour tenants, it will be discussed as a separate topic in Chapter 6.

⁷¹ S 7(2)(a); LAWSA 10 21; Gildenhuys *Ontelingsreg* 113-115; *Southwood Compulsory Acquisition* 55, *Springs Town Council v MacDonald* 1968 2 SA 114 (T) 120H.

⁷² *Southwood Compulsory Acquisition* 56.

⁷³ S 7(2)(b); LAWSA 10 21; *Delpot Property Practice* 154; *Southwood Compulsory Acquisition* 56.

⁷⁴ "An owner whose property has been expropriated in terms of this Act, shall, within sixty days from the date of notice in question, deliver or cause to be delivered to the Minister a

notice must state the amount that is offered or it must request the owner to advise the expropriator in writing within 60 days after notice was received of an amount claimed for compensation.⁷⁶ The owner's attention must be drawn to the fact that the expropriator may withdraw his offer if he had no knowledge on the date of notice of who has an unregistered protected right and who may be entitled to share in the amount of compensation.⁷⁷

The *Act* does not state or prescribe that the notice must contain the purpose of the expropriation, however, it is desirable.⁷⁸ It must be stated clearly and unequivocally in the notice that expropriation is effected in terms of the notice.⁷⁹

An example of legislation similar to this section of the *Act* is section 27 of the *Road Ordinance*.⁸⁰ Section 27 provides for three instances where expropriation may take place, namely:

- a) permanent expropriation of the property;
- b) temporarily use of the property; and
- c) the raise and remove of the material from the property.

When expropriation takes place in terms of this legislation the notice must comply with section 29 of the *Road Ordinance*, which states that the property to be expropriated should be properly described and the date on which expropriation is to take place should be set out accordingly. In *Provinsiale*

written statement indicating..." A list of factors and grounds that must be contained is set out in section 9(1).

⁷⁵ "If the owner fails to comply with the provisions of section 9(1) within the appropriate period referred to in the said section, the amount so payable shall during the period of such failure and for the purpose of the payment of interest be deemed not to be an outstanding amount."

⁷⁶ S 7(2)(c). Southwood *Compulsory Acquisition* 57.

⁷⁷ S 7(2)(d); *LAWSA* 10 21; Gildenhuys *Ontheieningsreg* 115 and Southwood *Compulsory Acquisition* 55-57.

⁷⁸ *Davis v Caledon Municipality* 1960 4 SA 885 (C) 886-887; Gildenhuys *Ontheieningsreg* 112; *Jacobs Law of Expropriation* 36 and *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 962 (A) 974F.

⁷⁹ *Pahad v Director of Food Supplies and Distributors* 1949 3 SA 695 (A) 709; *LAWSA* 10 22 and *Badenhorst* 1989 *THRHR* 133.

⁸⁰ 19 of 1976.

Administrasie, Kaap die Goeie Hoop v Swart,⁸¹ S and L had an agreement that L could remove sand from S's land in return for compensation, but before the agreement could take effect, the administrator delivered a notice of expropriation on S. S and L applied to the court for rescission of the notice on the grounds that the notice did not comply with the 60 day time period as set out in section 29(2)(b) of the Ordinance. The court rescinded the notice on the ground that the notice was vague and null.

3.5 Passing of ownership

When an act of expropriation takes place no actual sale of the property takes place, but the ownership passes from the expropriatee to the expropriator, and it is this passing of ownership that needs to be compensated.⁸²

Usually the ownership of the expropriated property only passes to the state through administrative action, in the form of a notice of expropriation, a government resolution or by a publication in a *Gazette*.⁸³ However, in pre-constitutional cases it was said that the serving of a notice of expropriation was not sufficient for the transfer of ownership, and the ownership could only pass once the expropriator had possession of the property.⁸⁴ As soon as the property passes to the state, the owner of the expropriated property has no more right over such property.⁸⁵

⁸¹ *Provinsiale Administrasie, Kaap die Goeie Hoop v Swart* 1988 1 SA 375 (C).

⁸² Van Schalkwyk 1984 TRW 22.

⁸³ LAWSA 10 17.

⁸⁴ *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 1 SA 328 (T) 333.

⁸⁵ *Gildenhuys Onteieningsreg* 117.

3.5.1 Section 8 of the Act

Section 8 of the Act deals with the passing of ownership. It is important to note that ownership does not pass by registration.⁸⁶ The ownership of expropriated property will on the date of expropriation, as stated in the expropriation notice, vest in the state, released from all mortgage bonds.⁸⁷ If the expropriated property is land, it shall remain the subject to all registered rights in favour of third parties, (except mortgage bonds), unless or until such rights have been expropriated from the owner thereof.⁸⁸

With regards to section 8(1), the question that arises is what about mortgage bonds, because the expropriation does not extinguish the debt for which security is provided through the bond, nor does the expropriator take over the liability secured by the bond.⁸⁹ Clearly section 8(1) provides that there is no automatic release from mortgage bonds registered over the property, and no cancellation in the Deeds Office is necessary.⁹⁰ However, section 19⁹¹ deals with the payment

⁸⁶ Carey Miller and Pope *Land Title* 142. In the pre-constitutional case of *Minister of Defence v Commercial Properties Ltd and Others* 1956 2 SA 75 (N) 79, it was wrongly held that *dominium* only passes once the property is registered in the name of the expropriating authority.

⁸⁷ LAWSA 10 31; Gildenhuys *Onteieningsreg* 118; and Delpont *Property Practice* 154.

⁸⁸ S 8(1); Gildenhuys *Onteieningsreg* 118; Southwood *Compulsory Acquisition* 59-60; Delpont *Property Practice* 154; Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 5; LAWSA 10 31 and Badenhorst 1989 *THRHR* 135.

⁸⁹ *Barclays Bank v Tarajia Estates* 1966 1 SA 420 (T) 423D and 424E.

⁹⁰ Jacobs *Law of Expropriation* 43.

⁹¹ S 19(1) If any immovable property expropriated under this Act was immediately prior to the date of expropriation encumbered by a registered mortgage bond or to the knowledge of the Minister the subject of an agreement contemplated in s 9 (1) (d) (ii) or any building thereon was then subject to a lien as contemplated in s 9 (1) (d) (iii), the Minister shall, subject to the provisions of subsection (3) of this section and s 20 and 21, not pay out any portion of the compensation money in question, except to such person and on such terms as may have been agreed upon between the owner of such property and the mortgagee, buyer or builder concerned, as the case may be, and as the Minister may have been notified of by them.

S 19(2) If an owner of property fails to comply with the provisions of s 9 (1) (d) (ii) or (iii) and the buyer or builder concerned in consequence thereof does not receive any portion of the compensation money by virtue of the provisions of s 19(1) of this section, the owner shall be liable to the buyer or builder, as the case may be, for any damage which the buyer or builder may have sustained in consequence of the expropriation, and the Minister shall not be obliged to pay compensation in respect of that damage.

of compensation to mortgagees of existing mortgage bonds and provides some protection to the mortgagee by preventing the mortgagor from obtaining any portion of the compensation, except if there was an agreement between the two parties as referred to in section 9(1).⁹²

Although there is no need for a formal deed of transport it is desirable to record the expropriation in the deeds registry:

it seems to me, however, that even although the mere act of expropriation vested the dominium of the expropriated property in the council, it was still necessary for security and greater certainty of title that transfer should be passed to the council of the property as expropriated. Without such transfer the transaction of expropriation would not be properly completed and difficulties might arise in future owing to the council not having transfer deeds of the properties and there not being a record of the expropriation of the properties in the Deeds Office.⁹³

Section 31 regulates the registration process of an expropriation. According to section 31(6)(a), the expropriating authority must lodge with the registrar the following documents:

- a certified copy of the expropriation notice;
- an expropriation plan in duplicate; and
- a certificate reflecting full details of the land, title deed and the registered owner.

After receipt of all the above-mentioned documents, the registrar is required to note the expropriation in relevant registers and to endorse the office copy of the title deed as well as the original.

S 19(3) If the owner and the mortgagee, buyer or builder, as the case may be, fails to conclude an agreement contemplated in s 19(1), any of the said persons may apply to the court referred to in s 14(1) for an order whereby the Minister is directed to pay out the compensation money as the court may determine, and the court may on such application issue such order, including an order as to costs, as the court may deem fit.

⁹² *Expropriation Act 63 of 1975*; *Jacobs Law of Expropriation* 219 and *Southwood Compulsory Acquisition* 63.

⁹³ *City of Cape Town v Union Government* 1940 CPD 188 195.

3.5.2 Exceptions

Section 31 is applicable for the transfer pursuant to the expropriation of land, or the vesting thereof in terms of statute.⁹⁴

Section 31(1) requires the registrar to execute the deed once it is prepared by the conveyancer and lodged in the Deeds Office in order to give effect to the expropriation.

Section 31(2) of the *Act* provides that the transfer deeds must be produced by the transferee, or if he has been unable to obtain them, he must provide an affidavit to the effect together with a draft deed of expropriation transfer in order that an endorsement can be made to reflect the change in ownership of the property and registration may then proceed.⁹⁵

3.6 Appropriation

Although, as mentioned above, expropriation means to dispossess ownership or to deprive of property, the concept entails more than the dispossession or deprivation of property. It was the indispensable accompanying requirement of 'appropriation' of certain property by the expropriator that gave rise to the legally defined expropriation accompanied with compensation.⁹⁶ The conclusion can thus be made that when property is expropriated for public use, the property is appropriated by the state.⁹⁷

⁹⁴ Carey Miller and Pope *Land Title* 142.

⁹⁵ Carey Miller and Pope *Land Title* 142-144. In the case of the expropriation of immovable property, registration of ownership to the state is not necessary, although desirable as the state will not be able to transfer the ownership to some else if the property is not registered in the state's name. Badenhorst 1989 *THRHR* 135.

⁹⁶ Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University 2006) 159; Van der Schyff 2007 *CILSA* 311.

⁹⁷ Van der Walt *SAPR/PL* 1999 279.

The inclusion of this requirement excluded state actions which disposed or took away rights. Therefore, it led to the viewpoint that compulsory acquisition of rights was a prerequisite for expropriation and it contributed to the distinction between deprivation and expropriation.⁹⁸

In *Colonial Development v Outer West Local Council*⁹⁹ it was stated that "in any event expropriation involves appropriation"¹⁰⁰ and in *Nkosi v Bührmann*¹⁰¹ another example of appropriation can be found when it was stated that the taking of a grave site would amount to appropriation which will cause permanent diminution of the right of ownership of the land.¹⁰²

The requirement of appropriation for expropriation emphasises the statement in *Davies v Minister of Lands, Agriculture and Water Development*¹⁰³ where it was said that expropriation can only take place when the deprivation is of such a nature that it amounts to compulsory acquisition.

3.7 Compensation in terms of the Act

Sections 10 to 14 in the Act deal with compensation. Compensation is what distinguishes expropriation from deprivation. Although expropriation is a subspecies of deprivation,¹⁰⁴ no compensation is payable, whereas expropriation requires compensation.¹⁰⁵

Section 2(1)¹⁰⁶ requires an obligation on the expropriator to pay compensation. The Act also provides for interest to be paid from the date the state takes

⁹⁸ Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North West-University 2006) 159-160.

⁹⁹ *Colonial Development v Outer West Local Council* 2002 2 SA 589 (N).

¹⁰⁰ *Colonial Development v Outer West Local Council* 2002 2 SA 589 (N) 611.

¹⁰¹ *Nkosi v Bührmann* 2002 1 SA 372 (SCA).

¹⁰² *Nkosi v Bührmann* 2002 1 SA 372 (SCA) 384.

¹⁰³ *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS).

¹⁰⁴ Silberberg and Schoeman's *Law of Property* 558.

¹⁰⁵ Van der Walt 2002 *THRHR* 461. A detailed discussion will be given in C 4.

¹⁰⁶ *Expropriation Act* 63 of 1975.

possession of the property to the date of final payment of compensation.¹⁰⁷ In South Africa, however, before the constitutional era, the parliament was supreme and could pass legislation to expropriate property without compensation or adequate compensation as no common-law right existed requiring the payment of compensation for any loss of property.¹⁰⁸ It was found in *Joyce and McGregor Ltd v Cape Provincial Administration*¹⁰⁹ that in South African law the expropriatee had no right to compensation, unless the relevant statutes provided for such compensation.

However, the *Constitution*¹¹⁰ renders expropriation invalid, unless the infringing legislation provides for compensation.¹¹¹ This principle is also confirmed in the English law in the case of *Attorney-General v De Keyer's Royal Hotel Ltd*,¹¹² where the House of Lords confirmed that there is a common-law right to receive compensation for expropriation, even in cases of war or if the property is only used for a limited time. Compensation is payable for the rights of the owner that have been taken away or expropriated.¹¹³ Not only must the rights which are taken away, but also its potential uses that enhance the value of the property must be compensated.¹¹⁴

¹⁰⁷ S 12(3).

¹⁰⁸ Jacobs *Law of Expropriation* 20.

¹⁰⁹ *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658.

¹¹⁰ *Constitution of the Republic of South Africa* of 1996.

¹¹¹ Silberberg and Schoeman's *The Law of Property* 568; Southwood *Compulsory Acquisition* 25 and *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BLCR 23 (T) 30G-H.

¹¹² *Attorney-General v De Keyer's Royal Hotel, Ltd* 1920 AC 508 (HL) quoted from Gildenhuys *Onteieningsreg* 143.

¹¹³ In *Greyvensteijn en 'n Ander v Minister van Landbou* 1970 4 SA 233 (T) 234 it was stated that the owner of property can only be expropriated of an interest in the property. In *Minister van Waterwese v Mostert en Andere* 1964 2 SA 656 (A) 666 the court held that land is expropriated when the rights of the owner of the property are expropriated and also in *Sandton Town Council v Erf 89 Sandton Extension 2 (Pty) Ltd* 1988 3 SA 122 (A) 129 the infringement on an owner's use and enjoyment of the property is construed as an expropriation.

¹¹⁴ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 955 and *Illovo Sugar Estates Ltd SAR&H* 1948 1 SA 58 (D).

Often the argument regarding the amount of compensation payable ends up in court, where the court needs to use discretion to make a ruling that will be fair to all parties affected in the particular circumstances.

3.7.1 *The role of the courts*

Nowadays compensation is the main issue in almost every expropriation case, and it is the determination and/or amount thereof that is in most instances referred to the courts. The court's discretion in such cases is usually that the expropriatee must be compensated for not more or less than his actual loss.¹¹⁵ Before the previous *Expropriation Act*,¹¹⁶ the traditional method of settling disputes regarding the amount of compensation was by way of arbitration¹¹⁷ (as discussed in Chapter 2), and it was this Act that made it possible for parties who could not agree upon compensation to refer such disputes to the ordinary courts of law.¹¹⁸

Although the constitutional requirement for expropriation will be discussed in Chapter 4, it is necessary to make reference to section 25(2)(b) that provides:

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.

It is thus clear from this section that the *Constitution* explicitly provides for the court to interfere in cases where parties cannot come to an agreement to what the amount of compensation should be.

¹¹⁵ Van der Merwe *Sakereg* 293.

¹¹⁶ 55 of 1965.

¹¹⁷ LAWSA 10 133; Gildenhuis *Onteieningsreg* 367, 373; Southwood *Compulsory Acquisition* 73; Gildenhuis 1977 *TSAR* 1.

¹¹⁸ S 14; Cowen 1972 *THRHR* 146 and Delpont *Property Practice* 155; and *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

When the expropriatee feels that he has not been compensated duly and wishes to dispute the amount of compensation or the validity of the expropriation, the duty to institute legal actions rests upon him.¹¹⁹ There is a burden on the owner to adduce sufficient evidence for the court to make a determination, because the court can only make such a determination on evidence placed before it.¹²⁰

Section 14 of the 1975 Act also provides:

the Minister, shall, in the absence of agreement, on the application of any party concerned be determined by a provisional or local division of the Supreme Court in whose area of jurisdiction the property in question is or is situated on the date of the expropriation.

The jurisdiction of the court is also important in determining the amount of compensation. In this respect, the case *Farmerfield Communal Property Trust v Remaining Extent of Portion 7 of the Farm Klipheuwel No 459*¹²¹ is significant. The issue in this case was whether the court had jurisdiction to determine compensation for expropriated land in terms of section 35(1) of the *Restitution of Land Rights Act*¹²² and whether it was in accordance with the 1975 Act. It was held that before the expropriation had been completed, the court lacked the jurisdiction to determine compensation payable, but after an expropriation had been completed, the court had exclusive jurisdiction to determine compensation payable. It was held in this case that the court may not exercise statutory power to determine compensation payable for expropriation before that expropriation had actually taken place, as this is a prerequisite to a court's jurisdiction. Therefore, if no expropriation has taken place, the court will have no power to determine compensation payable.

¹¹⁹ LAWSA 10 17-18

¹²⁰ Chaskalson *et al* *Constitutional Law* 31-25.

¹²¹ *Farmerfield Communal Property Trust v Remaining Extent of Portion 7 of the Farm Klipheuwel No 459* 1998 JOL 4152 (LCC).

¹²² 22 of 1994.

However, the proposed Expropriation Bill¹²³ intends to restrict the role of the courts in the sense that the court may only be approached for a review of the whole expropriation process and no longer for determination of compensation.¹²⁴

3.7.2 Market value

The state needs to promote land reform, and in order to do so, it has to acquire large portions of private land. As the purchasing of land at market prices slows down the process and is too expensive the government wants to revert to expropriation.¹²⁵

Market value has been the guideline for determining compensation for expropriation in courts for many years and became the general method for determining the amount of compensation.¹²⁶ For many years the view was that when a private person has to give up his property for a public purpose, the state needs to compensate him in full for his loss.¹²⁷ Market value is the starting point in determining the value of expropriated property.¹²⁸

It is important to understand what is meant by market value.¹²⁹ Market value is described as the amount which the property would have realised if it was sold in the open market from a willing seller to a willing buyer on the day that

¹²³ 16 of 2008.

¹²⁴ This aspect will be discussed in C 6.

¹²⁵ Van der Walt 2006 SALJ 23.

¹²⁶ Gildenhuis *Onteieningsreg* 174.

¹²⁷ Gildenhuis 1977 TSAR 1. *Estate Marks v Pretoria City Council* 196 3 SA 227 (A) 242-243.

¹²⁸ Gildenhuis *Onteieningsreg* 175. In *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 522 De Villiers JP stated that he was of the opinion "that we must take the word 'value' in its more ordinary meaning of temporary or market value."

¹²⁹ It must be remembered that when the court determines market value, it determines an amount which the property would have realized if sold. The sale that is referred to is an imaginary one, and the market value based there upon is only an estimate and sometimes an informed guess; Jacobs *Law of Expropriation* 63.

expropriation takes place.¹³⁰ To determine the market value, no real sale needs to take place. It will be sufficient if a hypothetical sale is created in order to determine what the price would be.¹³¹ In *Kim Investments (Pty) Ltd v Durban Valuation Appeal Board and Others* market value is seen as “the price which it would realise if brought to a voluntary sale between a willing seller and a willing buyer”.¹³²

Section 12 of the Act provides as follows:

- 12(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed –
- (a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of –
 - i. the amount which the property would have realized if sold on the date of notice in the open market by willing seller to a willing buyer, and
 - ii. an amount to make good any actual financial loss caused by the expropriation and...
 - (b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right.

In terms of section 12(1)¹³³ it is also allowed to determine market value where an open market does not really exist for that specific property, on the basis of the replacement cost of the improvements on the expropriated property minus the depreciation or any other suitable manner.¹³⁴ It is cases such as these, where there is no real market value, and the only potential purchaser is the

¹³⁰ Silberberg and Schoeman's *Law of Property* 569; *Southwood Compulsory Acquisition* 80; *LAWSA* 10 76; *Bonnett v The Department of Agriculture Credit and Land Tenure* 1974 3 SA 737 (T) 747H.

¹³¹ *Gildenhuys* 1977 *TSAR* 3; *Colman v Johannesburg City Council* 1948 1 SA 1258 (T) 1266.

¹³² *Kim Investments (Pty) Ltd v Durban Valuation Appeal Board and Others* 1979 4 SA 504 (N) 508G.

¹³³ *Expropriation Act* 63 of 1975

¹³⁴ *Held v Administrateur-Generaal vir die gebied van Suidwes-Afrika* 1988 2 SA 218 (SWA) 231; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy* 1973 3 SA 376 (A).

expropriating authority, that the tribunal must determine compensation on a more hypothetical basis.¹³⁵

The *Act* does not provide for a definition of market value and, therefore, an ordinary meaning will always be applicable,¹³⁶ as was stated in *May, Thomas, Cairns & Frogmore v Reserve Bank of Zimbabwe*, “the best price which can reasonably be obtained on the open market”.¹³⁷ The price is determined by the economic principle of supply and demand.¹³⁸ It is this “comparable sales” method that is seen by courts as the most acceptable way of determining compensation. This method requires that the location of the respective properties and the time factor in a rising or falling market must be considered. However, it is not necessary to take the potential of the property into consideration.¹³⁹

The problem is that the legislature does not always take notice of exceptions where “real market value” does not compensate certain owners sufficiently.¹⁴⁰ An example of this may be where a paraplegic made expensive modifications to his house to avoid steps which did not enhance the market value in the open market. There may also be cases where there is no general demand in the open market, for example churches and schools.¹⁴¹ This does not mean that a sale in the open market may not be presumed to determine the price.¹⁴²

¹³⁵ Jacobs *Law of Expropriation* 63-64; LAWSA 80; Southwood *Compulsory Acquisition* 85; Gildenhuys *Onteieningsreg* 175-176; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 955H-956A; *Krause v SAR&H* 1948 4 SA 554 (O) 559; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy* 1973 3 SA 376 (A) 389.

¹³⁶ Gildenhuys *Onteieningsreg* 174.

¹³⁷ *May, Thomas, Cairns & Frogmore v Reserve Bank of Zimbabwe* 1986 3 SA 107 (ZS) 120I.

¹³⁸ Gildenhuys *Onteieningsreg* 175; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 51.

¹³⁹ Silberberg and Schoeman's *The Law of Property* 569; *Minister of Water Affairs v Mostert* 1966 4 SA 690 (A) 723F; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA (W) 956B-C.

¹⁴⁰ Jacobs *Law of Expropriation* 5.

¹⁴¹ Jacobs *Law of Expropriation* 5; Van Schalkwyk 1984 *TRW* 22 and Gildenhuys 1977 *TSAR* 10, determining market value in such case would be useless.

¹⁴² Van Schalkwyk 1984 *TRW* 22. In *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy* 1973 3 SA 376 (A) 382 it was held that even though no open market exists, the market value test still needs to be applied to determine the price.

In this regard the Canadian viewpoint may be of help where judge Kelly AJ stated in *Gray Coach Lines Ltd v City of Hamilton*¹⁴³ with reference to section 14 of the *Ontario Expropriation Act 1986-9*:

As already stated there can be no doubt that the purpose of the legislature in enacting s 14(2) was to recognize the fact that there would be instances in which compensation based on "real market value" would not be adequately compensate certain owners.¹⁴⁴

In these cases, where no market value for the property exists, the compensation should be determined by looking at the replacement cost minus the depreciation value or any other suitable means.¹⁴⁵ There are many South African cases which support this statement. For example, in *Minister of Agriculture v Federal Theological Seminary*,¹⁴⁶ a theological seminary was expropriated and the court made the following statement:

the State is always a potential buyer and once that is so then, even if there is no open market... the Court must nevertheless assume an open market because the act requires the open market test to be applied in assessing the value of the expropriated land.¹⁴⁷

Again in *Todd v Administrator Transvaal*,¹⁴⁸ it was held that when determining the value, the valuator must ignore the fact that there is only one potential buyer and must, therefore, imagine an open market. The basis of determining compensation is the market value of the expropriated property, and any amount lower than the market value may be justified in terms of the *Constitution*.¹⁴⁹ This

¹⁴³ *Gray Coach Lines Ltd v City of Hamilton* 1972 1 LCR 181.

¹⁴⁴ Quoted from Jacobs *Law of Expropriation* 5.

¹⁴⁵ Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 53 and Gildenhuys *Onteieningsreg* 156.

¹⁴⁶ *Minister of Agriculture v Federal Theological Seminary* 1979 4 SA 162 (E).

¹⁴⁷ *Minister of Agriculture v Federal Theological Seminary* 1979 4 SA 162 (E) 169; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 3 SA 376 (A) where it was held that if no market value exist, such test must still be applied. *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 2 SA 218 (SWA).

¹⁴⁸ *Todd v Administrator Transvaal* 1972 2 SA 874 (A).

¹⁴⁹ Silberberg and Schoeman's *The Law of Property* 569; Chaskalson *et al Constitutional Law* 31-24 and Roux *Constitutional Law* 46-34. Badenhorst states in 1998 *De Jure* 267 that 'just and equitable' compensation in terms of the property clause may be equal,

is, however, a contentious and fairly complicated matter, regardless from what perspective it may be debated.¹⁵⁰ Compensation lower than market value has been a point of issue in many cases.

It often happens that a special feature of a building has a special value to the owner, but this value is not enhanced in the market value.¹⁵¹ Again the example a paraplegic can be used. If there are steps in front of his house that make entry difficult, he needs to build ramps, if his house is now expropriated, he loses that value that is not enhanced in the market value of building a new ramp to the new house.¹⁵²

There may also be instances where a house of a person in an urban renewal area is expropriated for a certain amount which is its fair market value price, but to obtain the same house in another area may be more expensive than the one which was expropriated.¹⁵³ The question now is, shouldn't that person be compensated in the amount it will cost him to obtain a house that is equivalent to that one which has been expropriated? Or is the market value fair enough? In the authors opinion, the person should be compensated by the amount it will cost him to obtain a house equivalent to the one that has been expropriated, as the expropriatee may not be in a worse or better position as a result of the expropriation.¹⁵⁴

Some authors are of the opinion that expropriation without actual payment of compensation may also be possible, as long as the requirements in section 25(3)(a)-(e)¹⁵⁵ are applied in such cases.¹⁵⁶ As this chapter only deals with

less than and probably, but not always, higher than market value. The purpose of land reform also could also justify the expropriation of land influence the level of compensation. Van der Walt 2006 SALJ 27; Zimmerman 2005 SALJ 407.

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Van der Walt 2006 SALJ 24.

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Jacobs *Law of Expropriation* 7.

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Jacobs *Law of Expropriation* 7.

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Jacobs *Law of Expropriation* 7.

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As was found in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA).

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Constitution of the Republic of South Africa of 1996.

compensation in terms of the current *Act*, expropriation in terms of section 25(3)¹⁵⁷ will be discussed in Chapter 4. Cases where no payment of compensation may still be “just and equitable” will be where the property was acquired in an inequitable manner in the first place, or cases where the state subsidized the acquisition and development of the property to such an extent that it would be inequitable to require compensation.¹⁵⁸

Although market value is the relevant factor, and probably the most important factor in determining the just and equitable amount for compensation, it cannot be the only one,¹⁵⁹ although it will probably remain the starting point.¹⁶⁰ In *Ex Parte Former Highlands Residents*¹⁶¹ the court noted that market value, while important, is not the conclusive and determinative factor in establishing just and equitable compensation in terms of section 25(3) of the *Constitution*, and while market value is a key factor in other jurisdictions, many of them also allow other factors to play a role. In *Khumalo v Potgieter*¹⁶² the court established a two-tiered approach by first establishing the market value of the property at stake and secondly, after consideration, the influence of the constitutional indications for valuation of the property to be expropriated on the determined amount.¹⁶³ Market value in terms of section 25(3) of the *Constitution* will be discussed in Chapter 4.

¹⁵⁶ Silberberg and Schoeman's *The Law of Property* 572.

¹⁵⁷ *Constitution of the Republic of South Africa* of 1996.

¹⁵⁸ Van der Walt *Constitutional Property Law* 271.

¹⁵⁹ Silberberg and Schoeman's *Law of Property* 570. If market value was the only factor in determining the amount of compensation, it would cost the state billions of rands and the restoration of land from white farmers back to black persons would be too expensive. Claassens 1993 SAJHR 423. Carey Miller and Pope *Land Title* 302; Eisenberg 1993 SAJHR 416; Budlender, Latsky and Roux *Juta's new Land Law* 1-56; Southwood *Compulsory Acquisition* 91; Gildenhuys *Onteieningsreg* 167.

¹⁶⁰ Silberberg and Schoeman's *Law of Property* 570.

¹⁶¹ *Ex Parte Former Highlands Residents* 2000 1 SA 489 (LCC).

¹⁶² *Khumalo v Potgieter* 2000 2 All SA 456 (LCC).

¹⁶³ *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) 93.

3.7.2.1 Section 12(1)(b)

The basis on which compensation is to be determined is an issue in almost every expropriation case. There is always a party who feels that he has been compensated too little, or not in the correct way. In *Mooikloof Estates (Edms) Bpk v Premier, Gauteng*¹⁶⁴ the basis for determining compensation was yet again in dispute. Section 26(3) of the *Act* provides that if land is to be declared to be a road or acquired to be a road in terms of an ordinance without such land being expropriated, the amount of compensation is to be determined in terms of section 12, as if the land was expropriated in terms of the *Act*. Except for the ways of determining compensation in terms of section 12(1)(i) and section 12(1)(ii), section 12 contains a further *provisio* which entails that if the expropriation was of such nature that there was no open market, compensation may be calculated on (a) the basis of the replacement value; or (b) in any other suitable manner.

This *provisio* is thus aimed at providing a method for determining compensation in cases where the expropriation is of such nature that no open market exists for such property.¹⁶⁵ Therefore, a court is free not to follow the provisions of section 12(1)(a)(ii), but in the same breath it must follow the provisions of the *Act* as far as possible.

Section 12(1)(b), however, states that the amount of compensation for the taking of a right to use property shall not exceed an amount to make good any actual financial loss caused by the expropriation or the taking of the right.

In *Du Toit v Minister of Transport*¹⁶⁶ the dispute to be settled was with regards to section 12(1)(a) and 12(1)(b). As this case is significant in terms of section

¹⁶⁴ *Mooikloof Estates (Edms) Bpk v Premier, Gauteng* 2000 3 SA 463 (T).

¹⁶⁵ Silberberg and Schoeman's *The Law of Property* 570; *Todd v Administrator* 1972 2 SA 874 (A).

¹⁶⁶ *Du Toit v Minister of Transport* 2003 1 SA 586 (CC); Schulze March 2005 *De Rebus* 35.

25(3)¹⁶⁷ as it changed the constitutional position regarding compensation, it will be discussed in Chapter 4, as well as *Kerksay Investments (Pty) Ltd v Randburg Town Council*.¹⁶⁸

Besides the *Du Toit-case*¹⁶⁹ many other cases revolve around section 12(1)(b). In *Kangra Holdings (Pty) Ltd v Minister of Water Affairs*¹⁷⁰ the court came to the conclusion that the market value of rights must be taken into account when determining whether compensation is payable under section 12(1)(b) of the *Act* in respect of actual financial loss. In this case the appellant was the owner of registered coal rights which were expropriated in terms of the *Water Act*.¹⁷¹ The appellant based his claim on section 12(1)(b), which provided that the plaintiff was entitled to be paid compensation for the actual financial loss caused by the expropriation. The court on consideration of market value, held that the loss of an asset by expropriation constituted actual financial loss of market value. Therefore, this loss fell in the ambit of section 12(1)(b) which provided for the owner to be compensated not only for the loss of market value, but also for the additional actual loss provided that it was caused by the expropriation.

In *City of Cape Town v Helderberg Park Development (Pty) Ltd*¹⁷² the local authority expropriated a portion of the respondent's property for the canalisation of stormwater. At the time the respondent bought the land, it was zoned as agriculture, but had in the mean time been awarded development rights. Accordingly, the respondent claimed compensation equal to the value of land with development rights. The appellant contended that the compensation the respondent was entitled to was that equal to agricultural land. The respondent's argument was based on section 12(5)(f), that the depreciation in the value of the expropriated portion, prior the date of expropriation, had to be disregarded in the

¹⁶⁷ Constitution of the Republic of South Africa of 1996.

¹⁶⁸ *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T).

¹⁶⁹ *Du Toit v Minister of Transport* 2003 1 SA 586 (CC).

¹⁷⁰ *Kangra Holdings (Pty) Ltd v Minister of Water Affairs* 1998 3 All SA 227 (A).

¹⁷¹ 54 of 1956.

¹⁷² *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA); Schulze March 2007 *De Rebus* 30-31.

determination of compensation that he was entitled to. However, the land was bought with a registered condition, that the expropriated portion had been allocated by the previous owner to be used as stormwater, which was not being used as stormwater. The court held that the amount of compensation payable could not exceed the market value of the property and the duty to compensate implies that the owner of the expropriated property may not be in a worse or better position as a result of the expropriation. The respondent's reliance on section 12(5)(f), that the purpose for which the land was expropriated, did not depreciate the value before the date of expropriation. Therefore, the land was worth more or less the same with or without the expropriation, and the respondent lost little in measurable terms and the amount of compensation proposed by the appellant was just and fair.

The court found that compensation had to be determined in two stages. Firstly the amount of compensation payable had to be established in terms of section 12 of the *Expropriation Act* 63 of 1975 and secondly, the amount needed to be just and equitable in terms of section 25(3)¹⁷³ and that the amount of compensation could not exceed market value as the owner of the expropriated property may not be in a better or worse position because of the expropriation. It is clear that section 12(5) states that the amount of compensation awarded may differ from the actual market value and that the legislature cannot always arrive at compensation that is equivalent of the market value. Section 12(5)(f) states that any enhancements or depreciations, before or after the date of the notice, shall not be taken into account.

The following formula is proposed when determining the amount of compensation:

Compensation = market value + actual financial loss caused by expropriation + positive factors – negative factors (whilst disregarding the

¹⁷³ Constitution of the Republic of South Africa of 1996.

neutral factors).¹⁷⁴ An alternative fixed market value formula for compensation would be a proportional formula, one which takes into account the interests of the past and present owners of the land, but also the affordability of the reward in terms of the state's resources.¹⁷⁵

The conclusion can thus be made that compensation in terms of the *Act* may be equal, less or sometimes more than market value.¹⁷⁶ It must be remembered that temporarily takings will not justify as much compensation as in cases of permanent expropriations.¹⁷⁷ Market value cannot be the only factor to take into account when determining the amount of compensation, as it is only one of the listed factors in section 25.¹⁷⁸ It would be unfair in certain circumstances such as in many historical cases where land was acquired at very low prices or with the help of state subsidies. If market value is the only factor, it could lead to instances, especially in land reform cases, that the property which is needed for land reform is too expensive or even unaffordable, with the result of delaying the process of land reform.

3.7.3 *The willing buyer and willing seller principle*

As the willing buyer and willing seller principles will not be included in the draft Bill, which will be discussed fully in Chapter 6, reference needs to be made to this principle in this chapter as it plays a role in the determination of market value.

¹⁷⁴ Badenhorst 1998 *De Jure* 256. See pages 256-257 for a discussion on the positive, negative and neutral factors.

¹⁷⁵ Claassens 1993 *SAJHR* 247.

¹⁷⁶ Badenhorst 1998 *De Jure* 266. In *Estate Geekie v Union Government and Another* 1948 2 SA 494 (N) the court held that compensation in cases of expropriation could exceed the true market value. In *Kerskay Investments (Pty) Ltd v Randburg City Council* 1997 1 SA 511 (T) the court stated that the factors in section 12 are guidelines in determining the amount of compensation, and therefore expropriation can be less than market value. If full market value was the criterion for compensation claims there would be no incentive to seek compromise solutions. Claassens 1993 *SAJHR* 426.

¹⁷⁷ Hopkins and Hofmeyr 2003 *SALJ* 51.

¹⁷⁸ *Constitution of the Republic of South Africa* of 1996.

The term does not necessarily apply to the owner and the expropriator and may, therefore, be imaginary.¹⁷⁹ This principle is often described as illusory, as the bargaining process is constrained by a compulsory sale, and the seller is more often than not willing to sell.¹⁸⁰ It is also very unclear who will qualify as hypothetical buyers, as different buyers will be willing to pay different prices which is based on their needs, therefore, the hypothetical buyer should be someone who would in practice buy or someone who has bought similar properties.¹⁸¹

3.8 Conclusion

The current *Act* does have some insufficiencies that renders it inconsistent with the *Constitution*. Many of these insufficiencies are a result from the fact that the *Act* predates the *Constitution*. However, at the time of drafting the *Act*, it could not be foreseen that a *Constitution*, with a Bill of Rights, which explicitly protects the right to property would see the light. The remedy for this problem is to determine exactly what the *Constitution*, and in particular section 25 determines, in order to understand what constitutes property and what may be expropriated in order to draft a new expropriation framework, infused with the values of equality, human dignity and freedom.

In Chapter 4, the constitutionality of expropriation in terms of section 25 of the *Constitution* will be examined. The purpose of this is to determine whether or not the current *Act* is inconsistent with the *Constitution* and to emphasize the need for a new expropriation framework for South Africa.

¹⁷⁹ LAWSA 10 80. *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy* 1973 3 SA 376 (A) 384G

¹⁸⁰ Jacobs *Law of Expropriation* 61.

¹⁸¹ Gildenhuys 1977 TSAR 3-4.

Chapter 4

Constitutionality of the *Expropriation Act*

4.1 Introduction

In the previous chapters the history, development of expropriation and the *Expropriation Act* 63 of 1975 were discussed. In order to determine whether there is a need for a new expropriation framework for South Africa, it is necessary to scrutinise the constitutional requirements in terms of section 25 of the *Constitution of the Republic of South Africa*¹ (hereafter referred to as the *Constitution*), regarding expropriation.

The introduction of the *Constitution* brought a new dimension to the South African property law with the inclusion of the property clause in section 25.² This section protects private ownership and broadens the public land reform objectives.³

To determine whether there is a need for the development of new expropriation legislation in South Africa it is firstly necessary to examine the constitutionality of the *Expropriation Act* 63 of 1975 (hereafter referred to as the *Act*). It is, however, important to remember that the *Constitution* is supreme law and that the *Act* has to be read together with the *Constitution*. Any inconsistencies in the *Act* with the *Constitution* will be invalid.⁴ The *Act* must also be read in context with section 7,⁵ which confirms the importance of the Bill of Rights as the cornerstone of

¹ *Constitution of the Republic of South Africa* of 1996.

² Silberberg and Schoeman's *The Law of Property* 9.

³ Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University) 68.

⁴ Silberberg and Schoeman's *The Law of Property* 559.

⁵ *Constitution of the Republic of South Africa* of 1996.

democracy in South Africa, and section 7(2)⁶ that provides for the respect, protection, promotion and fulfillment of the rights in the Bill of Rights.

The main purpose of expropriation is to enable the state to obtain ownership of land for the purposes of distributing or using it in the public interest. It is thus an important tool for land reform in South Africa. Through expropriation land can be distributed more equally and in some cases the land can be restored to its rightful owners.

As mentioned above, the main piece of legislation for expropriation is the *Expropriation Act* 63 of 1975, but there are three main problems with the *Act*, namely:

1. the *Act* predates the *Constitution*⁷ and, therefore, it does not adhere to all the principles of section 25 of the *Constitution*;
2. it is not consistent with comparable modern statutes elsewhere in the world⁸; and
3. the principles of the *Act* do not comply with the *Constitution* in respect of public purpose and public interest.⁹

This chapter will entail a study of the scope of the property clause; the difference between deprivation, expropriation and constructive expropriation; public purpose and public interest in order to emphasise the above three problems.

4.2 What constitutes property?

In some foreign countries it is said that human rights are more important than property rights and it is, therefore, necessary to take from the haves in order to

⁶ *Constitution of the Republic of South Africa* of 1996.

⁷ GN 1654 GG 30468 of 13 November 2007 par 26

⁸ GN 1654 GG 30468 of 13 November 2007 par 26

⁹ GN 1654 GG 30468 of 13 November 2007 par 26. The current *Act* only provides for expropriation for a public purpose, whilst the *Constitution* provides for expropriation for a public purpose and expropriation in the public interest. The inclusion of public interest in the proposed *Bill* will be discussed later in this chapter.

give to the have-nots.¹⁰ However, the South African *Constitution*¹¹ constrains a negative guarantee of property and rights in property in the Bill of Rights.

It is of extreme importance to determine what is meant by 'property'. Since the introduction of the *Constitution*, constitutional property law has developed into a sophisticated field of scientific inquiry.¹² In section 25(4)(b)¹³ there is a constitutional notion that property is not limited to land. 'Property' on its own designates the object of a right. Therefore it denotes movable and immovable property, including structures attached to land.¹⁴ Property can be described in three categories. Firstly, it may refer to the right of ownership in a legal object; secondly, it may refer to the legal object to which this right relates; and thirdly, it can denote a variety of legal relationships that qualify for constitutional protection.¹⁵ Property is divided into three notions; a) property as rights, b) property as objects of rights and c) a "thing" in a legal concept.¹⁶

In terms of section 1 of the *Act* property includes both movables and immovables. Expropriation of property amounts to the following:

- a. ownership of movable and immovable things;
- b. mineral rights;
- c. existing or new limited real rights; and
- d. personal rights and immaterial property rights.¹⁷

¹⁰ Robbins "Ecclesiastical Megalomania: The Economic and Political Thought of the Roman Catholic church (The Trinity Foundation:1999).

¹¹ *Constitution of the Republic of South Africa* of 1996.

¹² Van der Walt 2004 *SAPR/PL* 48.

¹³ *Constitution of the Republic of South Africa* of 1996.

¹⁴ Chaskalson *et al Constitutional Law* 31-3.

¹⁵ "The constitutional meaning of property involves two aspects, namely the objects of property rights and the content and scope of property rights." Van der Walt *Constitutional Property Law* 61.

¹⁶ Silberberg and Schoeman's *The Law of Property* 9.

¹⁷ Gildenhuys *Onteleeningsreg* 51, 57, 240; Badenhorst 1998 *De Jure* 254; Badenhorst and Van der Vyver 1996 *TSAR* 801-802,805; *Bodasing v South African Roads Board* 1995 4 SA 867 (D) 875F-G; *De Villiers v Stadsraad van Mamelodi* 1995 4 SA 340 (T) 352E-F.

During the 1990's, the time of constitutionalisation of property, an interpretation problem occurred with the possibility of a constitutional property clause. This problem was specifically directed at the meaning of the term "property".¹⁸ In many jurisdictions 'property' is given an extended meaning and land is not limited to just ownership.¹⁹ It can thus be said that land forms only part of the meaning and scope of property. Many authors are of the opinion that the exact meaning of property, which is described as a complex term, depends on the context in which it is used.²⁰

The problem, however, was whether "property" for constitutional purposes should be interpreted generously or restrictively.²¹ Those who were afraid that constitutionalisation of property might delay land reform favoured a restrictive interpretation.²² Those who were in favour of the generous interpretation argued that it would be ironic if property rights, that have been denied to the majority for many years,²³ were now guaranteed by the *Constitution*, but again just to be restricted through judicial interpretation.²⁴ It seems that South Africa might follow the generous interpretation because of the Constitutional Court's decision in the *FNB-case*²⁵ that the meaning of property in section 25 will play a smaller role in constitutional litigation than was originally foreseen.²⁶

¹⁸ Van der Walt *Constitutional Property Law* 58.

¹⁹ Budleiner, Latsky and Roux *Land Law* 1-19.

²⁰ Silberberg and Schoeman's *The Law of Property* 1.

²¹ Van der Walt 2004 *SAPR/LR* 49. Van der Walt *Constitutional Law* 59.

²² Van der Walt *Constitutional Property Law* 59; Van der Walt 2004 *SAPR/LR* 49.

²³ The present method of property rights distribution in South Africa is the result of historical discriminatory practices. The *Group Areas Act* 41 of 1950 and the *Native Land Act* 27 of 1923 prevented the majority from acquiring, holding or disposing of immovable property. Chaskalson *et al Constitutional Law* 31-2.

²⁴ Van der Walt *Constitutional Property Law* 59.

²⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 57. (hereafter the *FNB-case*).

²⁶ Van der Walt *Constitutional Property Law* 60.

As was stated in the *FNB-case*,²⁷ it is not easy to define property comprehensively and the Constitutional Court restricted itself to the statement that ownership of corporeal movables and land is at the heart of the constitutional property concept.²⁸

It is necessary to distinguish between the meaning of property in private law which deals with real rights²⁹ and constitutional law which is similar to the private law concept, but wider.³⁰ The traditional interpretation of property in the private law refers to a right that is in principle unrestricted and that any restrictions will have to be imposed specifically and clearly by legitimate legislation or regulatory action.³¹ Therefore, constitutional property involves the recognition of restrictive state powers that conflicts with the absolute protection of property owned by private individuals.³² The two meanings cannot be isolated from each other, both affect and influence one another and in a fundamental sense they are the link between private and constitutional law.³³

If property is accepted as a constitutional right for purposes of section 25 of the *Constitution*, it is necessary to determine the scope of the property clause.³⁴ In this regard one can refer to German law. A difference is drawn between an initial phase where a proper principle definition of property was developed and a subsequent phase where the principle was applied and more emphasis was placed on substantive justification issues.³⁵

²⁷ *FNB-case* 2002 4 SA 768 (CC) par 51. The *FNB-case* will be discussed in full in this chapter below.

²⁸ Van der Walt *Constitutional Property Law* 65.

²⁹ Silberberg and Schoeman's *The Law of Property* 22; Carey Miller and Pope *Land Title* 295.

³⁰ Silberberg and Schoeman's *The Law of Property* 22.

³¹ Van der Walt *Constitutional Property Law* 110.

³² Van der Walt *Constitutional Property Law* 72-73.

³³ Van der Walt *Constitutional Property Law* 61.

³⁴ Van der Walt *Constitutional Property Law* 61, 73.

³⁵ Van der Walt *Constitutional Property Law* 61.

According to Hopkins,³⁶ property is a very wide term and in most instances it is interpreted to mean possessions. This would include immovable property, movable property and intellectual property. Thus the private law generally considers property to be something that is the object of a real right, but in constitutional law, property is much wider than in the private law and will probably include any asset in a person's estate, including real and personal rights.³⁷

It thus clear that since the development of the property clause, section 28, from the *Interim Constitution*³⁸ to section 25 of the *Constitution*,³⁹ "property" can relate to a wide range of objects, which include corporeal and incorporeal things. It can also relate to traditional property rights, real and personal rights and a wide range of other rights and interests which were not previously classified as property.⁴⁰ Currie and De Waal are of the opinion that property in a constitutional context does not only refer to the limited, traditional, private law concept of property, but is neither just a relationship or interest having an exchange value.⁴¹ Property is also known to include rights like intellectual property rights, patents, clientele and "new property", which include the right to share in a subsidy or pension scheme.⁴² In *Transkei Public Servants Association v Government of the Republic of South Africa*⁴³ the courts suggested that the term property may be interpreted so widely so that it may include state contracts, pension benefits and employment rights.

³⁶ Hopkins May 2006 *De Rebus* 21.

³⁷ Hopkins May 2006 *De Rebus* 21.

³⁸ *Constitution of the Republic of South Africa* of 1993.

³⁹ *Constitution of the Republic of South Africa* of 1996.

⁴⁰ Van der Walt *Constitutional Property Law* 77.

⁴¹ Currie and De Waal *Bill of Rights* 561; Van der Walt *Constitutional Property Law* 113; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 80.

⁴² Gildenhuys *Onfeieningsreg* 1; Chaskalson *SAJHR* 404-408; Van der Walt 1992 *SAHJR* 431; Van der Walt 1992 *SAJHR* 305; Budlender, Latsky and Roux *Juta's new Land Law* 1-19 to 1-22; Van der Walt 1995 *SAPL/PR* 311-334, Carey Miller and Pope *Land Title* 296.

⁴³ *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk).

The notion 'property'... not only includes corporeal or material objects like land, houses and motor vehicles but also incorporeal or immaterial objects like personal rights, shares in a company and patent rights.⁴⁴

Therefore, it is important to take cognizance of section 25(4)(b) of the *Constitution*,⁴⁵ where property is not limited to just land.⁴⁶ According to the *Act*, property that can be expropriated includes movables, and immovable property as well as real and personal rights.⁴⁷ Property is thus a vested right or an object with patrimonial value.⁴⁸

If one looks at the protection provided by the *Constitution* and the assumptions that it is crucial to limit the embrace of property so that economic development is not strangled, it will be essential to apply a criterion which both restricts and arguments the meaning and ambit of property.⁴⁹

4.3 The scope of section 25

Expropriation cannot take place outside the scope of section 25 of the *Constitution*. Section 25 is referred to as the property clause, which embodies a negative protection of property and that the right to acquire, hold and dispose of property is not guaranteed.⁵⁰ In other words, no individual has a positive claim against the state to provide them with property.⁵¹ However, it has to be construed in its historical and constitutional context. In this regard one needs to refer to section 25(1) which reads as follows:

⁴⁴ Gildenhuys *Onteieningsreg* 62.

⁴⁵ *Constitution of the Republic of South Africa* of 1996.

⁴⁶ *Constitution of the Republic of South Africa* of 1996.

⁴⁷ S1. Badenhorst en Van der Vyder 1996 *TSAR* 801.

⁴⁸ Silberberg and Schoeman's *The Law of Property* 23.

⁴⁹ Chaskalson *et al Constitutional Law* 31-5, 31-6; Murphy 1994 *SAJHR* 388-391; Lewis 1992 *SAJHR* 400-409.

⁵⁰ *FNB-case* par 48. *In re: Certification of the Constitution of the Republic of South Africa* 1996 1996 10 *BCLR* 1253 (CC) 1287C-E; Van der Walt *Constitutional Property Clause* 21-28; According to Carey Miller and Pope the South African common law provides protection of property in the sense that invasion of interference is not based on the owner's permission, Carey Miller and Pope *Land Title* 284-285, 293.

⁵¹ Witbooi May 2001 *Butterworths Property Law Digest* 2.

no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

The idea of the property guarantee is not to protect private property from all state interference, but only to protect it against state interference which is improper, illegitimate, invalid or unfair. There are two kinds of state interference with private property that are allowed by the property clause, namely expropriation and deprivation. Expropriation may be regarded as a subspecies of deprivation because of the fact that it has to comply with all the requirements of section 25(1), 25(2) and 25(3) of the *Constitution*,⁵² (although it must be kept in mind not to connect public purpose to expropriation and public interest to deprivation, as this will be incorrect.)

Before the *FNB*-case it was theoretically possible that the private/public balance might have been struck at any one or more of six stages in the property clause inquiry:

1. Firstly it had to be determined if the right or interest allegedly protected by section 25 was indeed constitutionally protected property.
2. If so, it had to be decided whether the law at issue provided for deprivation of the property.
3. If it was, the next stage is to determine if such deprivation is arbitrary.
4. Stage four is the decision of whether the law at issue provided for expropriation of the property.
5. If it did, the amount, time and manner of compensation had to be determined.
6. Lastly it had to be determined whether any deviation from the property clause standard could be justified under the general limitations clause.

⁵² Silberberg and Schoeman's *The Law of Property* 540; Van der Walt *Constitutional Property Law* 137,181; *FNB*-case par 57; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bisset and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* (Kwazulu-Natal Law Society and Msunduzi Municipality as *Amici Curiae*) 2005 1 SA 530 (CC) par 34.

It is evident that after the *FNB*-case, the focus is on stage 3, namely the test for arbitrariness.⁵³

The stages may be expressed in questions:

- a) Does that which has been taken away from the property holder by the operation of law in question amount to property for purposes of section 25?
- b) Has there been a deprivation of such property by an organ of state?
- c) If positive, the next question is whether such deprivation was consistent with the provisions of section 25(1)?
- d) If not, is such deprivation justified under section 36 of the *Constitution*?
- e) If positive, does it amount to expropriation for purpose of section 25(2)?
- f) If so, does the expropriation comply with the requirements of section 25(2)(a) and (b)?
- g) If not, is the expropriation justified under section 36?⁵⁴

As it is now clear that property does not only amount to land, it is important to discuss different aspects of section 25 throughout this chapter to indicate the scope thereof.

4.4. Deprivations and expropriations

It is important to make a distinction between deprivations as mentioned in section 25(1) and expropriation as mentioned in section 25(2) of the *Constitution*. In the *FNB*-case it was stated:

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s25 is applied to this wide genus of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference.⁵⁵

⁵³ Roux *Constitutional Law* 46-2.

⁵⁴ *FNB*-case par 46.

⁵⁵ *FNB*-case par 57.

4.4.1 Section 25(1)

Section 25(1) states:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Clearly this section guarantees everyone the property rights by preventing the dispossession of property, except in a way which is permissible.⁵⁶ This limitation will only be applicable where the state's action results in a deprivation. Arbitrary deprivation is described as "capricious or proceeding merely from the will and not based on reason or principle".⁵⁷

It is thus clear that the *Constitution* distinguishes deprivations and expropriations. In this chapter the *FNB* decision will be closely scrutinised, as it was this decision that developed an interpretation and a methodology for applying the requirements of section 25(1).⁵⁸

However, in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* Yacoob J re-defined deprivation as:

(W)hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation... No more need to be said that that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.⁵⁹

⁵⁶ Nonyana June 2005 *Butterworths Property Law Digest*.

⁵⁷ *Beckingham v Boksburg Licensing Court* 1931 TPD 280 282; the aim of s25(1) is to prevent this capricious exercise of discretionary power. Chaskalson *et al Constitutional Law* 31-13.

⁵⁸ Van der Walt *Constitutional Property* 122.

⁵⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) par 57.

Deprivation of property in the form of regulation or police power may be described as the uncompensated, but duly authorized and fairly imposed restriction on the use, enjoyment or disposal of property, which is usually private property, for the common good.⁶⁰ Van der Walt describes deprivation as instances where the state interferes with private property for the sake of police power⁶¹ regulation of the property's use.⁶² Police power allows the state to regulate property use in order to protect the rights of others as well as the public interest, without acquiring the property for a public use.⁶³ In the *FNB*-case the court described deprivation in general terms, indicating that almost any interference with the use, the enjoyment or exploitation of certain property involves deprivation, and that it could entail the dispossession of all rights, use and benefit to and of corporeal movable goods.⁶⁴ In *Mkontwana v Nelson Mandela Metropolitan Municipality*⁶⁵ the Constitutional Court stated that deprivation depends on the extent of interference with or limitation of use, enjoyment or exploitation of property.

Examples of deprivations without compensation are found in the *Land Act* of 1913, the *Urban Areas Act* of 1923 and the *Native Trust and Land Act* of 1936, which only designate about 8% of South Africa's total land area as native reserves.⁶⁶ This drove Sol Plaatjie to state: "Awaking on Friday morning, June 20, 1913, the South Africa native found himself, not actually a slave, but a pariah

⁶⁰ Silberberg and Schoeman's *The Law of Property* 544; Gildenhuys *Onteieningsreg* 23-24; Van der Walt *Constitutional Property Law* 131. Mostert 2003 *SAJHR* 572.

⁶¹ According to Van der Walt in the pre-constitutional era police power was not really used in South African law, but with the introduction of the property clause in the 1996 *Constitution* it became in use to indicate the differentiation between the regulation of the use and exploitation of property and the power of expropriation or compulsory acquisition. Van der Walt 1998 *SAJHR* 560. This principle legitimizes state interference with and limitations on use, enjoyment and the exploitation of property in public interest. Van der Walt *Constitutional Property Law* 128, Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 82.

⁶² Van der Walt 2002 *THRHR* 463; Chaskalson *et al Constitutional Law* 31-14; Van der Walt *Constitutional Property Law* 132-133.

⁶³ Van der Walt 1999 *SAPR/PL* 277; Mostert 2003 *SAJHR* 572.

⁶⁴ *FNB*-case par 57-61.

⁶⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and another* 2005 1 SA 530 (CC) 546; Van der Walt *Constitutional Property Law* 127.

⁶⁶ GN 1654 GG 30468 of 13 November 2007 par 5.

in the land of his birth".⁶⁷ Many other acts also attacked the land rights of coloured people; for example, the *Natal Pegging Act* of 1943 and the *Asiatic Land Tenure and Indian Representation Act* of 1946.⁶⁸

It is important to separate and clarify the difference between deprivations and expropriations in order to understand the concept of 'constructive expropriation' which will be discussed below. For the time being the main difference lies in the fact that deprivations (in the sense of police power) take place without compensation, whilst expropriation without compensation is seen as invalid and unconstitutional. The purpose of this distinction is so that the state may in the case of deprivations be able to regulate the use of the property for a public purpose or public interest, without the fear that the state may be liable to owners who were affected in the course of the regulation.⁶⁹ Deprivation thus falls short of the acquisition of rights in property for a public purpose.⁷⁰ Furthermore, deprivation refers to the capacity of the state to regulate the use of property, while expropriation refers to state power to terminate ownership unilaterally in a constitutionally prescribed manner.⁷¹ Except for these differences, there are many other distinctions between deprivation and expropriation, for example expropriation is required to be accompanied by appropriation or acquisition of benefits by the state, whilst this is no requirement for deprivation.⁷² Another characteristic is that deprivations are seen as temporary and expropriations as permanent. This distinction is, however, problematic, as expropriation may also

⁶⁷ GN 1654 GG 30468 of 13 November 2007 par 6.

⁶⁸ GN 1654 GG 30468 of 13 November 2007 par 7.

⁶⁹ Delpont *Property Practice* 155; *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

⁷⁰ Van der Walt and Both 1998 *SAPR/PL* 19-20.

⁷¹ Silberberg and Schoeman's *Law of Property* 540. Van der Walt 2002 *THRHR* 460, Van der Walt goes further and raises the question of whether there is room for a middle category of interference known as constructive, regulatory, indirect expropriation of inverse condemnation. In terms of this, the state does not directly, explicitly or formally expropriate the property, but imposes a deprivation that is of such a nature that it is necessary to treat it as an expropriation and require compensation or to invalidate the deprivation.

⁷² Van der Walt and Botha 1998 *SAPR/PL* 20.

be temporary in certain circumstances.⁷³ The *Du Toit*-case⁷⁴ can be used as an example of such cases.⁷⁵ In this case it was stated that a taking that is only temporary of nature cannot amount to expropriation, as expropriation is permanent of nature.

The idea that expropriation targets individuals rather than groups is also seen as a characteristic that distinguishes expropriation from deprivation.⁷⁶ The extent of state infringement on the property could also be seen as another characteristic. However, this distinction could be too abstract, especially when deprivation and expropriation are viewed as different points on a conceptually continuous line.⁷⁷

4.4.2. *Harksen v Lane*

*Harksen v Lane*⁷⁸ is probably one of the most important cases for discussion of the meaning of deprivation and expropriation, as the distinction between the two terms featured prominently in this case. This case was one of the first of many cases that got the problematic surrounding the distinguish between deprivation and expropriation going.

⁷³ Silberberg and Schoeman's *The Law of Property* 542; *Harksen v Lane and Other* 1998 1 SA 300 (CC) par 33-40; Van der Walt *Constitutional Property Law* 126; Chaskalson *et al Constitutional Law* 31-15.

⁷⁴ *Du Toit v Minister of Transport* 2003 1 SA 586 (CC).

⁷⁵ This case will be discussed below in terms of section 25(3).

⁷⁶ Mostert 2003 *SAJHR* 573.

⁷⁷ Silberberg and Schoeman's *The Law of Property* 543; Van der Walt *Constitutional Property Law* 124 where he states that both may involve state inference and possibly loss or deterioration of value.

⁷⁸ *Harksen v Lane and Other* 1998 1 SA 300 (CC).

This case did not only contain issues regarding section 28⁷⁹ of the interim *Constitution*, which is the equivalent of section 25 of the *Constitution*, but also section 21 of the *Insolvency Act*.⁸⁰ The estate of the applicant's husband was sequestrated and upon this sequestration her own property was also attached by the trustees of the insolvent estate in terms of section 21(1), which provides that upon sequestration of the insolvent spouse, the property of the solvent spouse shall vest in the Master of the Supreme Court and in the trustees of the insolvent estate.⁸¹ In terms of this section, the solvent spouse's property is dealt with as if it belonged to the sequestrated estate, unless the solvent spouse can prove independent ownership. As a result of this, the applicant challenged the constitutionality of section 21, stating that it had the effect of an unconstitutional expropriation on her property. Her argument continued on the basis that the vesting of her property in the Master without the provision of compensation was in conflict with section 28(3) of the interim *Constitution*,⁸² and thus violating the property clause which determines that the state may only expropriate against the payment of compensation. The next aspect of argument was that upon violating the property clause, it also violated the equality guarantee and amounted to unfair discrimination.⁸³ However, the Constitutional Court decided that section 21 was never in conflict with section 8 or section 28(3) of the Interim *Constitution*.

⁷⁹

28 Property

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

⁸⁰

24 of 1936.

⁸¹

In *De Villiers NO v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) 15I-J the court remarked in an *obiter* that the effect of the vesting of the solvent's spouse's property to the Master is to transfer full ownership of that property which belong to the solvent spouse in the Master and trustees.

⁸²

Constitution of the Republic of South Africa of 1993.

⁸³

For an in dept discussion see Van der Walt and Botha 1998 *SAPR/PL* 17-41.

The court held that section 21 only deprived the solvent spouse of her property temporarily. If it was a permanent taking, it would have constituted an expropriation where compensation in terms of section 25(2) and 25(3) would be payable.⁸⁴

The applicant, however, limited her attack on the validity of section 28(3), and never attacked the validity of section 28(1) or section 28(2). Thus the question whether section 21 was a valid deprivation in terms of section 28(1) and section 28(2) was never raised.⁸⁵

This case was the first judicial attempt to elucidate the distinction between deprivation and expropriation of property. Although this case was heard in terms of section 28 of the interim *Constitution*, the Constitutional Court did not accept the contention that this provision constituted an expropriation of the solvent spouse's property for which compensation was envisaged,⁸⁶ because it was only a temporary measure. In this regard the author agrees with Van der Walt and Botha,⁸⁷ who stated that it is wrong to make the assumption that temporary takings are not expropriations because they lack permanence.⁸⁸ If the requirement of compensation is fulfilled, temporary takings may also amount to expropriation.

4.4.3 Conjunctive and disjunctive reading

A further distinction can be made by the conjunctive or disjunctive reading of section 25(1) and (2) of the *Constitution*. The disjunctive reading suggests that the only overlap between section 25(1) and (2) is the application of section 36 to

⁸⁴ Hopkins and Hofmeyr 2003 *SALJ* 49-50.

⁸⁵ Van der Walt and Botha 1998 *SAPR/PL* 19.

⁸⁶ Silberberg and Schoeman's *The Law of Property* 554-555.

⁸⁷ Hopkins and Hofmeyr 2003 *SALJ* 51.

⁸⁸ Van der Walt 2004 *SALJ* 854, 862 and 876 where he criticized the categorical distinction; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 84.

both. Section 25(2) also requires additional requirements, namely that a valid expropriation must be carried out in terms of law of general application, it must be in the public interest or for a public purpose and compensation must be provided. Therefore, the test for arbitrariness is not applicable to expropriations. The conjunctive reading suggests expropriation to be a specialised form of deprivation. Section 25(1) states that law may not permit arbitrary limitation whilst section 25(2) states that expropriation must be for a public purpose or in the public interest and is subjected to an amount of compensation.⁸⁹ Therefore, expropriations may also not be arbitrary. In the author's opinion, the conjunctive reading would be correct, as expropriation is a subspecies of deprivation as it needs to comply with the requirements of section 25(1), 25(2) and 25(3) of the *Constitution*.⁹⁰

4.4.3.1 *The FNB-case*

The *FNB-case* sheds light on distinguishing deprivations from expropriations and the facts were briefly as follows: Two tax debtors, namely Lauray Manufacture's CC and Airpark Halaal Cold Storage CC were in arrears with tax payments to the South African Revenue Services. In an attempt to enforce payment of the unpaid custom duties and penalties, SARS acted in terms of section 114⁹¹ of the *Customs and Excise Act*⁹² and detained certain movable property under the physical control of the two tax debtors, which were two vehicles leased and sold under an installment sale agreement to the two companies. The appellant's attack was based on the fact that section 114 constituted an unlawful

⁸⁹ Mostert 2003 SAJHR 574.

⁹⁰ Silberberg and Schoeman's *Law of Property* 540; Van der Walt *Constitutional Property Law* 137,181; *FNB-case* par 57; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bisset and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) par 34.

⁹¹ This section provides that the Commissioner of Customs and Excise may enforce payments of customs debt by detaining and selling certain goods in relation. These goods may even belong to third parties and not to the customs debtor self.

⁹² 91 of 1964.

expropriation in terms of section 25(2).⁹³ However, such a detention of the property establishes a statutory fictitious pledge, as opposed to the statutory pledge or lien created by attachment and removal. Only one of the two debtors, namely Lauray, was paying off a considerable amount of outstanding duties and penalties in monthly installments. SARS detained a vehicle belonging to FNB t/a Wesbank (the appellant), for security of the debt, but Wesbank had already reserved ownership as security for the credit agreement involved in financing the purchase of the vehicle. With liquidation and the winding-up of Lauray, SARS recovered only a fraction of the debt, and as a result of this SARS wanted to sell the vehicles in an attempt to recover the outstanding balance. The tax debt due by Airpark constituted an outstanding custom duty, and as a result SARS detained the vehicles as security for the debt. When Airpark defaulted in paying off this debt in monthly installments as agreed, SARS attached the vehicles and removed them to a government warehouse for safekeeping prior to their intended sale in execution. It was contended that under the circumstances the appellant was not a customs debtor and that the detention and sale of the vehicles by the Commissioner amounted to an unconstitutional expropriation in terms of section 25(2)(b), as no compensation was paid. Therefore, the dispute in this case was about the constitutionality of a provision authorizing extrajudicial attachment and sale in execution of one person's movable property to satisfy the tax debt of another. The court unanimously found that section 114 was indeed constitutionally invalid, as it provided that the goods which belonged to other persons than the customs debtor are subject to lien, detention and sale.⁹⁴

It was held in the *FNB-case*⁹⁵ that the overriding purpose of the constitutional property clause is to strike 'a proportionate balance' between the protection of existing property rights and the promotion of the 'public interest'. The decision introduced a methodological change in that the limitation of property will always be regarded as a deprivation and only after it has been tested against the

⁹³ Constitution of the Republic of South Africa of 1996.

⁹⁴ Jazbhay 2002 August *De Rebus* 46-47; Kok 2004 *THRHR* 684.

⁹⁵ *FNB-case* 2002 4 SA 768 (CC) par 50.

requirements of section 25(1), the question of whether it constitutes an expropriation will be raised and tested against the requirements of section 25(2).⁹⁶ Furthermore, that the deprivation is subject to judicial scrutiny only in relation to the nexus between the purpose and the property affected and its owner.⁹⁷ And as the court decided that FNB is a juristic person, it is entitled to section 25 property rights.⁹⁸ This confirms that the conjunctive reading should be followed.

Thus it is clear that a function of deprivation is the confirmation that property may be limited legitimately through regulatory deprivation and it further lays down the requirements for valid limitations.⁹⁹ Examples of deprivations may be public health and safety laws related to property, land-use planning and development control, building regulations and environmental conservation laws.¹⁰⁰ In addition to the two formal requirements as set out in section 25(1), namely that deprivation must take place in terms of law of general application and that no law may permit arbitrary deprivation, it can also be said that deprivation must serve a legitimate public purpose or must be in the public interest.¹⁰¹ If the term law of general application is seen in context, it is designed to protect individuals from being deprived of their property by other laws. A deprivation will be seen as arbitrary where the deprivation was dependent on the will of the party effecting the deprivation, and section 25(1) prevents this capricious exercise of discretionary power.¹⁰²

⁹⁶ Van der Walt 2005 SALJ 77.

⁹⁷ Van der Walt 2005 SALJ 82.

⁹⁸ Kok 2004 THRHR 685.

⁹⁹ Van der Walt *Constitutional Property Law* 13-14; Van der Walt 1995 SAPL/PR 303.

¹⁰⁰ Van der Walt *Constitutional Property Law* 124.

¹⁰¹ Van der Walt *Constitutional Property Law* 137; Gildenhuys *Onteieningsreg* 142 where it is stated that an action can only be an expropriation if it complies with the constitutional requirements, and if it does not comply it is invalid and cannot be seen as an expropriation.

¹⁰² Chaskalson *et al Constitutional Law* 31-13. The addition of the requirement that the state may not expropriate arbitrarily places an important duty on the state to comply with the procedural and substantive features of non-arbitrariness when taking private property. Hopkins and Hofmeyr 2003 SALJ 54.

In German law, any deprivation that limits the content or scope of property has to be imposed by a valid law and satisfy the principle of proportionality,¹⁰³ in other words, it must serve the public interest and the burden it imposes must not exceed what the public interest requires.¹⁰⁴

Therefore, deprivation of property by the state is permissible, as long as it is not arbitrary and takes place in terms of law of general application.¹⁰⁵ It is a wide concept encompassing expropriation, and all expropriations may be seen as deprivations but not all deprivations will have the effect of expropriation of property.¹⁰⁶

The distinction between expropriation and deprivation does render a purpose to enable the state to regulate the use of property for public good, without the fear of incurring liability to the owners the property whose rights are affected.¹⁰⁷

From the discussion above it is clear that expropriation has the following characteristics:

- Expropriation takes place by law and without the cooperation of the effected owner. In other words, expropriation takes place by way of original acquisition and not transfer.
- Expropriation involves the loss of property, total and permanently or partial and temporary.
- Property is usually acquired by the state or on behalf of the state.
- The loss of property is brought about for a public purpose or in the public interest.

¹⁰³ Van der Walt *Constitutionality Property Law* 138.

¹⁰⁴ Van der Walt *Constitutional Property Law* 138.

¹⁰⁵ In this regard the word "law" refers to an act of Parliament and may include common law, *Park-Ross v Director: Office for Serious Economic Offences* 1995 2 SA 148 (C) 168; Van der Walt *Constitutional Property Law* 137, 143-144; *Southwood Compulsory Acquisition* 16-17.

¹⁰⁶ Currie en de Waal *Bill of Rights* 541.

¹⁰⁷ Chaskalson *et al Constitutional Law* 31-16.

- Compensation usually accompanies the loss.
- Compensation for expropriation must be distinguished from compensation for damages, because expropriation is a lawful act of the state's power.¹⁰⁸

In the *FNB-case*¹⁰⁹ the Constitutional Court determined that deprivation constitutes a broad, encompassing category which includes expropriation. Deprivations refer to limitations, restrictions and regulations. It is thus a wide and inclusive category, whilst expropriation is much narrower. Thus all expropriations are *ipso facto* deprivations and, therefore, the requirement of section 25(1) must also be met.¹¹⁰ It was also indicated in this case that deprivation refers to a wide *genus* of interference with property.¹¹¹ The effect of this is that all expropriations may be regarded as a form of deprivation, while only some deprivations may be regarded as expropriations.¹¹²

4.4.4 Constructive expropriation

The principle of constructive expropriation creates a middle ground, and blurs the distinction, between deprivation and expropriation.¹¹³

Constructive expropriation occurs when the expropriation was not intended, but the infringement on the property was so extensive that little is left of ownership entitlements.¹¹⁴ This concept is usually associated with a claim for compensation,¹¹⁵ and originated from US law.¹¹⁶

¹⁰⁸ Van der Walt *Constitutional Property Law* 188-189; Gildenhuys *Onteieningsreg* 8-9; Chaskalson *et al Constitutional Law* 31-12.

¹⁰⁹ 2002 4 SA 768 (CC).

¹¹⁰ Hopkins and Hofmeyr 2003 *SALJ* 48,52.

¹¹¹ *FNB-case* par 57.

¹¹² Van der Walt *Constitutional Property Law* 132; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University 2006) 163.

¹¹³ *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1247.

¹¹⁴ Silberberg and Schoeman's *The Law of Property* 553; Van der Walt *Constitutional Property Law* 125,209; Gildenhuys *Onteieningsreg* 137-149; Van der Walt 1999 *SAPL/PR* 273-331; Mostert 2003 *SAJHR*, Van der Walt 2002 *THRHR* 459.

¹¹⁵ Van der Walt *Constitutional Property Law* 209.

¹¹⁶ Van der Walt *Constitutional Property Law* 213; Van der Welt 1999 *SAPL/PR* 273-331.

Deprivation and expropriation are interrelated and this leads to the doctrine of constructive expropriation. Constructive expropriation is known by a variety of names, which include indirect expropriation, *de facto* expropriation, regulatory expropriation, and taking or inverse condemnation.¹¹⁷ These situations may occur where the regulation of property by the state destroys private property interests without appropriation by the state and which cannot be justified on the basis of public purpose.¹¹⁸

As stated by Mostert:

The concept of 'constructive expropriation' refers to the envisaged protection of individual property holders against detrimental consequences of state regulation of private property in two distinct ways. Either it affords compensation to the aggrieved right holder, or it is used to strike down the imposition on the basis that it is excessive. A legislative or administrative measure, which has the effect of removing or destroying all the rights of a particular property holder (whether or not a corresponding advantage is granted to the expropriator or another party) without envisaging the payment of compensation, can generally be described as constructive expropriation.¹¹⁹

When a valid deprivation takes place, the question arises whether or when that deprivation results in constructive expropriation. Many legal systems tried to answer the question.¹²⁰ In the United Kingdom the House of Lords came to the following conclusion in *Attorney-General v De Keyser's Royal Hotel Ltd*;

The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.¹²¹

¹¹⁷ Gildenhuys *Onteieningsreg* 137; Silberberg and Schoeman's *The Law of Property* 553; Van der Walt *Constitutional Property Law* 189-192; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD Thesis North-West University 2006) 161; Mostert 2002 *THRHR* 576-592, Van der Walt 1999 *SAPL/PR* 273,277; Pienaar and Van der Schyff 2003 *Obiter* 150, Van der Walt 2002 *THRHR* 459.

¹¹⁸ Silberberg and Schoeman's *The Law of Property* 553; Van der Walt *Constitutional Property Law* 209-210; Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD Thesis North-West University 2006) 169.

¹¹⁹ Mostert 2003 *SAJHR* 569.

¹²⁰ Gildenhuys *Onteieningsreg* 143.

¹²¹ *Attorney-General v De Keyser's Royal Hotel Ltd* 1920 AC 542 as quoted from Gildenhuys *Onteieningsreg* 143.

In Canada the court set the test for constructive expropriation in *Alberta (Minister of Public Works, Supply and Services) v Nilsson* where it was held that constructive expropriation entails:

A complete "taking" or total extinguishment of rights;
No compensation paid; and
A corresponding benefit in favour of the expropriating authority...

...Thus the "taking" of property must be more than a mere restriction on use, except if the restriction is of sufficient severity to remove virtually all of the rights associated with the property holder's interest. In such a case, a claim of de facto expropriation may be supported.¹²²

The possibility of constructive expropriation has been raised in many cases such as *Harksen v Lane*,¹²³ *Steinberg*¹²⁴ and *FNB*,¹²⁵ to name only the three most important cases that played a major role in the development of the doctrine of constructive expropriation. The *Harksen*-case negated the question regarding the introduction of constructive expropriation into South African law, but instead of recognizing the fact that deprivation and expropriation are interrelated, it only relied on the interpretation of the requirements for expropriation.¹²⁶ Goldstone R made the statement that expropriation "involves acquisition of rights in property by a public authority, this implies that the courts will test whether an individual's rights were taken away and vested in the state to determine if 'constructive expropriation' took place".¹²⁷ In the *Steinberg*-case, the court showed that despite the clear difference between deprivation and expropriation in section 25 of the *Constitution*,¹²⁸ there may still be room to develop the doctrine of constructive expropriation, especially where the deprivation of property indirectly results in an appropriation of rights by the state.¹²⁹ Although the *FNB*-case did not receive

¹²² *Alberta (Minister of Public Works, Supply and Services) v Nilsson* 1999 67 LCR 16,20 as quoted from Gildenhuys *Onteieningsreg* 143.

¹²³ *Harksen v Lane and other* 1998 1 SA 300 (CC).

¹²⁴ *Steinberg v South Peninsula Municipality* 2001 SA 1243 (SCA).

¹²⁵ *FNB-case* 2002 4 SA 768 (CC).

¹²⁶ Mostert 2003 *SAJHR* 576. Silberberg and Schoeman's *The Law of Property* 554.

¹²⁷ Gildenhuys *Onteieningsreg* 146.

¹²⁸ *Constitution of the Republic of South Africa* of 1996.

¹²⁹ Mostert 2003 *SAJHR* 577, 579.

explicit attention on the point of constructive expropriation it is still valuable to this discussion.

As the *Steinberg*-case¹³⁰ plays an important role in the development of the doctrine of constructive expropriation, a short discussion will follow.

4.4.4.1 *Steinberg v South Peninsula Municipality*¹³¹

This case is important as it deals with the constitutional expropriation provision in section 25(2) and 25(3) and raises the question of whether the distinction between expropriation and deprivation leaves room for the development of the doctrine of constructive expropriation in South Africa.¹³²

In short, the argument was about a road scheme cutting across the plaintiff's property which might effect the value of her property. Although the scheme might have this effect, it was nothing more than advance notification of the intention to construct a road. Only if the scheme was implemented could it been seen as a taking, and the approval of the scheme did not result in a taking.¹³³

The appellant sought an order directing the respondent to take all necessary steps to complete the expropriation process, or alternatively, to expropriate her immovable property. In other words, she applied for what looked like a *mandamus* or court order to force the local authority to either expropriate or complete the expropriation of her property.¹³⁴ The argument was based on constructive expropriation in terms of which deprivation of rights would in certain circumstances oblige the expropriating authority to pay compensation even

¹³⁰ *Steinberg v South Peninsula Municipality* 2001 SA 1243 (SCA).

¹³¹ *Steinberg v South Peninsula Municipality* 2001 SA 1243 (SCA).

¹³² Van der Walt 2002 *THRHR* 459; Van der Walt *Constitutional Property Law* 230; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 6 SA 573 (C) 595G.

¹³³ Jazbhay December 2001 *De Rebus* 44; Silberberg and Schoeman's *The Law of Property* 556.

¹³⁴ Van der Walt *THRHR* 2002 461.

though no rights were vested in the expropriating authority.¹³⁵ The dismissal of this application led to an appeal to the Supreme Court of Appeal. The argument did not really make any sense, because the notion of constructive expropriation implies that the action should already amount/result to expropriation and it should rather just be compensated or invalidated.¹³⁶

The Supreme Court of Appeal¹³⁷ did not wholeheartedly approve the development of a doctrine of constructive expropriation, but in the same breath they did not exclude the possibility of the development either.¹³⁸ The main reasons for this decision were the confusion that it may infuse into the law and secondly that such a wide doctrine of constructive expropriation may/will obstruct and frustrate land reform in South Africa.¹³⁹ It is clear that the main consideration to be taken into account is the imposition on the right holder and the doctrine of the constructive expropriation must be for the sake of public interest.¹⁴⁰

Although case law exists in South Africa regarding the development of the doctrine of constructive expropriation, no clear guidelines are set. Because of the absence of true guidelines to identify regulatory takings,¹⁴¹ judges are left vulnerable and often make decisions based on personal predilections rather than on constitutional principles.¹⁴² Constructive expropriation is not a quick solving solution in cases where the state went too far with regulatory measures.¹⁴³

¹³⁵ Jazbhay *De Rebus* December 2001 44.

¹³⁶ Van der Walt 2002 *THRHR* 461.

¹³⁷ *Steinberg v South Peninsula Municipality* 2001 SA 1243 (SCA).

¹³⁸ Van der Walt is in favour of this development, Van der Walt 2002 *THRHR* 459, while Kleyn is of the opinion that such a development shows that expropriation can also imply severe infringement of property without it actually being acquired by the state, Kleyn 1996 *SAPL/PR* 437.

¹³⁹ Mostert 2003 *SAJHR* 569; Van der Walt 2002 *THRHR* 459-473; Van der Walt *Constitutional Property Law* 231; *Steinberg v South Peninsula Municipality* 2001 SA 1243 (SCA) par 8.

¹⁴⁰ Schulze February 2002 *De Rebus* 47; Mostert 2003 *SAJHR* 569.

¹⁴¹ The term regulatory taking is used to justify the notion that the state should pay compensation to property owners for their loss caused by the state; Van der 1999 *SAPR/PL* 277.

¹⁴² Chaskalson *et al Constitutional Law* 31-19.

¹⁴³ Van der Walt 2002 *SAPL/PR* 369.

Therefore, the Canadian approach to constructive expropriation may be a solution.

4.4.4.2 Conclusion regarding constructive expropriation

Although Canadian law does not contain an entrenched constitutional property guarantee, their approach to constructive expropriation might be useful in the South African milieu as compulsory acquisition is a prerequisite for expropriation in both the legal systems.¹⁴⁴ Furthermore, in both systems no formal recognition is given to the idea that regulatory deprivations will be compensated.¹⁴⁵ The way in which the Canadian law provides guidelines is due to the fact that Canadian jurisprudence recognizes that expropriation is a matter that involves both fact and law, and when the aggrieved party's loss is accompanied by a form of appropriation by the expropriatee, compensation becomes payable to the aggrieved.¹⁴⁶

Different views or opinions are proposed by different authors. Mostert is of the opinion that the doctrine of constructive expropriation justifies the notion that the state should compensate property holders where their rights were infringed due to the state's power to regulate property rights.¹⁴⁷ Chaskalson states that "such a doctrine must, however, derive clear authority from the section".¹⁴⁸ Van der Schyff's opinion is that "constructive expropriation can be veiled as 'equality assurance' if the holder of the infringed property right is justly compensated".¹⁴⁹ The opinion favoured by the author is neatly summarized in *Steinberg v South Peninsula Municipality*.¹⁵⁰

¹⁴⁴ Van der Schyff 2007 *CILSA* 311

¹⁴⁵ Van der Schyff 2007 *CILSA* 311.

¹⁴⁶ Van der Schyff 2007 *CILSA* 311.

¹⁴⁷ Mostert 2003 *SAJHR* 567-568.

¹⁴⁸ Chaskalson *et al Constitutional Law* 31-19.

¹⁴⁹ Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD thesis North-West University 2006) 178.

¹⁵⁰ *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1248A-B.

However, the development of a more general doctrine of constructive expropriation, even if permissible in view of the express wording of s 25 of the Constitution, may be undesirable both for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right is limited by executive action could for instance adversely affect the constitutional imperative of land reform embodied in ss (4), (6) and (8) of s 25 itself.

However, every case should be determined by its own merits when constructive expropriation takes place to determine whether it was valid or not, along with the right to compensation.¹⁵¹ It is this right of compensation that will be the next aspect of discussion, as the determination and payment thereof will be different in the future.

4.5 Compensation in terms of the Constitution

4.5.1 Section 25(2)

Section 25(2)¹⁵² sets out the second requirement for expropriation, namely, that expropriation is subject to compensation.¹⁵³ If legislation which authorises expropriation does not make provision for compensation, the provisions of the *Constitution*¹⁵⁴ will be read into the statute and the court will order payment of compensation.¹⁵⁵ Therefore, it was important to define expropriation thoroughly so that a layperson can understand the importance of the constitutional guarantee of compensation. Section 25(2) also contains the other requirements for expropriation as mentioned above, namely that it must take place in terms of law of general application and it must be in the public interest or for a public purpose, which will be discussed below.

¹⁵¹ Gildenhuys *Onteieningsreg* 149.

¹⁵² *Constitution of the Republic of South Africa* of 1996.

¹⁵³ S2(b).

¹⁵⁴ *Constitution of the Republic of South Africa* of 1996.

¹⁵⁵ Budlener, Latsky and Roux *Land Law* 1-56.

4.5.2 Section 25(3)

Section 25(3)¹⁵⁶ states:

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

Therefore, expropriation without compensation will be rendered invalid.¹⁵⁷ Before the *Constitution*¹⁵⁸ and the *Act*, other legislation, for example those in Natal as discussed in Chapter 2, made provision for compensation under three headings, namely, land value, severance and injurious affection.¹⁵⁹ Today, however, the headings have changed in terms of the *Act* to market value, actual financial loss and a *solatium* in certain circumstances. The *Constitution*,¹⁶⁰ on the other hand, provides for three possible methods in section 25(2)(b) whereby the amount, time and manner of compensation can be determined, having regard to the circumstances mentioned in section 25(3)(a)-(e), namely:

- a) agreement between the expropriator and the expropriatee;
- b) approval of the amount of compensation offered a court; or
- c) a decision by a court.¹⁶¹

¹⁵⁶ *Constitution of the Republic of South Africa* of 1996.

¹⁵⁷ Silberberg and Schoeman's *The Law of Property* 568; ; Southwood *Compulsory Acquisition* 25; *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) 30G-H.

¹⁵⁸ *Constitution of the Republic of South Africa* of 1996.

¹⁵⁹ LAWSA 10 6.

¹⁶⁰ *Constitution of the Republic of South Africa* of 1996.

¹⁶¹ S25(2)(b) of the *Constitution of the Republic of South Africa* of 1996; Carey Miller and Pope *Land Title* 302. Silberberg and Schoeman's *The Law of Property* 568; Southwood *Compulsory Acquisition* 4, 25; Gildenhuys *Onteieningsreg* 99; Du Plessis and Olivier *Property Law Digest* 14.

Compensation can, therefore, be determined by agreement between the state and parties affected by the expropriation, and in the absence of such an agreement the court must determine or approve the amount payable.¹⁶²

These three methods ensure that compensation must be “just and equitable”,¹⁶³ and must reflect an equitable balance between the public interest and the interest of those affected.¹⁶⁴ (Reflecting an equitable balance often refers to land reform, which will be discussed separately.) These requirements listed in section 25 of the *Constitution*, including all relevant circumstances, must be taken into account to determine “just and equitable” compensation.¹⁶⁵ If one of these aspects proves to be unjust or inequitable, the standard set by the *Constitution*¹⁶⁶ is not met.¹⁶⁷ The disputes about the quantum of compensation are about rand and cent. A method for translating the vague criteria in section 25(3) that are readily quantifiable must be found.¹⁶⁸

In the *First Certification-case*¹⁶⁹ there was no evidence that market value is the international standard for determining the amount of compensation. To calculate the amount of compensation, the circumstances stated in section 25(3) need to be taken into account, and that should ensure that the amount of compensation is just and equitable even in cases where the compensation is lower than the market value. Market value is only one of several factors that should be taken into account when determining the amount of compensation, and be lower than

¹⁶² Van der Walt *Constitutional Property Law* 272.

¹⁶³ “Just and equitable compensation is the sum total of the value of the interest of those affected by expropriation, minus the value of the public’s interest.” Badenhorst 1998 *De Jure* 264.

¹⁶⁴ Roux *Constitutional Law* 46-34; Van der Walt *Constitutional Property Law* 272; Chaskalson *et al Constitutional Law* 31-25.

¹⁶⁵ Van der Walt *Constitutional Property Law* 272; Silberberg and Schoeman’s *The Law of Property* 568; Van der Walt 2006 *SALJ* 38, Chaskalson 1995 *SAJHR* 232-324; Du Plessis and Olivier *Property Law Digest* 12.

¹⁶⁶ *Constitution of the Republic of South Africa* of 1996.

¹⁶⁷ Silberberg and Schoeman’s *The Law of Property* 568.

¹⁶⁸ Roux *Constitutional Law* 46-35.

¹⁶⁹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 4 SA 744 (CC) 799B-D.

market value as long as it can be justified by the *Constitution*.¹⁷⁰ Expropriation without actual payment is also possible as long as the requirements in section 25(3) are applied.¹⁷¹

The requirements set out in section 25(3) are not *numerus clausus*, as indicated by the words "including". Thus the conclusion can be made that these are some of the factors that may have an influence on the determination of the amount compensation payable. Any other relevant factor may also be taken into account and the courts are bound to consider all relevant circumstances, even if the factors are negative they should still be considered.¹⁷² It is more difficult to argue that compensation higher than market value will comply with the constitutional norm.¹⁷³ There are exceptional cases that require compensation higher than market value, for example where the property has a value to the owner which is much higher than market value.¹⁷⁴ For instance, in a case where a person in a wheelchair made his home 'wheelchair friendly' and it would cost him a great amount to do the same alterations to another house.

Section 12 of the *Act*, which was the main statutory provision concerning compensation in the pre-constitutional era, provided for market value as measure for compensation, whilst the *Constitution*¹⁷⁵ requires that the interest of the expropriatee and the public must be balanced.¹⁷⁶ Market value should be determined first and then it should be determined whether it should be reduced in the view of the other factors mentioned in section 25(3).¹⁷⁷

¹⁷⁰ Silberberg and Schoeman's *The Law of Property* 569, Zimmerman 2005 SALJ 407.

¹⁷¹ Silberberg and Schoeman's *The Law of Property* 527.

¹⁷² Badenhorst 1998 *De Jure* 264.

¹⁷³ Silberberg and Schoeman's *The Law of Property* 572; Kleyn 1996 SAPL/PR 444.

¹⁷⁴ Chaskalson *et al Constitutional Law* 31-24.

¹⁷⁵ *Constitution of the Republic of South Africa* of 1996.

¹⁷⁶ Silberberg and Schoeman's *The Law of Property* 568.

¹⁷⁷ Van der Walt 2006 SALJ 39.

As mentioned in Chapter 3, the *Du Toit*-case¹⁷⁸ is very significant to this aspect, and, therefore, it is of utmost importance to refer once again as it changed the constitutional interpretation regarding the determination of compensation.

4.5.2.1 The Du Toit-case¹⁷⁹

The difference between section 12(1)(a) and 12(1)(b) was the core of the argument in the *Du Toit v Minister of Transport*.¹⁸⁰ This case dealt with the compensation award for the removal of gravel on private land for the maintenance of a public road. The landowner argued that he should be compensated for the market value of the gravel that was removed from his land, while the state claimed that he should only be compensated for the actual loss caused by the taking of the right to use the land temporarily. In the plaintiff's view he should have been compensated in terms of section 12(1)(a) and the state argued that compensation must be calculated according to section 12(1)(b).

The Cape Provisional Division confirmed that it was the right to use the land temporarily and the taking of the gravel that was expropriated. Therefore, there was no market value in this case and compensation had to be calculated in terms of section 12(1)(b). The Cape Provisional Division relied on *South African Roads Board v Bodasing*¹⁸¹ where it was ruled that if a right was expropriated and the right does have a market value, there will be no difference whether the compensation was calculated in terms of section 12(1)(a) or 12(1)(b), as market value and actual financial loss amounts to the same amount.

On appeal to the Supreme Court of Appeal, the decision of the Cape Provisional Division was overturned, and the Supreme Court of Appeal was of the opinion

¹⁷⁸ *Du Toit v Minister of Transport* 2003 1 SA 586 (C)

¹⁷⁹ *Du Toit v Minister of Transport* 2003 1 SA 586 (C). Schulze March 2005 *De Rebus* 35 and Matlala April 2006 *De Rebus* 2006.

¹⁸⁰ *Du Toit v Minister of Transport* 2003 1 SA 586 (C). Schulze March 2005 *De Rebus* 35 and Matlala April 2006 *De Rebus* 2006.

¹⁸¹ *South African Roads Board v Bodasing* 1995 4 SA 867 (D).

that the matter should have been decided upon reference to section 12(1)(b), which deals with permanent expropriation of rights and temporary takings of rights to use property.¹⁸² The calculation of compensation must be determined by calculating the replacement cost or “in any other suitable manner”. The Supreme Court of Appeal held that the Cape Provisional Division was wrong to calculate compensation in terms of section 12(1)(bb), as this section is only applicable to section 12(1)(a) and not to the taking of a right as provided for in section 12(1)(b).

The case eventually proceeded to the Constitutional Court.¹⁸³ The Constitutional Court confirmed that the *Constitution*¹⁸⁴ provides the principles and values and sets the standard which have to be applied and met whenever an expropriation of property takes place. Therefore, the requirements of section 25(2) and 25(3) need to be complied with. The Constitutional court also pointed out that the difference between the *Act* and the *Constitution*¹⁸⁵ may have an effect on the fairness of the amount compensation to be awarded. After the majority considered section 8(1)(c) of the *National Roads Act*, the majority agreed with the Supreme Court of Appeal that it was not the gravel that was expropriated, but the right to remove the gravel, and that the compensation offered on the basis of the value of temporary use was just and equitable. However, the minority disagreed and argued that it was indeed the gravel that was expropriated and not the right to use the land temporarily, the outcome was nevertheless that compensation was just and equitable.¹⁸⁶

4.5.2.2 *Kerksay Investments (Pty) Ltd v Randburg Town Council*¹⁸⁷

¹⁸² *Minister of Transport v Du Toit* 2005 1 SA 16 (SCA).

¹⁸³ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC). For a detailed discussion of the *Du Toit*-case, see Van der Walt 2005 SALJ 765-778.

¹⁸⁴ The *Constitution of the Republic of South Africa* 108 of 1996.

¹⁸⁵ The *Constitution of the Republic of South Africa* 108 of 1996.

¹⁸⁶ Van der Walt 2005 SALJ 771.

¹⁸⁷ *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T).

Another case that is also significant to section 25(3)¹⁸⁸ is *Kerksay Investments (Pty) Ltd v Randburg Town Council*.¹⁸⁹

In *Kerksay Investments (Pty) Ltd v Randburg Town Council*¹⁹⁰ it was pointed out that the consideration of the *Act* alone can point towards compensation that is below market value, even without the influence of section 25(3).¹⁹¹ In the *Kerksay-case*¹⁹² it is clear that the basis for calculating compensation has shifted when it was stated that this method should be rejected.¹⁹³

The facts can be summarized as follows:

The appellant's property had been zoned as residential area, but was rezoned as property which could also be used as offices by the Randburg Amendment Scheme 128 of 1974. The condition was that the owner shall register a servitude for road widening purposes and a servitude for public parking purposes. This scheme was replaced by the Randburg Town Planning Scheme of 1976. Notice of expropriation took effect on giving the respondent notice on 3 April 1990 of the widening of the road. In terms of section 7(2)(c) and 12(1)(b) of the *Act* the amount of compensation that had been offered totaled an amount of R1401,00 being R1400 for the improvements and R1 for the land. The R1 had been calculated on a valuation of the expropriated servitudinal area taking into account the 1976 scheme and the reasoning that what had been taken had long ago been rendered valueless. The appellant claimed R40 000 compensation as actual financial loss or inconvenience. At the pre-trial conference the parties

¹⁸⁸ Constitution of the Republic of South Africa of 1996.

¹⁸⁹ *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T).

¹⁹⁰ *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T).

¹⁹¹ Constitution of the Republic of South Africa of 1996. *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T) 522F-G. Expropriation of required land against an amount of compensation which is less than market value could overcome or alleviate the problem of acquiring land in order for land reform purposes. Van der Walt 2006 SALJ 23. The Supreme Court of Appeal held in *City of Cape Town v Helderberg Park Developpment (Pty) Ltd* 2007 1 SA 1 (SCA) par 21 that compensation cannot be more than market value, because the owner may not be in a better or worse position as a result of the expropriation.

¹⁹² *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T).

¹⁹³ *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 1 SA 511 (T) 522E-G.

agreed that the scheme had caused a diminution in the value of the property. If it is legally permissible to take into account the diminution in the value due to the operation of the 1976-scheme, compensation payable in terms of section 12(1)(b) will be R1401,00, but if it is not legally permissible then the appropriate amount of compensation will be R40 000,00. The compensation court held that the 1976 scheme had not depreciated the value of the property and dismissed the appellant's claim for compensation as no loss had been suffered. An appeal was lodged to the Provincial Division, where the court found that the compensation court had erred in straying beyond the confines of the agreement between the parties limiting the issues before court and held accordingly that the compensation court had misdirected itself and that the award should be set aside.

4.5.3 Factors determining the amount of compensation

As compensation will be influenced by the factors in section 25(3)¹⁹⁴ in the future, a brief discussion of each will follow. It is important to keep in mind that these factors are not *numerus clausus* and other factors not mentioned in this section may also be taken into account.¹⁹⁵

4.5.3.1 The current use of the property

This consideration requires evidence of the exact use of the property on the date of expropriation, as this is the date compensation becomes payable. The use is thus relevant to reach the equitable balance between public interest and the interest of the expropriatee.¹⁹⁶

¹⁹⁴ Constitution of the Republic of South Africa of 1996.
¹⁹⁵ Silberberg and Schoeman's *The Law of Property* 572.
¹⁹⁶ Southwood *Compulsory Acquisition* 79.

Property may have one use, various uses or mixed uses.¹⁹⁷ It may even have a potential use – a factor that was taken into account in the pre-constitutional era to determine compensation.¹⁹⁸ Today this consideration is used to justify the expropriation of scarce resources, for example land that is not used productively and may be needed for housing schemes or for the support of emerging farmers.¹⁹⁹ Budlender adds that this consideration should not be used to punish a person for socially undesirable use of land as it would not constitute public purpose.²⁰⁰

Southwood is of the opinion that the use of the property should be taken into account not for the purpose of setting the market value, but rather in conjunction with market value for the assessment of the just and equitable compensation package.²⁰¹

4.5.3.2 *The history of the acquisition and use of the property*

No guidelines are set as to how the current use of the property should be weighed up against the historical use. As a result, it is not clear whether the expropriatee will be entitled to more or less compensation where the property was historically used unproductively, but that it was now in productive use.²⁰²

Since section 25(3) stipulates 'acquisition', it is submitted that it is the history of the expropriatee's acquisition which is relevant, rather than that of his predecessors. Evidence thus required will be when the property was acquired,

¹⁹⁷ Silberberg and Schoeman's *The Law of Property* 575, Gildenhuys *Onteieningsreg* 301; *Port Edward Town Board v Kay* 1996 3 SA 664 (A) 774J-675A.

¹⁹⁸ *Thanam NO v Minister of Lands* 1970 4 SA 85 (D) 88D-E; *Dormehl v Gemeenskapsonwikkelingsraad* 1979 1 SA 900 (T) 902D; *Union Government v Jackson and Others* 1956 2 SA 428G; Chaskalson *et al Constitutional Law* 31-19.

¹⁹⁹ Silberberg and Schoeman's *The Law of Property* 575; Van der Walt *Constitutional Property Law* 274; Budlender, Latsky and Roux *Land Law* 1-56, 1-59; Gildenhuys *Onteieningsreg* 172.

²⁰⁰ Van der Walt *Constitutional Property Law* 274; Budlender, Latsky and Roux *Land Law* 1-48-1-55, 1-59; Southwood *Compulsory Acquisition* 80.

²⁰¹ Southwood *Compulsory Acquisition* 79.

²⁰² Silberberg and Schoeman's *The Law of Property* 575; Badenhorst 1998 *De Jure* 261.

from whom, what the price was and what terms and the financing of the acquisition.²⁰³

The history of the acquisition will be relevant where compensation needs to be calculated for land which was obtained by forced removals or made available to white farmers at low prices with state subsidies or with favourable loans.²⁰⁴ Where land was sold or leased to white farmers for less than market value, it would be unfair to compensate such a person for the full market value. Clearly this consideration was added to allow the court to consider the effect that apartheid related expropriation may have had on the amount of compensation.²⁰⁵

4.5.3.3 *The market value of the property*

As this topic is fully discussed in Chapter 3 and above in terms of the *Constitution*,²⁰⁶ only brief reference will be made here to market value. It is, however, important to remember that market value in the property clause must have the same meaning as market value in the *Act*.²⁰⁷ Usually just and equitable compensation would be market value,²⁰⁸ but it should not be regarded as the underlying norm that compensation needs to be based on.²⁰⁹ All factors need to be taken into account. A problem that may occur is that market value may inflate the amount of compensation due to investments of improvements made by those affected.²¹⁰

²⁰³ Southwood *Compulsory Acquisition* 79.

²⁰⁴ Silberberg and Schoeman's *The Law of Property* 575; Southwood *Compulsory Acquisition* 80; Du Plessis and Olivier 1997 *Property Law Digest* 14; Gildenhuis *Onteieningsreg* 172; Budlender, Latsky and Roux *Land Law* 1-48,1-50,1-60.

²⁰⁵ Van der Walt *Constitutional Property Law* 275; Gildenhuis *Onteieningsreg* 172 and Badenhorst 1998 *De Jure* 261-262. Du Plessis and Olivier 1997 *Property Law Digest* 14.

²⁰⁶ *Constitution of the Republic of South Africa* of 1996.

²⁰⁷ Badenhorst 1998 *De Jure* 262.

²⁰⁸ Chaskalson *et al Constitutional Law* 31-23.

²⁰⁹ Van der Walt *Constitutional Property Law* 275, Silberberg and Schoeman's *The Law of Property* 576; Budlender, Latsky and Roux *Land Law* 1-48-1-55,1-63.

²¹⁰ Silberberg and Schoeman's *The Law of Property* 576; Gildenhuis *Onteieningsreg* 174-176.

4.5.3.4 *The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property*

The viewpoint for this consideration refers to land taken from black persons during the apartheid era and made available to white persons with state loans and subsidies. It is clear that if the investment/improvement or subsidy is not taken into account, the current landowner will benefit from the acquisition.²¹¹ This consideration thus allows the court to adjust the amount of compensation where the state had granted a subsidy or made a direct improvement/investment.²¹² Budlender is of the opinion that it is only direct subsidies that should be taken into account.²¹³

4.5.3.5 *The purpose of the expropriation*

The purpose of expropriation is an explicit requirement of the *Constitution*,²¹⁴ although it does not define clearly what must be taken into consideration.²¹⁵ It should incorporate 'public interest', and if the expropriation takes place for the purpose of land reform it will have an impact on the determination of compensation.²¹⁶ 'Public interest' and 'public purpose' will be discussed in 4.6 below. This consideration gives rise to a number of questions and uncertainties, the compensation award must not unjustifiably frustrate expropriation that is aimed at serving a 'pressing social necessity'.²¹⁷ There are two reasons why the purpose of expropriation is important. Firstly, where the expropriation lowers or

²¹¹ Silberberg and Schoeman's *The Law of Property* 576-577; Van der Walt *Constitutional Property Law* 275-276, Southwood *Compulsory Acquisition* 89; Gildenhuys *Onteieningsreg* 176; Budlender, Latsky and Roux 1-48-1-55, 1-65.

²¹² Van der Walt *Constitutional Property Law* 275; Silberberg and Schoeman's *The Law of Property* 577; Budlender, Latsky and Roux *Land Law* 1-65.

²¹³ Budlender, Latsky and Roux *Land Law* 1-62.

²¹⁴ *Constitution of the Republic of South Africa* of 1996; Budlender, Latsky and Roux *Land Law* 1-66, Van der Walt *Constitutional Property Law* 276.

²¹⁵ Southwood *Compulsory Acquisition* 90-91.

²¹⁶ Silberberg and Schoeman's *The Law of Property* 577. Badenhorst raises a special argument that compensation could be less than market value in the case of land reform. Badenhorst 1998 *De Jure* 263.

²¹⁷ Van der Walt *Constitutional Property Law* 276.

raises the market value of the property, its effect becomes important when calculating the amount of compensation, and secondly where the court balances public interest against the expropriatee's interest, it must consider the importance of the expropriation.²¹⁸

Section 25(3) clearly provides a new overriding framework for the duty of payment of compensation. However, the *Act* is still relevant and valid in deciding compensation issues, but it is subjected to constitutional provisions and will only be valid as long as it is not in conflict with the *Constitution*.²¹⁹ Once again this issue can be referred back to the *Du Toit case*.²²⁰ It might happen in certain circumstances that some of these factors may be more relevant than others, however, the importance is that these factors or other factors that are not listed in this section, should be taken into account.

4.6 Public purpose and public interest

The next important aspect to take note of is the imperative of section 25(2)²²¹ that property may be expropriated only in terms of law of general application for a public purpose or in the public interest.²²² The *Act*, however, only provides for circumstances where property is expropriated for a public purpose. The *Constitution* further defines 'public interest' in section 25(4) as:

- For the purpose 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.

²¹⁸ Southwood *Compulsory Acquisition* 90.

²¹⁹ Van der Walt *Constitutional Property Law* 269, Gildenhuys *Onteieningsreg* 177-179.

²²⁰ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC).

²²¹ *Constitution of the Republic of South Africa* of 1996.

²²² Silberberg and Schoeman's *The Law of Property* 566; Rautenbach *TSAR* 638; Gildenhuys *Onteieningsreg* 95-96, Southwood *Compulsory Acquisition* 17-22; *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BLCR 23 (T) 31B.

The constitutional scope for expropriation is, therefore, wider than that of the *Act*. This is one of the main issues concerning the *Act* and the drafting of the new proposed legislation.

4.6.1 *The term public*

It is necessary to determine what is meant by 'public' before the difference between 'purpose' and 'interest' is determined. In *Rondebosch Municipality Council v Trustees of the Western Province Agriculture Society*²²³ Innes JA expressed it as follows:

The word *public* is one of wide significance, and it may have several meanings, between some of which, in spite of their common origin, there are very real differences. In a broad sense it is commonly applied to things which pertain to or affect the people of a country or a local community. The expressions *public opinion*, *public road*, *public place*, *public hall*, are instances of the use of a word in that general way. On the other hand, it is frequently employed in a more restricted sense to denote matters which pertain not to the people directly but to the state or the government which represents the people. Thus the public accounts signify the government accounts; public revenue and public lands denote the revenue and the lands of the state; and the public service means the government service...²²⁴

Courts will have to use their own discretion to determine who the public in each case may be according to the context wherein it is used. One can, therefore, say that as long as something is done to benefit not only an individual, it benefits the public.

When a taking results in expropriation, the expropriation must take place for a 'public purpose' or in the 'public interest'.²²⁵ The main purpose of the *Act*, however, is to ensure that the expropriation takes place to the advantage of the

²²³ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 271; *Southwood Compulsory Acquisition* 17.

²²⁴ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 271 283-284.

²²⁵ *Gildenhuys Onteieningsreg* 94.

community and not to the advantage of an individual.²²⁶ This will be one of the key elements which will be amended in the new proposed Expropriation Bill to speed up the land reform process.

4.6.2 Public purpose

The term 'public purpose' does not have a clear meaning and is thus subject to various interpretations.

Pre-constitutionally the distinction between expropriation for 'public purpose' and expropriation in the 'public interest' was not very clear, and was it generally excepted that if something was in the public interest it might as well be for a public purpose. This was stated in *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd* as follows.²²⁷

Expropriation, generally speaking, must take place for public purpose or in the public interest. The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. *Non constat* that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case.²²⁸

According to the narrow interpretation of 'public purpose' in the *Act* (which will be discussed below) this transfer of expropriated property to private beneficiaries is improper, non-public and leads to unconstitutional expropriation. Therefore, expropriation only serves a 'public purpose' where the property was expropriated by the state for actual use by the state itself or for the actual use by the public.²²⁹

The *Act* states that 'public purpose' "includes any purposes connected with the administration of the provisions of any law by an organ of state."²³⁰ The

²²⁶ Gildenhuys *Onteieningsreg* 95.

²²⁷ *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A) 601 C-D.

²²⁸ 601 C-D.

²²⁹ Van der Walt *Constitutional Property* 243-244.

²³⁰ S1; Silberberg and Schoeman's *The Law of Property* 560.

expropriator, however, does not need to use the expropriated land itself, but expropriation where expropriated property is transferred to an individual will be invalid, because of the lack of 'public purpose'.²³¹

'Public purpose' can also be used in a broad sense, in terms whereof it refers to all purposes which pertain or benefit the general public,²³² or as Leon J stated it in *Rondebosch Municipality v Trustees of the Western Province Agriculture Society*,²³³ "matters which pertain to or affect the people of a country or a local community." In *Rondebosch*²³⁴ Innes J made the following conclusion regarding 'public purpose':

Public purpose may either be all purposes which pertain to and benefit the public in contradistinction to private individuals, or that may be those more restricted purposes which relate to the state, and the government of the country, - that is, governmental purposes.²³⁵

It is also understood to include "things whereby the whole population or the local public are affected and not only matters pertaining to the state or the government."²³⁶ In *Fourie v Minister van Lande en 'n ander*²³⁷ it was also held that these words should be interpreted in a broad sense, so that it can include things affecting the whole or local population, and not only things which the state or the government is concerned with.²³⁸

²³¹ Eisenberg 1995 SALJHR 220.

²³² Southwood *Compulsory Acquisition* 18; Gildenhuys *Onteieningsreg* 95, LAWSA 10 9 and Silberberg and Schoeman's *The Law of Property* 567; *African Farms and Townships Ltd v Cape Municipality* 1962 3 SA 392 (C) 396-397; *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 785 (N) 793; *Slabbert v Minister van Lande* 1963 3 SA 620(T) 621H.

²³³ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 271; *Slabbert v Minister van Lande* 1963 3 SA 620 (T) 621F, where it was stated further that the broad and narrow sense depends upon the context in which it is used.

²³⁴ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 271.

²³⁵ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 283.

²³⁶ *White Rocks Farm (Pty) Ltd & another v Minister of Community Development* 1984 3 SA 785 (N) 793I.

²³⁷ *Fourie v Minister van Lande en 'n ander* 1970 4 SA 165 (O).

²³⁸ *Jacobs Law of Expropriation* 15. And Gildenhuys *Onteieningsreg* 95; LAWSA 10 9.

Although the *Fourie-case*²³⁹ was based on the *Expropriation Act* 55 of 1965, the principle regarding 'public purpose' remains the same as in the current *Act*.

The applicant was the owner of certain property. On 28 March 1970 he received a notice of expropriation signed by the second respondent, in terms whereof the deputy Postmaster-General expropriated the property for 'public purpose' in terms of section 2(1) of the 1965 Act on authorization given by the first respondent. The first respondent had the right to expropriate the property to house technicians in the employ of the second respondent. The amount of compensation offered totaled R8'500, 00. The applicant questioned the validity of the expropriation on the grounds that the expropriation did not take place for 'public purpose' as intended in the Act and, therefore, it should be set aside. On 30 April 1970 the court gave a *rule nisi*. On the return date both respondents argued that the *rule nisi* should be upheld with costs as the expropriation was valid and for 'public purpose' as the Act intended. The question that arose out of this was whether the expropriation took place for 'public purpose' or not.

The court decided that the maintenance and expansion of the Republic's telecommunication system was not for sole governmental purposes, but also for 'public purpose' because it affects the whole country. Therefore, it is to the advantage of the public as a whole. The court also referred to the *Rondebosch-case* where Innes J defined 'governmental purposes' as follows:

Under all the circumstances, I have come to the conclusion that the expression 'public purpose' in this section must be confined to such purposes as are constitutionally required and created by the government of the country and may, therefore, be termed governmental purposes. It seems unnecessary to attempt to define the limit of such purposes; but it does not follow that they should be confined to purpose exercised through persons or bodies under the direct control or the immediate service of the State.²⁴⁰

²³⁹ *Fourie v Minister van Lande en 'n ander* 1970 4 SA 165 (O).

²⁴⁰ *Rondebosch Municipality V Trustees of the Western Province Agriculture Society* 1911 AD 271 286.

In the narrow sense it refers to governmental purposes, those more restricted purposes which relate to the state and the government of the country.²⁴¹ It can also be interpreted to benefit private beneficiaries, as long as it is legitimate.²⁴² The advantage as referred to above does not entail that every member of the community must derive personal advantage. Anything that is done to the advantage of the general public will be for 'public purpose'²⁴³ and will constitute 'public purpose' as long as the broader community receives an advantage. It was stated in the United States of America that:

It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise in order to constitute a public use... Everything which tends to enlarge the resources, increase the energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns, and the creation of new sources of private capital and labour, indirectly contributes to the general welfare and to the prosperity of the whole community.²⁴⁴

The interpretation of the 'public purpose' requirement underwent some difficulties during pre-constitutional case law because it was in contrast with 'public use' and 'public interest' respectively.²⁴⁵ 'Public use' and 'public purpose' both required a direct public advantage through actual use or access to the property, while 'public interest' only requires that the public must benefit, even indirectly, from the expropriation.²⁴⁶ 'Public use' further requires some actual physical use by the public.²⁴⁷

The debate about 'public purpose' illustrates the ambiguity in the common proposition that constitutional interpretation requires a 'generous' interpretation of

²⁴¹ Gildenhuys *Onteieningsreg* 95; Silberberg and Schoeman's *The Law of Property* 567; Slabbert v *Minister van Lande* 1963 3 SA 620 (T) 621F.

²⁴² Silberberg and Schoeman's *The Law of Property* 567; Gildenhuys *Onteieningsreg* 95; Van der Walt *Constitutional Property Law* 269.

²⁴³ LAWSA 10 9.

²⁴⁴ Murphy 1995 *SAPL/PL* 10 126.

²⁴⁵ Silberberg and Schoeman's *The Law of Property* 560.

²⁴⁶ Silberberg and Schoeman's *The Law of Property* 50; Eisenberg 1995 *SALJHR* 209.

²⁴⁷ Eisenberg 1995 *SALJHR* 208.

provisions in a Bill of Rights. However, this raises the question of generous to whom?²⁴⁸

Expropriation measures that intend to benefit private individuals will never constitute valid 'public purpose', but in the same breath expropriation measures cannot be invalid simply because they involve the transfer of property to private individuals to the benefit of those private individuals. Therefore, 'public purpose' does not require the direct use and access of property, but requires expropriation to create an advantage to the broader public.²⁴⁹

It is clear from the *Fourie*-case that the meaning of 'public purpose' must mean the same as it did in previous legislation.

4.6.3 Public interest

In *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* which is a pre-constitutional decision, Roper J defined 'public interest' as follows"

In my view a scheme is 'in the public interest' if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class or portion of the community.²⁵⁰

It is clear from this quotation that the term 'public interest' meant something different during the pre-constitutional era, than what is understood by this term today.

An interesting fact is that the interim *Constitution* did not provide for expropriation in the public interest, but the 1996 *Constitution* provides for expropriation in the public interest. The *Constitution* defines 'public interest' as including "the nation's

²⁴⁸ Buldeneer, Latsky and Roux *Land Law* 1-55.

²⁴⁹ Eisenberg 1995 *SALJHR* 221.

²⁵⁰ *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* 1948 4 SA 480 (W) 488.

commitment to land reform, and to reforms to bring about equitable access to South Africa's natural resources".²⁵¹

The double reference of 'public purpose' and 'public interest' in section 25(2) may be seen as an effort to prevent expropriations for land reform from being invalidated for not being in the 'public interest' because of the transfer of the expropriated property to an individual/private beneficiaries.²⁵²

The conclusion can thus be made that "public purpose" means something totally different from "public interest" and is it important that this section should be construed with regard to the ordinary meaning of the words in a generous and purposive way, giving expression to the values in the *Constitution* and its context.²⁵³

The term and concept 'public interest' is a widely used term applied in all branches of the law, and it is therefore strange that no exact definition has been formulated in case law. 'Public interest' is a term that may differ from time to time, from place to place and which is subject to the values and opinions of different culture segments of the community, and may not only differ from region to region, but also town to town, and different areas in the specific town.²⁵⁴

'Public interest' can thus be seen as the collective name for certain aspects of:

- economic interests;
- individual as well as collective interests;
- administrative interest;
- strategic interests; and
- legal interests.²⁵⁵

²⁵¹

S25(4).

²⁵²

Van der Walt *Constitutional Property* 243.

²⁵³

Southwood *Compulsory Acquisition* 19.

²⁵⁴

Du Plessis 1987 *THRHR* 290-291.

²⁵⁵

Du Plessis 1987 *THRHR* 293-294.

The requirements of public purpose and public interest ensure that the state does not abuse its power through controlling the power to expropriate and preventing the state from expropriating private property for improper or unlawful purposes.²⁵⁶ In the debate concerning 'public purpose' and 'public interest' the question arises whether the *Act* should be amended to include the words 'public interest' or whether the fact that it does not make provision for 'public interest' renders it invalid and inconsistent with the *Constitution*.

Although the *Constitution* does not allow expropriations solely to promote private interests, it is necessary that a court should respect the choice of the legislature as to where the public interest lies.²⁵⁷ When the public's interest in land reform is considered, the individual is to be considered in the context of the whole community's interest.²⁵⁸ 'Public interest' includes the interests of many and not the interests of an individual, thus all the inhabitants of the state – "individuals to all".²⁵⁹ 'Public interest' may be more than just land reform, but any action that is done to promote the greater part of a community.

The test to determine whether 'public interest' exists contains an objective and subjective side.²⁶⁰ The subjective side is determined when the interests of an individual are weighed up against the interest of another individual's right to determine any infringement on rights and the objective side is to determine if the infringement is in line with the public policy.²⁶¹

"Public interest" is, therefore, the instrument to measure the balance between clashing interests. It is important to have regard to the history and background to the adoption of section 25(2)(a) and section 25(4)(a) when interpreting and deciding what powers must be implied into the phrase 'in the public interest' to

²⁵⁶ Silberberg and Schoeman's *The Law of Property* 566.

²⁵⁷ Chaskalson et al *Constitutional Law* 31-22.

²⁵⁸ Southwood *Compulsory Acquisition* 22.

²⁵⁹ Du Plessis 1987 *THRHR* 291.

²⁶⁰ Du Plessis 1987 *THRHR* 292-293.

²⁶¹ Du Plessis 1987 *THRHR* 292-293.

proceed with the promotion of the values that underlie an open and democratic society based on human dignity, equality and freedom.²⁶²

As expropriation must take place for a public purpose or in the public interest, and takes place by state authority, it is an administrative action. In the next chapter expropriation as an administrative action will be discussed in order to indicate how the capacity to expropriate will change in the future (which will be discussed in Chapter 6).

²⁶² Southwood *Compulsory Acquisition* 21.

Chapter 5

Administrative procedure

5.1 Introduction

Expropriation is seen as an administrative action because of the fact that it is an action taken by an organ of state as mentioned in Chapter 2.1. The conclusion can thus be made that expropriation is an exercise of a statutory power affecting the expropriatee's property.¹ Therefore, it is important to understand what is meant by administrative action in light of the review process of expropriation actions which may and can 'adversely effect' a person as mentioned in Chapter 2.1.

Expropriation occurs in one of two methods, namely the judicial or the administrative method.²

When expropriation takes place by means of administrative action, the administrative method is used.³ The expropriating authority decides on the desirability of the expropriation, usually without reference to the expropriatee. This is followed by a resolution to expropriate and a notice of expropriation,⁴ where ownership passes even if the expropriatee is unhappy about the amount of compensation, however, the expropriatee is able to refer the dispute to the courts with the administrative method.⁵

¹ Southwood *Compulsory Acquisition* 31; *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) 748G-H.

² Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 2; Gildenhuys *Onteieningsreg* 13-14.

³ Gildenhuys *Onteieningsreg* 14-15; *Durban City Council v Jailani Café* 1978 1 SA 151 (D) 153-154; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 263.

⁴ *LAWSA* 10 17-18; Hall 1993 *SAPR/PL* 351.

⁵ Penny 1966 *SALJ* 185; Du Plessis *Compensation for Expropriation under the Constitution* (LLD These Stellenbosch-University 2009) 35.

The judicial method is used when the decision to expropriate is effected by a court.⁶ However, this method of expropriation used to take place in South Africa when the expropriation was authorised in terms of the old *Water Act*.⁷ In this instance the expropriator will request the court to grant the required land to the expropriator against compensation as the court deems fit. The expropriatee is a party to the litigation and may, therefore, argue the necessity or desirability of the expropriation and he/she may also argue the amount of compensation awarded.⁸

As expropriation in South Africa is mostly done in an administrative way, administrative requirements for a valid expropriation were laid down in *Durban City Council v Jallani Café*,⁹ namely;

1. the authority must comply with the procedure laid down in the legislation;
2. the expropriation must be for a purpose provided for in the legislation; and
3. acquisition must be for a *bona fide* act.¹⁰

To determine whether an action is administrative in nature, one has to consider administrative law principles such as the nature of the functionary performing the action,¹¹ the nature and source of the power that is being exercised¹² and whether the body concerned had a duty to act in the 'public interest'.¹³

The *Constitution*¹⁴ provides for the right to just administrative action in terms of section 33.¹⁵ Because section 33 deals with administrative action rather than with

⁶ LAWSA 10 18, Gildenhuys *Onteieningsreg* 14.

⁷ 54 of 1956; Gildenhuys *Onteieningsreg* 14.

⁸ LAWSA 10 18.

⁹ *Durban City Council v Jallani Café* 1978 1 SA 151 (D).

¹⁰ *Durban City Council v Jallani Café* 1978 1 SA 151 (D) 154.

¹¹ *Administrator, Transvaal and Others v Zenzile and Others* 1991 (I) SA 21 (A) 34C;

Administrator, Natal and Another v Sibiyi and Another 1992 4 SA 532 (A) 539C.

¹² *Administrator, Transvaal and Others v Zenzile and Others* 1991 (I) SA 21 (A) 34C;

Toerien en 'n Ander v De Villiers NO en 'n Ander 1995 2 SA 879 (C) 885D-E.

¹³ *De Ville Administrative Action* 36; Mdumbe 2005 SAPR/PL 8; *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 3 SA 344 (W) 364H-365A.

¹⁴ *Constitution of the Republic of South Africa* of 1996.

¹⁵ LAWSA 10 144. In terms of s 33 everyone has the right to administrative action which is lawful, reasonable and procedurally fair.

law, there will not easily be an overlap between section 33 and the property clause. This means that a law that provides for deprivation in a procedurally unfair manner will be challenged under section 25, and an administrative action that is procedurally unfair will be challenged under the *Promotion of Administrative Justice Act*¹⁶ (hereafter *PAJA*).

Section 1 of *PAJA* defines 'administrative action' as:

- 1(i) any decision taken, or any failure to take a decision, by-
 - (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provisional constitution; or
 - (ii) exercising a public power of performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external effect.¹⁷

As it is not clear what constitutes an administrative action, the next step is to determine what/who an organ of state is in order to understand the full extent of an administrative action.

5.2 Organ of state

Before 1994 the concept 'organ of state' was rarely used in legislation and it was only after the commencement of the *Interim Constitution*¹⁸ that the distinction between organs of state and private institutions became important. The South African law is not very clear on what constitutes an organ of state. Section 239 of the *Constitution*¹⁹ defines an organ of state as:

- (a) any department of state or administration in the national, provincial or

¹⁶ *Promotion of Administrative Justice Act* 3 of 2000.

¹⁷ S 1.

¹⁸ *Constitution of the Republic of South Africa* of 1993.

¹⁹ *Constitution of the Republic of South Africa* of 1996.

- local sphere of government; or
- (b) any other functionary or institution-
 - (i) exercising a power of performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer

Section 233(1)(ix)²⁰ states that an organ of state is circumscribed as "including a statutory body or functionary".

Administrative action does not necessarily need to be taken by an organ of state. As long as the body or person performs a public function or exercises a public power it may still constitute administrative action.²¹ The court followed this approach in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.²² In case of expropriation, the *Act* prescribes that the decision to expropriation needs to be taken by an organ of state. The test to determine whether an institution is an organ of state which performed the expropriation, is whether the power was exercised in the public interest.²³ The same was said of *Mkhize v Commission of Conciliation, Mediation and Arbitration*,²⁴ when the court held that the Commission for Conciliation, Mediation and Arbitration is an organ of state as envisaged in section 239(b)(ii) of the *Constitution*, as it exercises public powers and performs public functions in terms of legislation.

According to Rautenbach, a juristic person that falls under the scope of section 7(1)²⁵ and who acts under state authority will be an organ of state.²⁶ Thus a private body performing a public function could be acting as an organ of state, if

²⁰ PAJA 3 of 2000.

²¹ De Ville *Administrative Action* 44; Mdumbe 2005 *SAPL/PR* 20.

²² *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA). Olivier J held that the body in question only needs to exercise a public power of perform a public function to constitute an administrative action; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 4 SA 661 (SCA) par 23.

²³ The control test was laid down in *Directory Advertising Cost Cutters v Minister for Post Telecommunications and Broadcasting* 1996 3 SA 800 (T).

²⁴ *Mkhize v Commission of Conciliation, Mediation and Arbitration* 2001 1 SA 338 (LC) par 20.

²⁵ *Constitution of the Republic of South Africa* of 1993.

²⁶ Pienaar *Subjektiewe Regspersoon* 110.

that action is reviewable in terms of the Bill of Rights.²⁷ Wiechers, on the other hand, is of the opinion that whether an institution is an organ of state depends on whether it was a creature of statute, whether it was integrated in some hierarchy of state authority, whether it performed a public function and if it was a bearer of government authority.²⁸ Baxter confirms this with his argument that an institution under the duty to act in the public interest was a public authority and is, therefore, subject to the administrative law principles.²⁹

The criteria for determining whether a statutory body or functionary acts as an organ of state is twofold:

- exercising public power (state authority) and
- performing a public function.³⁰

In *Baloro v University of Bophuthatswana*³¹ it was held that a person or institution will be an organ of state if it can be described according to the following requirements:

- The fact that the organ was created by statute is not enough to qualify it as an organ of state; it must be integrated with the state as an organ exercising state authority.
- If a body performs a public function and receives financial assistance from the state, such bodies are organs of state.
- Private institutions which were not created by legislation but fulfill a public function under state supervision and receive financial assistance from the state, are also organs of state.

Du Plessis suggested that the words 'organ of state' in section 7(1)³² should be given an extended meaning and the court concurred with this and held that an

²⁷ Hoexter *Constitutional and Administrative Law* 117.

²⁸ Wiechers *Administrative Law* 67-69.

²⁹ Baxter *Administrative Law* 100.

³⁰ Pienaar *Subjektiewe Regspersoon* 112.

³¹ *Baloro v University of Bophuthatswana* 1995 4 SA 197 (Bop).

³² *Constitution of the Republic of South Africa* of 1993.

university was an organ of state as it was under the control of the executive.³³ It is a statutory juristic persons performing a public teaching function and which is largely financed by the state and representatives of the state are also appointed on the university councils. However, Venter is of the opinion that it is not possible to classify universities as organs of state, despite state subsidies and state representation in management structures.³⁴ In this regard the author would have to agree with Venter, although universities performs a public function, it not necessarily needs to be preformed by an organ of state, as long as it a public function or public power that is preformed it will still constitute an administrative action.³⁵

In order for an action to qualify as administrative action it must amount to a decision.³⁶ The decision to expropriate can be made without consulting the expropriatee, whereafter the expropriatee will have 60 days to respond to the notice after it was delivered.³⁷ This decision must have been made under empowering provisions and must affect rights adversely and must have a direct, external legal effect.³⁸ In this instance, one can refer to *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others*.³⁹ The question to be answered in this case was whether the minister's decision to lease property to the third respondent constituted an administrative action within the meaning of PAJA. The court decided that the minister's decision did constitute an administrative action, as the public power was exercised in the ordinary course of administering state property which had immediate and direct legal consequences. In this case administrative action was defined as:

³³ Mdumbe 2005 SAPR/PL 5.

³⁴ Pienaar *Subjektiewe Regspersoon* 112-113.

³⁵ *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA).

³⁶ Gildenhuys *Onteieningsreg 77; White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 785 (N) 792-793.

³⁷ S9.

³⁸ Hoexter 2006 *Acta Juridica* 306; Gildenhuys *Onteieningsreg 77; Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (K).

³⁹ *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 6 SA 313 (SCA).

In general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involved the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.⁴⁰

5.3 *Audi alteram partem*

It is a principle of the Common Law that no man shall be condemned unheard, and it would, to our mind, require very clear words in the Statute to deprive a man of that right.⁴¹

The *audi alteram partem* rule is seen as an equitable measure, which has its origin from Roman-Dutch law and English law and formed part of our law over the years.⁴²

Section 6(2)(a)(iii) of PAJA authorizes the court to review administrative action where the administrator was biased or was reasonably suspected to be biased. In layperson terms the *audi alteram partem* rule means that every party to a case must be given a chance to tell his side of the story. Thus literally it means to 'hear the other side'.⁴³ In *Minister of the Interior v Bechler*⁴⁴ the court stated it as follows :

the stereotyped expression which is used to describe those fundamental principles of fairness which underlie or ought to underlie every civilized system of law.

This means that every person whose rights are affected by an administrative action has the right to a fair hearing before the administrative organ takes

⁴⁰ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA) 324A-B.

⁴¹ *Chief Constable, Pietermaritzburg v Ishim* 1908 29 NLR 338 341.

⁴² Baxter *Administrative Law* 537; Viljoen 1990 *SAPR/PL* 280; Hall 1993 *SAPR/PL* 351.

⁴³ Hoexter *Constitutional and Administrative Law* 196.

⁴⁴ *Minister of the Interior v Bechler* 1948 3 SA 409 (A) 451.

action.⁴⁵ At common law it is known that "fair" entails two elements, namely, notice of the intended action and the opportunity to be heard before the final decision is taken. The notice of the intention to take action must be given in order to give proper effect to the second element.⁴⁶ The notice must contain certain information, such as the allegations against the effected party, and the time and place the hearing is to take place.⁴⁷ The purpose of this is to enable the affected party to prepare an answering brief.⁴⁸ The requirement of the second element, right to a hearing, is applicable to general administrative actions and purely administrative actions.⁴⁹ These two elements must be fulfilled in order for the administrative action to be fair. Fairness is an ambiguous concept and not easily ascertained.⁵⁰ It is a flexible concept, and it is the circumstances of each case which will determine the fairness, the seriousness and the consequences of each case also plays an important role in the determination of the fairness.⁵¹

In the new constitutional regime it is commonly accepted that the owner of the property may object to any administrative decision taken. No provision exists in the Act that provides a procedure where the effected person is given the opportunity to be heard⁵² about the intended expropriation, although earlier expropriation acts did make provision for such procedures, for example the 1981 Codification of the Orange Free state.⁵³

⁴⁵ Hall 1993 *SAPR/PL* 351; Baxter states "the celebrated principles of natural justice which dictate that persons who are affected by administrative action should be afforded a fair and unbiased hearing before the decision to at is taken". Baxter *Administrative Law* 536; Gildenhuys *Onteieningsreg* 78, 81; Purshotam 1994 *SALJ* 237, 239; *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 4 SA 427 (HHA) 439I-J; *Transvaal Agriculture Union v Minister of Land Affairs and Another* 1997 2 SA 621 (KH) 630I-632G; *Administrator, Transvaal & Others v Traub & others* 1989 4 SA 731 (A).

⁴⁶ Corder 1980 *THRHR* 159; Gildenhuys *Onteieningsreg* 82; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 36; *Van der Merwe and Others v Slabbert NO and Others* 1998 3 SA 613 (D) 625E-626B.

⁴⁷ *De Vos v Die Ringkommissie van die Ring van die NGK, Bloemfontein* 1952 2 SA 83 (O) 101A.

⁴⁸ Corder 1980 *THRHR* 160; Gildenhuys *Onteieningsreg* 82-82.

⁴⁹ Corder 1980 *THRHR* 161.

⁵⁰ Baxter *Administrative Law* 543.

⁵¹ Hoexter *Constitutional and Administrative Law* 196-197.

⁵² The opportunity to be heard presupposes a notice of the intended administrative action to take place. Baxter *Administrative Law* 544; Hall 1993 *SAPR/PL* 355.

⁵³ Hall 1993 *SAPR/PL* 352.

To ensure that a fair procedure is followed and to give adherence to the *audi alteram partem* rule, the moment that the Minister considers expropriating a certain property, he must call upon that person and discuss the potential expropriation before making the final decision. During the discussion the expropriator should give the expropriatee a clear idea of the nature and extent of the property to be expropriated. He should be given notice of factors which will be taken into account when deciding upon the expropriation and the expropriator should give the expropriatee adequate time to make representations to him before deciding on the expropriation.⁵⁴ The fulfillment of this rule is described as "a corner stone of administrative law".⁵⁵ It is important and necessary to give all owners the opportunity to object, and not only in those cases where it is prescribed by the governing law.⁵⁶ In *Bullock No and others v Provincial Government, North West Province, and another*⁵⁷ the question arose as to when the *audi alteram partem*-rule is applicable. This rule entails basically that a party to a matter has the right to be heard before an administrative decision is taken. Everyone has the right to administrative justice.⁵⁸ Although this case did not deal with expropriation, but the renewal of a lease, the principles as to administrative action are still applicable. Since the *Promotion of Administrative Justice Act* only comes into operation after the court's decision, it had to determine whether the decision to grant a servitude constituted administrative action as intended by item 23(2)(b) of the *Constitution*.⁵⁹ The court held that the appellant had a legitimate expectation to be heard and to make representations before the first respondent decides whether or not to renew the lease.

⁵⁴ Southwood *Compulsory Acquisition* 52-53. Baxter also states that an individual must be appraised of the information and reasons underlining the decision, Baxter *Administrative Law* 546; Hoexter *Constitutional and Administrative Law* 198; Corder 1980 THRHR 156,159; *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) 40C.

⁵⁵ Gildenhuys *Onteieningsreg* 81; *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 4 SA 427 (HHA) 439F-J.

⁵⁶ Gildenhuys *Onteieningsreg* 78, 81.

⁵⁷ *Bullock No and others v Provincial Government, North West Province, and Another* 2004 5 SA 262 (SCA).

⁵⁸ S 33 of the *Constitution of the Republic of South Africa* of 1996.

⁵⁹ *Constitution of the Republic of South Africa* of 1996.

Although expropriation is seen as an administrative action, the general practice was that a potential expropriatee did not have to be given the opportunity to be heard, as can be seen in pre-constitutional cases such as *Pretoria City Council v Modimola*⁶⁰ and *Laubscher v Native Commissioner, Piet Retief*.⁶¹ Fortunately the courts have changed their view on this and the emphasis is now on the need and importance of assessing each administrative act and its effect on rights and freedoms.⁶²

The application of the *audi alteram partem*-rule was extended in *Administrator, Transvaal and Others v Traub and Others*⁶³ to instances where the person effected by the decision had a legitimate expectation to make it more flexible. The question that was raised from this decision was whether a public official would be bound to adhere to the rules of natural justice of the actual or potential infringement of some legal right or consideration of fairness.⁶⁴ In *South African Roads Board v Johannesburg City Council*⁶⁵ the court confirmed the judgment in *Traub* and extended it by finding that the *audi alteram partem*-rule finds application in general legislation of administrative action which affects members of the community at large.⁶⁶

Although the *audi alteram partem*-rule may not always be applicable to expropriation processes, the administrative action of the expropriator must be constitutionally just. This raises the question to what extent this right will be applicable in cases of expropriation. In *Johannesburg Diocesan Trustees v Johannesburg City Council*⁶⁷ the court held that the *audi alteram partem*-rule:

⁶⁰ *Pretoria City Council v Modimola* 1966 3 SA 250 (A).

⁶¹ *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A).

⁶² Purshotam 1994 SALJ 3 237.

⁶³ *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

⁶⁴ Purshotam 1994 SALJ 3 238; Grogan 1991 SALJ 108 601.

⁶⁵ *South African Roads Board v Johannesburg City Council* 1991 4 SA 1(A).

⁶⁶ Hall 1993 SAPR/PL 353; Burns 1991 SAPR/PL 282.

⁶⁷ *Johannesburg Diocesan Trustees v Johannesburg City Council* 1957 2 SA 367 (W).

is die billikheidsreël *audi alteram partem* onbestaanbaar met die begrip 'onteiening' wat 'n selfverklarende algehele miskenning is van die eienaar en sy regte, behalwe sy reg op vergoeding.⁶⁸

Although this judgment is concerned with the administrative *audi alteram partem*-rule it is clear that the right contained in the bill of rights concerns administrative action which includes the right to be heard and the right to just administrative action.

*Buffalo City Municipality v Gauss and Another*⁶⁹ is another good example of the application of the *audi alteram partem*-rule in cases of expropriation. The facts of this case can be summarised as follows:

The appellant in this case was the Municipality who wanted to expropriate private property owned by the first respondent, namely Gauss. The first respondent was successful in setting aside the appellant's decision based on the fact that he was not granted a hearing prior to the decision being made. The court pointed out that in terms of section 5 of the *Act*, local authorities who are empowered to expropriate, must do so in accordance with the procedural requirements of the *Act*. As indicated above, the rules of natural justice provide that an individual who will be affected by the decision of the functionary, has the right to be heard before such decision is taken, unless the empowering statute expressly indicated otherwise. Thus the owner of property would, and should have the right to be heard before an expropriation takes place.⁷⁰ The question in this case was, however, whether Gauss was entitled to a hearing before the decision was taken, as the effect would be a restriction on the use of property. The appeal was upheld with costs, as the court held that the restriction would have no practical effect on the use of the property and, therefore, Gauss did not suffer any prejudice as the restriction was only temporarily.

⁶⁸ The equitable measure of the *audi alteram partem* rule is incompatible with the term expropriation which is a self-explanatory disregard of the owners right, except is right to compensation. (Own translation.)

⁶⁹ *Buffalo City Municipality v Gauss and Another* 2005 4 SA 498 (SCA).

⁷⁰ Schulze July 2006 *De Rebus* 33; Matlala October 2005 *De Rebus* 32-33

To conclude, expropriation is an administrative process which is normally commenced with negotiations.⁷¹ The common law rule is that natural justice must be observed before a decision is made rather than afterwards.⁷² Therefore, the effect and application of the *audi alteram partem*-rule is two-fold. Firstly it satisfies the expropriatee's desire to be heard before his rights are adversely effected, and secondly it provides the expropriator the opportunity to acquire information relevant to his decision.⁷³ At the hearing the affected person does not only have to present his case, but he must also convince the decision maker that he was wrong.⁷⁴ However, adherence should be given to the principles of natural justice by the authorities before the implementation of the expropriation and in cases of departure from the rules, the onus should always rest on the authority to justify this departure in the cases of expropriation.⁷⁵

These procedures are not compulsory in terms of the *Act*. One can, therefore, hope that the new proposed Expropriation Bill⁷⁶ will include a procedure where the expropriatee will be given the opportunity to be heard and adherence is given to the *audi alteram partem*-rule, and the author agrees with Corder, when he states that a minimum of content of timeous notice, an oral hearing and written reasons should be incorporated in the law.⁷⁷

5.3.1 Directly or indirectly

An administrative act has to be reasonable or justifiable, lawful and procedurally fair, and written reasons for such action must be furnished.⁷⁸ It has a legal and

⁷¹ LAWSA 10 144.

⁷² Hoexter *Constitutional and Administrative Law* 201.

⁷³ Burns 1991 SAPR/PL 282. *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A) 13B-C.

⁷⁴ Baxter *Administrative Law* 587; Hoexter *Constitutional and Administrative Law* 201.

⁷⁵ Purshotam 1994 SALJ 3 239.

⁷⁶ Section 11 of Bill 16 of 2008.

⁷⁷ Corder 1980 *THRHR* 177.

⁷⁸ Section 33 read with section 23(2)(b) of schedule 6 of the *Constitution of the Republic of South Africa* of 1996. Written reasons must be given, unless the reasons have been

binding effect until a competent court or tribunal sets it aside, and until such, the legal consequences cannot simply be overlooked.⁷⁹ It may, however, be subject to judicial review in one of two ways, namely directly or indirectly (collaterally).⁸⁰

The distinction between direct and indirect attacks is mainly for purposes of convenience. Where the main purpose of the attack on the action is the setting aside, correction, prevention or remedying the action, the attack is direct. Instances where the legality of the administrative action becomes an issue, the attack is indirect or collateral.

In *Smit v Minister of Public Works, RSA & Others*⁸¹ the plaintiff sought orders setting aside the administrative action (the expropriation) and to compel the defendant to transfer the property back to him.

The question was whether the setting aside of the administrative action was subject to the 180 day period referred to in section 7(1) of the *Promotion of Administrative Justice Act*.⁸² It was held that the legality of administrative action may be subjected to judicial review, either directly or indirectly.

Section 7(1) of PAJA provides:

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to sub-section (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in sub-section (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

made public, section 3 of PAJA; Gildenhuys *Onteieningsreg* 84; Southwood *Compulsory Acquisition* 31; Corder 1980 *THRHR* 169; Wiechers *Administrative Law* 221.

⁷⁹ *Smit v Minister of Public Works, RSA & Others* 2006 JOL 18041 (T) 10.

⁸⁰ Baxter *Administrative Law* 676.

⁸¹ *Smit v Minister of Public Works, RSA & Others* 2006 JOL 18041 (T).

⁸² *Promotion of Administrative Justice Act* 3 of 2000.

While section 6 provides:

(6)(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

Counsel agreed that in terms of section 6 the expropriation constituted an administrative action and that the claim setting aside the expropriation was ancillary to the main claim for retransfer and, therefore, the attack on the administrative action was indirect. Because the plaintiff's aim was the retransfer, he did not institute proceedings in a court for judicial review of the administrative action, and was it concluded that his action does not fall within the ambit of section 7(1) and the 180 day time limit did not apply. The definition of administrative action *per se* is not that important, it only determines the extent and standard of scrutiny applicable in reviewing actions.⁸³

Written reasons for the decision could be said to be the third rule encompassed by *audi alteram partem* principle, but finds little application in practice.⁸⁴ As mentioned previously, for an action to qualify as an administrative action, it must have adversely affected the right of a person and can be read as pertaining specifically to the question of the granting of remedies.⁸⁵

5.3.2 Direct, external legal effect

As a general principle, it means that the decision must not only have an effect internally, ie within the sphere of public administration. Instead, the decision is required to have a direct effect on a person's rights by determining the scope of a specific individual right.⁸⁶

The three elements can be said to exist out of this phrase, namely:

- Legal effect – which refers to the fact that the decision taken must have an effect on a person's right.
- Direct effect – which requires the finality in the determination of rights.

⁸³ De Ville *Administrative Action* 37.

⁸⁴ Corder 1980 *THRHR* 169.

⁸⁵ De Ville *Administrative Action* 51-53.

⁸⁶ Pfaff and Schneider 2001 *SAJHR* 82.

- External effect – excludes internal administrative acts from the definition.⁸⁷

Thus, in order for expropriation to be fair, adherence must be given to the administrative principles, and any expropriation act that is not done in a just and fair manner, may be reviewable by the courts.

5.4 Conclusion

From the above discussion it is evident that there are many aspects of the *Act* that are not consistent with the *Constitution*, namely:

- The *Act* predates the *Constitution*;
- The *Act* does not provide for expropriations to take place in the public interest, but only for a public purpose;
- The *Act* does not provide for notice of expropriation to be served upon parties with unregistered rights, or compensation to be paid to them;
- The *Act* does not provide for a notice to be served to inform the affected parties of the intended expropriation; and
- The *Act* does not provide explicit procedures for administrative actions to name only a few.

To satisfy all the parties affected by the expropriation, it is important to draft new legislation that will give adherence to all the constitutional requirements and fundamental rights. Further as the right to own property is endorsed as a human right in section 25(1), a new Act must be promulgated which will expedite land reform, one which is fair and equitable on the determination and amount of compensation payable and one that is infused with the equalities of human dignity, equality and freedom. An attempt to draft such legislation has been made, but after heavy debates concerning the constitutionality thereof it was not promulgated as envisaged but referred back to cabinet to rectify certain aspects.

⁸⁷

De Ville *Administrative Action* 54-55; Pfaff and Schneider 2001 *SAJHR* 72-75.

However, the Draft Policy, proposed Bill and reasons for the withdrawal of the proposed Bill will be discussed in the following chapter.

Chapter 6

The proposed expropriation framework

6.1 Introduction

After democracy was introduced in South Africa and the new South African legal order came into existence, it became necessary to restore the historical imbalance regarding land. Although, as seen, legislation regulating expropriation did (and still does) exist, and is it perceived to be insufficient as it delays the process of land reform.¹ In an attempt to relieve poverty, redress historical imbalances and improve access to agriculture land for upcoming black farmers, the cabinet drafted a Policy² and a Bill³ in an effort to alleviate these problems.

6.2 The Policy

From the discussion in the previous chapters, it is clear that the *Expropriation Act*⁴ (hereafter referred to as the *Act*) does not pass all the constitutional requirements, which only emphasises the need for a new expropriation framework for South Africa.⁵ Many discussions and debates concerning this issue have been passed and as a result, the Government published a Policy on the Expropriation Bill: "Expropriate for a public purpose in the public interest."⁶ The main objectives of the policy are to enable the state to use expropriation as an effective means of land reform and to align the *Act* with the *Constitution*.⁷

¹ Reasons for the delay will be discussed in this chapter.

² GN 1654 GG 30468 of 13 November 2007

³ Bill 10 of 2008.

⁴ *Expropriation Act* 63 of 1975.

⁵ Gildenhuys *Ontelening* 47.

⁶ GN 1654 GG 30468 of 13 November 2007.

⁷ Anon 2008 <http://www.info.gov.za/2008/08090510451001.htm> [Date of use 26 November 2008]

The Government published the Policy⁸ on expropriation on 13 November 2007, describing the current expropriation framework and proposed amendments to the framework.

The Policy gives a brief background of dispossession of property in South Africa, dating back as far as 1659,⁹ and it also explains the property clause in the *Constitution of the Republic of South Africa*¹⁰ (hereafter referred to as the *Constitution*). It also gives a brief discussion about the current expropriation framework,¹¹ and the principles of the new Bill. It is committed to rectify the historical wrongs by focusing on the expansion of the expropriation in South Africa.

The aim of the policy framework is to give effect to the *Constitution* and to infuse the values of equality, human dignity and the achievement of freedom.¹² If this is achieved, the centuries of colonial dispossession can be reversed and social justice achieved.¹³ Furthermore, it acknowledges that expropriation must be constrained by section 25, which provides that it must take place in terms of law of general application, and lastly it should be regulated by the constitutional right to administrative action that is lawful, reasonable and procedurally fair.¹⁴

The Policy¹⁵ can be seen as an instrument which emphasises the main issues regarding the current *Expropriation Act*¹⁶ and *Constitution*.¹⁷ According to the Policy,¹⁸ the main issues can be summarised as follows:

⁸ GN 1654 GG 30468 of 13 November 2007.

⁹ The history of expropriation was discussed in Chapter 2.

¹⁰ *Constitution of the Republic of South Africa* of 1996.

¹¹ Which was discussed in Chapter 4. The current expropriation framework in light of the *Constitution*, Pienaar JQR 2007 4.

¹² GN 1654 GG 30468 of 13 November 2007 par 17.1.

¹³ GN 1654 GG 30468 of 13 November 2007 par 17.1.

¹⁴ GN 1654 GG 30468 of 13 November 2007 par 17.1-17.3. Section 33 read with section 23(2)(b) of schedule 6 of the *Constitution of the Republic of South Africa* of 1996. Written reasons must be given, unless the reasons have been made public, section 3 of PAJA; Gildenhuys *Onteieningsreg* 84; Southwood *Compulsory Acquisition* 31; Corder 1980 *THRHR* 169; Wiechers *Administrative Law* 221.

¹⁵ GN 1654 GG 30468 of 13 November 2007.

1. The *Act* predates the *Constitution* with the result that its focus is not infused with the transformative intent.
2. The *Act* is inconsistent with comparable modern statutes elsewhere in the world.
3. The *Act* is inconsistent with the *Constitution*.¹⁹

According to the Policy, the following principles should underpin a new expropriation framework:

1. Expropriation in the public interest

The concept of 'public interest' and 'public purpose' was dealt with in Chapter 4, but once again, it is evident that legislation must be adopted which recognises and permits expropriation for purposes of land reform, restitution and redistribution in order to restore natural justice.²⁰ The *Act* restricts the Government's ability to expropriate only for a public purpose, whereas the *Constitution* permits the Government to expropriate for both a public purpose and in the public interest.²¹

2. Expanding the scope of the protected rights

The current *Act* does not provide for compensation for expropriations of all rights in property. Regarding land, compensation is payable to the owner, holder of registered right and holders of certain unregistered rights. Therefore, the legislation must be amended to provide for compensation for expropriation of all rights in property.²²

3. Compensation

As discussed in Chapters 3 and 4, compensation is one of, if not the most problematic issue regarding the *Act* and the *Constitution*. The formula for

¹⁶ *Expropriation Act* 63 of 1975.

¹⁷ *Constitution of the Republic of South Africa* of 1996.

¹⁸ GN 1654 GG 30468 of 13 November 2007.

¹⁹ GN 1654 GG 30468 of 13 November 2007 par 23.

²⁰ GN 1654 GG 30468 of 13 November 2007 par 30.1 and 30.2.

²¹ GN 1654 GG 30468 of 13 November 2007 par 24.1

²² GN 1654 GG 30468 of 13 November 2007 par 31.1 and 31.2.

the payment of the amount of compensation in terms of the *Act* is inconsistent with the *Constitution*, as it gives the owner the right to claim the market value of the property, plus an amount to make good any actual financial loss and a solatium. This leads to an amount that is higher than the amount calculated in terms of the *Constitution*, and is it suggested that this inconsistency must be avoided by specifying in legislation that compensation should be just and equitable as provided for in the *Constitution*.²³ The Policy also states that:

The amount of compensation has to be just and equitable reflecting an equitable balance between the public interest and the interest of those affected' having regard to all relevant circumstances, of which market value is but one factor.²⁴

The Policy further states that the Bill must provide for a system where the Minister may make interim determinations on the amount of compensation, but the interim determination will have no effect on the final decision as approved by court of law as the Constitutional requirement or as agreed upon by the parties.²⁵

6.3 The proposed Expropriation Bill

It is the first time since 1994 that such radical change regarding a bill has been made. It makes one wonder who is handling South Africa's future in such an unthinking manner.²⁶

The Expropriation Bill (hereafter referred to as the Bill) was presented on 26 March 2008 to Parliament by the Minister of Public Works, Thoko Didiza (hereafter referred to as the Minister), after it was approved by the cabinet on 6 March 2008. The intended date for promulgation was in July 2008, but it was

²³ GN 1654 GG 30468 of 13 November 2007 par 24.2.

²⁴ GN 1654 GG 30468 of 13 November 2007 32.1 and also s 25(3) of the *Constitution of the Republic of South Africa* of 1996.

²⁵ GN 1654 GG 30468 of 13 November 2007 par 32.4

²⁶ Visagie *Diamond Fields Advertiser* 3.

withdrawn for reasons which will be discussed later on. Although the proposed Bill has been withdrawn, it is still important, for purposes of this dissertation to discuss certain aspects thereof, as the Bill will most likely feature again after the elections in April 2009. The Bill is very wide, and only the following aspects of the Bill will be concentrated on:

- 6.3.1. Who may expropriate?
- 6.3.2 What may be expropriated?
- 6.3.3 Administrative nature of the expropriating authority.
- 6.3.4 Compensation in terms of the proposed Bill.
- 6.3.5 The role of the courts.

The preamble of the Bill reads as follows:

To provide for the expropriation of property, including land, in the public interest or for public purposes; to provide for the establishment of the Expropriation Advisory Board; to provide for the approval of compensation by a court; and to provide for matters connected therewith.

The Bill was withdrawn after accusations that it is unconstitutional, and was referred to as "the land grab act" by many newspapers, especially Afrikaans newspapers.²⁷ It was also said that "Even a perfunctory reading shows it to be unconstitutional and the reasons for its promotion are spurious."²⁸ Some churches also expressed their fears of unconstitutionality of the Bill.²⁹ Other commentators are of the opinion that the political tension between the African National Congress and the government is the reason the Bill was withdrawn.³⁰

The Bill is aimed at speeding up the process of land reform,³¹ and seeks to provide a common framework for expropriation by providing the following:

²⁷ Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch-University) 134.

²⁸ Anon *Legalbrief Today* 27 August 2008 3.

²⁹ Anon *Kerkbode* 1 August 2008 4.

³⁰ Jara *City Press* 21.

³¹ Steenkamp *Rapport* 2.

- The extension of the purpose of expropriation to include expropriation for public interest, in order to bring about equitable access to all South African's natural resources, (section 1).
- All affected parties must be notified and may raise objections and make representations to the expropriating authority before the decisions to expropriate is taken, (section 11).
- Compensation is provided in situations of both registered and unregistered rights,³² (section 15).
- The amount of compensation must reflect an equitable balance between the public interest and the interests of those affected, (section 15).
- In the event where no agreement can be reached about the determination of compensation, a person may approach the court for a judicial review of the process followed by the expropriating authority in making such determination, (section 24).
- The establishment of an Expropriating Advisory Board to advise all the expropriating authorities on aspects of the expropriations as well as the determination of compensation,³³ (section 8).

It is necessary to dedicate the rest of this chapter to the 5 aspects of discussion as mentioned above and points of criticism against the Bill³⁴ and the constitutionality of some provisions.

6.3.1 *Who may expropriate?*

The proposed Bill differs little from the current *Act* as to who may expropriate, as the current *Act* and the Bill authorises the Minister to expropriate. The current *Act* states in section 2 that the Minister may expropriate any property subject to compensation as long as it is for a public purpose. Section 3 of the *Act* further

³² Legalbrief 27 March 2008.

³³ Anon 2008 <http://www.info.gov.za/speeches/2008/08032615451001.htm> [Date of use 23 March 2008]

³⁴ Bill 16 of 2008.

provides that the Minister may expropriate on behalf of certain juristic persons or bodies.³⁵

Section 3 of the proposed Bill states that the Minister may expropriate any property in the public interest or for a public purpose subject to just and equitable compensation, whilst section 4 provides for the expropriation on behalf of juristic persons.

This was one of the main points of criticism against the Bill as the juristic persons on behalf of whom the Minister may expropriate is not listed in the *Act*. Thus it may seem as if the Bill gives the Minister unlimited power and she may decide whether property should be expropriated and the amount of compensation thereof. However, the Minister has always had the power to expropriate. The only difference is the fact that the juristic persons on whose behalf the Minister may expropriate are not listed in the Bill as in the *Act*. However, this is not a point to render the Bill unconstitutional.

The Bill further provides for an organ of state to expropriate property. The definition in section 1 reads as follow:

expropriating authority means any organ of state contemplated in section 239 of the Constitution, authorized by this Act or any other law to acquire property through expropriation, and includes the Minister and any person contemplated in section 2 of the Expropriation (Establishment of Undertakings) Act 1951 (Act No. 39 of 1951).

Section 233(1)(ix)³⁶ states that an organ of state is circumscribed as "including a statutory body or functionary". In Chapter 5 the concept of an organ of state was

³⁵ Section 3(2) states that the juristic persons or bodies are: universities as defined in section 1 of the *Universities Act* 61 of 1955, a university college as defined in section 1 of the *Extension of University Education Act* 45 of 1959, a technikon as defined in section 1 of the *Technikons Act* 40 of 1967, a governing body as defined in section 1 of the *Educational Services Act* 41 of 1967, the Atomic Energy Board mentioned in section 11 of the *Atomic Energy Act* 90 of 1967, a college as defined in section 1 of the *Indians Advanced Technical Education Act* 12 of 1968, the Council as mentioned in section 1 of the *National Monuments Act* 28 of 1969 and any juristic person, other than a person mentioned, established by or under any law for the promotion of any matter of public importance.

dealt with and it was seen in *Baloro v University of Bophuthatswana*³⁷ that a person or institution will be an organ of state if it fulfills the following requirements:

- It must be integrated with the state as an organ exercising state authority, and not only created by statute.
- The body must perform a public function and receive financial assistance from the state.
- Private institutions which were not created by legislation but fulfill a public function under state supervision and receiving financial assistance from the state, are also organs of state.

Therefore, it is clear from the Bill that an organ of state may also expropriate, as it is an expropriation authority in terms of section 1,³⁸ and section 2 of the Bill provides that an expropriating authority may only expropriate property in the public interest or for a public purpose. If the expropriation is done in accordance with this provision, it will be a valid expropriation.

The current *Act* only provides for expropriation for a public purpose, whilst the *Constitution* and the proposed Bill provides for expropriation for a public purpose or expropriation in the public interest.

The proposed Bill defines public purpose as “including any purpose connected with the administration of the provision of any law by an organ of state”.³⁹ It is clear from this section that an organ of state receives the competence and authority to expropriate in terms of the Bill and any other legislation, but this competence is not restricted to expropriations transactions in relation with the authorising legislation, but may include the pursuance of any regulation of any act by such organ of state. Although this section is in accordance with the

³⁶ PAJA 3 of 2000.

³⁷ *Baloro v University of Bophuthatswana* 1995 4 SA 197 (Bop).

³⁸ Bill 16 of 2008.

³⁹ Bill 16 of 2008 s 1.

definition of public purpose in the current *Act*, it still leads to the question whether the scope of public purpose is so wide that it may lead to arbitrary deprivations. As was seen in Chapter 4, expropriation is a subspecies of deprivation, as it has to comply with the requirements of section 25(1), (2) and (3) of the *Constitution*.⁴⁰ In this regard, the proposed Bill may be constitutionally disputable, especially if one takes into consideration section 36(1)(e)⁴¹ of the *Constitution*.

The term public interest, which will be added in the proposed Bill will be difficult to define as unconstitutional. Section 1⁴² defines public interest as "includes the nation's commitment to land reform and to reforms to bring about equitable access to the Republic's natural resources", whilst the *Constitution* defines it as "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources".⁴³ It is also clear from the Bill and the *Constitution* that public purpose is not restricted to just land reform, and that land reform is not restricted to land. However, it is necessary to stipulate exactly what public interest includes, as the presumptions may now be made that it may include rights such as the right to a clean environment,⁴⁴ the right to housing,⁴⁵ and the right to health care, food, water and social security.⁴⁶ The purpose of the inclusion of public interest is to bring expropriation more in line with the *Constitution*, and as the definition of public interest almost mirrors the wording of the definition in the *Constitution*, one cannot see how it can be labeled as unconstitutional. Thus if an organ of state expropriates property in the public purpose or for a public purpose it will be a valid expropriation.

According to the proposed Bill, the passing of ownership will pass in the following ways:

⁴⁰ *FNB-case* par 58.

⁴¹ "less restrictive means to achieve the purpose."

⁴² Bill 16 of 2008.

⁴³ S 25(4)(a).

⁴⁴ S 24.

⁴⁵ S 16

⁴⁶ S 27.

1. If the Minister expropriates property, the assumption can be made from section 1⁴⁷ that such expropriated property will vest in the government, as it will not be possible to vest the property in the Minister.⁴⁸
2. In the case where the Minister expropriates on behalf of a juristic persons, such juristic person shall become the owner of that property on the date of expropriation.⁴⁹
3. Section 13(1)(a) further provides as follows:
 - (1) The effect of an expropriation of property is that-
 - (a) the ownership of the property described in the notice of expropriation vests, subject to section 4(2), in the expropriating authority on the date of expropriation, released from all mortgage bonds (if any)

Therefore, if an organ of state expropriates, such expropriated property will vest in the organ of state that performed the expropriation.

Section 13 of the new Bill provides that ownership of the property, as mentioned in the notice, vests in the expropriating authority on the date of the expropriation, released from any mortgages, if any exist. Any unregistered rights will be expropriated simultaneously, to the extent of their inconsistency with such ownership.

The expropriation will be subject to all registered rights, except mortgage bonds, unless or until such registered rights have been expropriated from the holder thereof, however, it must be consistent with the terms of the provisions of the Bill.

This section also creates the liability that the owner of the property to be expropriated must maintain such property from the date of expropriation to the date on which the expropriation authority takes possession. If the owner should

⁴⁷ Bill 16 of 2008. The definition in section 1 reads as follow: "expropriating authority means any organ of state contemplated in section 239 of the Constitution, authorized by this Act or any other law to acquire property through expropriation, and includes the Minister and any person contemplated in s 2 of the Expropriation (Establishment of Undertakings) Act 1951 (Act No. 39 of 1951)."

⁴⁸ *Gildenhuys Onteieningsreg* 97.

⁴⁹ Bill 16 of 2008 s 4(2).

fail in doing so and the value of the property depreciates, the expropriating authority may recover the amount from the owner.

Section 8 of the *Act* deals with the passing of ownership, which does not pass by registration.⁵⁰ The ownership of expropriated property will on the date of expropriation, as stated in the expropriation notice, vest in the state, released from all mortgage bonds.⁵¹ If the expropriated property is land, it shall remain subject to all registered rights in favour of third parties, (except mortgage bonds), unless or until such rights have been expropriated from the owner thereof.⁵² Section 8(4) also creates the liability that the expropriatee should maintain the property until the date the state takes possession, and in failing so, the state may recover the amount occurred by depreciation from the owner. Therefore, it is clear that ownership will still pass in more or less the same way as it does currently, and no discrepancies are included.

According to the proposed Bill, the Minister may also delegate the power to expropriate:⁵³

- (1) The Minister may... delegate to an official in the service of the Department of a level not lower than-
 - (a) deputy director general, any of the functions contemplated in section 3, 4, 11(4) and 18(5);
 - (b) director, any other function contemplated in this Act.
- (2) The Minister may not delegate the function to withdraw an expropriation in terms of section 25(1).⁵⁴

As discussed in Chapter 3.1, in terms of the current *Act* the Minister may assign his/her power to expropriate to an officer in the service of the state, and may the

⁵⁰ Carey Miller and Pope *Land Title* 142. In the pre-constitutional case of *Minister of Defence v Commercial Properties Ltd and Others* 1956 2 SA 75 (N) 79, it was wrongly held that *dominium* only passes once the property is registered in the name of the expropriating authority.

⁵¹ LAWSA 10 31; Gildenhuys *Onteieningsreg* 118; and Delpont *Property Practice* 154.

⁵² S 8(1); Gildenhuys *Onteieningsreg* 118; Southwood *Compulsory Acquisition* 59-60; Delpont *Property Practice* 154; Olivier, Pienaar en Van der Walt *Statutêre Sakereg* 5; LAWSA 10 31 and Badenhorst 1989 *THRHR* 135.

⁵³ Bill 16 of 2008.

⁵⁴ Bill 116 of 2008 s5.

executive committee also assign such power to any of its members.⁵⁵ It is clear that the delegation of powers basically still remains the same.

6.3.2 What may be expropriated?

According to the proposed Bill.⁵⁶

The Minister may expropriate any property in the public interest or for public purposes subject to the payment of just and equitable compensation contemplated in this Act.⁵⁷

The current *Act* also empowers the Minister to expropriate any property.⁵⁸

According to newspaper commentators it is proposed in the new Bill that in order to improve land reform, not only the land, but also the company or trust, (if the land is registered in the name of such entity), shares, pension benefits, implements and cattle, should be expropriated and awarded to upcoming black farmers.⁵⁹ According to these commentators the Minister is now able to expropriate whatever she feels is in the public interest, whether it is farm land, a mall or even shares. According to Steve Booysen this could mean misuse of the Bill.⁶⁰

This emotional rollercoaster that was set off by the press, leads to the fear that the Minister will be able to expropriate even one's motor vehicle if it is for a public purpose.⁶¹ This is to the author's opinion totally blown out of proportion, as it is not likely that the Minister may expropriate private vehicles or shopping centres to expedite land reform. Although pension benefits and shares fall within the

⁵⁵ *Expropriation Act* 63 of 1975 s24.

⁵⁶ 16 of 2008.

⁵⁷ Bill 16 of 2008 s3.

⁵⁸ S 2(1)

⁵⁹ Steenkamp *Rapport* 13; Steenkamp *Rapport* 13.

⁶⁰ Steenkamp *Rapport* 13.

⁶¹ According to section 1 of Bill 16 of 2008, property includes movable property.

constitutional definition of property,⁶² it will be arbitrary to expropriate pension benefits or shares, as one can hardly connect the expropriation of shares or pension benefits with public purpose or public interest for land reform purposes. In this regard one can refer back to the *FNB-case*⁶³ as discussed in Chapter 4. Expropriation is a subspecies of deprivation as it has to comply with the requirements of section 25(1), (2) and (3) of the *Constitution*,⁶⁴ therefore, the mere fact that there is no *nexus* between the method of expropriation and the consequences thereof, is not the only way of determining if the expropriation was arbitrary, but the test as in the *FNB-case* needs to be applied. The test for arbitrariness is contained in the following questions.⁶⁵

- a) Does that which has been taken away from the property holder by the operation of law in question amount to property for purposes of section 25?
- b) Has there been a deprivation of such property by an organ of state?
- c) If positive, the next question is whether such deprivation was consistent with the provisions of section 25(1)?
- d) If not, is such deprivation justified under section 36 of the *Constitution*?
- e) If positive, does it amount to expropriation for purpose of section 25(2)?
- f) If so, does the expropriation comply with the requirements of section 25(2)(a) an (b)?
- g) If not, is the expropriation justified under section 36?⁶⁶

⁶² Hopkins May 2006 *De Rebus* 21. *Onteieningsreg* 1; Chaskalson *SAJHR* 404-408; Van der Walt 1992 *SAHJR* 431; Van der Walt 1992 *SAJHR* 305; Budlender, Latsky and Roux *Juta's new Land Law* 1-19 to 1-22; Van der Walt 1995 *SAPL/PR* 311-334, Carey Miller and Pope *Land Title* 296; *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 *BCLR* 1235 (Tk).

⁶³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

⁶⁴ *FNB-case* par 58.

⁶⁵ Roux *Constitutional Law* 46-2.

⁶⁶ *FNB-case* par 46.

Thus, no *nexus* will exist between the expropriation of pension benefits, shares or shopping centres, and, therefore such expropriation will be arbitrary and invalid.

According to the proposed Bill, the following property may be expropriated:

- property for a public purpose or in the public interest;⁶⁷
- rights in land, registered or unregistered;⁶⁸
- movable property;⁶⁹
- rights in property;⁷⁰ and
- the exercise of a right.⁷¹

Thus the notion that the Minister acts unconstitutionally by expropriating property other than land, is thus not substantive. As discussed in Chapter 4, the expropriating authority has always had the power to expropriate any property for a public purpose. The courts have ruled in the past that property includes more than just corporeal or material objects⁷². It is only now that the phrase public interest is being added, that this subject is raised as to be unconstitutional.

6.3.3 Administrative liabilities of the expropriating authority

As discussed in Chapter 5, expropriation is an administrative action that affects the expropriatee's property,⁷³ and in order to qualify as an administrative action a decision must be taken.⁷⁴ The decision to expropriate lies with the expropriating

⁶⁷ Bill 16 of 2008 s 1.

⁶⁸ Bill 16 of 2008 s 13(1)(c).

⁶⁹ Bill 16 of 2008 s 1.

⁷⁰ Bill 16 of 2008 s 1.

⁷¹ Bill 16 of 2008 s 1.

⁷² *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk).

⁷³ *Southwood Compulsory Acquisition* 31; *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) 748G-H.

⁷⁴ *Gildenhuys Onteieningsreg* 77; *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 785 (N) 792-793.

authority.⁷⁵ Section 24(2) of the Bill also states that the decision to expropriate in the public interest or for a public purpose constitutes an administrative action as defined in section 1 of *PAJA*. This decision is taken after the prescribed procedure has been followed.

The procedure prescribed in the Bill differs from that in the *Act*, as section 10 provides for an investigation to take place. The expropriating authority must investigate the existence of unregistered rights in respect of the said property, compensation payable and the effect which the expropriation will have on existing and future engineering services, infrastructure, housing and urban planning.⁷⁶

If the expropriating authority contemplates expropriating property after the investigation, it must be published in a notice to that effect. A copy of the notice must be served on all interested parties, including holders of unregistered rights, whose rights or legitimate expectations may be materially and adversely affected by the expropriation. Notice must also be given to the Regional Land Claims Commissioner in whose area the land is situated and the Director-General of Land Affairs or his delegate.⁷⁷ The information that this notice must contain is listed in section 11(3). The expropriating authority must consider any objections and submissions that were received in the prescribed time and notify these persons in writing of its decision and the reasons for the decision.⁷⁸ The expropriating authority should also attempt to reach an agreement with the person whose rights and interests may be adversely affected by the contemplated decision before deciding to expropriate, and may depart from the provisions of subsection (1) to (4) where it is reasonable and justifiable to do so.⁷⁹

⁷⁵ Bill 16 of 2008 s 11.

⁷⁶ Bill 16 of 2008 s 10.

⁷⁷ Bill 16 of 2008 s 11(1) and 11(2).

⁷⁸ Bill 16 of 2008 s 11(4).

⁷⁹ Bill 16 of 2008 s 11(5).

The inclusion of this provision, that notice should be served on all affected parties before the final decision to expropriate is taken, gives affected parties the opportunity to make any objections to the intended expropriation. The inclusion of such provision is very positive as the current *Act* does not provide for such opportunity. This is an indication that the aim of the Bill is not to take away all the rights of private persons and is aimed at bringing expropriation more in line with the *Constitution*, that states that the amount of compensation should be just and equitable reflecting an equitable balance between the parties.⁸⁰

However, section 11(2)(b) states an exception as to where the service of the notice will not be necessary. This will be in the case where the expropriating authority is the relevant municipality. Section 11(5) also provides that the Minister may depart from such procedure where it is reasonable and justifiable to do so. However, the following factors must be taken into account when departing from this procedure:

- the purpose of the expropriation;⁸¹
- whether the need for the expropriation is so compelling that departure from the said requirements is warranted;⁸²
- whether the expropriation has to be effected as a matter of urgency;⁸³
- prejudice to the owner of the property and any other persons whose rights and interests may be materially and adversely be affected by the expropriation decision;⁸⁴ and
- advice of the Board.⁸⁵

It will be difficult to depart from the procedure to give notice of the intended expropriation, as section 3(2) and section 3(4) of *PAJA*⁸⁶ must be adhered to and

⁸⁰ S 25(3).

⁸¹ Bill 16 of 2008 s 11(5)(c)(i).

⁸² Bill 16 of 2008 s 11(5)(c)(ii).

⁸³ Bill 16 of 2008 s 11(5)(c)(iii).

⁸⁴ Bill 16 of 2008 s 11(5)(c)(iv).

⁸⁵ Bill 16 of 2008 s 11(5)(c)(v).

it is not likely that circumstances will exist which will cause expropriation to be of such an urgent nature to justify the departure from prescribed procedures.⁸⁷

Departure from this provision would lead to unfair administrative action in terms of section 33 of the *Constitution* and section 62(a)(iii) of *PAJA*. The object of this provision is to give adherence to the *audi alteram partem* principle. This means that every person whose rights are affected by an administrative action has the right to a fair hearing before the administrative organ takes action.⁸⁸ The *audi alteram* principle was discussed in Chapter 5, but once again the importance of this principle needs to be emphasised. Notice of the intended expropriation must be given in order to give proper effect to the second element of *audi alteram* namely, a hearing before the final decision is taken, in order for the expropriatee to literally tell his side of the story why his property should not be expropriated.⁸⁹

Section 12 of the Bill deals with the notice of expropriation. This section states as follows:

12(1)(a) In order to expropriate property an expropriating authority must serve a notice of expropriation on the owner of the property concerned and, subject to paragraph (b), must publish it within seven days of such service.

The section further states that a copy must be delivered to the Registrar of Deeds or the Registrar of Mining Titles or any government office and the Department, and if the property to be expropriated is land, a copy must also be

⁸⁶ 3 of 2000.

⁸⁷ Hoexter *Constitutional and Administrative Law* 342-344.

⁸⁸ Hall 1993 *SAPR/PL* 351; Baxter states "the celebrated principles of natural justice which dictate that persons who are affected by administrative action should be afforded a fair and unbiased hearing before the decision to at is taken". Baxter *Administrative Law* 536; Gildenhuys *Ontefeningsreg* 78, 81; Purshotam 1994 *SALJ* 237, 239; *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 4 SA 427 (HHA) 439I-J; *Transvaal Agriculture Union v Minister of Land Affairs and Another* 1997 2 SA 621 (KH) 630I-632G; *Administrator, Transvaal & others v Traub & others* 1989 4 SA 731 (A).

⁸⁹ Corder 1980 *THRHR* 159; Gildenhuys *Ontefeningsreg* 82; Du Plessis *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009) 36; *Van der Merwe and Others v Slabbert NO and Others* 1998 3 SA 613 (D) 625E-626B.

served on the municipality in whose area of jurisdiction the land to be expropriated is situated, the Director-General of Land Affairs and the Regional Claims Commissioner in whose area the land to be expropriated is situated and every holder of a registered right.

The notice must also contain the following:

- an offer of compensation;
- a full description of the property to be expropriated;
- in the case of temporary use, the period of such use must be stated;
- the date on which the expropriating authority will take possession; and
- it must contain the date on which payment with interest will take place.⁹⁰

The notice should also draw attention to the fact of unregistered rights. The expropriating authority may withdraw an offer of compensation if he/she was not aware of the unregistered right at the time the offer was made.⁹¹ The notice must also contain an explanation of how the amount of compensation was determined.

The addition of the advisory boards is new to expropriation legislation. The Minister may establish a National Expropriation Advisory Board and Regional Expropriation Advisory Boards as she may deem appropriate.⁹² Important to note that the Board does not expropriate; their function is to advise the Minister on the decision to expropriate. The functions of these advisory boards include advice on all aspects of expropriation, including the determination of compensation.⁹³ As the Board advises the Minister on the decision to expropriate, their function is administrative in nature, but they do not make the decision. As their function is administrative in nature, it needs to comply with section 33 of the *Constitution* as well as section 3(2) of *PAJA*⁹⁴. It must advise all organs of state on the fair value of immovable property and rights when the state

⁹⁰ Bill 16 of 2008 s 12(4)(a)-(d).

⁹¹ Bill 16 of 2008 s 12(4)(f).

⁹² Bill 16 of 2008 s 6.

⁹³ Bill 16 of 2008 s 8(1).

⁹⁴ 3 of 2000.

acquires the property or dispossession thereof.⁹⁵ The advisory boards may perform any other functions as the Minister may prescribe,⁹⁶ the National Expropriation Board must advise the Minister on uniform norms and standards for the functioning of Regional Expropriation Advisory Boards,⁹⁷ and lately, the Minister may prescribe a dispute resolution mechanism if disputes arise between the National Expropriation Advisory Board and a Regional Expropriation Advisory Board, or between one or more Regional Expropriation Advisory Boards,⁹⁸ which all amount to administrative action.

6.3.4 Compensation in terms of the new Bill

15(1) Every expropriated owner and expropriated holder is entitled to compensation in terms of section 25(3) of the Constitution.⁹⁹

In terms of section 25(3) of the *Constitution* and section 15(3)(a) of the Bill compensation is payable for the expropriation of any rights as provided for, the amount of compensation has to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, with regard to all the circumstances listed in section 25(3)(a) – (e). The proposed Bill adds a further requirement to the list, namely, (f) any advice received from the Advisory Board.¹⁰⁰ It is clear that the basis on which compensation will be determined in terms of the Bill differs radically from the current *Act*, as it mirrors the wording of the *Constitution*.

The expropriation authority has the power to determine the amount of compensation payable to the expropriatee¹⁰¹ after the expropriating board has advised her on the subject.¹⁰² However, the *Constitution* provides in section

⁹⁵ Bill 16 of 2008 s 8(2).

⁹⁶ Bill 16 of 2008 s 8(3).

⁹⁷ Bill 16 of 2008 s 8(4).

⁹⁸ Bill 16 of 2008 s 8(5).

⁹⁹ Bill 16 of 2008 s 15(1).

¹⁰⁰ S 15(3)(a)(i)-(vi).

¹⁰¹ Section 24 of the new proposed Bill 16 of 2008.

¹⁰² Van Wyk *Beeld* 2; Hamlyn

25(2)(b) that if no agreement can be reached between the parties, the court may approve or decide on an amount of compensation.

The current *Act* provides that the basis of determining the amount of compensation is the amount which the property would have realised if sold on the date of the notice in the open market by a willing seller to a willing buyer,¹⁰³ as was discussed in Chapter 3. No real open market needs to exist, the open market method only serves as a guideline in the determination of compensation that will be just and fair.¹⁰⁴ The Bill does not mention the application of this principle in the determination of compensation, but does mention market value as one of the factors to be taken into account in the determination of compensation.¹⁰⁵ This principle has been the core of South Africa's post-apartheid land drive, which guaranteed that land will be acquired by the state at a fair price and given to landless black persons.¹⁰⁶ But it became clear that there is not enough agriculture land in the open market to adhere to this principle.

According to a conference which was held by the ANC at Polokwane, it was decided that the "willing buyer and willing seller" concept should be done away with, as it restrains the target that by 2014, 30% of agriculture land should be transferred to black farmers.¹⁰⁷ Tobias Pokolo is of the opinion that the "willing buyer and willing seller" concept does not work when he raised the question how willing are you, if you ask a price that the state can not afford.¹⁰⁸ Whilst Tozi Gwanya, the Chief of South Africa's land claims commissioner said the reason why this concept will no longer exist is because many white farmers want more money than what the government is prepared to pay.¹⁰⁹ The agricultural sector

http://www.mg.co.za/articlepage.aspx?area=braking_news/breaking_news_national/&articleid=334060&referred=RSS [Date of use 6 March 2008]; Section 6 of the new proposed Bill 16 of 2008.

¹⁰³ Expropriation Act 63 of 1975 s 12(1)(a)(i).

¹⁰⁴ *Minister of Agriculture v Federal Theological Seminary* 1979 4 SA 162 (E).

¹⁰⁵ Bill 16 of 2008 s 15(3)(iii).

¹⁰⁶ Anon 2008 www.mg.co.za [Date of use 7 February 2008].

¹⁰⁷ Steenkamp *Rapport* 13.

¹⁰⁸ Steenkamp *Rapport* 13.

¹⁰⁹ Anon 2008 www.mg.co.za [Date of use 7 February 2008]

and small businesses will suffer the most, this will have the consequences of economic confidence.¹¹⁰ According to advocate Nikki de Havilland¹¹¹

Deur grondbesitters te dwing om pryse benede markpryse te aanvaar, skuif die regering die koste van grondhervorming effektief af op die individue.¹¹²

Once again, many newspaper commentators are of the opinion that the whole concept of the “willing buyer and willing seller” is done away with and the purpose of this is to undermine the true market value that compensation is based on.¹¹³ The effect of this will be negative on the property market, food security as well as investment confidence.¹¹⁴ Nobody would want to invest in property which is subject to expropriation below market value, and the stability of upcoming and well established farmers becomes shaky as they would not be able to obtain security from banks.¹¹⁵

This is all media propaganda as it would be unconstitutional to scrap this principle. The Bill’s wording mirrors the wording of the *Constitution* in section 25(3), thus it is not possible to scrap this principle as the aim of the Bill is to bring the determination of the amount of compensation more in line with the *Constitution*. If it were to be scrapped it would mean that the “seller” will not receive an amount he would have received in the open market as on the day of expropriation, but will receive an amount which may be far less than the true value of the property. This is not consistent with section 25(3)¹¹⁶ which explicitly provides that the amount of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected. How can any amount be just and equitable if it is not measured against the amount such person would receive if he had sold it and it was not

¹¹⁰ Steenkamp *Rapport* 13.

¹¹¹ Du Toit *Beeld* 2.

¹¹² If landowners are compelled to accept prices below market value, the individual becomes responsible for the costs of land reform. (This is my own translation.)

¹¹³ Anon 2008 <http://www.cfc.org.za/?p=55> [Date of use 1 July 2008].

¹¹⁴ Du Toit *Rapport* 13.

¹¹⁵ Du Toit *Beeld* 2. Also Steenkamp *Rapport* 13.

¹¹⁶ *Constitution of the Republic of South Africa* of 1996.

expropriated? By scrapping this principle, the expropriatee may be left in a worse position as a result of the expropriation.¹¹⁷ Therefore, it is not possible to just scrap this principle in the Bill, as it is the basis of market value, and the Bill provides clearly that market value is one of the factors to be taken into account when determining the amount of compensation.¹¹⁸

This should rather be seen in the positive, as the aim of this provision is to take the focus off market value as the only factor that should play a role in the determination process. While market value is important it should not be the conclusive and determinative factor to establish just and equitable compensation in terms of section 25(3). Other factors, even those not listed, should also be allowed to play a significant role.¹¹⁹ In this regard the author has to agree with Zimmerman when she criticises the fact that market value features too centrally and has too much influence on the existing analyses of compensation. She blames this error on the comparative perspective adopted by so many South Africans in the early period of the constitutional analysis.¹²⁰ Market value is but only one of the factors listed in section 25(3)¹²¹ to be taken into account when determining the amount of compensation. The author's opinion is that every expropriation case should be viewed and determined on its own merits and every relevant factor should be taken into account, as Claassens stated it; to bind the compensation formula to market value in all cases would have bizarre and inequitable results.¹²² Thus the decision that the amount of compensation should not be based on market value alone is correct, however, it should not be shifted to the side and be forgotten, it should still play a role, but not the determinative role.

¹¹⁷ It was discussed in Chapter 4 above that the expropriatee may not be in a worse or better position as a result of the expropriation. *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) par 21.

¹¹⁸ Bill 16 of 2008 s 15(3)(iii).

¹¹⁹ *Ex Parte Former Hihlands Residents* 2000 1 489 (LCC).

¹²⁰ Van der Walt 2006 SALJ 33.

¹²¹ *Constitution of the Republic of South Africa* of 1998.

¹²² Claassens 1993 SAJHR 423.

Section 15 also provides that an expropriating authority must not give weight to a single factor, and no account must be taken of the fact that the property has been taken without the consent of the expropriatee.

Section 14 of the Bill demonstrates the transformative aim of the Bill and its commitment to land reform. This section provides for compensation of an unregistered right which has been expropriated as contemplated in section 13(1)(b). This provision is aimed at people like farm workers, who receive or are allowed to farm a piece of the land as part of their remunerations.¹²³ This provision is to be welcomed, as it brings a balance between all affected parties as provided for in the *Constitution*.

6.3.5 *The role of the courts*

24(1) The compensation to be paid for any property expropriated by an expropriating authority and the time and manner of payment must, in the absence of agreement between the expropriated owner or the expropriated holder and the expropriating authority, be determined by the expropriating authority.¹²⁴

Many critics are of the opinion that the role of the courts is taken away by the proposed Bill. This is not true, the role of the courts is just restricted in the sense that the court will no longer be able to determine the amount of compensation; it will only be possible for the court to approve or decline the amount of compensation and refer it back to the Minister, who must then determine another amount.¹²⁵ Therefore, there will still be court intervention concerning disputes regarding the amount of compensation payable, the only difference between the current *Act* and the Bill is that the court will not be able to determine the amount of compensation payable if the parties do not agree on the amount determined by the Minister. According to the proposed Bill, any aggrieved party can approach the court, but the Bill will constrain the courts when they are asked to

¹²³ Oelofse *The Herald* 2.

¹²⁴ Bill 16 of 2008 s 24(1).

¹²⁵ Bill 16 of 2008 s 24(3)(f).

adjudicate on a dispute over compensation. According to Roux substantive review under the Bill is possible, as *PAJA* is mentioned in the Bill and is coupled with the use of the word “approve” in section 24(3)(a), this proves that the courts will have power to review the merits of the case.¹²⁶

Any party to an expropriation may request the court to approve any of the following:

- any final determination of compensation contemplated in section 18(5);
- the determination of the manner of payment of compensation; or
- the determination of the manner of payment of compensation.¹²⁷

It is clear that the court's intervention is still allowed, but only restricted to the minimum, as the current *Act* provides that if no agreement can be achieved, it may be referred to the courts to determine the compensation.¹²⁸ The draft Bill¹²⁹ aims at restricting and not taking away the role of the courts as it provides that the expropriating authority may determine the time, manner and amount of compensation payable in the absence of agreement.¹³⁰ The expropriating authority may also determine the amount of compensation in terms of the current *Act*.¹³¹

Many newspaper commentators are of the opinion that this may lead to unconstitutional procedures in terms of section 34 of the *Constitution*, namely the right to access to courts, as well as the *Promotion of Administrative Justice Act*.¹³² This is not correct as the Bill still provides access to the courts.¹³³ The only problem with this is that it may delay the payment of compensation procedure, as the court will be able to refer the amount as determined by the

¹²⁶ Roux *Business Day* 7.

¹²⁷ Bill 16 of 2008 s 24(3)(a)(i)-(iii).

¹²⁸ This was discussed in Chapter 3 and Chapter 4.

¹²⁹ 16 of 2008.

¹³⁰ S 24.

¹³¹ S 14(1).

¹³² The *Promotion of Administrative Justice Act* 3 of 2000.

¹³³ S 24(3)(a).

Minister back again and again until the court is satisfied with the amount, where currently if the court is not satisfied, it can determine an amount which would be fair. In this regard one can refer back to Chapter 4, where the deference between the conjunction and the disjunction readings was discussed. The *Constitution* provides in section 25(2)(b) that expropriation is subject to compensation which has either been agreed to or decided or approved by a court. Thus the argument that the court may not determine the amount of compensation, but only approve or decline the amount of compensation falls within the scope of the conjunctive reading. The Policy¹³⁴ also favours this method of reading. If the disjunctive reading was followed, it would entail that the courts may not be left out in the determination process of compensation.

Another positive point of the proposed Bill is that it provides for the development of procedures to expedite the determination and approval of the amount of compensation,¹³⁵ as well as the training of judges to determine the outcome of expropriation cases.¹³⁶

6.4 Conclusion

The primary purpose of the Bill¹³⁷ is to harmonize the considerable amount of legislation in the country on the subject of expropriation,¹³⁸ to fill the gaps of the current *Act* and to infuse the values of equality, human dignity and freedom, but in its own way, it brings more problems.¹³⁹ According to the Minister, the current *Act* is unconstitutional in many areas and must be replaced. Some of these areas include the recognition of rights of tenants and farm workers, the basis for determination of compensation and the rationale for expropriation.¹⁴⁰

¹³⁴ GN 1654 GG 30468 of 13 November 2007 par 20.

¹³⁵ Bill 16 of 2008 s 24(4).

¹³⁶ Bill 16 of 2008 s 24(5) and (6).

¹³⁷ Bill 16 of 2008.

¹³⁸ According to the Draft Bill, there are more than 100 acts and ordinances dealing with expropriation.

¹³⁹ Anon 2008 www.sabinet.co.za/sabinetlaw/news [Date of use 31 January 2008].

¹⁴⁰ Legalbrief 27 March 2008; Anon 2008

As can be seen in the previous chapters, there are many constitutional difficulties with the current *Expropriation Act* 63 of 1975. The new draft Bill is stoned with negative comments, objections and fears. Many of these are blown out of proportion. The Bill¹⁴¹ addresses shortcomings of the *Act* and is based upon certain principles which ensure that the constitutional objectives are met,¹⁴² for example, the requirement that an equitable balance between the parties interest must be sought indicates that protection is sought and to protect the interests of the parties equally.¹⁴³

It is clear from the above discussion that the many provisions of the proposed Bill that were considered unconstitutional do not suffice. There are actually only three possible aspects that may be unconstitutional, namely the wide expropriation capacity that is given to organs of state, the exception of when notice of expropriation needs not to be given and the restriction of courts to determine the amount of compensation.

It can be said that the reasons for the debate concerning the draft Bill, are because it was published in a form that was not refined enough. As the previous president, President Thabo Mbeki stated the people of South Africa cannot wait forever while strategies are refined, people should just get on with the job at hand of providing development and poverty alleviation whilst they are refining strategies along the way.¹⁴⁴ In the author's opinion, this is one of the main reasons why the Bill was not accepted in its proposed form.

If an indepth study of the proposed Bill is done one will see that it is not unconstitutional as newspaper and other commentators makes it to be. The Bill is infused with the values of equality, human dignity and freedom. It strives at

¹⁴¹ <http://www.info.gov.za/speeches/2008/08032615451001.htm> [Date of uses 23 March 2008].

¹⁴² 16 of 2008.

¹⁴³ Anon 2008 <http://www.info.gov.za/2008/08090510451001.htm> [Date of use 26 November 2008].

¹⁴⁴ Onagoruwa and Straughean Spetembet 2008 *Butterworths Property Law Digest* 3.

¹⁴⁴ Anon 2008 www.polity.za/article.pp?a_id=127188 [Date of use 10 March 2008].

alleviating many problems, such as the fact that the current *Act* does not explicitly provide for adherence to the *audi alteram partem*-rule, as the Bill intends in terms of the procedure prescribed in section 10. The Bill further provides for notice and compensation to parties with unregistered rights.¹⁴⁵ This brings expropriation more in line with the *Constitution*, as the Bill once again mirrors section 25(3) by providing for compensation that is just, equitable, reflecting an equitable balance between the public interest and the interest of those affected.¹⁴⁶

¹⁴⁵ Bill 16 of 2008 s11 and 15(2).

¹⁴⁶ Bill 16 of 2008 s15(2).

Chapter 7

New legislation for expropriation, or maybe not?

7.1 Introduction

The research question of this dissertation is whether the present *Expropriation Act* complies with the constitutional property concept infused with the values of equality, human dignity and freedom, and whether the Draft Policy and the proposed Bill are constitutionally compatible and fill the gaps that are caused by the present *Act*.

In this chapter final conclusions and recommendations as to the problems facing expropriation at present will be made. As many aspects have been dealt with throughout this dissertation, this chapter will focus on the three aspects in the proposed Bill that might be unconstitutional, namely the wide expropriating capacity that is given to organs of state, the exceptions to the provision that notice of expropriation needs to be given and the restriction on courts to determine the amount of compensation.

7.2 Conclusion in respect of the history and development of expropriation

As was discussed in Chapter 2, expropriation was introduced into South African law more than 350 years ago when Jan van Riebeeck came to South Africa. Laws regulating this very sensitive land issue dated back as far as 1872, namely the *Lands Clauses Consolidation Law* 16 of 1872,¹ which was modeled on the English *Land's Clauses Consolidation Act* of 1845.²

¹ Gildenhuys *Onteleningereg* 40.

² LAWSA 10 6.

However, many acts followed as an attempt to regulate expropriation so that it would be fair to all. Yet still no act has been satisfactory reflecting the aim of expropriation to be fair and equitable to all the parties affected.

In the author's opinion, the reason why there is still no legislation that is satisfactory is the fact that property, especially land, is a political issue; it has always been a political issue and will always be. With the passing of time, the politics change, and so does the need for power. As needs change, there will always be legislative change. The current *Act* was sufficient for many years, until the *Constitution* was promulgated, whereafter the *Act* became insufficient in certain regards. Therefore, it is not likely that there will ever be legislation regulating expropriation that will be fair and sufficient. As soon as the land reform aim of 2014 has been reached, a new need will occur, and the intended Bill will not be sufficient for the new needs that will arise. However, it is important to draft legislation that will satisfy the current needs on a basis that is fair, just and equitable, infused with the fundamental values of human dignity, freedom and equality.

It is clear from this chapter that market value has been used as the determinative factor to calculate the amount of compensation. Market value will be discussed in Chapter 7.5. If no agreement could be reached, or if the parties were not satisfied with the amount of compensation, the dispute was referred to arbitration. Later, through legal development, disputes were referred to court. Today disputes are still referred to court, where the court may decide on or approve the amount of compensation.³

Therefore, there are two important historical aspects that are still undergoing development and are still main points of argument in modern law, namely market value as factor to be taken into account when determining the amount of compensation and the referral of disputes to the courts.

³ *Constitution of the Republic of South Africa of 1996 s 25(2)(b).*

7.3 Conclusion in respect of the current Expropriation Act 63 of 1975 and the constitutionality thereof

The purpose of Chapters 3 and 4 is to examine the current *Act* in order to indicate the gaps that still exist regarding expropriation laws in South Africa and to identify the aspects which are unconstitutional and which will have to be changed in future.

There are mainly two aspects that can be identified in Chapter 3 that are unconstitutional according to the constitutional requirements as discussed in Chapter 4. These two aspects can be summarised as follows:

1. The first aspect is the fact that the current *Act* only provides for expropriation for a public purpose, whilst the *Constitution* provides for expropriation for a public purpose and for expropriation in the public interest.⁴ This amounts to an inconsistency between the two statutes. The *Constitution* provides that any law inconsistent therewith will be regarded as invalid.⁵ Clearly this opens the pathway for a debate as to the unconstitutionality of the *Act*. This is an important aspect that needs to be rectified by new legislation which will include both the terms public purpose and public interest as provided for in the *Constitution*.
2. The second aspect that leads to the unconstitutionality of the *Act*, is the fact that the *Act* only provides for market value as the determinative factor whilst the *Constitution* lists it as only one of the factors that should be taken into account when determining the amount of compensation.⁶ One can make the presumption from the wording in the *Constitution* that the factors that should be taken into account are not limited to the five factors listed in section 25(3) of the *Constitution* as discussed in Chapter 4.5.3.

⁴ S 25(2)(a).

⁵ S 2.

⁶ S 25(3)(a)-(e).

7.4 Administrative nature of expropriation

It was determined in Chapter 5 that expropriation is an administrative action, as it amounts to a decision.⁷ This decision must have been made under empowering provisions and must affect rights adversely and must have a direct, external legal effect.⁸ The decision to expropriate is seen as an administrative action in terms of the *Act*, and the proposed Bill explicitly states that the taking of a decision to expropriate amounts to an administrative action.⁹

As it is an administrative action that can be reviewed by a court, the notion that the courts will no longer have a role in the expropriation is not valid. It was mentioned in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*¹⁰ that the court's power to review administrative action no longer flows directly from the common law but from *PAJA* and the *Constitution*.¹¹ Therefore, the debate that the Bill is unconstitutional in this regard is not valid. The Bill specifically aims at giving adherence to *PAJA* and the *Constitution*.¹²

As discussed in Chapter 6.3.3, the only point on the administrative nature of expropriation that could lead to a debate of unconstitutionality of the Bill is the fact that the Minister may depart from the procedure to give notice of the intended expropriation as prescribed in section 11 of the proposed Bill. If this procedure is not followed, it will not be possible to give adherence to both the requirements of the *audi alteram partem*-rule. If the notice is not served on the affected party, that party will not be in a position to prepare for a hearing before the final decision is taken, as such party will not have sufficient information to

⁷ Gildenhuys *Onteieningsreg* 77; *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 3 SA 785 (N) 792-793.

⁸ Hoexter 2006 *Acta Juridica* 306; Gildenhuys *Onteieningsreg* 77; *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (K).

⁹ Bill 16 of 2008 s24(2).

¹⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (C).

¹¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (C) par 18.

¹² Bill 16 of 2008 s 24(2).

prepare for such hearing. It is highly unlikely that circumstances will exist which will cause expropriation to be of such an urgent nature to justify departure from prescribed procedures.¹³ Therefore, the circumstances provided for in section 11 of the Bill will in most instances not suffice as reasons to depart from the notice procedure, which will then be a unjust administrative action. The expropriation procedure must give adherence to section 3(2) and section 3(4) of *PAJA*,¹⁴ as section 24(2)¹⁵ provides that expropriation is subject to review in accordance with *PAJA*.

7.5 Market value

Much has been said on this topic throughout this dissertation. As was seen in Chapter 2, market value has always been part of the determination procedure of the amount of compensation payable. It was adopted from early legislation into the current *Act*. The *Constitution* also provides for market value to be one of the factors to be taken into account when determining the amount of compensation. The concern that was raised, especially by the organized agriculture sector, that market value will no longer be used as a determining factor in order to scrap the willing buyer and willing seller concept, is in no way valid. The proposed Bill makes provision for market value to be one of the factors to be taken into account when determining the amount of compensation, as it will be unconstitutional in terms of section 25(3) of the *Constitution* not considering it. Therefore, it is not possible for any legislation scrapping market value, which was proposed by certain political factions. The proposed Bill aims at market value not being the determinative factor when determining the amount of compensation, which in the author's mind is correct, as every expropriation case has to be valued according to its own circumstances and factors as seen in Chapter 6.3.3. All factors as mentioned in the *Constitution*, and even those not listed, should be taken into account when determining the amount of compensation to give

¹³ Hoexter *Constitutional and Administrative Law* 342-344.

¹⁴ 3 of 2000.

¹⁵ Bill 16 of 2008.

adherence to the *Constitution* which provides for just and equitable compensation reflecting an equitable balance between the public interest and the interests of those affected. This provision is mirrored by the proposed Bill. Therefore, there is no way the commentators can be correct in saying that market value will no longer exist or should be scrapped, as the Bill explicitly provides for market value.

7.6 Public purpose

The Minister has always been able to expropriate any property for a public purpose. Therefore, the fact that the Bill states that the Minister may expropriate any property for a public purpose or in the public interest is not unconstitutional. Public purpose and public interest were discussed in 4.6.1, 4.6.2 and 6.3.1. Once again it is necessary to emphasise that the term public purpose is so wide that it may lead to arbitrary deprivation. Therefore, it is necessary to define public purpose narrowly to prevent arbitrary deprivations. In this regard it is also necessary to create a statute that will define what includes public interest as it is a term that is very wide at present. The Bill should also contain a list mentioning who the juristic persons are on whose behalf the Minister may expropriate, as the current *Act* contains such information. If such a list is added, this point of criticism against the proposed Bill will no longer be substantive.

7.7 Restriction of the courts

As discussed in Chapter 6.3.5 the role of the courts in expropriation matters as known today will change according to the proposed Bill. The proposed Bill is not unconstitutional in this regard, as the affected party may still refer the case to the court for review. It is proposed that the courts intervention in determining the amount of compensation is restricted in the sense that the court will no longer be able to *determine* the amount of compensation if no agreement between the parties can be reached, as provided for in section 25(3) of the *Constitution*. The

proposed Bill provides that where no agreement can be reached between the two parties, the Minister must determine the amount payable. The court will, however, still have the power to approve or decline the amount of compensation as determined by the Minister,¹⁶ but may never determine the amount. This is unconstitutional, because the *Constitution* provides in section 25(2)(b) that in the absence of an agreement the court may determine or approve the amount, as discussed in Chapter 4.5.2

7.8 Final conclusions and recommendation

To conclude, there are actually three important aspects in the proposed Bill that differ from the *Act*, namely the definition of public purpose which is to be included that widens the capacity to expropriate; departure from the notice of expropriation procedure; and the fact that the courts may no longer determine the amount of compensation, but only approve or decline it.

The author agrees with the statement made by various commentators that the need for a new expropriation framework is long overdue. Furthermore, it is clear that if the Bill was passed in its proposed form, it would have resulted in protracted litigation and severe political and economic disturbance. In the author's opinion, it would not be satisfactory to just once again amend the current *Act*, as it has been amended many times before. This piece of legislation was drafted and applicable in the apartheid era, and will continue to cause problems until all injustices have been corrected. The quickest way to complete this aim will be to draft a new expropriation act, as the Bill has attempted. As this study has shown, the draft Bill is not in all aspects unconstitutional; in fact there are only three aspects that may lead to unconstitutionality. Simple rectifications to its proposed form will be sufficient to make this Bill constitutionally viable.

¹⁶ Bill 16 of 2008 s24.

As there is an urgent need for a new expropriation framework for South Africa, the author is sure that the draft Bill will appear before Parliament in refined form sooner than thought, as the aim is distributing a third of white owned land to upcoming black farmers before 2014.

Land reform is a reality in South Africa, and it is necessary to restore the historical imbalance and injustice that was caused. It is, therefore, of utmost importance that a framework for expropriation is drafted which is fair and equitable to all and that gives adherence to the constitutional values of human dignity, equality and freedom. If this can be achieved not only will the correction of historical imbalances be achieved, but social justice will also be achieved.

Chapter 8

Bibliography

8.1 Books

B

Baxter *Administrative Law*

Baxter L *Administrative Law* 2nd ed (Juta Cape Town 1994)

Budlender, Latsky and Roux *Land Law*

Budlender G, Latsky J, Roux T *Juta's new Land Law* (Juta & Co Ltd Cape Town 2000)

Bybelgenootskap van Suid-Afrika *Die Bybel*

Bybelgenootskap van Suid-Afrika *Die Bybel* Nuwe vertaling (Nasionale Boekdrukkery, Kaapstad 1984)

C

Carey Miller *Acquisition and Protection*

Carey Miller DL *The Acquisition and Protection of ownership* (Juta Cape Town 1986)

Carey Miller and Pope *Land Title*

Carey Miller DL and Pope A *Land Title in South Africa* (Juta Cape Town 2000)

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

D

Delport Property Practice

Delport HJ *South African Property Practice and the Law* (Juta Cape Town 2005)

De Ville Administrative Action

De Ville JR *Judicial Review of Administrative Action in South Africa* (Butterworths Durban 2003)

Du Plessis Compensation for Expropriation under the Constitution (LLD Thesis Stellenbosch University 2009)

Du Plessis E *Compensation for Expropriation under the Constitution* (LLD Thesis Stellenbosch University 2009)

G

Gildenhuys Onteieningsreg

Gildenhuys A *Onteieningsreg* 2^e uitg (Butterworths Durban 2001)

H

Hoexter Administrative Law

Hoexter C, Lyster R *The New Constitutional and Administrative Law* Volume 2 (Juta Lansdowne 2002)

J

Jacobs The Law of Expropriation

Jacobs M *The Law of Expropriation in South Africa* (Juta & Cape Town 1982)

O

Olivier NJJ, Pienaar GJ and Van der Walt AJ *Statutêre Sakereg*

Olivier NJJ, Pienaar GJ and Van der Walt AJ *Statutêre Sakereg* (Juta Kaapstad 1988)

P

Pienaar *Regsubjektiviteit en die regspersoon*

Pienaar GJ *Subjektiewe Regspersoon* (Central Publications Department, Potchefstroom University for CHE 1997)

S

Silberberg and Schoeman's *The Law of Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5th ed (Butterworths Durban 2006)

Southwood *Compulsory Acquisition*

Southwood MD *The Compulsory Acquisition of Rights* (Juta Lansdowne 2000)

V

Van der Merwe *Sakereg*

Van der Merwe CG *Sakereg* 2^e uitg (Butterworths Durban 1989)

Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002*

Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (LLD Thesis North West University Potchefstroom 2006)

Van der Walt *Constitutional Property*

Van der Walt AJ *Constitutional Property Law* (Juta & Cape Town 2005)

W

Wiechers *Administrative Law*

Wiechers M *Administrative Law* (Butterworths Durban 1985)

8.2 Contributions

C

Chaskalson and Lewis *Constitutional Law*

Chaskalson M and Lewis C "Property" in Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman S (reds) *Constitutional Law of South Africa* (Juta & Co, Ltd Cape Town 1999) 31-1 to 31-28

G

Gildenhuys and Grobler *LAWSA*

Gildenhuys A and Grobler G "Expropriation" in Joubert WA (red) *The Law of South Africa* (Butterworths Durban 1980) 1-159

R

Roux *Property*

Roux T "Property" in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M and Bishop M (reds) *Constitutional Law of South Africa* 2nd ed, Volume 3 (Juta & Co, Ltd Cape Town 2007) 46-i to 46-73

8.3 Articles

A

Appies 2008 *De Rebus*

Appies J "Eradicating the legacy of racism, colonialism and apartheid in the property industry" 2008 *De Rebus* 63-64

B

Badenhorst 1989 *THRHR*

Badenhorst PJ "Die vereistes vir 'n geldige onteieningskennisgewing"
1989 *THRHR* 130-138

Badenhorst 1997 *THRHR*

Badenhorst PJ "Die onteieningsbegrip en vereistes vir die onteiening in
die Nederlandse reg" 1997 *THRHR* 650-664.

Badenhorst 1998 *De Jure*

Badenhorst PJ "Compensation for purposes of the property clause in the
new South African Constitution" 1998 *De Jure* 251-270.

Badenhorst en Van der Vyver 1996 *TSAR*

Badenhorst PJ an Van der Vyver E "Mineraalregte as voorwerp van
onteieining" 1996 *TSAR* 800-809

Burns 1991 *SAPR/PL*

Burns Y "Subordinate legislation and the *audi alteram partem* rule" 1991
SAPR/PL 282-285

C

Claassens 1993 *SAJHR*

Claassens A "Compensation for expropriation: the political and economic
parameters of market value compensation" 1993 *SAJHR* 422-427

Chaskalson 1993 *SAHJR*

Chaskalson M "The problem with property: Thoughts on the constitutional
protection of property in the United States and the Commonwealth" 1993
SAJHR 388-411

Chaskalson 1995 *SAJHR*

Chaskalson M "Stumbling towards section 28: negotiations over the protection of property rights in the Interim Constitution" 1995 *SAJHR* 222-240

Corder 1980 *THRHR*

Corder H "The content of the *audi alteram partem* rule in South African administrative law" 1980 *THRHR* 156-177.

Cowen 1972 *THRHR*

Cowen DV "Expropriation and the arbitration process" 1972 *THRHR* 146-159

D

Du Plessis 1987 *THRHR*

Du Plessis W "'n Regshistoriese ondersoek na die begrip 'openbare belang'" 1987 *THRHR* 290-298

E

Eisenberg 1993 *SAJHR*

Eisenberg A "Different formulations of compensation clauses" 1993 *SAJHR* 412-421

Eisenberg 1995 *SAJHR*

Eisenberg A "'Public Purpose' and expropriation: Some comparative insights and the South African Bill of Rights" 1995 *SAJHR* 207-221

G

Gildenhuys 1977 *TSAR*

Gildenhuys A "Markwaarde as vergoedingsmaatstaf by onteiening" 1977 *TSAR* 1-13

Grogan 1991 *SALJ*

Grogan J "Dismissals in the Public Sector: The triumph of *audi*?" 1991 *SALJ* 108 599-606

H

Hall 1993 *SAPR/PL*

Hall MS "Toepassing van die *audi alteram partem*-reël in die Suid-Afrikaanse onteieningsreg" 1993 *SAPR/PL* 351-354

Hoexter 2006 *Acta Juridica*

Hoexter C "Administrative action in the courts" 2006 *Acta Juridica* 303-324

Hopkins and Hofmeyr 2003 *SALJ*

Hopkins K and Hofmeyr K "New perspectives on property" 2003 *SALJ* 48-62.

Hopkins May 2006 *De Rebus*

Hopkins K "Capping Claims, Is it constitutional" 2006 *De Rebus* May 2006 20-24

J

Jazbhay 2001 *De Rebus*

Jazbhay SA "Expropriation v deprivation" December 2001 *De Rebus* 44.

Jazbhay 2002 *De Rebus*

Jazbhay SA "Proportionality analysis in property rights" 2002 August *De Rebus* 46-47

K

Kok 2004 *THRHR*

Kok A "Why the finding that juristic persons are entitled to the property rights protected by section 25 of the Constitution?" 2004 *THRHR* 683-686

L

Lewis 1992 *SAJHR*

Lewis C "The Right to Private Property in a New Political Dispensation in South Africa" 1992 *SAJHR* 389-430

M

Mann 1959 *LQR*

Mann FA "Outlines of a History of Expropriation" 1959 75 *LQR* 188

Matthews 1920-1921 34 *Harv LR*

Matthews N "The valuation of Property in the Roman Law" 1920-1921 34 *Harv LR* 229-259

Matlala 2005 *De Rebus*

Matlala D "The law reports" October 2005 *De Rebus* 32-33

Mdumbe 2005 *SAPR/PL*

Mdumbe F "The meaning of 'organ of state' in the South African Constitution" 2005 *SAPR/PL* 1-28

Mostert 2003 *SAJHR*

Mostert H "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" 2003 *SAJHR* 567-592

Murphy 1994 *SAJHR*

Murphy J :Property Rights and Judicial Restraint: A Reply to Chaskalson"
1994 *SAJHR* 385-398

Murphy 1995 *SAPR/PL*

Murphy J "Interpreting the property clause in the Constitution Act of 1993"
1995 *SAPR/PL* 107-130

N

Nonyana June 2005 *Butterworths property Law Digest*

Nonyana MR "The arbitrary deprivation of property" 2005 *Butterworths Property Law Digest* 1-3

O

Onagoruwa and Straughan September 2008 *Butterworths Property Law Digest*

Onagoruwa Y and Straughan R "Land Expropriation Draft Bill bound to spark lively debate" September 2008 *Butterworths Property Law Digest* 1-3

P

Pfaff and Schneider 2001 *SAJHR*

Pfaff R and Schneider H "The Promotion of Administrative Justice Act from a German Perspective" 2001 *SAJHR* 59-86

Pienaar and Van der Schyff 2003 *Obiter* 150

Pienaar GJ and Van der Schyff E "Watergebruikregte ingevolge die *Nasionale Waterwet* 36 van 1998" 2003 *Obiter* 132-156

Purshotam 1994 *SALJ*

Purshotam R "The expropriatee's right to a hearing before the decision is made to expropriate" 1994 *SALJ* 3, 237-239

S

Schulze 2002 *De Rebus*

Schulze H "Law reports/hofverslae" 2002 Februarie *De Rebus* 47

Schulze 2005 *De Rebus*

Schulze H "The law reports" March 2005 *De Rebus* 35

Schulze 2007 *De Rebus*

Schulze H "The law reports" March 2007 *De Rebus* 30-31

V

Van der Merwe 1988 *SALJ*

Van der Vyver JD "Expropriation, Rights, Entitlements and Surface Support of Land" 1998 *SALJ* 1-16

Van Schalkwyk 1984 *TRW*

Van Schalkwyk JH "Aspekte van Onteieningsreg" 1984 *TRW* 14 – 27.

Van der Schyff 2007 *CILSA*

Van der Schyff E "Constructive appropriation – the key to constructive expropriation? Guidelines from Canada" 2007 *CILSA* 306-321

Van der Walt and Botha 1998 *SAPR/PL*

Van der Walt AJ and Botha H "Coming to grips with the new constitutional order: critical comments on Harksen v Lane NO" 1998 *SAPR/PL* 19

Van der Walt 1992 *SAJHR*

Van der Walt AJ "The fragmentation of land rights" 1992 *SAJHR* 431-450