

**A CRITICAL EXPOSITION ON THE DETERMINATION OF A “JUST AND
EQUITABLE” COMPENSATION FOR EXPROPRIATION IN SOUTH
AFRICAN LAW**

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(i)

DEDICATION

This dissertation is dedicated to my late grandfather, **TROTT PHEAGANE
MODIPANE.**

PREFACE

I am indebted to Prof Jeannie van Wyk for all her assistance and insightful guidance in preparing this dissertation. I also wish to express my sincere gratitude to the Department of Defence for the financial support and time off to pursue my studies and research during preparation of this dissertation. A word gratitude and appreciation is also extended to Adv L.K.Manie for the unreserved assistance and inputs in this undertaking.

In conclusion, I would like to extend my gratitude and sense of appreciation to my family members, in particular my grandmother, mother, Mama and Bobo; and most importantly my daughter, Mapula, and my son, Phuthi.

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CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

1.1. Introduction

Expropriation is necessary for a variety of reasons. It is often necessary to expropriate land in order to build a road¹ or other public facility such as a hospital, clinic or school.² It is also necessary to expropriate land so that development can take place.³

Most recently, though, it has become necessary to expropriate land for land reform purposes. South African history is marked with unprecedented and systematic land dispossessions and restrictions that were implemented with little and, in some instances, no compensation. The process was heightened with the introduction of laws in 1913 and subsequent other statutes, the sole purpose of which was to ensure that land ownership did not resort in the hands of the majority black people and ensured segregation of communities along racial lines through the system of apartheid.

The dawning of the new constitutional dispensation saw a government that was determined to ensure that there was equitable access to land for all its citizens. To achieve this the government committed itself to promulgate legislation that would ensure that access to land be achieved through transformation and land reform programmes aimed at land restitution, land redistribution and land tenure reform. As a starting point the country adopted a Constitution⁴ that provided for the framework for such programmes.⁵ The

¹ See *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) and *Administrator, Transvaal, and Another v J Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A).

² See *Fourie v Minister van Lande en Ander* 1970 (4) SA 165(O) and *Slabbert v Minister van Lande* 1963 (3) SA 620 (T).

³ See *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) on line: URL: <http://www.saflii.org/za/cases/ZASCA/2006/91.html> visited on 30 August 2008. See also *Abrams v Allie and Others* 2004 (4) SA 534 (SCA) on line: URL: <http://www.saflii.org/za/cases/ZASCA/2004/13.html> visited on 30 August 2008.

⁴ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

Constitution, amongst others, laid the foundation for the promulgation of the Restitution of Land Rights Act⁶ and other legislation.⁷ The Constitution also lays down, in section 25, the framework within which land expropriation and deprivation of rights in land should be handled. The Constitution requires that the amount of compensation payable in cases of expropriation must be just and equitable and reflect a fair balance between the interests of the persons whose property is affected and those of society (public interest), taking into account other relevant factors.⁸ The Constitution did not provide any particular formula for the determination of what is deemed to be “just and equitable” within the constitutional framework and as such the task was left to the able hands of the judiciary.

Prior to the adoption of the Constitution expropriation was primarily governed by the Expropriation Act.⁹ After the adoption of the Constitution, the Expropriation Act remained in place. However, its provisions did not fit comfortably with the Constitution.

In the discussion that follows focus will be on the challenges brought about by the provisions of the Constitution in the determination of a “just and equitable” amount of compensation on expropriation. Since the Expropriation Act, promulgated long before the Constitution, contains no such provisions emphasis will be placed on its role in a constitutional context.

⁵ Ss 25(5)–(9) of the Constitution. See also Article 16 the *Draft Policy on Expropriation Bill* (now withdrawn) in the *Government Gazette* No. 30468 of 13 November 2007. See also Currie I and De Waal J *The Bill of Rights Handbook* Juta (5ed 2005) 563 – 565.

⁶ 22 of 1994.

⁷ These statutes include the Extension of Security of Tenure Act 62 of 1997 (ESTA), the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the Land Reform (Labour Tenants) Act 3 of 1996. See *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC).

⁸ Section 25(3) of the Constitution. The specific factors are discussed in detail in Chapter 3 on pages 22 – 30 below.

⁹ Expropriation Act 63 of 1975 (hereinafter referred to as “the Expropriation Act”). The relevant provisions of the Expropriation Act are discussed in detail in Chapter 3 on pages 16 – 21 below.

1.2. Problem statement

Prior to the enactment of the Constitution, compensation for expropriation was dealt with under the Expropriation Act. Even after the enactment of the Constitution the Expropriation Act remains in force. This Act provides for the process to be followed in determining the amount of compensation payable for expropriation in South Africa.¹⁰ The Expropriation Act has “market value” as a primary factor in the determination of the amount to be paid.

With the enactment of the Constitution, a new approach was introduced in terms of which compensation for expropriation must be “just and equitable” taking into account the balance between the interests of the affected individual and those of society. In this regard consideration must be given to certain factors introduced by section 25 of the Constitution.¹¹

It is imperative to consider the provisions of section 25(3) of the Constitution:

25. (3) The amount of compensation and the time of 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.

¹⁰ See section 12(1) of the Expropriation Act. See the discussion on Chapter 3 on pages 16 – 21 below.

¹¹Section 25(3) of the Constitution; also Gildenhuys J in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) 36. See also *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) [23.1] as per Jamie AJ with reference to the *Ex Parte Former Highlands Residents* case wherein he stated:

The learned Judge accepts that in South Africa, the provisions of s 25(3) are clearly intended to require that market value, while important, not be the conclusive and determinative factor in the assessment of just and equitable compensation.

The determination of the amount of compensation has to reflect a clear consideration of predetermined factors as espoused in section 25 of the Constitution. Market value ceased to be the primary determinant in this regard, but was reduced to one of the factors to be considered.

However, the list of the factors was deemed not to be exhaustive and as such the court is still at liberty to consider any other factor that it deems relevant for the determination of a “just and equitable” compensation.¹²

Considering the historical background of the South African judiciary, one is inclined to believe that enormous challenges have to be overcome in ensuring that the spirit of the Constitution prevails in dealing with the determination of a “just and equitable” compensation in South Africa. However, while there is agreement that the courts have so far made an effort to uphold the purport and spirit of the Constitution, there is also the concern that the Gildenhuys two-stage approach in the determination of compensation in expropriation may amount to an entrenchment of the traditional approach of having market value as the key factor. This aspect flies in the face of the provisions of section 25(3) of the Constitution.¹³

In the current dispensation courts are expected to determine a “just and equitable” compensation for expropriation in such a way that the factors as enshrined in section 25(3) of the Constitution are given effect to and that such a determination has to reflect a balance between the affected individual/body and society. In my opinion, it always remains a question as to how to best align the provisions of the Expropriation Act with those in the Constitution.

¹² Van der Walt AJ *Constitutional property law* Juta (2005),281. See also the unreported judgment of Moloto J in *Lappeman v Mphole N.O.* case no 37/2002, 27 November 2003, LCC; Judgment of Gildenhuys AJ in *Baphiring Community v Uys and Others* LCC 64/98, 5 December 2003 [13]–[14] 6-7 on line http://www.law.wits.ac.za/lcc/summary.php? Case_id=12710 visited on 12 April 2008 at 11:59; Kleyn D “The constitutional protection of property: a comparison between the German and the South African approach” (1996) 11 *SAPR/PL* 403–445, 444,

¹³ *Former Highlands Residents* case fn 11 above 40. See also the criticism to the majority decision in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) [81]–[84]. See pages 36 – 40 in Chapter 4 below for a detailed discussion on the “two-stage” approach.

Therefore, this research seeks to expose the difficulties that the courts face in determining the extent to which they have to decide the approach to be adopted in the determination of compensation for expropriation in terms of the Expropriation Act while giving effect to the requirements of the Constitution as espoused in section 25.

1.3. Research method

The discussion will, firstly, deal with a brief analysis of the definition of the concept of expropriation. Following that will be a detailed discussion on the determination of compensation for expropriation as provided for in terms of the Constitution. The background and context of expropriation in terms of the Constitution will be set out. Then follows an examination of the relevant aspects of the Expropriation Act.

A brief reference to relevant aspects of the proposed Expropriation Bill¹⁴ will be made in order to contextualise the discussion further.

The interpretation of the term “just and equitable” as found in legislation and case law will be addressed.

Throughout there will be a critical exposition of the relevant case law, primarily South African, reflecting, particularly, the challenges experienced in the determination of a “just and equitable” compensation in South African law.

Finally, the summation, conclusion and recommendations flowing from the observations made will be presented.

¹⁴ Now withdrawn.

CHAPTER 2

DEFINITION OF EXPROPRIATION

2.1. Introduction

Before dwelling on the other intricate issues pertaining to expropriation it is imperative to establish a common understanding of the concept as impacted upon by the constitutional provisions. The Constitution, particularly with its emphasis on the principles of land restitution and redistribution, brought about a new perspective on the concept of expropriation as opposed to the underlying principles in the Expropriation Act.

In this chapter focus will, therefore, be on a reflection of the historical development of the concept in the pre- and post- Constitution era, including the various approaches adopted by the courts. The discussion will conclude with a discussion of the agreed premise for the interpretation of the concept of expropriation.

2.2 Historical development of the term

Meyer explains that although no systematic exposition of the legal rules concerning expropriation is to be found in Roman Law, there are, however references to the effect that the principle of expropriation was not unknown in Roman Law.¹⁵ It is, however, acknowledged that the state always had authority to expropriate.¹⁶

In his helpful exposition of the development of expropriation Meyer locates its origin in England to the Magna Carta in 1215. There expropriation came to be construed as the compulsory sale of the land in which agreement between the expropriator and the expropriatee was supplied by statute.¹⁷

¹⁵ Meyer JM "Expropriation" in Joubert WA (ed) vol 10 part 1 *LAWSA* (First Re-issue 1998) [134]-[135] 132. In this work reference is made to some original texts: *Tacitus Annalium* 1 75; C 8 11 18.

¹⁶ Meyer fn 15 above 132; See also *Fourie v Minister van Lande* fn 2 above 169G-H.

¹⁷ Meyer fn 15 above 132.

It is contended that the first statute to prescribe a general procedure for expropriation and assessment of compensation was the English Land Clauses Consolidation Act of 1845. Even though its prescribed procedure was not obligatory, it could still be re-enforced by a statute.¹⁸

The provisions of the 1845 Act formed the basis of expropriation law in many other countries including South Africa. However, criticism of its application was based on the fact that the value of appropriated land was to be assessed as the value to the owner of the expropriated land. This resulted in exorbitant amounts of compensation having to be paid.¹⁹

As a result of the unfavourable consequences brought about by the application of the above process, the English Acquisition of Land Act of 1919 was introduced. This statute resulted in the setting out of a number of rules that had to be followed in determining the quantum of expropriation. These rules were later incorporated into the South African Expropriation Acts of 1965 and 1975.²⁰ Amongst the rules provided for is the one that requires that the value of the land has to be determined as the amount that a hypothetical seller could have sold it on an open market to a hypothetical purchaser at the time of expropriation.²¹ This principle became the keystone to the market value as applied in expropriation law in South Africa.

Prior to the enactment of the Expropriation Act of 1965, a number of statutes regulating expropriation were in existence in South Africa.²² The 1965 Expropriation Act was the first consolidating statute in terms of which the Minister of Lands, authorities of the four provinces and local authorities (on authorisation by the administrator) had the power to expropriate.

¹⁸ Meyer fn 15 above 132.

¹⁹ Meyer fn 15 above 132.

²⁰ Meyer fn 15 above [135] 133. See also Expropriation Act 55 of 1965 s 8; Expropriation Act 63 of 1975 s 12.

²¹ Meyer fn 15 above [135]. See also section 12(1)(a)(i) of the Expropriation Act.

²² This deduction is made from the general exposition by Meyer fn 15 above 133–134.

The Expropriation Act of 1975 repealed the 1965 Act and conferred the authority to expropriate on the Minister of Public Works and the executive committee of a province.²³

The Expropriation Act governed the expropriation processes prior to the Constitution and never envisaged the principles of land redistribution and restitution as provided for in the Constitution. It primarily authorised the expropriation of property for public purposes. In this regard “public purpose” is seen as any purpose connected with the administration of the provisions of any law by an organ of state.²⁴ Section 2(1) of the Expropriation Act empowers the Minister of Public Works to, subject to payment of compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes. The Act is silent on the expropriation of any property in the public interest. It is, therefore, my submission that the Expropriation Act does not authorise the expropriation of property in the public interest. The result hereof is that the Minister of Public Works could therefore not expropriate any property for the benefit of an individual.

The Act, however, empowers the Minister of Public Works to expropriate immovable property on behalf of certain juristic persons or bodies.²⁵ It needs to be stressed, however, that such juristic persons or bodies must satisfy the Minister of Public Works that they require such immovable property for public purposes.

The exact meaning of the phrase “public purposes” can be discerned from the judicial interpretation attached to it over a period of time.²⁶

The first South African case to analyse the term “public purpose” is *Rondebosch Municipal Council v Trustees of the Western Province*

²³ S 2(1) read with the definition of “minister” in s 1.

²⁴ S 2(1) read with the definition of “public purposes” in s 1.

²⁵ S 3(1).

²⁶ See also *African Farms and Townships Ltd v Cape Town Municipality* fn 1 above; *Slabbert v Minister van Lande* fn 1 above.

Agricultural Society.²⁷ In the case of *Fourie v Minister van Lande en Ander*²⁸ Steyn JA gave an authoritative exposition of the judicial interpretation of “public purposes”. He held that, with regard to section 2(1) of the Expropriation Act 55 of 1965, the legislator intended the words “public purposes” to have the same meaning as the established interpretation and that the words should be understood in their broad sense i.e. that they include things affecting the whole population or the local public, and not only things with which the state or the government is concerned. On this premise the upkeep and expansion of the Republic’s telecommunication system was held to be not merely a “government purpose” but also a “public purpose” in the broad sense because it affects the whole country and it extends to the advantage of the public as a whole.²⁹

Following on this line of analysis it was held that the housing of technicians associated with such a function was deemed to be a public purpose and, consequently that the Department of Posts and Telecommunications was entitled to expropriate a house which is necessary to house one of its technicians under its employ.³⁰

This raises an important aspect relating to the interpretation of the term “public purpose” within the context of expropriation. There is, on one hand, the narrow interpretation which confines “public purpose” to matters which do not relate to the people directly but to the state or government which represents the people. On the other hand there is the wide interpretation which refers to affairs affecting the whole population or local public.³¹

Upon a reading of a number of the pre-constitutional decisions³² one is inclined to conclude that the courts favoured a lenient approach. This allowed

²⁷ 1911 AD 271 283 - 286.

²⁸ Fn 2 above 170E–175. See also *African Farms and Townships Ltd v Cape Town Municipality* fn 1 above; *Slabbert v Minister van Lande* fn 2 above.

²⁹ *Fourie’s* case fn 2 above 165.

³⁰ *Fourie’s* case fn 2 above 171B – G.

³¹ *Fourie’s* case fn 28 above.

³² The most important decisions to be noted being: *Slabbert v Minister van Lande* fn 2 above; *African Farms and Townships* fn 1 above; *Fourie v Minister van Lande en Ander* fn 2 above. See also Van der Walt fn 12 above 246.

the state or organ of state to expropriate property for what could, depending on the circumstances of the case, be a narrow sense that it was for governmental purposes while also prepared to accept such when the expropriation could be deemed to be for the benefit of the public as a whole or local community.

An application of the stricter public purpose interpretation is to be found in the *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*³³ case. There the court refused to extend the meaning to the functions of a Provincial Agricultural Society despite the fact that it (Agricultural Society) contended that it was entitled to be exempted from levies since it might be rendering what could be argued to be a public purpose service.

In what is regarded as an important decision of the Appellate Division in *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd*³⁴ the court had to decide, *inter alia*, on the question whether a provision of a statute could ever be interpreted in such a manner as to confer on the Administrator the power to acquire the land of one person and transfer it to another for the latter's use and benefit. The court, having found that the Administrator could conceivably have been entitled to expropriate land for the state in terms of section 7(1) of the Roads Ordinance 22 of 1957(T) had the following to say as per Smalberger AJ:

The fundamental problem, however, still remains – is the Administrator empowered under s 7(1) of the ordinance to acquire or appropriate the property of one person for what is essentially the benefit of another? Expropriation, generally speaking, must take place for public purposes 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. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of portion of his land to relocate the services of B, who would otherwise have to be paid massive compensation, could be justified on the basis of it being in

³³ *Rondebosch Municipal Council* case fn 27 above.

³⁴ Fn 1 above.

the public interest. The present instance affords an example of such a situation. In planning the construction of the new road 51, the Administrator would need to have had to take an overall view of all the practical and economic implications of the project as a whole in deciding what would best serve the public interest. He would be entitled and obliged to have regard to the fact that Sentrachem conducted an undertaking which was in the national interest, and what the effect on the national interest would be if Sentrachem lost its rail connection with its sources of raw material, thereby disrupting its production of strategically important products. In principle, therefore, the Administrator's power under s 7(1) can extend to the acquisition of land for what may include the benefit of a third party.³⁵

It is submitted, as succinctly pointed out by Van der Walt,³⁶ that the *Van Streepen* case correctly presents an exposé of the fact that the courts in the pre-constitutional expropriation era were willing to follow a lenient interpretation that corresponded with the wider notion of public interest or a narrower interpretation that corresponds with the public purpose as dictated by the authorizing statute and the context. The fact that the Expropriation Act did not specifically authorise expropriation in the public interest, as currently provided for in section 25(3) of the Constitution, meant that the extension found in the interpretation of public purposes remained dependent on the court. This could clearly lead to uncertainty and unsatisfactory situations especially when one has to deal with matters of land transformation.

The writer favours the conclusion by Eisenberg³⁷ that "public purpose" does not require direct public use and access to the property, but rather requires that the expropriation should have some advantage to the public. Consequently, it is submitted that land transformation and land reform programmes have been recognised as falling within the purview of the public purpose definition.

³⁵ *Van Streepen's* case fn 1 above 661A–E.

³⁶ Fn 12 above 246.

³⁷ Eisenberg A "Public purpose" and expropriation: Some comparative insights and the South African Bill of Rights" 1995 (11) *SAJHR* 207–221 221.

2.3. Post-constitutional developments

The term “expropriation” cannot be easily defined without reference to “deprivation”. Deprivation only became an issue after the introduction of the Constitution. In the important Constitutional Court of *Harksen v Lane*,³⁸ where the property clause was dealt with for the first time, Goldstone J stated that while expropriation is characterised by the acquisition of rights in property by public authority for a public purpose, deprivation is, on the other hand, seen as involving the state’s regulation of the use and enjoyment of private property in the public interest and normally without compensation.³⁹

The generally accepted distinction between deprivation and expropriation is founded on the nature of their characteristics, namely that deprivation is seen as being temporary in nature and without compensation to the affected party whereas expropriation is permanent and accompanied by compensation to the affected party.⁴⁰

However, the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,⁴¹ as correctly observed by Van der Walt,⁴² regarded expropriation as a special subset of deprivation and consequently had to comply with more general requirements for deprivation in section 25(1) of the Constitution. The approach adopted by the Constitutional Court, in fact, had the effect of blurring the distinction between the two concepts instead of providing more consistent distinguishing criteria.⁴³

Van der Walt⁴⁴ points out that despite the apparent simplicity and clarity of the distinction, it remains difficult to define expropriation accurately and

³⁸ *Harksen v Lane* 1998 (1) SA 300 (CC) at 315E-G; *Hewlett v Minister of Finance* 1982 (1) SA 502 (ZSC).

³⁹ *Steinberg v South Peninsula Municipality* 2001 (4) SA 961 (A) 1246B–F; Currie and De Waal fn 5 above 552.

⁴⁰ See fn 37 above 315E–317C.

⁴¹ 2002 (4) SA 768 (CC) 796 F-H

⁴² Van der Walt fn 12 above 187–188.

⁴³ Van der Walt fn 12 above 188.

⁴⁴ Van der Walt fn 12 above 187-188.

distinguish it from deprivation consistently. He also rejects the assumption that the two concepts share an element that defines expropriation and distinguishes it from non-acquisitive deprivation of property in that the state acquires property through expropriation but not through deprivation. He substantiates this by making reference to situations where the loss of property occurs without actual acquisition by the state and it is even difficult in those instances to tell whether the state acquired the affected property or any property at all. This he refers to as the existing “grey area” between deprivation and expropriation. I support the contention by Van der Walt that, even on the application of the methodology introduced by the *FNB* case, a distinction is still to be made between expropriation and deprivation.⁴⁵

Southwood⁴⁶ submits that the use of the phrase “public purpose” in the Constitution is intended to have a wider meaning that would see its interpretation being given the effect of including the interest of the public as a whole.

The Constitution provides that the phrase “public interest” in section 25 must be read to include “the nations’ commitment to land reform” and “the nation’s commitment to reforms to bring about an equitable access to all South Africa’s natural resources.”⁴⁷ It is my submission that this can be used for the purposes of acquiring private property for the benefit of an individual or a group of persons to achieve land reform or bring about an equitable access to all South Africa’s resources. This clearly transcends the traditional property concept of public purposes.

The summation of the ultimate impact of the constitutional provisions on interpretation of “public purposes” and “public interest” is presented by Van

⁴⁵ Van der Walt fn 12 above 188.

⁴⁶ Southwood MD *The compulsory acquisition of rights* Juta (2000) 19–20. See also *Administrator, Transvaal, and Another v J van Streepen (Kempton Park) (Pty) Ltd* fn 1 above 661B–G.

⁴⁷ S 25(4)(a).

der Walt where he states:⁴⁸

However, in view of the double- barrelled provision in section 25(2) of the Constitution (that includes both phrases), this distinction has lost all meaning in the Constitutional era: in view of the formal, normative and interpretive superiority of the Constitution and the obvious effort to frame the constitutional requirement purposefully to leave room for land –reform related expropriation, the lenient approach should now always prevail when a statute authorizes expropriation in terms of either “public purpose” or “public interest”. It is of course possible that an enabling statute could explicitly impose a stricter or narrower public purpose requirement, but in view of the *Van Streepen* decision and the subsequent constitutional requirement use of the phrases “public purpose” and / or “public interest” that should no longer make a difference in principle.

2.4. Proposed markers for expropriation

Realising the general difficulties experienced in defining expropriation, Van der Walt ⁴⁹ proposes the following useful markers for expropriation:

Expropriation takes place by operation of law and is brought about unilaterally, without the co-operation of the affected party.

- a. Expropriation always involves a loss of property, usually total and permanent, but in at least some jurisdictions partial and temporary loss of property can constitute expropriation.
- b. The property is usually acquired by or on behalf of the state, but in some cases destruction of the property or acquisition by another private person can amount to expropriation.
- c. The compulsory loss and the concomitant destruction or acquisition of the property is about for public purpose or in public interest.

⁴⁸ Fn 12 above 246.

⁴⁹ See *Van Streepen's* case fn 1 above 188-9.

- d. The compulsory loss of property for a public purpose is usually accompanied by compensation.
- e. Expropriation is a lawful exercise of a legitimate state power (usually but not necessarily granted in the constitution), and therefore compensation for expropriation must be distinguished from compensation for damages in delict.

2.5. Conclusion

For the purposes of this discussion expropriation will be treated to mean an action whereby the state exercises its public power⁵⁰ as a representative of the public or a local community as a whole to unilaterally terminate the owner's ownership and usually acquire the property for public interest or public purpose such as land reform oriented redistribution,⁵¹ acquisition of private building to house technicians to perform a function in the public interest⁵² or the acquisition of private land for building of public facilities such as road and dams, etc. This action must pass the constitutional imperatives; namely, that it must be sanctioned by a law of general application, it must be for public purposes or public interest and with compensation.⁵³

⁵⁰ See *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258H.

⁵¹ Van der Walt AJ "Moving towards recognition of constructive expropriation? *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA)" 2002 (65) *THRHR* 459 463.

⁵² Meyer fn 15 above.

⁵³ S 25(2) of the Constitution.

CHAPTER 3

EXPROPRIATION LEGISLATION

3.1. Introduction

Having established the premise for an understanding of the concept of expropriation in the previous chapter, it is prudent to have an overview of the primary statutes governing expropriation under the South African law.

The discussion that follows seeks to give an exposition of the relevant sections of the Expropriation Act and the Constitution and, most importantly, the methodologies in dealing with expropriation. There will also be an in-depth discussion of the relevant factors for the determination of a “just and equitable” compensation as stipulated in section 25(3) of the Constitution. In this regard a basis would have been laid to showcase the dichotomy in application of the two statutes leading to the difficulties that the courts experience in the determination of a “just and equitable” amount of compensation in the next chapter.

3.2. Section 12 of the Expropriation Act

The process and procedures for expropriation in the pre-constitutional era fell primarily within the domain of the Expropriation Act. It provides:

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 taking, in terms this Act, of a right to use property, shall not, subject to the provisions of ss (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 realised if sold on the date of notice in the open market by a 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:

Provided that where the property expropriated is of such a nature that there is no open market therefore, compensation therefore may be determined-

- (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
- (bb) in any other suitable manner.

A closer reading of the section reveals the fact that the determination of compensation for expropriation revolves around the market value of the expropriated property and the actual financial loss by the affected party.

Section 12(2) of the Expropriation Act allows for an add-on of a fixed percentage to the compensation moneys awarded in respect of expropriation of land and right, respectively in the form of what is termed *solatium*. The term *solatium*, as found in various jurisdictions, refers to, *inter alia*, factors such as inconvenience, nuisance, annoyance, inconvenience and distress⁵⁴.

Solatium takes the form of payment of either a fixed ad-on percentage to the amount awarded for compensation in expropriation or it could be an amount fixed by the Court at its discretion as warranted by the circumstances⁵⁵. It is seen as an amount aimed to provide redress for non-financial deprivations.

Gildenhuys J stated *in obiter* that in determining the compensation the Court must balance the interests of the claimant with the interests of the community from whom the money to pay compensation would come⁵⁶.

⁵⁴ See a detailed discussion of the various jurisdictions in *Hermanus v Department of Land Affairs: In re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 [17] – [24] 1040 – 1042.

⁵⁵ S 2(2) of the Expropriation Act.

⁵⁶ *Hermanus* case fn 54 above [33] 1045 – 1046.

I agree with the Learned Justice Gildenhuys' assertion that an award for *solatium* must signify a symbolic reparation and, consequently, must not be an attempt to provide full redress for emotional suffering by the claimant.

In the case of *Du Toit v Minister of Transport*⁵⁷ it was held that

s 12(1) (a) of the Act based the determination of the amount of compensation paid for expropriation of property on the aggregate of the market value and actual financial loss, whereas s 12(1) (b), which dealt with the expropriation of a right, based the compensation only on actual loss suffered.

As was observed in numerous decisions the determination of what was actually expropriated, i.e. whether it is a right or property that is affected, is of cardinal importance for the determination of the amount of compensation for expropriation.⁵⁸ In the majority of the decisions the parties contended on appeal that what was expropriated was a property and that a determination by the trial court that it was a right being expropriated prejudiced them. The reason for this is that the amount that can potentially be payable in the former instance is higher than in the latter which is only based on the actual loss.⁵⁹ This becomes the case if the right being expropriated does not have market value.

Conversely, it was held in the *Kangra Holdings* case,⁶⁰ (as Mokgoro J also states in *Du Toit's* case), that

in instances where a right has been expropriated and the right has a market value, the distinction between s 12(1)(a) and s 12(1)(b) will be blurred.

Mokgoro J went on to refer to the unreported case of *South African Roads*

⁵⁷ 2006 (1) SA 297 (CC) 314J–315B,

⁵⁸ See also *Du Toit's* case fn 57 above; *Khumalo v Potgieter* [2000] 2 All SA 456 (LCC); *Kangra Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA).

⁵⁹ See *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) and *South African Roads Board v Bodisang* (NPD, case no 948/94, 22 September 1995).

⁶⁰ Fn 59 above at 336I/J–337B.

*Board v Bodisang*⁶¹ where the court found:

In my view, it makes very little difference whether compensation is assessed under s 12(1)(a) or s 12(1)(b) of the Expropriation Act. I say this because I find that what the Defendant expropriated was in fact a right as contemplated by s 12(1)(b). It was the right to take gravel from the defined 4,83 hectares of plaintiff's land. That right was abandoned before the trial started. The amount of gravel taken is known, that is to say it was agreed at 194 945 cubic metres. That is what ultimately was taken, so whether compensation is to be based upon what a willing buyer would pay a willing seller under s 12(1)(a) for that material or for actual loss to the plaintiff is really of no practical importance.

While the results are generally the same irrespective of the section of the Expropriation Act the determination of compensation, it is submitted that this is not an all-embracing outcome. To ensure that a just result is achieved it remains of utmost importance to determine what is being expropriated and ascertain the applicable section of the Expropriation Act to determine the amount of compensation.

It is noted that the said Act has to date not been amended to reflect the letter and spirit of the Constitution, including its compelling provisions of section 25(3).

3.2.1. Analysis

In its current state the Expropriation Act makes no provision for the determination of compensation for expropriation that is based on “just and equitable” principles, including the provisions of section 25 (3), as preordained by the Constitution.

This, as will be observed later in this undertaking,⁶² deepens the dichotomy. Provisions of the Act are seen as entrenching the protection of the individual

⁶¹ Fn 59 above.

⁶² See the criticism of the “two-stage” approach in [4.5] of chapter 4 below.

as opposed to the collective,⁶³ and thus not imposing an attempt to balance what Underkuffler⁶⁴ terms “the inevitable tension between the two”.

In dealing with the critical role that property plays in society, Erasmus⁶⁵ has the following to say:

.....I argue that property, in its historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective. This tension – now seen as something external to the concept of property- was in fact internal to it.

He concludes that if the courts recognise the role and function of property within society and adhere to the constitutional framework for the implementation and application of property, the implementation of land reform should not cause friction between the judiciary and legislation. A case in point where such a friction was experienced was the Indian experience over the period 1950–1973 and 1978. The constitutional conflict in India reflects the extent to which a conservative court could use the guarantee of property as a fundamental right to frustrate effective and decisive land reform in a particular country. The Indian Supreme Court used the constitutional guarantee of the right to acquire, hold and dispose of property in that country to frustrate reform measures introduced by the legislature. The newly introduced measures by the legislature which aimed at achieving drastic land and economic reforms were in most instances met with the conservative Supreme Court interpretation of the property guarantee. The court adopted a narrow interpretation of the property guarantee that effectively blocked the reforms and protected the privileges of existing property owners. This conflict was finally ended in 1978 when the new government introduced a Forty–Fourth

⁶³ Ntsebeza L “*Slow delivery in South Africa’s land reform programme: The Property clause revisited*” Associate Professor, Department of Sociology, University of Cape Town, SA, on line: http://www.yale.edu/macmillan/apartheid/apartheid_part_1/Land_Reform.pdf re-visited on 16 January 2009 at 12:51.

⁶⁴ Underkuffler LS “Essay on property: An essay” 1990 *Yale Law Journal* 127–148 129. See also *FNB* case fn 41 above 13; 14; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) 217 (CC) 227.

⁶⁵ Erasmus J “Reconciling land reform and the constitutional protection of property: A look at jurisdictions without official land reform programme” (2000) 15 *SAPR/PL* 105–136.

Amendment, removing the guarantee of property as a fundamental right from the Constitution. The constitutional right was introduced in the place of the fundamental right.⁶⁶

The exact impact of not subjecting the Expropriation Act to the constitutional principles is founded in the exposition by Mathew Chaskalson⁶⁷ on the process leading to the adoption of section 28 of the Interim Constitution of the Republic of South Africa Act. The determination of compensation that is tied to the market value of the property being expropriated as a central determinant factor is contrary to the agreements reached in the pre-constitutional negotiations that saw the enactment of section 28(3) of the Interim Constitution, and now section 25(3) of the Constitution.⁶⁸ Concomitant to this is the obstruction to the operation of the legislative programmes addressing the massive disparities of wealth in society which were a legacy of apartheid. This would open an avenue for the lodging of exorbitant compensation claims in expropriation cases. It is submitted that this would result in the exhaustion of state funds dedicated to this process and, thus, lead to the ultimate failure to implement the land reform programmes as envisaged.

By emphasising market value as a premise for compensation the Expropriation Act promotes the resoluteness of an individual's right to property against the collective as represented by public purpose /or public interest. It, thus, stands to negate the achievement made throughout the constitutional negotiations - resulting in the compromise reached in the formulation of section 28 of the Interim Constitution and later section 25 of the Constitution.

⁶⁶ Erasmus fn 65 above 107-111.

⁶⁷ Chaskalson M "Stumbling towards section 28: Negotiations over the protection of property rights in the interim constitution: exposition of the negotiation process leading to section 28 of the Interim Constitution" 1995 *SAJHR* 223–240.

⁶⁸ See Chaskalson fn 67 above 232. See also the *dictum* by Mokgoro J in *Du Toit's case* fn 57 above 316.

3.3. Section 25 of the Constitution

As hinted at *supra* the Expropriation Act governed the expropriation actions and determination of compensation for expropriation before the enactment of the Constitution with the result that market value of the expropriated property at the time of expropriation was a determinant factor. The Constitution, as was correctly observed by Mokgoro J in the *Du Toit's* case,

provides for the principles and values and sets the standards to be applied whenever property, which in turn is now constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation must comply with the Constitution, including the spirit, purport and objects generally and section 25 in particular.⁶⁹

The relevant provisions of section 25 of the Constitution read as follows:

- (1) No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application -
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which must be agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of 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.

⁶⁹ See *Du Toit's* case fn 55 above at 312 as per Mokgoro J.

The Constitution⁷⁰ prescribes the formal requirements for a valid act of expropriation, namely that expropriation must be executed in terms of law of general application, for a public purpose or in the public interest and subject to compensation.

3.3.1. Section 25(3) of the Constitution

The Constitution also makes it mandatory for the court to set an amount of compensation that must be “just and equitable”, reflecting an equitable balance between the public interest and interests of those affected. Such an exercise must also reflect a consideration of circumstances stipulated in section 25 (3). However, the set circumstances are held not to be a *numerus clausus* and therefore, the court is, in its pursuit of determining what is “just and equitable” compensation, at liberty to consider any other relevant factor.⁷¹

A consideration of the public interest should, of necessity, look at the individual in the context of the whole community’s interest.⁷² Southwood⁷³ suggests that section 25(3) of the Constitution requires the making of a comparison between the interests of the individuals comprising the community taken as a whole and not in its organised capacity, and the interests of the expropriatee. The learned author sums up the position by suggesting that where the benefit to such assembled interests outweighs the detriment to an expropriatee’s interests, the legislation authorises the expropriation. Consequently, the expropriation will be seen to have been done for public purposes or in the public interest.

The following analysis by Southwood is noteworthy:

Apart from establishing how and to what extent the interests of the expropriatee on the one hand and the community on the other have been affected by the expropriation, it must be established whether the results are desirable for the

⁷⁰ S 25(2).

⁷¹ *Du Toit’s case* fn 57 above 315.

⁷² Southwood fn 46 above 22.

⁷³ Fn 72 above.

expropriatee and the community and to what extent. This requires a decision on what the community regards as desirable. Having gone through these exercises, it must be decided whether the benefit to the community to the community of the expropriation outweighs the disbenefit to the expropriatee. This involves attaching to the effects of the two interests the moral weight attributed to them by the community and a comparison of the two.⁷⁴

3.3.1.1. *Time and manner of payment*

Section 25(3) of the Constitution requires compensation, both as to the amount, as well as time of payment, to reflect an equitable balance between the public interest and the interests of those affected by the expropriation. The amount, time and manner of payment of compensation can be agreed upon by the expropriator and the expropriatee.⁷⁵ Where there is no agreement on those aspects, compensation can be determined or approved by a court.

While compensation is commonly known to be payable promptly, the Constitution provides for the possibility of a delayed payment of compensation.⁷⁶ Chaskalson and Lewis⁷⁷ contend that the factors in section 28(3) of the Interim Constitution are only relevant to the *quantum* of compensation and not the determination of the period in which compensation will be paid. The learned authors are of the view that the court is, accordingly, not bound to consider the factors in the enquiry relating to the period in which payment is to be made. It is, however, conceded that the use to which property is being put may in a particular case be relevant to the period in which compensation is to be paid. They cite a scenario of an owner who is not using a particular property and has no intention of deriving any material benefit from its use in the future and submit that, in an instance, it may well be “just and equitable” to allow delayed payment of compensation. It is my submission that the same analogy is applicable to section 25(3) of the Constitution.

⁷⁴ Fn 46 above 23.

⁷⁵ See Currie and De Waal fn 5 above 555.

⁷⁶ Chaskalson M and Lewis C *Constitutional Law of South Africa* Juta (1996) 31–21.

⁷⁷ Chaskalson and Lewis fn 76 above 31–21.

3.3.1.2. *Equitable balance between the public interest and interests of those affected*

The standard set by the Constitution is to ensure that there is an equitable balance between the public interest and the interests of those affected by the expropriation.⁷⁸ This clearly indicates that the calculation of “just and equitable” compensation involves a balancing of interests.⁷⁹ It makes it peremptory that all relevant circumstances be considered to ensure that there is an equitable balance between the public interest and the interests of those affected by the expropriation.⁸⁰

The public interest refers to the interests of the individuals comprising the community as a whole and not in its organised capacity.⁸¹ In the final analysis, the interest of the community as a whole comprises, as correctly stated by Southwood, the individual interest of each of its members collected together.

The interests of those affected refers to those with vested rights in the property that is to be expropriated and includes owners of the property, the holders of registered and unregistered leases in the property and those holding other rights, like bank pledges and servitudes on the property that is to be expropriated.⁸²

This balancing of interests entails, as succinctly put by Southwood, a determination of what, in the circumstances, are the interests of the “public” benefited, and what, in the circumstances, the expropriatee’s interest is. It also presupposes an imbalance brought about by divesting the expropriatee of his or her property and vesting it in the expropriator. I support Southwood’s

⁷⁸ S 25(3) of the Constitution.

⁷⁹ See also Terblanche T *The challenges to valuers with regard to compensation for expropriation and restitution in South African statutes* 21 on line: http://www.pres.net/Papers/Terblanche_Compensation_Expropriation_South_African_Statutes.pdf visited on 05 April 2008 at 09:17.

⁸⁰ *Du Toit’s* case fn 57 above [28] and [33].

⁸¹ Southwood fn 46 above 22.

⁸² See also Van der Walt fn 12 above 118–120 for a detailed discussion of what rights might be asserted under the protection of property in terms of section 25 of the Constitution.

submission that what is required is:

a redress of this imbalance while neither adversely affecting the public interest too much nor beneficially affecting the expropriatee's interest too much.⁸³

3.3.1.3. *Relevant circumstances*

Terblanche⁸⁴ and Southwood⁸⁵ provide a comprehensive discussion of all relevant circumstances to be considered as provided by section 25 (3) of the Constitution. Each of the circumstances will be briefly discussed below.

a. The current use of the property.

It is overwhelmingly held by the learned authors, Terblanche⁸⁶ and Southwood,⁸⁷ that the consideration of use is inherent in the market valuation exercise, the mechanics of which are well settled and well known. I support the suggestion that section 25(3) should direct that the use of the property be taken account of not for the purposes of setting the market value, but in conjunction with the market value, for the purposes of an assessment of a "just and equitable" compensation. It is my contention that such an approach will ensure that market value remains one of the factors to be considered and not the determinant factor.

It is also submitted that the current use of the property is relevant for the determination of the extent of loss that the expropriatee might suffer if the compensation amount is not paid promptly. For example, if the expropriatee is actively using the property and generating profit from its use, a delay in the payment of the compensation amount might justify a higher amount of compensation to make good the losses that might be suffered in due course while payment is pending.

⁸³ Fn 46 above 30.

⁸⁴ Fn 79 above 9–12.

⁸⁵ Southwood fn 46 above 79-91.

⁸⁶ Terblanche fn 79 above 69.

⁸⁷ Southwood fn 46 above 70.

b. The history of the acquisition and use of property.

Van der Walt⁸⁸ submits that this factor was inserted to allow the court to consider the effect that the previous apartheid –related expropriation might have on the compensation award. The author illustrates this point with a reference to a reminder by Judge Gildenhuys of instances where land was often sold or rented to white farmers for less than market value after having been expropriated from black and white land owners during the apartheid era. He suggests that if such an owner were now to be expropriated for land restitution it would be unfair to compensate him at full market value.⁸⁹

Terblanche⁹⁰ cites an instance where restitution is to take the form of restoration of the land to those dispossessed through forced removals as a classical case where this may be applied. In most of those instances, the removal of blacks from the land was followed by the sale of the land to white people at reduced prices, often through the Agricultural Credit Board. Often too, the sale was at productive value of the land, which was essentially below market value. The author submits that in such an instance, the expropriator will be in a strong position to argue for a lesser value to prevent the present owner from benefiting twice through apartheid:

in the first instance through obtaining the ownership and use of land at well below market value, and then through having the land bought back according to a formula which results in much higher price than the formula which was previously used.⁹¹

I support the contention by Yanou,⁹² that, in view of the historical injustices of the past land distribution, the consideration of the history of the acquisition as well as the use to which the land is put are the most crucial factors in the

⁸⁸ Van der Walt fn 12 above 275.

⁸⁹ See also Yanou MA *Access to Land as a Human Right: The payment of just and equitable compensation for dispossessed land in South Africa* 156 -157 on line : http://eprints.ru.ac.za/799/01/Yanou_PhD_2005.pdf visited on 27 April 2008 at 15:17. The author cites the case of the dispossession of the Mfengu in Tsitsikama as a classical case representing these concerns.

⁹⁰ Terblanche fn 79 above 9.

⁹¹ Terblanche fn 79 above 9.

⁹² Yanou fn 89 above 157–158.

determination of “just and equitable” compensation. This view is, in my opinion, correct because it results in calculating compensation in a manner which will avoid exorbitant prices being paid to current land owners and also make land more affordable for purpose of land reform.

c. The market value of the property.

The “market value of the property” is the price which would be paid by a willing purchaser to a willing seller in an open market on usual terms and conditions.⁹³ The market value must be assessed at the date on which the property is taken by the expropriator, seen as the date that the compensation becomes due. Market value of the expropriated property is no longer considered as the only factor or primary determinant of the amount of compensation. It is rather considered together with other factors to arrive at a “just and equitable” compensation. It is to be acknowledged, as will be illustrated later in this undertaking,⁹⁴ that this factor continues to be one of the controversial factors in the determination of a “just and equitable” amount of compensation in the new dispensation.

It is held to be one of the factors that can be quantified with a measure of accuracy based on the established traditional valuation methods, particularly influenced by its application under the Expropriation Act.⁹⁵

d. The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property.

Terblanche and Southwood suggest that the fact that the section refers to “acquisition” rather than indicating more than one acquisition, is indicative of the drafters’ intention that it is the expropriatee’s acquisition that is to be considered.⁹⁶ Terblanche also contends that, based on the reasoning that “beneficial capital improvement” is coupled with the “acquisition”, that it is the

⁹³ S 12(1)(a)(i) of the Expropriation Act.

⁹⁴ See the criticism of the “two-stage” approach in [4.5] of chapter 4 below.

⁹⁵ *Du Toit’s* case fn 57 above [37].

⁹⁶ See Terblanche fn 79 above 10 and Southwood fn 46 above 88–89.

extent of financial assistance during the expropriatee's ownership that is to be considered.

It is contended that, since it is the state, which must either directly or indirectly bear the burden of paying the compensation to the expropriatee, it is plain that the object of the subsection is that it is the extent of the state's direct input into the acquisition or capital improvement of the property to which regard must be had. I agree with the learned authors' submission that the value of the investment and subsidy that results in capital improvement of the property benefit the owner even in instances where it does not necessarily increase the market value thereof.

e. The purpose of the expropriation.

Terblanche⁹⁷ in his detailed analogy of this factor states that the requirement that the purpose of the expropriation must be regarded does not define clearly what must be taken into account. He further submits that, bearing in mind that the word "purpose" must be given a generous and purposive interpretation, giving expression to the underlying principles and values of the Constitution, in its context, including the history and background to its adoption, and in a manner that secures for individuals a full measure of protection, the word is intended to cover the immediate purpose for which the property is taken.

This will be determined by the expropriator, who will expropriate the property to use it in a particular way, and thus, making the purpose of expropriation the use of the property in that specific way. The learned author concludes his analogy of this with a submission that this could have a bearing on the equitable balance between the interests of the public and the expropriatee in the following ways. First, it may be felt that the purpose of the expropriation is so important to the public interest that the expropriatee should have less compensation or should be paid over a longer period. Secondly, where the purpose for which the property has been taken has increased the property's

⁹⁷ Terblanche fn 79 above 11- 12.

market value or decreased it, it is felt that the decrease or increase in value due to action taken by the expropriator should not be considered in the determination of the amount of compensation. This equitable principle is embodied in section 12(5)(f) of the Expropriation Act and is known as the *Pointe Gourde* principle.⁹⁸ Thirdly, it might be felt that the special suitability or usefulness of the property for the purpose for which it is expropriated should be discounted in the assessment of compensation if it would not have been purchased in the open market for that purpose. This principle is embodied in section 12(5)(f) of the Expropriation Act. It is clearly relevant in striking an equitable balance between the public interests and the expropriatee's interest.

3.3.2. Analysis

The Constitution introduced a completely new methodology to determine the amount of compensation for expropriation in the South African jurisprudence. It did not only require that the amount of compensation and the time and manner of payment should be "just and equitable", but that it should also reflect a balance between the interests of the party affected by the expropriation, on the one hand, and that of the public, on the other hand, while taking into account the relevant factors mentioned in section 25(3) of the Constitution.

It needs to be mentioned that the terms "just and equitable" compensation are subject to a number of different interpretations to an extent that in some jurisprudences they are equated to market value.⁹⁹ It is however, clear that the same does not hold for South Africa.

A closer scrutiny of the relevant provisions of section 25, particularly the peremptory effect of section 25(3), clearly indicate that market value is not intended to be the determinant factor in the determination of compensation for

⁹⁸ Also referred to in *Ex Parte Highlands* case fn 11 above 40-42.

⁹⁹ See Eisenberg A "Different constitutional formulations of constitutional clauses: cases and comments" (1993) *SAJHR* 412–421. This concept is discussed in detail on pages 31 – 34 on Chapter 4 below.

expropriation, as opposed to the situation under the Expropriation Act where market value plays a central role.

However, it is to be noted that, as the Constitution is the supreme law of the land, all acts of expropriation must pass the test as set out by the Constitution in section 25.

The only factors in section 25(3) which are capable of being apportioned any determinable value/ quantified are “market value” and “the extent of state investment and subsidy in the acquisition and beneficial capital improvement of the property”. As will be illustrated in detail in the following discussion, the traditional property law method of relying primarily on the market value of the property in determining compensation for expropriation has resulted in much uncertainty when attempts to reconcile it with the intended effect of section 25 of the Constitution are made.

With regard to the factors other than market value listed in section 25(3), there is obviously no precise method for calculating values that are based on considerations of equity and justice or of weighing the various factors against each other, and the facts and circumstances of each case will determine the method and outcome of this process.¹⁰⁰

¹⁰⁰ See also Currie and De Waal fn 5 above 557.

CHAPTER 4

INTERPRETATION OF THE APPLICABLE CASE LAW.

4.1 Introduction

The democratisation of South Africa left the country with the mammoth task of not only re-uniting the country at a social and political level, but it considerably meant having to redress the historical system of land dispossessions brought about by apartheid laws aimed at depriving blacks of any form of land ownership. As a premise to deal with this challenge the Constitution provides for the expropriation of land to redress these injustices through land transformation. For the purposes of this work focus will, in this chapter, be, firstly, on the exposition of the content of the concept “just and equitable.” Finally will be an in-depth discussion on the courts’ and authors’ interpretation of section 25, particularly the various approaches adopted in the determination of a “just and equitable” compensation in expropriation.

4.2. Content of the concept “just and equitable” compensation

The courts have, in certain instances, tried to formulate a catalogue of circumstances that are “just and equitable” and certain general principles have evolved as guides in particular cases. Mostly these are dealt with in the winding up of companies. In what is perhaps the best exposition of what is “just and equitable” Friedman AJP stated in *Pienaar v Thusano Foundation and Another*¹⁰¹ that:

In its plain, grammatical meaning, “just” means *inter alia* correct, appropriate, fairly-minded, sound, deserved, fitting, reasonable, justified and “equitable” means *inter alia* even-handed, fair, honest, reasonable, right.

This in effect connotes and signifies that, if the Court, in exercising its discretion judicially, comes to the conclusion that it is correct *and* appropriate and fair and reasonable to wind-up a company, it will do so.

¹⁰¹ 1992 (2) SA 552 (B) 580D–F.

To put it another way, in its process of reasoning, the Court is guided by “broad conclusions of law, justice and “equity”, and in doing so it must take into account competing interests and determine them on the basis of a judicial discretion of which “justice and equity” are an integral part. The Court has to balance the respective interests and tensions and counterbalance the competing forces and resolve and determine them in a fair, proper and reasonable manner.

He stated further that the power of the court to wind-up a company whenever it considers that it is “just and equitable” to do so is a power not restricted to grounds of the same class as those specified in section 344 of the Companies Act 61 of 1973.¹⁰²

The categories of circumstances were referred to by Nestadt J in the case of *Erasmus v Pentamed Investments (Pty) Ltd*¹⁰³ and Coetzee J in the case of *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd*.¹⁰⁴ In *Pienaar v Thusano Foundation* Judge Friedman sets out the five categories of circumstances referred to by his predecessors as follows:

- a. The disappearance of the company's substratum.
- b. Illegality of the objects of the company and fraud committed in connection therewith.
- c. A deadlock which results in the management of the company's affairs, because the voting power at board and general meeting level is so divided between dissenting groups that there is no way of resolving the deadlock other than by making a winding-up order.
- d. Grounds analogous to those for the dissolution of partnerships. Where the company is a private one and its share capital is held wholly and mainly by the directors and it is in substance a partnership in corporate form, the court will order its winding up in the same kind of situation that it would order the dissolution of a partnership on the ground that it is “just and equitable” to do that.
- e. Where there is oppression. Where the persons who control the company have been guilty of oppression towards minority shareholders, a winding-up order in suitable cases may be made.¹⁰⁵

¹⁰² Fn 101 above 581A.

¹⁰³ 1982 (1) SA 178 (WLD) 181-185.

¹⁰⁴ 1985 (2) 345 (W).

¹⁰⁵ Fn 101 above 581.

In the delict case of *Union National South British Insurance Company Ltd v Vitoria*¹⁰⁶ the court stated that the words “just and equitable” are interpreted widely to indicate that all relevant factors in connection with fault requirement ought to be taken into account.

Southwood¹⁰⁷ discusses at length the court’s discretion in the determination of “just and equitable” compensation. The learned author observes that, although the phrase “just and equitable” has appeared in some statutes, the provision in section 25(3) of the Constitution appears to be one of the few times that it has been used in South Africa to give the court the power to award money. Some of the statutes that the phrase appeared in prior to the Constitution include section 7 of the Divorce Act 70 of 1979 and section 2(6)(a) of the Apportionment of Damages Act 34 of 1965. In the pre-constitutional era the phrase was used in South Africa and England in connection with contributions to damages by wrongdoers.¹⁰⁸

Section 6(3) of PIE provides that in, deciding whether it is “just and equitable” to grant an order for the eviction of an illegal occupier of land, the court must have regard to certain laid down factors. Those factors are, firstly, the circumstances under which the unlawful occupier occupied the land and erected the buildings or structures; secondly, the period for which the unlawful occupier and his or her family resided on the land in question; and thirdly, the availability to the unlawful occupier of suitable alternative accommodation or land. This section enjoins the court to take into consideration all the factors in determining whether it will be “just and equitable” to grant an eviction order for the eviction of an illegal occupier of land. None of the factors are to be regarded as a pre-condition for the granting of such an order.¹⁰⁹

¹⁰⁶ 1982 (1) SA 444 (AD) 445.

¹⁰⁷ Southwood fn 46 above 27–30.

¹⁰⁸ Southwood fn 46 above 27-30.

¹⁰⁹ See also the decision in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2001 (4) SA 759 (ECD) 769C-D/E.

The concept “just and equitable“ is also used in section 68(d) of the Close Corporations Act¹¹⁰ in the context of winding up of a close corporation. The Close Corporations Act, like the Apportionment of Damages Act and the Companies Act, does not provide any specific factors that must be taken into account in determining what will be “just and equitable” under the circumstances.¹¹¹

The Constitution provides, as a guiding principle for the determination of compensation for expropriation, that the amount awarded must be “just and equitable” reflecting a balance between the public interest and the interests of those affected.¹¹² As correctly noted by Southwood, the phrase “just and equitable” has appeared in the Apportionment of Damages Act 34 of 1965 in terms of which a joint wrongdoer is given power to recover a contribution in respect of his responsibility for damages in such an amount as the court may deem “just and equitable”. An observation is made of the decision in the case of *Abrahamse v Danek*¹¹³ where it was held:

This appears to vest the court in with a wide and unlimited discretion to determine what in the circumstances would be just and equitable.

I find more reasons to agree with Southwood’s submission that the preferable approach to adopt is to exercise a judicial discretion based on the relevant factors and circumstances. It is contended that this enjoins the court to order payments that it thinks fairly balance the interests of the expropriator and the “public” it is serving by expropriating and the interests of all holders of rights in the property expropriated.

¹¹⁰ 69 of 1984.

¹¹¹ See also the cases of *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (CPD) and *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997 (3) SA 878 (SE). In these decisions the court had to decide on the grounds for winding up of a close corporation. Amongst others the court had to decide whether it was presented with factors which rendered it “just and equitable” to grant an order for the winding up of a company/close corporation.

¹¹² S 25(3).

¹¹³ 1962 (1) SA 171 (C) 173E-F.

4.3. Interpretation of the constitutional provisions

In interpreting the Interim Constitution of the Republic of South Africa, 1993, the court in *S v Makwanyane and Another*¹¹⁴ adopted the approach in *S v Zuma and Others*¹¹⁵ and stated:

...which, whilst, paying due regard to the language which has been used, is “generous” and “purposive” and gives expression to the underlying values of the Constitution.

The Constitutional Court further laid down the following with regard to the interpretation of the Bill of Rights in chapter 3:

Section 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way that secures for “individuals the full measure of protection.”¹¹⁶

In the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (First Certification Case)*¹¹⁷ it was held:

Further, as to the interpretation of the Constitutional Principles, that the CP had to be applied purposively and teleologically to give expression to the commitment expressed in the Preamble to the Interim Constitution “to create a new order” based on a “sovereign and democratic constitutional State” in which “all citizens” were “able to enjoy and exercise their fundamental rights and freedoms”. The CPs had therefore to be interpreted in a manner which was conducive to that objective and any interpretation of any CP which might impede the realization of this objective had to be avoided.¹¹⁸

¹¹⁴ 1995 (3) SA 391 (CC) 403.

¹¹⁵ 1995 (2) 642 (CC).

¹¹⁶ Fn 114 above 403G/H–4A. See also *S v Zuma and Others* fn 115 above.

¹¹⁷ 1996 (4) SA 744 (CC) 786D-E.

¹¹⁸ See also Van der Walt fn 12 above 22.

I concur with Southwood’s submission that the same approach as laid down for the Interim Constitution is equally applicable to the current Constitution.¹¹⁹

The decision by the learned judge Sachs J in *Port Elizabeth Municipality v Various Occupiers* concretised the purposive approach to constitutional interpretation as the one to be adopted by the South African courts.¹²⁰

Van der Walt¹²¹ contends that the tension between individual rights and social responsibilities has to be a guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.

4.4 The “two- stage” approach

The first reported case in which the court had to determine a “just and equitable” compensation in terms of section 25(3) was in *Ex Parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs*.¹²²

In adopting the two - stage approach the Land Claims Court, as per Gildenhuys J, stated:

The position in other countries indicates a central role for market value in the determination of compensation. Except for factor (d) (which is about the extent of State and subsidy), it is the only factor listed in section 25(3) of the Constitution which is readily quantifiable. That makes it pivotal to the determination of compensation. The interests of an expropriatee require a full indemnity, which may lift the compensation to above market value by also redressing items such as financial loss. Similarly, the public interest may reduce the compensation to an amount which is less than market value.¹²³

¹¹⁹ Southwood fn 46 above 12. See also the *First Certification* case fn 113 above 786.

¹²⁰ Fn 64 above 222A–229G. See also Van der Walt fn 12 above 22–42. The purposive approach to interpretation entails that the courts must, in the interpretation of a provision of a statute, seek to establish the purpose for which a specific statute has been enacted and align its interpretation with the general principles of the Constitution. The statutes must be understood to be giving effect and achieving the purpose of the Constitution using its general principles as guidelines.

¹²¹ Van der Walt fn 12 above 39. See also *FNB* case fn 41 above 792D–794D; *Port Elizabeth Municipality v Various Occupiers* fn 64 above 222A–229G.

¹²² Fn 11 above.

¹²³ *Former Highlands Residents* case fn 11 above 40.

The learned judge further stated:

In my view, the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the market value, as other relevant circumstances require. Therefore I will start off in this case by determining the market value of the dispossessed erven. Thereafter I will consider whether on the evidence or in law, that amount must be adjusted upwards or downwards in order to determine just and equitable compensation.¹²⁴

The Constitutional Court had the opportunity in the *FNB* case to lay the methodology for determining a “just and equitable” compensation for expropriation. In this case the court held that expropriation was a subset of deprivation with the implication that every act of expropriation necessarily includes deprivation.¹²⁵

It is on this premise that the court adopted the approach that in dealing with an act of expropriation, it must first determine whether the act concerned does not amount to an arbitrary act as prohibited in terms of section 25(1) of the Constitution. Once the act is found not to offend the said section, then one can proceed to deal with the question whether the act complained of amounts to expropriation within the parameters of subsections 25(2) and (3) of the Constitution.

However, the Constitutional Court surprisingly did not find itself enjoined to follow its own precedent in the *FNB* case when it had decided the *Du Toit's* case. In this particular case the court adopted a different approach without even explaining the reasoning for deviation thereof.¹²⁶

In *Du Toit's* case the court, as per majority judgment delivered by Mokgoro J, adopted the two-stage approach, as espoused in *Ex Parte Former Highlands*

¹²⁴ *Former Highlands Residents* case fn 11 above 40.

¹²⁵ Van der Walt fn 12 above 275. See also *FNB* case fn 41 above 796–797.

¹²⁶ See Van der Walt AJ “Retreating from the FNB arbitrariness test already?” (2005) 122 SALJ 777-778

Residents; In Re: Ash and Others v Department of Land Affairs, in the determination of a “just and equitable” compensation. In terms of this approach, the court has to first determine what compensation is payable under the Expropriation Act wherein the market value (being the price that a willing buyer will be prepared to pay to a willing seller in an open market) is a determinant factor.¹²⁷ Thereafter, the court will determine whether the amount is “just and equitable” under section 25 of the Constitution. The court will then, while considering the relevant factors in s 25(3) of the Constitution, either reduce or increase the amount as founded on the market value. And the amount so arrived at after this last stage will be deemed to be a “just and equitable” amount of compensation for expropriation and, thus, constitutionally sound.

This *dictum* was cited with approval and followed in the case of the *City of Cape Town v Helderberg Park Development (Pty) Ltd.*¹²⁸ In this case the court, as per Harms JA, considered the current use of strip of land consisting of a canal to deal with storm water and the purpose of the expropriation as the key factors. The court found that the purpose of the expropriation was to use that strip of land for the purpose that it was currently used. It also found that the strip of land had no commercial value to either the local authority or Helderberg Park and concluded that the price to be paid to the latter had to be based on the fact that the strip had no commercial value. In fact, the court held that a downward adjustment would have been justified, but was not considered as the appellant in the case made no such a submission.¹²⁹

In the case of *The Baphiring Community v Uys and Others*¹³⁰ the court had to decide whether the Baphiring community had received a “just and equitable”

¹²⁷ See Badenhorst PD “Compensation for purposes of the property clause in the new South African Constitution” 1998 *De Jure* 251 255. See also Van der Walt AJ “The state’s duty to pay ‘just and equitable’ compensation for expropriation: reflections on the Du Toit’s case” 2005 *SALJ* 765-778; See also Currie and De Waal fn 5 above 556 where the learned authors state that market value is pivotal in the determination of compensation. They further submit that once market value has been determined, the court can then attempt to strike an equitable balance between private and public interest.

¹²⁸ See fn 3 above [19] – [20].

¹²⁹ See *Helderberg Park* case fn 3 above [32].

¹³⁰ See fn 12 above

compensation when they were relocated from the Old Mabaalstat to New Mabaalstat. The purpose of the expropriation was to remove the tribe from the so-called white area and to relocate the tribe to an area said to be designated for occupation by black people. The court noted that market value is but one of the factors that must be considered in the determination of a fair compensation.

Gildenhuys AJ observed that the introduction of items other than market value in the Constitution is, according to van Wyk, Dugard, de Villiers and Davis,¹³¹

...meant to force the court to accept a certain approach when taking its decision, namely an approach in terms of which not only the narrow market –oriented factors relating to owner’s financial interests are considered but also a wider range of socially relevant factors concerned with the circumstances under which the owner acquired and uses the land and the interest of others who are affected by it.

As a result the court stated that other items to be considered could include financial loss (including resettlement costs) caused by the taking and not made up during an award of market value, and also in appropriate circumstances solace for emotional distress.¹³²

In instances involving the relocation of a community, the amount of compensation must be sufficient to enable the community to meet the requirements of a successful relocation for it to be regarded as “just and equitable”¹³³.

The compensatory land that is awarded to a relocated community must be suitable for their purpose for it to constitute a fair compensation. The payment of some additional cash payments and assistance in the relocation assistance to the relocated community from the state may not constitute a fair

¹³¹ Van Wyk DH *et al Rights and Constitutionalism* Juta (1994), 496. See also *The Baphiring Community* case fn 12 above [13].

¹³² See *Baphiring Community* case fn 12 above [21]–[22].

¹³³ See *Baphiring Community* case fn 12 above [22].

compensation if the compensatory land is found to be unsuitable for its purposes.¹³⁴

The Supreme Court of Appeal, in *Abrams v Allie NO and Others*,¹³⁵ upheld the court *a quo*'s conclusion that, after a considering the relevant factors listed in section 25(3) of the Constitution and other relevant circumstances, there was nothing to warrant an upward adjustment of the market value. The court found that in all the circumstances of the case that "just and equitable" compensation was equivalent to market value of the case.

In finding that the claimants did not cross the threshold of section 2(2) of the Restitution of Land Rights Act,¹³⁶ the court, as per Scott JA, stated:

But the present enquiry is different, it is whether 22 years previously the former owner of the property was paid just and equitable compensation which on the facts of the case would be equivalent to market value. To hold that he was not, when the difference what he was then paid and the estimate market value made two decades later is less than two per cent, is to proceed on the assumption that market value is capable of being estimated with such precision as not to permit a variation of less than two percent. This is quite clearly not the case and this was established in evidence. Gerber was at pains to point out that valuation was not an exact science and that although he had estimated the value of the property in a particular amount, in the event of a sale in the open market the property could realise anything within the range he estimated. Accordingly, it cannot be said that the price paid to Mahatey in 1979 was less than market value at the time.¹³⁷

In the *Ex Parte Highlands Residents* decision the court referred to the *Pointe Gourde* principle as determined in the matter of *Pointe Gourde Quarrying & Transport Co Ltd v Superintendent of Crown Lands (Trinidad)*.¹³⁸ The Judge observed that in the application of this rule any increase or decrease in the market value of the expropriated property arising from the carrying out, or the

¹³⁴ See *Baphiring Community* case fn 12 above

¹³⁵ See fn 3 above [16].

¹³⁶ 22 of 1994.

¹³⁷ See *Abrams*'s case fn 3 above [26]–[27].

¹³⁸ [1947] AC 565 (PC)

proposal to carry out, the purpose for which the land was dispossessed, must be disregarded.¹³⁹

It is my observation that the courts readily accepted the “two – stage” approach as one of the most practical way of determining the amount of compensation for expropriation. Following this approach, a determination of a “just and equitable” of compensation is embarked upon by first establishing what the market value of the expropriated property will be and thereafter adding or reducing the value in consideration of factors mentioned in section 25(3) of the Constitution.

However, a totality of all relevant factors, including those outside the prescripts of section 25 (3) of the Constitution, must be considered to arrive at “just and equitable” amount of compensation in expropriation.

4.5. Criticism of the “two-stage” approach

Mokgoro J acknowledged in the *Du Toit* judgment, with reference to the two-stage approach, that “this approach was not a novel one, but one that is practical for the particular circumstances of this case.”¹⁴⁰ This approach met with sharp criticism from the minority judgment of the Constitutional Court in *Du Toit’s* case, delivered by Langa ACJ. The Honourable Langa ACJ contended that the mandatory approach for the calculation of compensation set in section 25(3) of the Consitution differs greatly from the one set out in section 12(1) of the Expropriatio Act. Addressing the approach adopted in the majority judgement he stated as follows:

Mokgoro J suggests that s 12 can be reconciled with s 25(3) by first undertaking the s 12 calculations and then considering whether that calculation is consistent with the test set by the Constitution. I cannot accept that such an approach is permitted by our Constitution. It seems to me that our Constitution expressly avoided the approach to the calculation of compensation set out in the Expropriation Act, which has been the approach in South Africa for many years. In my view, the Constitution

¹³⁹ *Pointe Gourde Quarrying case* fn 138 above 40–41.

¹⁴⁰ *Du Toit’s case* fn 57 above [37].

expressly insists upon a different approach – one which makes justice and equity paramount, not as a second – level ‘review’ test for the calculation of compensation. In my view, the approach advocated by Mokgoro J would continue to privilege market value at the expense of other considerations relevant to justice and equity which are expressly advocated by the Constitution. Moreover, it would be unwieldy to apply.¹⁴¹

The minority’s view was to approach the issue by asking whether the amount of compensation arrived at was “just and equitable” as contemplated by section 25(3) without having to set a market value first and then adding or subtracting thereof as dictated by each of the other relevant factors.¹⁴²

Southwood¹⁴³ contends that there is no warrant in section 25(3) of the Constitution for taking market value of the expropriated property as a starting point in assessing the compensation package. In this regard he refers to the Appellate Division case of *Beaumont v Beaumont*.¹⁴⁴ Botha J¹⁴⁵ expressed his disagreement to the notion of having starting point. He contends, in disagreement to the earlier views by Kriegler J, that there is no difficulty in starting with a clean slate and then filling in the void by looking at all relevant facts and working through all the facts and working through all the relevant considerations. It is in this way that the court can finally exercise its discretion in terms of what is just without being influenced by the starting point.

I support the submission by Southwood to the effect that the above remarks accurately sum up what the court’s approach should be in assessing the compensation package under section 25(3) of the Constitution.

Southwood¹⁴⁶ contends that, in exercising its discretion in the determination of a “just and equitable” compensation, must consider all relevant factors, including their effect in either increasing or decreasing the amount of

¹⁴¹ *Du Toit’s* case fn 57 above [83] – [84].

¹⁴² See Van der Walt fn 127 above 765–778.

¹⁴³ Southwood fn 46 above 29.

¹⁴⁴ 1987 (1) SA 967 (A). This case involved the consideration of the provisions of s 7 of the Divorce Act 70 of 1979 governing the Court’s power to make a contribution order in favour of one of the of the spouses.

¹⁴⁵ *Beaumont’s* case fn 144 above 998E – G.

¹⁴⁶ Southwood fn 46 above 29 – 30.

compensation. In this process the court must strive to balance the public interest and the expropriatee's interest. According to the learned author, this involves a determination of what the public interest is benefited and expropriatee's interest, respectively, are under the circumstances. This presupposes an imbalance brought about by the deprivation of the expropriatee of his property and the transfer (sometimes temporarily) of the property to the expropriator. The court should see itself fulfilling its role by redressing this imbalance in such a way that it does not adversely affect the public interest or benefiting the expropriatee's interest too much.

Claassens¹⁴⁷ expresses strong reservations about a form of compensation for expropriation based on full market value of an expropriated property. The author contests that such an approach may, amongst others, result in over-compensation of the actual interest.

4.6. The Expropriation Bill (Now withdrawn)

During 2008 the Minister of Public Works introduced an Expropriation Bill to replace the Expropriation Act in its entirety. The Bill sought, amongst others, to broaden the scope for expropriation to be in the public interest or for public purposes. Section 15(2) of the Bill provided that the expropriating authority must ensure that the amount of compensation paid is "just and equitable", reflecting an equitable balance between the public interest and the interests of those affected. It also specifically provided that the expropriating authority may determine an amount of compensation that is below the market value of the property. It in a way dispels the notion that the amount of compensation for expropriation is to be seen as the market value of the expropriated property. The significance of the Bill in this regard was also the fact that it sought to do away with the notion of a willing buyer and willing seller concept as contained in the Expropriation Act.¹⁴⁸

¹⁴⁷ "Compensation for expropriation: the political and economic parameters of market value compensation" (1993) 9 *SAJHR* 422–427. Yanou fn 89 above 161-162.

¹⁴⁸ See ss 24(2) of the Principles for the Expropriation Bill fn 5 above.

The Expropriation Bill provided for a procedure that was to be followed in the determination of compensation in expropriation.¹⁴⁹ Its provisions in this regard resembled the provisions of section 25(3) of the Constitution. The only factor added to the relevant factors is “any advice received from the Board”.¹⁵⁰

The Bill specifically brought the determination of compensation in expropriation aligned with the purport and spirit of the Constitution.¹⁵¹

The Expropriation Bill was withdrawn from the parliamentary processes for unclear reasons. The Portfolio Committee on Public Works released a press statement on 30 September 2008 indicating that the Expropriation Bill was withdrawn in order to allow more consultations with stakeholders in the matter.¹⁵² Contrary to the Portfolio Committee’s statement, the then Minister of Public Works issued a press statement on 28 August 2008 to set the record straight regarding the reasons for the withdrawal of the Bill and express shock at the fact that Bill was being withdrawn for further consultations with stakeholders without informing the relevant Ministry.¹⁵³ The Minister maintained that there were sufficient consultations with the stakeholders. The Ministry indicated that the only consultation that could be referred to was the lack of cooperation between the legal advisors for the Ministry and those of the Portfolio Committee for Public Works on the alleged unconstitutionality of certain provisions of the Bill. The specific aspects or provisions of the Bill are not mentioned.

¹⁴⁹ S 15 of the Expropriation Bill.

¹⁵⁰ S 15(3)(a)(vi) of the Expropriation Bill. The Expropriation Bill provided for establishment of National and Regional Expropriation Advisory Board(s). The Board were to, amongst others, to advise an expropriating authority on all aspects of expropriation, including the determination of compensation. See section 8 of the Expropriation Bill for detailed functions of the Boards.

¹⁵¹ S 3 of the Expropriation Bill.

¹⁵² Portfolio committee for Public Works. Press statement. Parliament gives Notice on the withdrawal of the Expropriation Bill. 30 September 2008, on line: <http://www.sabinet.co.za/sabinetlaw/news> [824] html _12k visited 16 January 2009 at 12h30.

¹⁵³ Department of Public Works. Press statement on the withdrawal of the Expropriation Bill. 28 August 2008 on line: <http://www.info.gov.za/speeches/2008/0809051001.htm> _14k visited on 16 January 2009 at 12h15.

However, reading from the contentious issues raised during the public consultations as reported by the Ministry,¹⁵⁴ the following issues remain thorny:

- a. the definition of public interest ;
- b. the role of the courts in the determination of compensation; and
- c. the role of market value in the determination of compensation.

4.7. Conclusion

The Constitution laid down a new methodology for the determination of compensation for expropriation. The methodology requires the compensation to be “just and equitable” and reflect a balance between the interests of the affected parties and those of the public. The amount arrived at must reflect a consideration of the relevant factors, which include market value, set out in section 25(3) of the Constitution. In terms of this methodology, market value plays an even role with the other factors mentioned in section 25(3) and not a central role as in section 12 of the Expropriation Act. This clearly represents a fundamental contrast between section 25 of the Constitution and section 12 of the Expropriation Act.

A determination of a “just and equitable” compensation can also be achieved by a consideration of other relevant factors outside those stipulated in section 25(3) of the Constitution. Examples of such factors could be the hardships brought about by a relocation and resettlement cost.¹⁵⁵

The concept “just and equitable” enjoins the court to consider a wider scope of factors deemed relevant to enable the court to come to a decision that is correct, fair, appropriate and reasonable. The factors to be considered differ from one scenario to the other. It is noted that in some instances, such as in section 25(3) of the Constitution and section 6(3) of PIE, the main factors to be considered in the determination of a “just and equitable” decision are listed

¹⁵⁴ Department of Public Works Press statement fn 153 above.

¹⁵⁵ *Baphiring Community* case fn 12 above [13] and [20]–[22].

and made peremptory. Even in those statutes, the factors to be considered are not similar.

On the other hand, in statutes such as in the Close Corporations Act and the Companies Act, the factors that the court must consider to determine whether it is “just and equitable” to wind-up a close corporation or company are not listed and are left to the discretion of the courts. Judges have over a period of time formulated general principles describing the circumstances under which it would be “just and equitable” to wind up a company. The said principles are not regarded as *numerus clauses*. The court has a wider discretion to consider any other relevant factor it deems fit to arrive at a “just and equitable” decision regarding whether to wind up a company or not.

There are, however, no all-embracing general principles regarding the determination of what is “just and equitable” in a given scenario. The factors that are set out for consideration in the determination of what is “just and equitable”, as in section 25(3) of the Constitution, are only limited to the application of the said section. It can be concluded that the term is used every time in its own specific context and that the factors determining what is “just and equitable” differ according to the context as well.

An attempt to reconcile the two provisions by adopting a “two-stage”¹⁵⁶ approach to the determination of expropriation is clearly not ideal.¹⁵⁷ The proponents of this approach also acknowledge that it is not a novel approach.¹⁵⁸ It is submitted that this vindicates the founded reasoning by the opponents to the “two-stage” approach.¹⁵⁹

The criticism of the “two-stage” approach, with market value as the starting point, can also be founded from outside the constitutional era/framework as articulated by Southwood¹⁶⁰.

¹⁵⁶ See *Former Highland Residents case* fn 11 above [35].

¹⁵⁷ *Du Toit's case* fn 57 above [36].

¹⁵⁸ *Du Toit's case* fn 57 above [37].

¹⁵⁹ See fn 141 above.

¹⁶⁰ See fn 143 above.

However, our courts have adopted and continue to follow the “two-stage” approach as adopted by Gildenhuis J in *Ex Parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* despite it having been described as not being ideal¹⁶¹ or novel¹⁶² in certain instances.

It is unfortunate that the positive changes that the Expropriation Bill sought to introduce could not be achieved owing to its withdrawal.

Until such time that the Expropriation Act is brought in line with the purport and spirit of the Constitution, the uncertainty and difficulties of finding an acceptable process of determining a “just and equitable” compensation will remain pervasive.

It, however, remains noteworthy that, to the extent that the Expropriation Act seems inconsistent with the Constitution, the Constitution must prevail as the supreme law of the land. In this sense market value should not remain to be seen as a determinant factor in determining a “just and equitable” compensation for expropriation under South Africa law.

¹⁶¹ See fn 57 above [36].

¹⁶² See fn 57 above [37].

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

The discussion in this chapter will outline the observations that were made throughout this undertaking. This will, at the outset, focus on the summation of all the preliminary conclusions reached in each of the foregone chapters.

The penultimate focus will reflect the writer's recommendations as a way forward to deal with challenges that were observed.

5.2. Conclusions

Expropriation can generally be ascribed to an action whereby the state exercises its public power as a representative of public or local community as a whole to unilaterally terminate the owner's ownership and usually acquire the property for public purposes or public interest. Such can take the form of a land reform oriented redistribution, acquisition of private building to house technicians to perform a function in the public interest, acquisition of private land for building of public facilities such as roads, hospitals, dams, etc and etc. This action must pass the constitutional imperatives, namely; that it must be sanctioned by a law of general application; it must be for a public purpose or public interest; and with compensation.

Two main statutes, namely; the Constitution and the Expropriation Act, govern expropriation in South African law. The Expropriation Act governed the process of expropriation before the enactment of the Constitution in South African law. It remained in force after the commencement of the Constitution.

The Expropriation Act, which predates the Constitution, makes no provision for the determination of compensation for expropriation that is based on "just and equitable" principles, including the provisions of section 25(3) as

preordained by the Constitution. The procedure prescribed in the Expropriation Act does not require the balancing act between the public interest and the interest of those that are affected by the expropriation.

The Expropriation Act uses market value as a yardstick for the determination of compensation. It can, thus, be seen as promoting the resoluteness of an individual's right to property against the collective as represented by public purpose or public interest. This is contrary to the purport, spirit and principles of the Constitution.

Compensation paid purely in terms of the Expropriation Act will in most instances be market value or above. This is primarily due to the fact that the Act also allows for the payment of *solatium*¹⁶³ in addition to market value. The process for the determination of an amount of compensation for expropriation was settled under the Expropriation Act.

The Constitution introduced a completely new methodology to determine the amount of compensation in South African law. In addition to the requirement that compensation made should be "just and equitable", it prescribed that it must reflect a fair balance between the public interest and the interests of those affected by the expropriation. This balancing act must be achieved in consideration of all relevant circumstances, including the ones provided for in section 25(3) of the Constitution.

The terms "just and equitable" compensation are subject to a number of different interpretations. The dominant interpretation in other jurisdictions is one wherein it is equated with market value. The Constitution clearly dispels such an interpretation. The wording of section 25(3) of the Constitution categorically reflects that market value is not intended to be the determinant factor in the determination of a "just and equitable" compensation for expropriation. Market value is listed as merely one of the relevant factors that must be considered in the determination of the amount of compensation.

¹⁶³ S12 (2) of the Expropriation Act. See also fn 54 above 1045 – 1047.

The term “just and equitable” compensation as used generally in case law and statute seems to encompass a wide meaning. The statutes sometimes prescribe the minimum factors to be considered in the determination of what would constitute a “just and equitable” decision. Even in those instances the court still has the wider discretion to consider any other factor that it deems relevant to arrive at a “just and equitable” decision. This wider discretion of the court is more evident in instances where there are no prescribed factors to be considered to arrive at a “just and equitable” decision. It is also of cardinal importance to note that the factors to be considered differ from statute to statute, where the factors are listed, and from one case to the other depending on the merits thereof.

There are, however, no all-embracing general principles regarding the determination of what is “just and equitable” in a given scenario. It can be concluded that the term is used every time in its own specific context and that the factors determining what is “just and equitable” differ according to the context as well.

The approach prescribed by the Constitution is that of a balancing nature. The amount of compensation so determined should, after consideration of all relevant circumstances, reflect a fair balance between the interest of the public and the interests of those affected by the expropriation.

In terms of this approach, market value is to play an even role with other factors mentioned in section 25(3) of the Constitution and not a central role as in section 12(1) of the Expropriation Act.

Gildenhuys J introduced the “two-stage” approach¹⁶⁴ in an attempt to reconcile the inconsistent provisions of the Expropriation Act with the Constitution. In this approach compensation is determined by first determining the market value of expropriated property and thereafter making an upward or downward adjustment of the amount as demanded by a consideration of the

¹⁶⁴ See *Former Highlands Residents* case fn 11 above [35].

relevant individual circumstances, including those in section 25(3) of the Constitution.

The “two-stage” approach continues to be followed by our courts in the determination of a “just and equitable” amount of compensation in expropriation.

There is perhaps a sound theoretical argument to the effect that the “two-stage” approach does not set market value as a determinant factor i.e. above other factors as listed in section 25(3) of the Constitution, in the determination of compensation for expropriation. However, practically viewed, the pre-constitutional approach with the concomitant effect of having market value playing a central role in the determination of compensation prevails to this day. Despite the acknowledgement that the “two-stage” approach is not “novel” or “ideal”, given the constitutional imperatives, it continues to be followed.

It is deplorable that, for almost fourteen years into the constitutional era, a radical judicial activism that will yield the departure from this approach is yet to be experienced in our judiciary. In essence, the well-founded submission, made almost eight years ago, by Langa ACJ¹⁶⁵ in his criticism of this approach continues to be ignored by our judiciary.

It, however, remains noteworthy that, to the extent that the Expropriation Act is found to be inconsistent with the Constitution, the latter must prevail as the supreme law of the land. In this sense market value, with its inherent “willing seller and willing buyer” notion, should not remain to be seen or treated as a determinant factor in determining a “just and equitable” compensation for expropriation under South African law.

¹⁶⁵ *Du Toit's case* fn 57 above 141.

Finally, the ascertainment of what a “just and equitable” amount is, continues to be illusory until the courts adopt what is found to be an ideal way to the determination of compensation within the constitutional framework.

5.3. Recommendations

It is submitted that the following recommendations be considered as a way of further elucidating the process for the determination of a “just and equitable” compensation for expropriation under the South African law:

- a. The Expropriation Act must be repealed and replaced by a new law that will govern aspects of expropriation as a whole in South Africa as provided for in the Constitution;
- b. The envisaged legislation must ensure that market value is treated as one of the factors to be considered in the determination of a just and equitable compensation in expropriation;
- c. A precise methodology for the determination of a “just and equitable” compensation must be prescribed in the new expropriation legislation to serve as a framework to guide the courts in exercising their judicial function in this regard; and
- d. Such legislation must give effect to the spirit, purport and principles of the Constitution.

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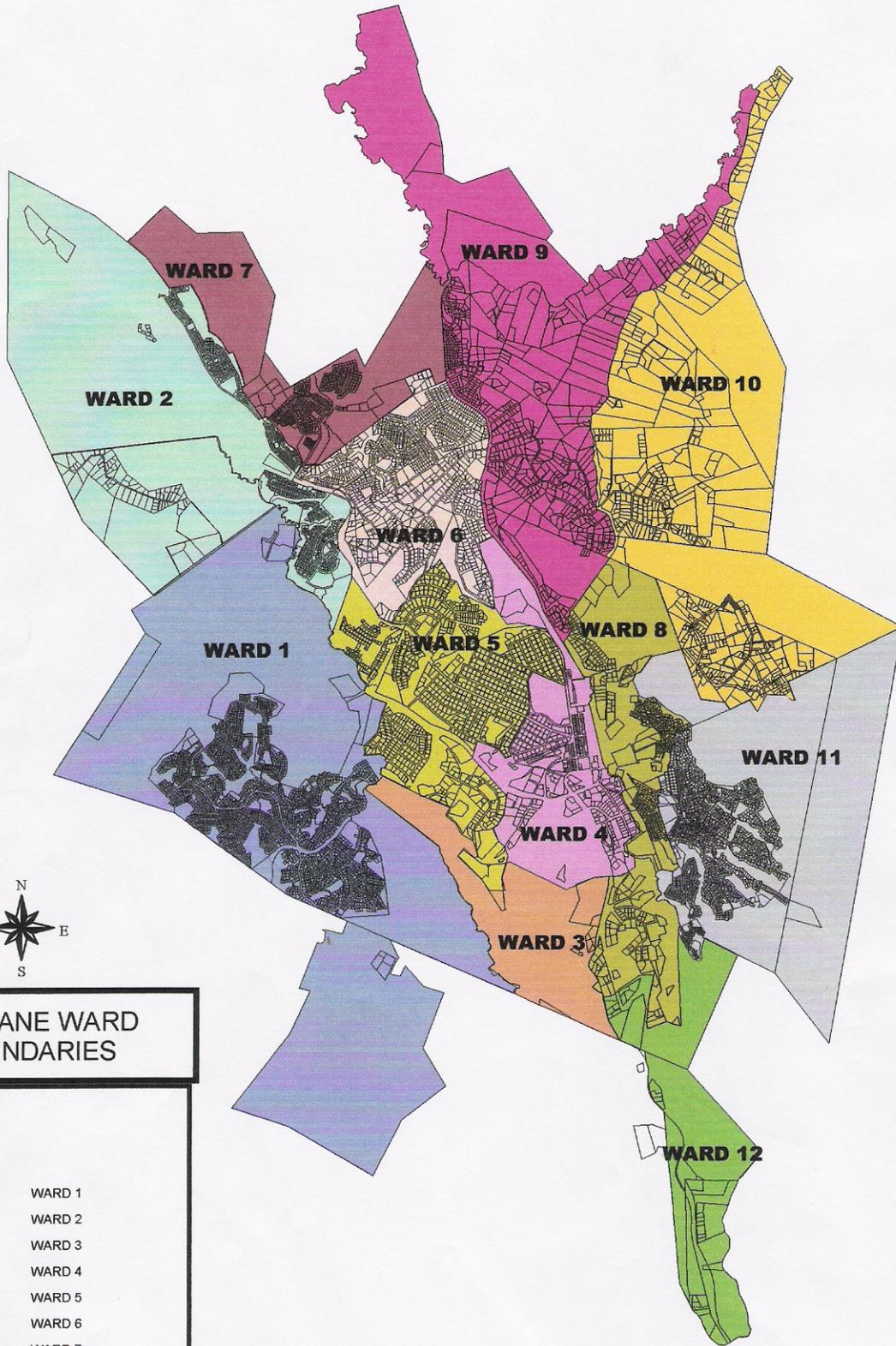
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MBABANE WARD BOUNDARIES

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