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15 JUNE 2018

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Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996

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INTRODUCTION

On the 27th of February 2018, the National Assembly adopted a motion to review section 25 and other relevant provisions of the Constitution of the Republic of South Africa, 1996, to permit the state to expropriate land in the public interest without paying compensation. The Constitutional Review Committee, mandated by the National Assembly, has invited written submissions on this matter. We hereby submit our submission on the motion to review section 25 and other relevant provisions. We are also prepared to make oral representation if the need arises.

BACKGROUND

The motion to review section 25 of the 1996 Constitution was proposed by the Economic Freedom Fighters (EFF). The African National Congress (ANC) proposed several amendments to the EFF's motion, both with regard to the reasons for the review, and the mandate of the Constitutional Review Committee. The amended motion, as proposed by the ANC, was adopted by the National Assembly. The reasons proffered for, or underlying, the mandate to review section 25 and any other clauses to permit the state to expropriate land in the public interest without compensation include the following:

- South Africa has a unique history with regard to land dispossession.
- Black ownership of land in South Africa during apartheid was capped at 13%.
- Skewed patterns of landownership have negative social, political and economic consequences.
- Various challenges and difficulties impede the achievement of land reform targets.

In terms of EFF's original motion, section 25 was placed 'at the centre of the present crises regarding the resolution of the land question',¹ since it protects private property rights and requires compensation to be paid in the event that an expropriation takes place. The EFF's motion did not refer to the constitutional standard of just and equitable compensation. The ANC, however, took a more nuanced approach. In its amendment to the EFF's motion, the ANC recognised that policy instruments (such as the willing-buyer-willing-seller policy) and other provisions of section 25 *may* be hindering effective land reform.² The acknowledgement on the part of the National Assembly that

¹ Minutes of Proceedings of the National Assembly on Tuesday 27 February [No 3 – 2018: Fifth session, Fifth Parliament] page 8.

² Pienaar JM *Land Reform* 226, 342-343, 819-820; Lahiff E "Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-led Agrarian Reform" (2007) 28 *Third World Quarterly* 1585; Dlamini SRA

policy instruments may be hindering the effective implementation of land reform is to be welcomed. In the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel Report) it is stated that the policy shifts with regard to land reform, particularly in the area of land redistribution, have contributed greatly to the lack of any meaningful change in landownership patterns.³ Although the willing-buyer-willing-seller principle is regarded as an obstacle to effectively implement land redistribution,⁴ it is important to emphasise that this principle is not contained in section 25. As retired Justice Sachs stated in his submission to the High Level Panel: 'It [the Constitution] contains no willing seller, willing buyer principle, the application of which could make expropriation unaffordable.'⁵ A willing-buyer-willing-seller principle is in fact, as will be further discussed below, at odds with the state's power to expropriate, as expropriation occurs without the consent of the owner concerned.⁶ In his submission to the panel, retired Justice Moseneke stated that '[t]he willingness of the buyer and/or of the seller may facilitate a smooth transaction, but does not seem to be a constitutional requirement.'⁷ Therefore, the application of the willing-buyer-willing-seller principle, which is not a constitutional requirement, and in fact has hindered effective land reform, cannot be relied upon to amend section 25.⁸ In order to justify any amendment of section 25 (and potentially other clauses) to make it possible for the state to expropriate land in the public interest without compensation, it is necessary to have a clear understanding of the operation and ambit of section 25.

This submission sets out the operation and ambit of section 25 of the Constitution in relation to the mandate given to the Constitutional Review Committee. It therefore proceeds by posing questions in relation to certain statements that are drawn from the motion. In this regard it will be shown that an amendment of section 25 is not necessary to effectively implement land reform. If section 25 is exhausted to its

Taking Land Reform Seriously: From Willing Seller-willing Buyer to Expropriation LLM thesis, University of Cape Town (2014); *White Paper on South African Land Policy* Part 4: Land Reform Programmes.

³ Report of the High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (November 2017) 206 onwards, available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 06-06-2018).

⁴ Pienaar JM *Land Reform* (2014) 34.

⁵ Report of the High Level Panel (2017) 206.

⁶ See discussion below.

⁷ Report of the High Level Panel (2017) 206.

⁸ The willing-buyer-willing-seller principle is applicable in relation to the determination of market value, which is only one of the factors set out in section 25(3) of the Constitution. With regard to the acquisition of property for land reform purposes this principle has already been adjusted under the Property Valuation Act 17 of 2014, which commenced on 1 July 2014.

full potential, the possibility exists that the amount of compensation can fluctuate to the extent that it becomes possible to recognise very little or minimal compensation. Furthermore, since the motion is silent with regard to the amendment of 'other provisions' in the Constitution to allow expropriation of land in the public interest without compensation, we argue that the amendment of section 25(2) to allow for expropriation without compensation also necessitates the amendment of other provisions, specifically in the bill of rights. The far-reaching implications of amending these other provisions are not discussed in detail, but are highlighted in order to strengthen the argument that an amendment of section 25 to allow for expropriation without compensation is not advisable as it requires a review and amendment of potentially the entire design of the bill of rights. In the end, it is submitted that the determination of just and equitable compensation, as is currently required by the Constitution, must be given further content and clarity in legislation.

The motion specifically refers to the amendment of section 25 of the Constitution to allow expropriation without compensation. A question that should be asked is whether the whole of section 25 or only certain parts of section 25 be reviewed and possibly amended to make expropriation without compensation possible.

In order to address this question, it is necessary to set out the structure of section 25. Section 25 is divided into two main parts. The first part (s 25(1)-(3)) protects existing property from arbitrary deprivation, and requires an expropriation to satisfy certain requirements.⁹ The second part (s 25(5)-(9)) contains the transformative thrust of the clause as it is aimed at reforming property law generally and land (and natural resources) specifically.¹⁰ Section 25(4) is an interpretive provision that applies to both parts. Since the second part of section 25 provides the constitutional mandate for land reform in particular, it is unlikely that amending any provision in that part would accelerate land reform. In his remarks to the High Level Panel, retired Justice Sachs

⁹ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 12. However, the constitutional protection of property is not absolute and may be subjected to regulatory limitations. See Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 190; Badenhorst P, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 96; Mostert & Pope (eds) *The Principles of The Law of Property* 116. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 (CC) paras 49-50; *Offit Enterprises v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 46 in this regard.

¹⁰ Sections 25(5)-(9) of the Constitution of the Republic of South Africa, 1996. See also Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 12.

re-iterated that the Constitution is not a 'barrier to radical land restitution, ... in fact [it] requires and facilitates extensive and progressive programmes of land reform.'¹¹ The Constitution, particularly the second part of section 25, is therefore the driving force for radical land reform. As the High Level Panel's report pointed out, it is the lack of clear and effective implementation of coherent policy that hinders land reform.¹² Even in the amended motion, the ANC conceded that certain policy choices may hinder land reform. It is therefore unlikely that the idea is to amend the second part of section 25, since it provides for land and other related reform and does not specifically refer to expropriation and compensation for land reform purposes. Furthermore, section 25(8) makes it clear that '[n]o provision of this section [which would include the first part of section 25] may impede the state from taking legislative and other measures to achieve land, water, and related reform'.

It is more likely that the motion to review and amend is focused on the first part of section 25, commonly referred to as the protective provision in section 25.¹³ In this regard it is important to set out clearly the first part of section 25 and how the Constitutional Court has interpreted its provisions. Section 25(1) prevents an arbitrary deprivation:

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

Section 25(2) in turn, permits the expropriation of property, provided it is authorised in legislation, is for a public purpose or in the public interest, and that just and equitable compensation follows the expropriation. Section 25(3) deals with compensation and reads as follows:

'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'.

Section 25(3) lists certain factors that should be taken into account to calculate just and equitable compensation.

Deprivation connotes the interference with regard to the use, enjoyment and exploitation of property by the state. The state may by way of regulation interfere with the use, enjoyment and exploitation of property, provided that such a regulation does

¹¹ Report of the High Level Panel 206.

¹² See also Pienaar JM *Land Reform* (2014) 850-858; JM Pienaar 'Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions Part 2' 2014 4 *TSAR* 689-705.

¹³ This also ties in with the EFF's original motion that section 25 hinders land reform in that it requires an expropriation to be compensated.

not constitute an arbitrary deprivation. In terms of the state's police powers, the state therefore regulates property to 'protect public health and safety or other, similar public interests'.¹⁴ Since the interference with property is for public health, safety, and similar public interests, and since members of society are equally affected by the regulation, compensation is not payable. Therefore, section 25(1) of the Constitution does generally not require the state to compensate property owners in cases where regulatory action constitutes a deprivation. A deprivation that is found to be arbitrary is invalid unless it can be saved by section 36(1), the limitation clause. However, given the test for arbitrariness as is discussed further below, it seems unlikely that an arbitrary deprivation would be saved from invalidity in terms of section 36(1).¹⁵

Expropriation on the other hand, usually connotes the acquisition of property by the state for public purposes, such as building roads, dams, and transportation ports. Since specific property may be required to realise the purpose of the expropriation, there is a duty on the state to compensate the owner whose property is expropriated as that particular property owner alone has to give up his/her property in order to benefit the broader society.

One of the contentious issues in constitutional property law is the distinction between deprivation and expropriation and how this impacts on the application of section 25(1) and section 25(2) respectively. In the *First National Bank*¹⁶ (*FNB*) decision, the Constitutional Court argued that deprivation is a wide form of interference with property, and that expropriation is a subset of deprivation. All expropriations are therefore also deprivations, but not all deprivations are expropriations. The Constitutional Court has therefore indicated that the inquiry into the validity of any interference with property must start with section 25(1).¹⁷ Therefore, even in cases where it is clear that the interference is an expropriation, the validity of the interference must first be determined with reference to the requirements for a valid deprivation in terms of section 25(1). Academic authors have persuasively argued that a property inquiry that starts with section 25(1) will be lawful or unlawful based on whether the deprivation is arbitrary.¹⁸ This is due to the test described by the Court to determine

¹⁴ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 213.

¹⁵ See also Roux T 'Property' in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* Vol 3 (2nd ed OS 2003) Cape Town: Juta ch 46.

¹⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁷ *FNB* para 46.

¹⁸ Roux T 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 3 (2 ed OS 2003) ch 46; Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 74-78.

arbitrariness.¹⁹ That means that the validity of any deprivation or expropriation would be determined in terms of the arbitrariness test. By way of example: An expropriation that is not undertaken for a public purpose or in the public interest would not survive the arbitrariness test, and would be invalidated in terms of section 25(1), without having been subjected to the requirements in section 25(2).²⁰ Similarly, an expropriation that is not compensated, may already be found to be arbitrary in terms of section 25(1).²¹ Adopting this position, may have important implications for the review and possible amendment of section 25, since expropriation without compensation would be invalid based on the prohibition against arbitrary deprivation of property. Despite any reference to expropriation in section 25(1), an expropriation without compensation can in theory be attacked on the basis that it constitutes an arbitrary deprivation of property in conflict with section 25(1). However, section 25(1) arguably serves a different purpose, and should only be relied on in cases where the interference with property is not an expropriation that is authorised in legislation (a discussion on the requirements of expropriation follows below). In cases where there is a regulation of property that causes a deprivation and in cases where it is unclear whether an interference is a deprivation or expropriation, then the inquiry into the validity should start with section 25(1).

Therefore, in cases where the state uses its power of expropriation to expropriate property, section 25(1) should be bypassed and the inquiry can start with section 25(2). This is exactly the type of cases to which the motion refers; expropriation of land in the public interest. There are also examples in case law, where the courts have ignored the position as outlined in *FNB* to start all disputes regarding the interference with property with section 25(1) and proceeded straight to consider whether the expropriation complies with the requirements in section 25(2). Therefore, in cases where property has been expropriated formally,²² courts tend to forego the *FNB* methodology of starting with section 25(1). In cases where it is questioned whether the

¹⁹ In *FNB* para 100 the arbitrariness test was set out as follow: 'Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.' The Court then set out certain factors to determine whether sufficient reason exists for the deprivation.

²⁰ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 74-78.

²¹ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 74-78.

²² A formal expropriation would be where an expropriation notice has been served on an owner in terms of the Expropriation Act 63 of 1975.

expropriation is for a public purpose or in the public interest,²³ or if the amount, time and manner of payment of compensation is questioned,²⁴ courts have rightly ignored *FNB* and proceeded directly to consider whether the requirements set out in section 25(2) were complied with. It is submitted, that in cases where property has been expropriated formally, section 25(1) should be bypassed; and the requirements in section 25(2) of the Constitution must be satisfied. In this regard, Dugard and Seme argue that 'expropriation is a distinct sub-set of deprivation requiring a separate investigation.'²⁵

However, even if that argument is accepted, the possibility remains open that if section 25(2) is amended to explicitly permit expropriation without compensation, a litigant may still be successful in arguing that the expropriation, as a total interference with his/her property, constitutes an arbitrary deprivation of property in terms of section 25(1), and hence invalid. However, if a clearer distinction between deprivation and expropriation is accepted, or that the expropriation of property need only pass scrutiny under section 25(2) it may be that an amendment of section 25(2) (and other sections in the Constitution)²⁶ would make it possible for the state to expropriate land without compensation. If an amendment of section 25(2) is therefore contemplated, it must first be determined, and made clear, what section 25(2) actually permits.

Section 25(2) does not prohibit state interference with existing property interests. It simply dictates to the state the requirements that it needs to fulfil to lawfully expropriate property. The state has the power to expropriate property for achieving legitimate state goals.²⁷ If the state wants to implement a specific project that would serve the general public's interest, such as preserving catchment areas or building roads, and it needs specific land to implement the project, the state can negotiate with the owner(s) for the sale of the land. It is in fact advisable that the state first offer to buy the land from the owner. If, however, the owner refuses to sell the land, the state can proceed to expropriate the land. The power of expropriation exists essentially to prevent a private property owner from holding-out and in the process prevent an important and

²³ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011; *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010

²⁴ See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), where the Constitutional Court only focussed on determining the appropriate amount of compensation in line with section 25(2) and the National Roads Act.

²⁵ Dugard J & Seme N 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation' (2018) 34 *SAJHR* 43.

²⁶ See below.

²⁷ See for instance s 40 of the South African National Roads Agency Limited and National Roads Act 7 of 1998.

potentially crucial project from being realised. For that reason, expropriation is regarded as an original form of acquisition of ownership; meaning that the consent of the property owner is not required.²⁸ Therefore, if the owner refuses to sell his/her property to the state voluntarily, the state need not continue negotiating with the owner; it can summarily expropriate property, provided that the requirements in legislation and the Constitution are adhered to.

In the expropriation context, it is important to draw a distinction between the lawfulness/legitimacy/validity of an expropriation on the one hand and the consequence of a valid expropriation, on the other. An expropriation is valid if effected in terms of authorising legislation, and if it is undertaken for a public purpose or in the public interest. That means an administrator (a minister or another functionary) must be authorised in legislation to expropriate property, and that expropriation must be for a public purpose or in the public interest.

In the land reform context, a variety of legislative measures provide specifically for expropriation of property for land reform purposes, including:

- sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993;²⁹
- section 26 of the Extension of Security of Tenure Act 62 of 1997;³⁰
- sections 22, 35, 42A, 42C, and specifically section 42E, of the Restitution of Land Rights Act 22 of 1994; and
- section 3 of the Land Reform (Labour Tenants) Act 3 of 1996.

Where land for housing is concerned, Part 4, section 9 of the Housing Act 107 of 1997³¹ specifically provides for the expropriation thereof. At provincial level the Eastern Cape Land Disposal Act 7 of 2000 also makes provision for the expropriation of land by the Premier of the province under section 2.

²⁸ See Badenhorst P, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 173.

²⁹ For both redistribution and tenure reform purposes – see (former) Department of Land Affairs document: *Policy and Procedures for Expropriation of Land*, signed by the Minister on 22 March, 1999.

³⁰ For both redistribution and tenure reform purposes – see (former) Department of Land Affairs document: *Policy and Procedures for Expropriation of Land*, signed by the Minister on 22 March, 1999.

³¹ Local Government is herewith authorised to expropriate land for purposes of housing, aligned with the procedure set out in the Expropriation Act 63 of 1975.

With regard to envisaged legislative measures clause 26 of the Regulation of Agricultural Land Holdings Bill,³² a measure that stands to make a massive impact in future, also provides specifically for expropriation.

Expropriation for purposes of land reform, which involves expropriating property for transfer to third parties is an expropriation in the public interest.³³ This is specifically provided for in the wording of section 25(4):

‘the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.’³⁴

Therefore, any expropriation of property for purposes of land reform, which is authorised in legislation will be valid in terms of the requirements of section 25(2).

Once the requirements for an expropriation, namely authorisation by legislation and for a public purpose or in the public interest, have been complied with, the expropriation is deemed valid, and then, only then, does the question of compensation follow.

This has important implications: The validity of an expropriation cannot be attacked because the compensation is not, according to the owner, sufficient, or below market value (see comment below). The validity of the expropriation can only be attacked if not authorised in legislation, adopted in a procedurally unfair manner, or not undertaken for a public purpose or in the public interest. If the owner is not satisfied with the amount of compensation that the state offers (after the parties were unable to agree on the amount of compensation) then the owner is free to approach a court for relief in terms of section 25(2)(b).

The motion refers to the expropriation of *land* in the *public interest*. What would the situation be with regard to an expropriation of land for a public purpose?

³² GN 229 in GG 40697 of 17 March 2017. Also see Pienaar JM “Land reform” *Juta Quarterly Review* 2017 (1).

³³ Third party transfers occur when the state uses its power to expropriate property from one private owner and transfer the property to another private owner. Expropriation involving a third party transfer is mandated in the current Expropriation Act, see s 3, which allows the state to expropriate property on behalf of a juristic person if such juristic person requires the property for a public purposes. An example of a juristic person who may approach the minister to expropriate property on its behalf is a university, who require property for public purposes.

³⁴ During the time that the Interim Constitution was in force, there was concern that expropriation for land reform purposes, which involves third party transfers, would not be justifiable in light of the fact that section 28 of the Interim Constitution, only referred to expropriation for a public purpose. There was authority in case law (*Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A)) to the effect that an expropriation involving a third party transfer cannot be for a public purpose. This concern was resolved by the insertion of the phrase ‘public interest’ in section 25 of the 1996 Constitution and by adding section 25(4)(a) as quoted above.

The motion refers to the expropriation of *land* without compensation. Section 25(4)(b) of the Constitution makes it clear that 'property is not limited to land'. Given that the constitutional concept of 'property' is not limited to land, but includes various categories of property interests,³⁵ the motion to review section 25 presumably does not extend to the expropriation of property other than land without compensation. The ambit of the motion would therefore not permit an amendment of section 25 that would allow the expropriation of property other than land without compensation.

However, what exactly would be included under 'land' would have to be clearly defined. In his reply to the National Assembly on 14 March 2018, President Ramaphosa indicated that land reform should not only focus on meeting the needs of the poor on 'rural agricultural land.' Ramaphosa stated that '[w]e should take steps to address the property rights of people living in informal settlements and in inner-city buildings with absentee landlords. We need to develop a clear strategy to dispose of under-utilised public owned land for inclusive urban development – to bring poor people from the periphery into the centre of the cities.'³⁶ Given that President Ramaphosa also stated that expropriation without compensation should be implemented in a manner that does not impede agricultural production and food security, the exact parameters of what would be included under 'land' need to be made clear. Does it refer to rural land, (which includes agricultural land) *and* urban land, and what would the impact be if land, (with permanent fixtures like houses or a block of flats) is expropriated without compensation?

The motion also refers to expropriation of land in the *public interest*. No reference is made to the expropriation of land for a public purpose. Public interest is said to be a broader category than public purpose.³⁷ The expropriation for public purposes would refer to expropriation for government purposes, while expropriation in the public interest would refer to expropriation for purposes that benefit the public.³⁸

³⁵ See in this regard Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) ch 3; Badenhorst P, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (2006) 531-540

³⁶ President Cyril Ramaphosa Replies to Questions in the National Assembly – 14 March 2018. See the argument of Strydom J & Viljoen S 'Unlawful Occupation of Inner-city Buildings: A Constitutional Analysis of the Rights and Obligations Involved' (2014) 17 *PELJ* 1207-1621 for an argument in favour of the expropriation of inner-city buildings.

³⁷ See Slade BV "'Public Purpose or Public Interest" and Third Party Transfers' (2014) 17 *PELJ* 166-206 185.

³⁸ See Slade BV "'Public Purpose or Public Interest" and Third Party Transfers' (2014) 17 *PELJ* 166-206 185.

The distinction between public purpose and public interest does not make that much difference where the property is acquired and in fact used by the state for the fulfilment of a particular purpose.³⁹ However, there is a fundamental difference between an expropriation for a public purpose and an expropriation in the public interest where it concerns an expropriation involving a third party transfer.⁴⁰ An expropriation involving a third party transfer for a public purpose may refer to the expropriation of property by the state and the transfer of such property to permit a private entity to construct transportation ports.⁴¹

An expropriation involving a third party transfer in the public interest may refer to the expropriation of property by the state and the transfer of such property to private parties for purposes of land reform. As the motion only refers to expropriation of land in the public interest, the concern regarding the slow pace of land reform is placed under the spotlight. It is conceivable that the reference to public interest in the mandate, is limited to only investigate the expropriation of land for purposes of land reform without paying compensation, while the expropriation of land for fulfilling a public purpose would still attract compensation.

The motion refers to the expropriation of land in the public interest without paying compensation. The state is prone to offer market value compensation, which may create the incorrect impression regarding the standard of compensation required by the Constitution. What then is the standard of compensation in the Constitution? What has the approach of the courts been with regard to that standard?

The Constitution introduced a new framework for determining compensation. Section 25(3) requires the amount of compensation to be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected'. In determining just and equitable compensation, regard must be had to all relevant circumstances; and certain factors are listed. These factors include 'the current use of the property;' 'the history of the acquisition and use of the property'; 'the market value of the property;' 'the extent of direct state investment and subsidy in the acquisition

³⁹ See Slade BV "Public Purpose or Public Interest" and Third Party Transfers' (2014) 17 *PELJ* 166-206; 184-185; Van der Walt AJ *Constitutional Property Law* (2011) 462.

⁴⁰ For an expose, see Slade BV "Public Purpose or Public Interest" and Third Party Transfers' (2014) 17 *PELJ* 166-206.

⁴¹ See the remark by the Supreme Court of Appeal in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15: '[E]xpropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself ...'

and beneficial capital improvement of the property;’ and ‘the purpose of the expropriation.’ The list is not exhaustive, other factors may also be considered.⁴² The Constitution therefore rejects the position as cemented in the Expropriation Act 63 of 1975, that compensation be determined with reference to the price that the property would have realised if sold ‘in the open market by a willing seller to a willing buyer’.⁴³

In terms of the constitutional standard of compensation, namely ‘just and equitable’, market value is but one of the factors that may be considered, and is thus not decisive on its own. See for instance the articulation of this by Ngcukaitobi AJ in *Msiza v Director-General, Department of Rural Development and Land Reform*: ‘Market value is not the basis for the determination of compensation under section 25 of the Constitution ... The departure point for the determination of compensation is justice and equity.’⁴⁴ However, since market value is the only factor in section 25(3) that can be determined/quantified relatively easy, courts generally start with market value in assessing compensation.⁴⁵ It then takes the other factors into account to adjust the compensation either upwards or downwards.⁴⁶

While this approach is questionable, since it does place market value at a certain vantage point, and may, as Langa ACJ pointed out in his minority judgment in *Du Toit v Minister of Transport* ‘continue to privilege market value at the expense of other considerations relevant to justice and equity’,⁴⁷ the approach of the courts can probably not be faulted. There is no legislative framework to assist courts any further in determining just and equitable compensation.⁴⁸ It is difficult to quantify factors such as ‘the purpose of the expropriation’ in section 25(3)(e) or ‘the history of the acquisition and use of the property’ in section 25(3)(b). Courts need clearer guidelines in

⁴² *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 28.

⁴³ S 12(1).

⁴⁴ 2016 (5) SA 513 (LCC) para 29. In this decision, the Land Claims Court awarded compensation that was less than market value. However, the Supreme Court of Appeal (*Uys NO v Msiza* 2018 3 SA 440 (SCA)) overturned the ruling of the Land Claims Court and awarded compensation equal to market value compensation, as it was of the opinion that it was not justified in the circumstances to make a downward adjustment. This decision may point towards a tendency on courts to award compensation equal to market value. See also Pienaar JM “Land reform” *Juta Quarterly Review* 2017 (4)

⁴⁵ See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 37; *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) paras 34-35, 75; *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) paras 72, 93-100. See also Van Wyk “Compensation for Land Reform Expropriation” 2017 *TSAR* 21-35 in general.

⁴⁶ See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 37; *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) paras 34-35, 75.

⁴⁷ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 84.

⁴⁸ E du Plessis “Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform (2014) 17 *PELJ* 798-830 808. See also Van Wyk “Compensation for Land Reform Expropriation” 2017 *TSAR* 21-35 in general

assessing compensation in terms of the Constitution. It is generally not the practice to include detailed provisions outlining precisely how factors relevant to the determination of compensation in a constitutional provision. Constitutional provisions contain broad rights, and may lay down certain standards relevant to those rights, which should be given further content in legislation and unpacked sufficiently by courts.⁴⁹

Despite numerous attempts parliament has been unable to pass a new expropriation act. The current Expropriation Act predates the Constitution by some 40 years. Three Expropriation Bills (Expropriation Bill of 2008, Expropriation Bill of 2013, and the Expropriation Bill of 2015) have been through various stages in the legislative process, but have not been enacted into law. However, the provisions in the various Bills dealing with the calculation of compensation do not give clear guidance with regard to the calculation of just and equitable compensation with reference to the factors listed in section 25(3) of the Constitution. These Bills merely incorporate section 25(3) of the Constitution verbatim. The 2008 Bill did, however, make it clear that compensation may, subject to the constitutional provision of justice and equity, be below market value. It further stated which factors may not be taken into account in determining just and equitable compensation. However, it goes no further in giving further content to the factors in section 25(3) and its application.

In the absence of a newly promulgated Expropriation Act aligned with the Constitution, it is noteworthy that another legislative measure, already promulgated, may be of value concerning compensation and the expropriation of land for land reform purposes, namely the Property Valuation Act that commenced on 1 July 2014.⁵⁰ The importance of the Act lies at two levels: firstly, it provides for the establishment of the Office of the Valuer-General, a source of and collection point for particular expertise regarding property valuation, approaches thereto and general data producing; and secondly, setting out an approach to market value where land is expropriated for land reform purposes. With regard to the latter, previous prices paid for acquisition of property or amounts of compensation where expropriation occurred by the state are ignored in calculating suitable compensation or determining the market value of property. To that end past escalations of prices and/or values are not extended and each transaction is to be approached afresh, but in light of the data collected by the Valuer-General. Aligned with the other factors listed in section 25(3) of the Constitution,

⁴⁹ Pienaar JM *Land reform* (2014) 604-607.

⁵⁰ Two versions of the Bill were published in May 2013 and March 2014 respectively.

compensation paid at less than market-value, on a much more sustainable and affordable basis, is thus already possible.

The ANC recently announced that it would expropriate property in terms of section 25 of the Constitution without compensation in order to facilitate a 'test case'.⁵¹ This step has to be viewed against the initial parameters for expropriation without compensation set out by Cyril Ramaphosa, namely that it does not impact negatively on food security or agricultural productivity.⁵² It has been argued that expropriation without compensation is in principle possible in terms of section 25(3), but that would depend on a very unique set of circumstances.⁵³ Given this background, as well as acknowledging that 'justice and equity' is context-sensitive, it is thus unlikely that a test case would result in the establishment of blanket authority for the expropriation of property without compensation for purposes of land reform. Section 25(3) requires that compensation must reflect 'an equitable balance between the public interest and the interest of those affected' with reference to the listed factors. It would perhaps be prudent to unpack the factors in section 25(3) in legislation so that administrators and courts would be better equipped to determine in a specific context, whether a proper balance is struck between the public interest of, for instance implementing land reform, and the interest of those affected by the expropriation.

It would therefore be advisable to follow a democratic process and promulgate legislation that unpacks the notion of 'just and equitable compensation' as well as the factors in section 25(3). In terms of section 25(8), it may be possible to set out the factors in such a manner that low (or very low, almost zero) compensation may be paid in order to achieve land reform.⁵⁴ The constitutionality of the legislation can then be attacked for not complying with the constitutional provisions and further clarity can be obtained in that regard.

Regardless, there appears to be a general duty on the state to pay compensation for an expropriation. The general duty would exist even in the absence of an explicit constitutional provision that provides for compensation.⁵⁵

⁵¹ According to a Legalbrief Report on 4 June 2018 '[t]he more than 1 000 pending farm evictions in the Simondium area of Drakenstein in the Cape have been described as suitable for the Rural Development and Land Reform Department's test case for expropriation without compensation.' These remarks were made by Deputy Minister Mcebisi Skwatsha.

⁵² See motion on page 9 para 3.

⁵³ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 506.

⁵⁴ Section 25(8) states that '[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).'

⁵⁵ Van der Walt AJ *Constitutional Property Law* (3rd ed 2011) 505.

Furthermore, expropriation without compensation blurs the boundaries between expropriation on the one hand and confiscation of property,⁵⁶ on the other, with particular implications. Confiscation embodies a punitive element, carried out in the public interest.⁵⁷ However, the approach to redress in the South African land reform programme is distinctively unique⁵⁸ and does not incorporate a punitive element. This much was confirmed in various judgments,⁵⁹ most notably by Justice Moseneke in *Florence v Government of the Republic of South Africa*:⁶⁰

‘... compensation...is neither punitive nor retributive. It is not to be likened to a delictual claim aimed at awarding damages that are capable of precise computation of loss on a “but-for” basis... [Compensation is paid] out of public funds in order to find equitable redress to a tragic past. Ultimately, what is just and equitable must be evaluated not only from the perspective of the claimant but also of the State as the custodian of the national fiscus and the broad interests of society, as well as all those who might be affected by the order made.’⁶¹

In this regard, expropriation without compensation (which is just another name for confiscation) is punitive in nature. There may be some benefits to acquiring land in this fashion, including for example, no or little direct costs of acquiring land.⁶² However, apart from not being authorised constitutionally, employing confiscation as a

⁵⁶ Binswanger-Mkhize *et al* “Introduction and Summary” in *Agricultural Land Redistribution 21*; S Pazcakavambwa & V Hungwe “Land Redistribution in Zimbabwe” in Binswanger-Mkhize HP, Bourguignon C & Van den Brink R (eds) *Agricultural Land Redistribution: Toward Greater Consensus* (2009) 137-137-167.

⁵⁷ Confiscation and forfeiture are often used interchangeably. However, confiscation of property should be distinguished from forfeiture. Similar to confiscation, forfeiture takes place without any compensation to the owner and ownership of the movable or immovable property vests in the State at the moment on which the order for forfeiture is made. However, in *National Director of Public Prosecutions v Rebuzzi* 2002 2 SA 1 (SCA), the court held that orders of forfeiture are not aimed at enriching the State, but to deprive criminals of the proceeds of their crimes. In this regard, various pieces of legislation make provision for forfeiture, including: the Criminal Procedure Act 51 of 1977; the Films and Publications Act 65 of 1886; the Drugs and Trafficking Act 140 of 1992; the Prevention of Organised Crime Act 121 of 1995 and the Proceeds of Crime Act 76 of 1996. In other words, the loss of property in terms of forfeiture is applicable where a crime was committed whereas confiscation is where the State lays claim to and separates property from its owner or holder for a public or State interest, without compensation. See Van der Walt AJ & Pienaar G *Introduction to the Law of Property* (7th ed 2016) 129-130 where the authors distinguish between forfeiture and confiscation and Van der Walt *Constitutional Property Law* (3rd ed 2011) 311-314; L Ntsebeza “Land redistribution in South Africa: The property clause revisited” in L Ntsebeza & R Hall (eds) *The Land Question in South Africa* (2007) 107-122; Cliffe (2000) *Review of African Political Economy* 277-278; FED Belling *Case studies of the changing interpretations of land restitution legislation in South Africa* Magister Technologiae, University of South Africa (2008) 58-63.

⁵⁸ Pienaar JM “Land reform and restitution in South Africa: An embodiment of justice?” in De Ville J (ed) *Memory and Meaning* (2015) 141-160.

⁵⁹ *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 125. The same point was emphasised in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 68 where the court states: “The claim is against the state. It has a reparative and restitutionary character. It is neither punitive in the criminal sense nor compensatory in the civil law sense. Rather it advances a major public purpose and uses public resources in a manifestly equitable way to deal with egregious and identifiable forms of historic hurt”. See also Pienaar JM *Land Reform* (2014) 521-525, 836-838.

⁶⁰ 2014 (6) SA 456 (CC).

⁶¹ *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 125.

⁶² Binswanger-Mkhize *et al* “Introduction and Summary” in *Agricultural Land Redistribution 21*.

mechanism for acquiring land for redistributive purposes may have other undesirable consequences, such as ‘reduced investor confidence and an international backlash’.⁶³ Arguably, these consequences can also have a negative knock-on effect as the economy as a whole may be impacted on detrimentally, devaluating currency, which in turn could place additional burdens for the costs of land reform on the South African *fiscus* and citizens.⁶⁴ At an international level confiscation of land was historically also linked to revolutionary political change, usually characterised by violence,⁶⁵ which is not reconcilable with the constitutional aims and values embodied in the South African Constitution.

If section 25(2) is amended to provide for expropriation without compensation, what other provision would have to be amended?

The motion refers to the amendment of section 25 and *any other provision* to allow for the expropriation of land in the public interest without compensation. It has been argued above that section 25(2) and (3) of the Constitution would have to be amended to allow the state to expropriate land in the public interest without compensation. How that provision is to be amended to allow for compensation without expropriation within the specific parameters of the motion, does not fall in the ambit of our submission. However, if section 25(2) is amended to allow for expropriation of land in the public interest without compensation, it is necessary to consider what other provisions in the Bill of Rights would still permit an owner to challenge an expropriation without compensation. In this part, we briefly refer to other provisions in the Constitution that a litigant may use in order to attack the validity of an expropriation without compensation.

Even if it is accepted that expropriation is a unique subset of deprivation that needs to comply with the specific requirements in section 25(2) as argued above, an owner may still argue (and the courts may potentially accept that argument) that an

⁶³ Binswanger-Mkhize *et al* “Introduction and Summary” in *Agricultural Land Redistribution* 21. See also R van den Brink, GS Thomas & H Binswanger “Agricultural land redistribution in South Africa: towards accelerated implementation” in Ntsebeza L & Hall R *The Land Question in South Africa* (2007) 183 152-201.

⁶⁴ Binswanger-Mkhize *et al* “Introduction and Summary” in *Agricultural Land Redistribution* 21. See also Van den Brink *et al* “Agricultural land redistribution in South Africa: towards accelerated implementation” in *The Land Question in South Africa* 183.

⁶⁵ Pazcakavambwa & Hungwe “Land Redistribution in Zimbabwe” in *Agricultural Land Redistribution* 137; Binswanger-Mkhize *et al* “Introduction and Summary” in *Agricultural Land Redistribution* 21.

expropriation without compensation constitutes an arbitrary deprivation in terms of section 25(1) and is invalid on that basis.

In South African law, expropriation takes place exclusively by an administrative decision to expropriate property for a specific purpose. The decision to expropriate is therefore an administrative action,⁶⁶ and can be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), which gives effect to section 33 of the Constitution.⁶⁷ The decision to expropriate property is generally separate from the decision regarding the compensation that would be payable. In *Haffejee*,⁶⁸ the Constitutional Court accepted that compensation can be determined after the expropriation took place.⁶⁹ Therefore, if a decision is made not to offer compensation because it is an expropriation in the public interest, it may be possible to review that decision in terms of administrative justice.

Above it was pointed out that it is unclear what land would be susceptible to expropriation in the public interest without compensation. If expropriation of land in the public interest (for land reform purpose) is not compensated, but land expropriated for public purposes is compensated, it may be possible to argue that such a differentiation is a violation of the equality provision in section 9, and also in conflict with the rule of law principle in section 1 of the Constitution.

If land is expropriated in the public interest without compensation, and the property owner concerned also lived in the house on the land, the expropriation of the land without compensation may conflict with section 26 of the Constitution, since it potentially takes away existing access to housing and may, potentially result in an arbitrary eviction.

CONCLUDING REMARKS

Effectively implementing land reform depends on a number of factors. It requires constitutional legitimacy, clear policy guidelines, and effective implementation. It therefore requires a co-ordinated effort by all the relevant role players. The motion adopted by the National Assembly seems to point towards the constitutional provisions (specifically section 25, and potentially others as well) as an obstacle to achieve the

⁶⁶ Viljoen S “Substantive Adjudication of the Decision to Expropriate Property” (2017) 2 *Stell LR* 454

⁶⁷ Quinot G (ed) et al *Administrative Justice in South Africa* (2015) 76.

⁶⁸ *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC).

⁶⁹ Boggenpoel, ZT “Compliance with Section 25(2) of the Constitution: When should Compensation for Expropriation be Determined?” (2012) 129 *SALJ* 611.

set land reform targets. In this submission, we have attempted to address some of the questions that arise from the adopted motion.

In this submission, we have indicated that section 25 provides for radical land reform, and expressly permits expropriation for land reform purposes. Section 25(2) and (3) provide for just and equitable compensation in the case of any expropriation of property. To obtain the proper balance between the public interest and the interest of those affected by an expropriation in determining just and equitable compensation, the context of the particular case needs to be considered. For that reason, it would be appropriate to provide clear guidance to administrators and courts in legislative measures setting out exactly how compensation in specific circumstances should be calculated.

It is highly questionable whether the expropriation of land in the public interest (i.e. for land reform purposes) without compensation would ever be acceptable in a democratic society based on human dignity, equality and freedom. As shown above, the expropriation of land without compensation is basically confiscation, which is punitive in nature and contrary to the overall constitutional imperative of healing the divisions of the past and establishing a free and equal society. Furthermore, there is a general duty to compensate an owner for giving up his/her property for the benefit of the broader society. As argued above, there are also other constitutional rights that may be impacted if an amendment of section 25 is effected.

We accept that it is important to accelerate land reform in order to reach the transformative aspirations of the Constitution and to relieve poverty. However, the tools for effective implementation of land reform exist. It is imperative that the tools be employed effectively and sustainably. In this context our submission is that the state should use its power to expropriate property for land reform purposes and then refrain from paying market value compensation as is currently the practice. Instead, the boundaries of just and equitable compensation ought to be scrutinised and tested. In light of budgetary constraints, we further submit that corruption and collusion around the sale and expropriation of property for land reform purposes, including inflated market values should be rooted out. Integral in the effective and sustainable utilisation of existing tools and mechanisms is good governance.

We submit that the extant property clause, coupled by guidelines that enable functionaries and courts to unpack the calculation of compensation effectively, and endorsed by principles of good governance, can achieve the set reformative goals and objectives.

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