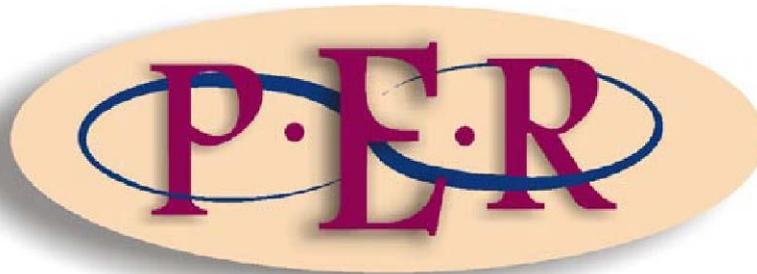


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SILENCE IS GOLDEN: THE LACK OF DIRECTION ON COMPENSATION FOR EXPROPRIATION IN THE 2011 GREEN PAPER ON LAND REFORM

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1 Introduction

When I started my doctorate in 2005, the then Minister of Land Affairs, Lulu Xingwana, had just caused an uproar by remarking that land reform will be speeded up by shortening the negotiation period for compensation for individual expropriations.¹ Farmers, concerned that South Africa would become the next Zimbabwe,² objected that Xingwana's statements were in conflict with land reform laws setting out the procedures to be followed for expropriation. They insisted on a reasonable commercial price for farming properties. The ministry, on the other hand, was of the opinion that farmers were making expropriation difficult by inflating property prices,³ thereby preventing the government from successfully returning property to people who lost it under "years of racial discrimination and white colonial rule".⁴ The government therefore proposed to move away from the willing-buyer-willing-seller model⁵, intimating its intention to move away from buying property from farmers through negotiations, and using expropriation as a legitimate alternative method of land acquisition instead. This resulted in fierce media debates and reports of tension between mostly white farmers and the government.⁶ The farmers persistently relied on the concept of "compensation" as contained in and

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1 SAPA 2006 mg.co.za.

2 Swartz 2006 www.news24.com.

3 SAPA 2006 mg.co.za; Wanneburg 2006 www.iol.co.za.

4 Swartz 2006 www.news24.com.

5 In cl 5(a) of the *Green Paper on Land Reform* (2011) also referred to as "[t]he land acquisition strategy".

6 This is evident in many newspaper reports. See for instance Sinkins *Witness 5*; West *Business Day 2*.

historically construed under the *Expropriation Act*,⁷ should they be expropriated. For the farmers it is important to receive the full market value of property that has been expropriated. That is how it used to be prior to 1994. A *Constitution*⁸ protecting existing property rights, but not guaranteeing full market-value compensation for expropriation, is in their view insufficient and may pose a threat to their vested interests.⁹ This indicates a perception that when land is bought, prices can be negotiated and the farmer is likely to receive full market value for the property, while when the property is expropriated, the *Constitution* causes uncertainty and poses the risk of compensation below market value. The farmers' fears stand in tension with the government's land reform aspirations. The government, pressed by the constitutional mandate to transform, seeks to rely to an increasing extent on the new compensation possibilities created by the *Constitution* and entailing possible departure from strict market value compensation in all instances.¹⁰

Seven years down the line the issue is still not settled. The *Expropriation Bill*¹¹ was shelved in 2009,¹² a draft *Green Paper* leaked in 2010, an official *Green Paper* published in 2011¹³ and a Land Reform Policy document of the African National Congress (ANC) produced in 2012,¹⁴ while a Draft *Expropriation Bill* made its appearance in March 2013.¹⁵ Recently Stone Sizane, as chairperson of Parliament's land reform committee, stated that government is not making sufficient use of its right to expropriate land.¹⁶ Despite South Africa having a land market and the necessary infrastructure to facilitate transfer of land, the government has so far been unable to affect land reform through the voluntary acquisition of land.¹⁷ In

⁷ *Expropriation Act* 63 of 1975.

⁸ *The Constitution of the Republic of South Africa*, 1996.

⁹ Naidu *Sunday Independent* 1. Schoeman *Farmers Weekly* 22.

¹⁰ To date the government mostly acquired land for land reform purposes by buying the land from the owner, the price being determined by agreement. It seems as if the government, when saying that it wants to depart from the "willing-buyer-willing-seller" model, means that it would henceforth *expropriate* land as opposed to entering into negotiations with the owner.

¹¹ *Expropriation Bill* B16-2008.

¹² For notes on this, see Du Plessis 2011 *Stell LR* 352-375.

¹³ Agri SA 2011 www.agrisa.co.za.

¹⁴ ANC 2012 www.anc.org.za.

¹⁵ *Draft Expropriation Bill*, 2013 (GN 234 in GG 36269 of 20 March 2013).

¹⁶ SAPA 2012 www.news24.com.

¹⁷ Greenberg Date Unknown www.amandlapublishers.co.za.

many instances it is bureaucratic obstacles that prevented this, but there are also instances where the land offered for sale was not suitable for the purpose it was acquired for, and in some instances the current owners demanded excessive prices for land.¹⁸ With many landowners politically sceptical or opposed to land reform and with some losing their faith in the process because of bureaucratic delays from the government, land reform has reached a stalemate. A possible solution lies in the state making better use of its expropriation powers by expropriating property for land reform purposes.¹⁹ Upon such expropriation, compensation must be paid.

Does the 2011 *Green Paper on Land Reform* provide any guidance on the issue of compensation for expropriation? The aim of this paper is to show the potential and the shortcomings of the *Green Paper* with regard to compensation for expropriation in the land reform context. To do so it will start by clarifying the concept of "willing-buyer-willing-seller". Thereafter, the paper will discuss the *Green Paper's* stance on the issue. A discussion of compensation for expropriation under the *Constitution*²⁰ will follow, discussing the constitutional mandate to expropriate for land reform purposes, as well as the way compensation should be calculated under the *Constitution*. Lastly, it will conclude with an evaluation of the *Green Paper* on the issue of compensation for expropriation.

2 Terminology

The willing-buyer-willing-seller model stands opposed to expropriation as a way of acquiring land for land reform purposes. This is based on the pro-market approach the government adopted in 1994 on advice from the World Bank.²¹ In terms of this approach, land is transferred by contract. It effectively leaves landowners with the discretion of whether they want to partake in land reform or not.²²

¹⁸ Manjengwa 2006 www.plaas.org.za.

¹⁹ This seems to be the opinion of the Committee on Rural Development and Land Reform, 23 May 2012 (Committee on Rural Development and Land Reform 2012 www.pmg.org.za).

²⁰ *Constitution of the Republic of South Africa*, 1996.

²¹ Lahiff 2007 *Third World Quarterly* 1577.

²² Lahiff 2007 *Third World Quarterly* 1585.

The 1997 *White Paper on South African Land Policy*²³ supported the willing-buyer-willing-seller model. This was despite section 25 of the *Constitution* that provides for expropriation of land for land reform purposes and for compensation below market prices.²⁴ One can only attribute this to the neoliberal and investor friendly economic strategy adopted by the ANC at the start of the constitutional democracy.²⁵

This approach should be distinguished from the willing-buyer-willing-seller model that is used to calculate market value compensation when expropriating property based on section 12²⁶ of the *Expropriation Act*.²⁷ All this is done to determine what price the property will fetch in the open market on the date of the notice. The value that property will fetch in the open market is commonly referred to as the market value. Market value as compensation norm is based on the assumption that in the property market there will always be a free interchange between supply and demand.²⁸ This is problematic when it comes to the (real) property market that is

²³ *South African Land Policy White Paper* (1997).

²⁴ See discussion that follows.

²⁵ Lahiff 2007 *Third World Quarterly* 1580.

²⁶ Section 12(1) of the *Expropriation Act* 63 of 1975 sets out how compensation should be calculated: 12. Basis on which compensation is to be determined.- (1) The amount of compensation to be paid in terms of this act to an owner in respect of property expropriated in terms of this act, or in respect of the taking, in terms of this act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed- (a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of- (i) the amount which the property would have realized if sold on the date of notice in the open market by 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 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.

²⁷ *Expropriation Act* 63 of 1975.

²⁸ In this instance, an open market must be imagined to be a place where a transaction takes place free of competition. Penny 1966 *SALJ* 204 writes that "[t]he 'market' or 'exchange' value of a thing is determined by its utility, its scarcity and the competitive wants of purchasers. It represents the point of equilibrium between supply and demand at any one moment. In real estate valuation, the thing to be valued is the group of rights attaching to a property. Because the term "Property" is commonly used as a convenient ellipsis for this group of rights, it should not be thought that it is the property as such which is being valued." See Gildenhuys 1977 *TSAR* 3. For case law, see *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy* (Edms)

regulated by its own occurrences and acts.²⁹ The rationale remains that the market price will be determined by the economic principles of supply and demand,³⁰ thereby determining the "equivalent in value ... of the property loss" as the *Estate Marks v Pretoria City Council*³¹ requires. This method of calculation was adopted in South African case law.³²

Notwithstanding the problems with this approach,³³ the courts have usually found a way to apply the open market test, even where it has been very difficult to do so.³⁴ The market value test plays a central role in South African expropriation law, and in order to determine the market value, one has to hypothesise what the property would have realised if sold on an open market by a willing seller to a willing buyer.

When the government therefore talks about the willing-buyer-willing-seller *principle*, it refers to open-market transactions based on contract. When one talks about the

Bpk 1973 3 SA 376 (A) 389; *Todd v Administrator, Transvaal* 1972 2 SA 874 (AD) 881-882; *Estate Hemraj Mooljee v Seedat* 1945 NPD 22 24.

²⁹ Gildenhuys 1977 TSAR 8.

³⁰ Gildenhuys *Onteieningsreg* 174.

³¹ *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 242. In this case the court, referring to market value, imported the common law position that a person whose property is expropriated must be compensated in full. According to this approach, compensation is usually paid for the value of the property lost, and value is normally taken to be market value. See also *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 522 where De Villiers JP was "of the opinion [that] we must take the word 'value' in its more ordinary meaning of temporary or market value [it being *value in exchange*]. To give the other meaning [namely *value in use*] would perhaps be more satisfactory from an assessment point of view; in a country where fluctuation in the market value of property, are considerable and frequent this would certainly make for uniformity". This is a conservative approach according to Grütter *Regsposisie van die Huurder* 56.

³² See for instance *Krause v SA Railways and Harbours* 1948 4 SA 554 (O) 560; *Hirschman v Minister of Agriculture* 1972 2 SA 887 (A) 889; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973) SA 376 (A) 385; *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 2 SA 218 (SWA) 225. See also *Sri Raja Vyricherla v Revenue Divisional Officer Vizagapatam* 1939 2 All ER 317 321 for an English law discussion of market value. This corresponds with the methods followed in *Minister of Water Affairs v Mostert* 1966 4 SA 690 (A) 722; *Katzoff v Glaser* 1948 4 SA 630 (T) 637.

³³ See below.

³⁴ *Todd v Administrator, Transvaal* 1972 2 SA 874 (AD) 881-882; *May v Reserve Bank of Zimbabwe*; *Thomas Family v Reserve Bank of Zimbabwe*; *Cairns Family Trust v Reserve Bank of Zimbabwe*; *Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 4 SA 185 (ZH) 116; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 953; *Minister of Agriculture v Estate Randeree* 1979 1 SA 145 (A) 183.

willing-buyer-willing-seller approach with regard to compensation for expropriation, it refers to one (of many) *methods* to determine market value.

2.1 The problem with the market value principle

There seems to be general consensus that the willing-buyer-willing-seller model to acquire land for land reform purposes has failed.³⁵ There are various reasons for this. Most notable is the long time it takes to acquire land (from the negotiation phase to the actual transfer). Firstly, good quality land is sold in the open market - either by public auction or private transaction, with relatively expedient transfer of ownership.³⁶ This makes it almost impossible for land reform beneficiaries who rely on funding to purchase farms, as the funding application takes longer than a normal transfer.³⁷

Secondly, the beneficiaries are not directly involved in this process, and must rely on the Department of Land Reform (as it was) to do the negotiation on their behalf. This means that even if there are small differences in price that a willing buyer might have negotiated around, the deal might fall through because the officials do not negotiate as a willing buyer would.³⁸ From the seller's side there also seems to be delays in payment once the agreement has been reached. This, amongst other things, creates the perception that the Department is an unreliable negotiation partner.³⁹ This bureaucratic obstacle to purchasing land means that the land

³⁵ Committee on Rural Development and Land Reform 2012 www.pmg.org.za.

³⁶ Lahiff 2007 *Third World Quarterly* 1585.

³⁷ The official grant application process requires a written agreement to sell from the landowner and an agreement from an independent valuator that the price is market related. This can take up to two years, with the risk of the funding application being turned down. Understandably, only farmers that are very committed to land reform would enter into a land reform transaction. This also means that the farmers that do enter into negotiations for selling land for land reform purposes, have a relatively strong negotiation position as there are not many farms in the market for this purpose. If the valuers (working for the Department of Land Affairs) estimate a price that is below the perceived market value, they can only make such an offer to the farmer, who is then free to reject such an estimate. See Lahiff 2007 *Third World Quarterly* 1585.

³⁸ Lahiff 2007 *Third World Quarterly* 1586.

³⁹ Lahiff 2007 *Third World Quarterly* 1586.

purchased and transferred to beneficiaries is often of poor quality and very expensive. Without a credible threat of expropriation, the *status quo* will continue.⁴⁰

2.2 The problem with market value and the willing-buyer-willing-seller method of determining market value when calculating compensation

Market value is a problematic concept because in transactions of sale, the market is a relatively unrestrained phenomenon where sellers and buyers bargain until they reach an acceptable price level, and such bargaining is usually done without many artificial constraints. The problem thus lies in the fact that one must imagine compensating a compulsory purchase in terms of exactly the opposite, namely a free market transaction where the price level is determined by the relatively free will of the buyer and the seller. The determination of market value is therefore an informed guess.⁴¹ The method is described as illusory, since the bargaining process is constrained by a compulsory sale, and the seller is more often than not unwilling to sell.⁴²

As King J stated in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*:⁴³

Notwithstanding, the law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation. This is so because I

⁴⁰ One of the reasons why land reform failed is that the farms are too big to make it suitable for new entrants to the agricultural sector. Farmers seem to be hesitant to sell off only small portions of land, and there seems to be resistance against the *Subdivision of Agricultural Land Act* 70 of 1970; coupled with unrealistic commercial business plans and poor post-settlement support, beneficiaries have little chance of success. See Lahiff 2007 *Third World Quarterly* 1577.

⁴¹ *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 3 SA 376 (A); *Minister of Lands and Natural Resources v Moresby-White* 1978) SA 898 (RAD); *Krause v SA Railways & Harbours* 1948 4 SA 554 (O).

⁴² Jacobs *Law of Expropriation* 61.

⁴³ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 955-956.

must ignore any enhancement or diminution in value flowing from the expropriation or the scheme causing the expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuers make the task of the super valuer seemingly 'curiouser and curiouser'.

The court in *Todd v Administrator, Transvaal*⁴⁴ ruled that despite the fact that there was no open market, it will nonetheless determine what such property would fetch on the open market, since the *Expropriation Act* requires it.⁴⁵ It took value to be the value that the arbitrator placed on it. This is a clear indication of how the courts labour the idea that value can only refer to market value.⁴⁶

It is unclear which persons would qualify as hypothetical buyers, because different buyers will pay different prices for land, based on their needs.⁴⁷ It is therefore assumed that the hypothetical buyer should at least be someone who would in practice buy or have bought similar properties.⁴⁸ This must be done without regard to the particular seller, since no method of calculation should include subjective considerations.⁴⁹

⁴⁴ *Todd v Administrator, Transvaal* 1972 2 SA 874 (AD) 881-882.

⁴⁵ See also *May v Reserve Bank of Zimbabwe; Thomas Family v Reserve Bank of Zimbabwe; Cairns Family Trust v Reserve Bank of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 4 SA 185 (ZH) 116; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 953.

⁴⁶ Gildenhuys 1977 *TSAR* 5 criticises this as being unscientific.

⁴⁷ Gildenhuys 1977 *TSAR* 3 says such an imaginary sale is one where the seller is not anxious to sell property, but is willing to sell if (s)he gets a good price. It is important that objective formulas be used, so that the personal circumstances of the expropriatee do not dictate the price. See also *Pienaar v Minister van Landbou* 1972 1 SA 14 (A) 20. If the land has a special characteristic that is of value to the specific owner, this must be disregarded. Examples of this in case law include where a house was rebuilt to serve the needs for a disabled person. Instead, the court must ask what a person in the shoes of the owner would pay to keep the land. See *Hirschman v Minister of Agriculture* 1972 2 SA 887 (A).

⁴⁸ Gildenhuys 1977 *TSAR* 4. He also mentions the Canadian and Australian approaches that state that in cases where land has a special meaning to the expropriatee, the expropriatee can also be regarded as a hypothetical buyer. It must be treated with caution, since in such a case the expropriatee cannot be both the willing buyer and the willing seller. The English case of *Sri Raja Vyricherla v Revenue Divisional Officer Vizagapatam* 1939 2 All ER 317 states that the value of the property will not be increased because of such special value. In South Africa there seems to be an indication that we follow the rule that the special value would not be regarded to some extent.

⁴⁹ The court in *Pienaar v Minister van Landbou* 1972 1 SA 14 (A) stated that market value is an objective concept that should be determined not by looking at the personal circumstances of the owner, but by looking at the property itself. This contradicts the doctrine of subjective rights that regards expropriation as the expropriation of rights to an object, as opposed to the object itself.

The market-led approach based on the willing-buyer-willing-seller method seems to stand in the way of expedient land transfers of land reform purposes.⁵⁰ Is expropriation a viable alternative, and if so, how should compensation be calculated for expropriated land? What does the *Green Paper* have to say about this issue?

3 *Green Paper on Land Reform and compensation for expropriation*

The *Green Paper* in clause 5 states that one of the challenges and weaknesses (and thus the rationale for change) is *inter alia* "the land acquisition strategy / willing-buyer willing-seller model". It proposes an improved track for land reform⁵¹ that will attempt to "improve on past and current land reform perspectives, without significantly disrupting agricultural production and food security".⁵² This new track will be supported, amongst other things, by the Land Valuer-General.

The Land Valuer-General (LVG) will be a statutory office that will, *inter alia*, be responsible for "determining financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, in compliance with the [C]onstitution". Exactly what the powers of the LVG will be or how compensation will be calculated is not clear from the *Green Paper*. The ANC Land Reform Policy

However, when calculating actual financial loss, personal circumstance can play a role in determining how the loss should be compensated. In *Durban Corporation v Lewis* 1942 NPD 24, "value to the owner" was considered "in so far as they enhance the value to him". In *Krause v SA Railways and Harbours* 1948 4 SA 554 (O) 561 "the value which has to be assessed is the value to the old owner ... not the value to the new owner". In *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 3 SA 376 (A) 384 the court stated that value is the equivalent in value to the expropriatee. However, the former Appellant Division settled it in *Pienaar v Minister van Landbou* 1972 1 SA 14 (A) 20 where value was determined with reference to the land itself, and the court ruled that personal circumstances of the owner should not have an influence, since it will be valued differently in the hands of different owners. This point was qualified when it was mentioned, but not decided, in *Hirschman v Minister of Agriculture* 1972 2 SA 887 (A). Where property has a special value because the owner can use it together with other property, it is a factor that will be considered with the calculation of compensation. In such a case the owner is regarded as a potential purchaser, even if it means that (s)he is both the hypothetical willing buyer and the willing seller (*qua* owner). It remains, however, the intrinsic value of the property that is valuated. However, courts would rather award extra compensation under actual financial loss. See Georgiou *Determination of Compensation* 51.

⁵⁰ Lahiff 2007 *Third World Quarterly* 1585.

⁵¹ Clause 6 of the *Green Paper on Land Reform* (2011).

⁵² Clause 6.1(a) of the *Green Paper on Land Reform* (2011).

Discussion Document⁵³ expands a bit more on what is envisioned. According to this policy discussion document, the office of the LVG will report to an inter-ministerial committee of ministers who have land interests vested in their departments.⁵⁴ The rationale for this "office" is to provide a "hub of property values" that is reliable and comprehensive.⁵⁵ Importantly, this document raises the concern that there is no legislative framework to determine when "market value" must be one of the variables in calculating compensation, as opposed to it being the only variable. Therefore, one of the functions of this office will be to determine financial compensation when expropriating in line with the *Constitution* and other legislation.⁵⁶ Again, this document does not seem to give clear and specific direction. What follows is an attempt to put a possible direction on the table for discussion.

4 Expropriation for land reform purposes

A holistic reading of section 25 makes it clear that expropriation is possible for land reform purposes. Section 25(2) states that "[p]roperty may be expropriated only in terms of law of general application (a) for public purpose or in public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court". Section 25(4) qualifies this by stating that "for the purposes of this section (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to South Africa's natural resources".⁵⁷ Section 25(5)-(9) provides for land reform.

As far as the interpretation techniques are concerned, the Constitutional Court tends to follow a purposive interpretation when interpreting the Bill of Rights.⁵⁸ The

⁵³ ANC 2012 www.anc.org.za.

⁵⁴ ANC 2012 www.anc.org.za cl 5.3.

⁵⁵ ANC 2012 www.anc.org.za.cl 5.3.

⁵⁶ ANC 2012 www.anc.org.za.cl 5.3.

⁵⁷ For legislation on natural resources that might be relevant in this section, see for instance *Mineral and Petroleum Resources Development Act 28 of 2002*; *National Heritage Resources Act 25 of 1999*; *National Water Act 36 of 1998*.

⁵⁸ *Brink v Kitshoff* 1996 4 SA 197 (CC).

tension in section 25 between the protection afforded to existing rights and the reformist imperatives makes it a particularly difficult clause to interpret.⁵⁹ It has been said that an interpretation of section 25 rests on three premises. The first premise is that all constitutional property clauses have this inherent tension between the protection of existing rights and the state's power to infringe on it. In this regard, the land reform provisions in section 25(5)-(9) only add a context-specific dimension to the idea that the state has the power to infringe on existing property rights.⁶⁰ Secondly, the power to infringe on private property for the purposes of land reform developed from a specific historical context in South Africa. This historical context can therefore not be divorced from a proper interpretation of the property clause when the state limits private property.⁶¹ Thirdly, the fact that the property clause is transformative does not imply that the *Constitution* does not value existing private property. It means that the classic protection of private property stands alongside the transformative purpose.⁶² In the context of expropriation these premises will be especially important to keep in mind when applying and interpreting the property clause. These premises must at least be considered in every expropriation case.

Expropriation can be used in all three the pillars of land reform. The redistribution pillar of land reform aims to provide landless people with land through assistance from the government, mainly through programs that provide *inter alia* for financial assistance through grants and subsidies. Land for redistribution purposes can be acquired through expropriation.⁶³ Restitution is managed by the *Restitution of Land Rights Act 2* of 1994.⁶⁴ It might be necessary for the state, in the instances where

⁵⁹ Van der Walt *Constitutional Property Law* 23.

⁶⁰ Van der Walt *Constitutional Property Law* 23.

⁶¹ Van der Walt *Constitutional Property Law* 23.

⁶² Van der Walt *Constitutional Property Law* 23.

⁶³ Section 25 of the *Constitution*; ss 10, 10A and 14 of *Provision of Land and Assistance Act* 126 of 1993; ch II of *Extension of Security of Tenure Act* 62 of 1997.

⁶⁴ Restitution refers to those instances where individuals or communities that were deprived of their land under the apartheid laws can claim that their land rights be either restored or replaced by other equitable redress (usually monetary compensation). The requirements for restitution are set out in s 2 of the Act, and restitution is available to a person or community that was dispossessed of their land after June 1913 as a result of a past racially discriminatory law or

the claimants claim their land back, to expropriate land in order to restore it to the previous owner.⁶⁵ To a limited extent expropriation might also be relevant in the tenure pillar of land reform. Section 25(6) aims at securing tenure of land that has been made insecure in the past by racially discriminating laws or practices. In the case of tenure reform, land is not redistributed as such, but rights and interests in land are strengthened through reform of the applicable laws.⁶⁶ The beneficiaries of the tenure programme are those people who already have interests or rights in land, but whose interests or rights are weak. It follows that they do not require land through restitution or redistribution, but that their rights are legally redefined and thereby strengthened.⁶⁷ There are various laws aimed at strengthening these rights.⁶⁸

practices for which just and equitable compensation was not paid. See Badenhorst, Pienaar and Mostert *Law of Property* 629.

⁶⁵ This is what essentially happened in *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC); *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 1 SA 1030 (LCC).

⁶⁶ Van der Walt *Constitutional Property Law* 308-309.

⁶⁷ Van der Walt *Constitutional Property Law* 309. The *Land Reform (Labour Tenants) Act* 3 of 1996 was promulgated to broaden access to land and to provide security for labour tenants who in the past have been denied access to land. As opposed to farm workers, their primary reason for staying on the farm is not to earn a salary. These people are protected from arbitrary eviction and they can only be evicted in terms of the procedure described in the Act.

⁶⁸ The *Communal Property Associations Act* 28 of 1996 aims at providing communities with secure tenancy of communally held land. The *Extension of Security and Tenure Act* 62 of 1997, also referred to as ESTA, protects lawful occupiers of rural land against eviction. This is one of the more controversial and politically motivated land reform Acts. The Act aims to provide rural stability by providing rural land occupants with a mechanism through which they can acquire land, controlling the relationship between owners and lawful occupiers and protecting such lawful occupiers against unfair evictions. The Act is aimed at rural occupiers that has permission to reside on the land in question and that is not labour tenants. The aspect of ESTA that is particularly interesting in an expropriation context is the issue of family graves. Before it was amended, s 6(2)(d4) provided that occupiers had the right to visit and maintain family graves on the farms these family member had been buried, but the section was amended in 2001 adding the right to bury family members on the farm without consent and in some cases against the will of the landowner. This can only be done if it is part of the workers' religious or cultural beliefs and if it is an established practice to do so. The first two burial cases, based on the old s 6(2)(d4), were not decided with reference to expropriation. In *Serole v Pienaar* 2000 1 SA 328 (LCC) the owner's property rights were weighed up against the right to a cultural life (burial). The court found that such a burial would have a significant effect on the owner's property rights, and cannot be condoned unless sanctioned by legislation or agreed upon. See *Serole v Pienaar* 2000 1 SA 328 (LCC) paras 16-17. In *Nkosi v Bührman* 2002 1 SA 372 (SCA), the Supreme Court of Appeal ruled that the right to bury outside the municipal jurisdiction can only be obtained with permission of the landowner. The right to religion, the court ruled, does not include the right to diminish the landowner's property rights. See *Nkosi v Bührman* 2002 1 SA 372 (SCA) paras 49-50. For a thorough discussion see Pienaar and Mostert 2005 *SALJ* 633 and for the constitutional significance see Du Plessis "South African Constitution" 189. The *Prevention of Illegal Eviction*

With constitutional permission to expropriate for land reform purposes, the most pertinent question that remains is how do we calculate compensation that is in line with the *Constitution*?

5 Compensation for expropriation under the *Constitution*

5.1 Introduction

The *Constitution* requires that compensation must be "just and equitable" with regard to the relevant factors listed in section 25(3), while the *Expropriation Act* contains detailed provisions of what should be compensated and how such compensation must be calculated.⁶⁹ The *Expropriation Act*, like other legislation dealing with expropriation, is only valid insofar as it is consistent with the *Constitution*.⁷⁰ The Constitutional Court⁷¹ stated that it is the *Constitution*, and not legislation, that provides the principles that are applicable when property is expropriated. These are principles that the courts *must* adhere to, and it requires a balancing of the listed factors⁷² with no specific factor carrying more weight than the others.⁷³

Either the compensation can be agreed to by those affected, or it can be decided or approved by a court. When there is no agreement, the *Constitution* provides the

from and Unlawful Occupation of Land Act 19 of 1998, also known as PIE, is applicable to unlawful occupiers of land (previously so-called squatters). The Act is aimed at regulating eviction and ensuring that eviction of unlawful occupiers is just, equitable and fair. The Act tries to counter the injustices of the apartheid style forced evictions that limited, limiting landowners' rights to evict occupiers of land without due regard to their personal circumstances. See also Van der Walt *Constitutional Property Law* 315-316; Badenhorst, Pienaar and Mostert *Law of Property* 593-651, Liebenberg *Socio-Economic Rights*; Muller *Impact of Section 26*.

⁶⁹ In *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 17 the Constitutional Court ruled that compensation should be paid under the correct section of the *Expropriation Act*. If it is paid under the wrong section, it may be unconstitutional. See Badenhorst 1998 *De Jure* 251-270 for an overview of the interaction between the *Expropriation Act* and the *Constitution*.

⁷⁰ Van der Walt *Constitutional Property Law* 269.

⁷¹ In *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 31.

⁷² *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 33.

⁷³ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 34. Despite ruling that market value is but one of five factors, the court applied the *Highlands* test, which places market value central in the determination of compensation (para 37).

court with the principles in section 25(3) that should be used when calculating compensation.⁷⁴ The central principle is that the amount of compensation must reflect an equitable balance between the public interest of the community and the individual interests of the private landowner(s). This balance must be established with reference to the relevant circumstances, including, but not restricted to, the list of factors in section 25(3). This requires looking at each case individually with regard to the individual property interest that might stem from the pre-constitutional era, and the constitutional framework and its legitimate land reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard for the context of the expropriation. When determining compensation, the broader scheme of the *Constitution* should therefore be duly regarded.⁷⁵

The aim of compensation under the constitutional dispensation seem to be not to let the individual carry the burden on his/her own of something that is in the public benefit, as in pre-constitutional expropriation. However, the *Constitution* aims to do this by balancing the interest of the public with the interest of those affected (the individual), and this might not always mean paying market value.

The fact that the interest of the individual should be weighed up against the public interest means that the centrality of market value in pre-constitutional expropriation law should be revised. Market value is only *one* of the factors that should be considered, and must therefore be considered alongside other factors.⁷⁶ The weight that each factor carries would be determined by the facts and the circumstances of each case. Care should therefore be taken to ensure that the *Expropriation Act* is interpreted in line with the *Constitution*, with special caution not to over-emphasise market value.

⁷⁴ Section 25(2)(b) of the *Constitution*. See Van der Walt *Constitutional Property Law* 272.

⁷⁵ Van der Walt *Constitutional Property Law* 272.

⁷⁶ Van der Walt *Constitutional Property Law* 273.

5.2 Market value

Where market value plays a central role in the calculation of compensation according to section 12 of the *Expropriation Act*, market value is listed as just one factor amongst many to be taken into account when determining constitutional compensation under section 25(3)(c). Before the *Constitution* was enacted, Claassens⁷⁷ warned that entrenching a property clause that provides for compensation at market value would fuel the tension by protecting existing strong, white land rights at the expense of weak, black land rights. White people who acquired land relatively inexpensively from black people or the state during apartheid will be able to rely on their right to market value compensation. That, in turn, will make land reform expensive, if not unaffordable. If the government cannot pay the bill for land reform, it means that the dispossessed would not receive equitable redress as section 25 requires. It was therefore imperative that the constitutional property clause would also include factors other than market value to ensure that land reform is just and equitable in the sense of affordable and possible.⁷⁸ This was done by agreeing on four other factors that should be taken into account when calculating compensation,⁷⁹ as well as including the land reform objectives in section 25.⁸⁰

In *City of Cape Town v Helderberg Park Development (Pty) Ltd*⁸¹ the Supreme Court of Appeal ruled that compensation for expropriation is a constitutional issue by virtue of section 25 of the *Constitution*. This implies that compensation must be paid in accordance with the Bill of Rights. This requires a balancing of interests to determine just and equitable compensation. The court focused on market value, since it is the only quantifiable value. Market value thus remains pivotal when determining compensation.

⁷⁷ Claassens 1993 *SAJHR* 422.

⁷⁸ Claassens 1993 *SAJHR* 423.

⁷⁹ Section 25(3) of the *Constitution*. This is not an exhaustive list.

⁸⁰ Section 25(5)-(9) of the *Constitution*.

⁸¹ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para 19.

The Constitutional Court ruled in *Du Toit v Minister van Transport*⁸² that compensation may not exceed market value,⁸³ it must simply be just and equitable, meaning that the individual may not benefit unduly at the expense of the public. Rather, the expropriatee must be put in the same position (s)he would have been, but for the expropriation.⁸⁴ In the *Helderberg* case,⁸⁵ the Supreme Court of Appeal said that compensation cannot be more than market value, since an owner may not be better or worse off because of the expropriation. Rather, a monetary award must restore the *status quo ante*. In *Khumalo*⁸⁶ the Land Claims Court stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss. In *Hermanus*⁸⁷ the Land Claims Court also ruled that the expropriatee is compensated for the loss of the property, and that the value the property has for the owner should be calculated under actual financial loss. The court further ruled that it is in the interests of justice that the injuriously affected be compensated.

Gildenhuys⁸⁸ is of the opinion that it should be *possible* to pay more than market value compensation, as the *Constitution* merely sets the minimum standard that must be adhered to. This should be approached with caution, since the balancing of interests in section 25(3) requires that the state should not pay more than is *due* as this will have a negative effect on taxpayers.⁸⁹ Chaskalson and Lewis⁹⁰ argue that such a balancing test might allow for compensation that is *more* than market value in instances where the property, due to particular circumstances, has a value to the owner that is more than market value. Thus, balancing out the benefit to the state with the affected owner might require the state to pay more.⁹¹ Gildenhuys J ruled in

⁸² *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 21.

⁸³ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 21.

⁸⁴ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 22.

⁸⁵ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para 21.

⁸⁶ *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) para 22.

⁸⁷ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 1 SA 1030 (LCC) para 15.

⁸⁸ Gildenhuys *Onteieningsreg* 164-165.

⁸⁹ Gildenhuys *Onteieningsreg* 165.

⁹⁰ Chaskalson and Lewis 31-24.

⁹¹ See also Currie and De Waal *Bill of Rights Handbook* 556.

*Ex Parte Former Highlands Residents*⁹² that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay *more* than market value.

*Nhlabathi v Fick*⁹³ paved the way for expropriation without compensation in certain circumstances, when it ruled that where the infringement is minimal to the owner's rights, it should not be necessary to pay full market value compensation, or in this case any compensation. This would probably be more likely in land reform instances.

⁹² *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 34-35.

⁹³ *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) paras 32-35. In *Nhlabathi*, a widow tried to bury her husband in a family graveyard (according to an established custom), but the owner, Mr Fick, refused. Ms Nhlabathi went ahead with the arrangements to bury her husband. Nonetheless, upon return to the farm she found that the owner locked her out of the property. This prompted Ms Nhlabathi to apply for an interdict to allow her to bury Mr Nhlabathi. This interdict was based on s 6(2)(dA) of ESTA that allows burial of family members against the will and without permission from the landowner, if they were occupiers of land at the time of death and if there was an established practice on the farm. The amendment therefore added the right to bury a family member to the occupier's tenure right. This right, the court highlighted, is not absolute, and must be balanced with the rights of the owner, and is only enforceable if there is an established practice on the farm to bury members. The owner argued that s 6(2)(dA) is unconstitutional because it does not protect his property. The court, following the *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) 2002 ZACC 5 methodology, ruled that s 6(2)(dA) is a deprivation in terms of law of general application (ESTA). The court also found that it is not arbitrary deprivation because the right has to be balanced against the right of the landowner, in light of the fact that the section is enacted as part of the state's constitutional duties to provide security of tenure. On balancing the right the court found that there must be an established practice on the part of the occupier before they can bury the family members, and that such an intrusion is minor. The court then had to decide whether the burial right is an expropriation. In *Serole v Pienaar* 2000 1 SA 328 (LCC) the court had stated that the right to establish a grave could amount to a servitude, and when such a servitude is granted without consent of the owner, it could amount to an expropriation. In *Nhlabathi* the court assumed, without deciding the point, that it could be a *de facto* servitude, and therefore an expropriation. The court then ruled "[t]here can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation's commitment to land reform)". This was justifiable under s 36 of the *Constitution*, which the court found to run cumulatively with the ss 25(2) and (3) limitations. The court held that the interference with the landowner's property rights is reasonable and justifiable as per s 36 because (a) the right does not constitute a major intrusion on the landowner's property rights; (b) the right is subject to balancing with the rights of the landowner, whose right can sometimes weigh more; (c) the right only exists where there is a past practice of burials on the land, and that granting the right will provide the occupiers with security of tenure in the land since it will enable them to comply with their religious and cultural beliefs; and (d) it will enable the occupiers to comply with their cultural and religious beliefs, since they need to be close to their ancestors. The court found that, even if it amounts to expropriation of the property in order to use it for burial purposes, it does not require compensation. This is because the intrusion to the owner's property, weighed up against the gains for the occupants, is a minor intrusion. Alternatively, the absence of compensation could be justified in terms of s 36.

The Land Claims Court argued, in line with *FNB*,⁹⁴ that the right to bury family in a family grave does deprive the owner of his land, and could be an expropriation, but that compensation needs not be paid.

While verdict is still open on the question whether the *Constitution* sets a minimum or a maximum standard, what is clear is that compensation must be just and equitable, taking into account the five factors in section 25(3). The *Constitution* brought a new requirement, namely that compensation must be "just and equitable" by considering and weighing up a non-exhaustive list of factors to take into account. Market value is only one of five factors listed, and therefore market value should not be the centre of the inquiry into compensation. *Nhlabathi*, in this context, serves as a good example of how the weighing up process works, and how compensation needs not always be market value.

5.3 The list in section 25(3)

The *Constitution* provides us with a non-exhaustive list of factors to take into account when determining just and equitable compensation. The first factor in section 25(3)(a) provides that the current use of the property can be a relevant circumstance that can influence the compensation amount. This subsection seems to justify cases where scarce resources, like agricultural land, might be expropriated for land reform because it is not otherwise used productively and can be used for housing or the establishment of new farmers. For example: where labour tenants apply to become owners of land⁹⁵ it should be borne in mind that the owner did not have use of the land.⁹⁶ It might be possible, therefore, that the owner's loss is not substantial. This might mean that the owner should not necessarily receive the full market value of the property. This factor cannot be used as a punitive measure as that would be against the public purpose.⁹⁷ It remains a balancing test, where the

⁹⁴ *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* 2002 4 SA 768 (CC).

⁹⁵ Section 1 of the *Land Reform (Labour Tenants) Act* 3 of 1996.

⁹⁶ Budlender "Constitutional Protection of Property Rights" 1-59.

⁹⁷ Van der Walt *Constitutional Property Law* 274.

interest of those affected is weighed up with the public interest. The use of the property could also be applicable in *Modderklip*⁹⁸-type cases: when land is occupied unlawfully and the market value is depressed because of it, the court could adjust compensation upwards to equalize the negative effect of the unlawful occupation.⁹⁹

It is not only the current use of the property, but also the history of the acquisition of the property that can influence the compensation amount. Section 25(3)(b) includes cases where the state expropriated property and sold it well below market value during apartheid.¹⁰⁰ In many of these cases the state made land available to white farmers well below market value.¹⁰¹ If such an owner is now expropriated for land reform purposes, it would be unfair to offer full market value compensation. Such an owner should not be allowed to benefit twice from apartheid.¹⁰²

Section 25(3)(c) lists market value as a factor to take into account when calculating just and equitable compensation. Market value in section 25(3)(c) probably has the same meaning as market value in section 12 of the *Expropriation Act*,¹⁰³ although market value is not the main consideration in section 25(3).

Section 25(3)(d) refers to the instances where the acquisition by the person expropriated and the capital improvement made to such property was made to the land with the assistance of the (apartheid) state.¹⁰⁴ The rationale underlying this subsection is that the (current) state should not compensate an owner for

⁹⁸ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 5 SA 3 (CC).

⁹⁹ Budlender "Constitutional Protection of Property Rights" 1-60.

¹⁰⁰ Du Plessis and Olivier 1997 *BPLD* 11. See also Van der Walt *Constitutional Property Law* 275.

¹⁰¹ Budlender "Constitutional Protection of Property Rights" 1-59. See n 106 for an example.

¹⁰² Budlender "Constitutional Protection of Property Rights" 1-59. The question is whether, when an owner that benefited from a reduced price transfer the land to a *bona fide* third party, the history of acquiring factor is still applicable. The general feeling is that such a buyer should not be penalised because of the initial history of acquisition. It is also not sure whether the fact that farms were inherited or often sold symbolically to transfer the property to a child before death, for example, should be taken into account. See Gildenhuys *Ontheieningsreg* 172 for a detailed explanation of how compensation will be calculated in such cases. See also Badenhorst 1998 *De Jure* 261.

¹⁰³ See Badenhorst 1998 *De Jure* 262

¹⁰⁴ This only applies to direct subsidies in respect to the property.

improvements that they made with (apartheid) state subsidies, as it will not be just and equitable to do so.¹⁰⁵ Budlender is of the opinion that it is only direct subsidies that should be taken into account.¹⁰⁶

Section 25(3)(e) requires the court to have regard for the purpose of the expropriation.¹⁰⁷ It is not clear whether this means that if land is expropriated for land reform purposes the owner should be happy to accept a lower price than where property is expropriated for non-land reform public purposes,¹⁰⁸ or whether it merely confirms the reformist agenda of section 25.¹⁰⁹ Badenhorst¹¹⁰ states that it is possible that in cases where expropriation is for land reform purposes, compensation can be less than market value. It is, however, important not to interpret this section too widely to include non-land reform purposes.¹¹¹ In the *Du Toit* trilogy¹¹² the court

¹⁰⁵ See Van der Walt *Constitutional Property Law* 276. An apt example would be the case of the Mfengu people that used to reside in the Tsitsikamma area. Their land was registered in the 1840s under a Moravian Mission's name. The land was later on scheduled for occupation by "natives" under the *Natives Land Act* 27 of 1913. These people were finally removed from Keiskammahoek in 1977 on the State President's order. They were moved to the old homeland of Ciskei. The apartheid state promised them compensation that they never received. They were given land in Ciskei, but it was substantially smaller and drier than the land in Tsitsikamma. The Tsitsikamma land were allocated to other people or sold to white buyers at a third of the price with a government bond covering the whole amount. In 1990, lawyers and activists became aware that many farmers intended to sell the land for great profits. The land was returned in 1994, before the elections, when Archbishop Tutu initiated a land claim on behalf of the people to the then Minister of Land Affairs and then President FW de Klerk. In terms of the settlement, the farmers were paid an amount of R35 million, while the trust that took ownership of the land got a R1,96 million award. See Everingham and Janneke 200) *Journal of Southern African Studies* 554; Claassens 1993 *SAJHR* 424. Such a discount, as well as the subsidy, should thus be taken into account when farmers who acquired their farms in such a way, is expropriated for land reform purposes.

¹⁰⁶ Budlender "Constitutional Protection of Property Rights" 1-65.

¹⁰⁷ The purpose of the expropriation in s 25(3)(e) is complimented by s 25(4)(a), which states that public interest includes the nation's commitment to land reform. S 25(4)(a) therefore circumscribes the content of public interest, while s 25(3)(e) is about the role that public purpose plays in compensation. This should also be distinguished from s 25(2)(a), which states that the expropriation must be in the public interest or for a public purpose, therefore public interest and public purpose as requirements for the expropriation.

¹⁰⁸ For Gildenhuys *Onteieningsreg* 178 this interpretation would not be just.

¹⁰⁹ Van der Walt *Constitutional Property Law* 276 where he explains that s 25(3)(e) probably aims at avoiding frustrating expropriations aimed at social necessities. If s 25(3)(e) is read in conjunction with s 25(8) where the *Constitution* directs the state to promote land reform, then such an interpretation would be plausible, especially in cases where paying compensation would impede land reform.

¹¹⁰ Badenhorst 1998 *De Jure* 263.

¹¹¹ See Van der Walt *Constitutional Property Law* 276.

took into account the purpose of the expropriation even though it was not for land reform purposes. This has been questioned.¹¹³

Subsections (a)-(e) are not all applicable in all cases, and it might be that in certain circumstances a particular subsection is more relevant than others. However, it is important that *all* relevant circumstances be taken into account in every case, including those circumstances or factors that might be relevant, but not listed in section 25(3).

The courts were left to interpret how these factors interact with one another and in *Ex Parte Former Highlands Residents*¹¹⁴ Gildenhuis J formulated a two-step approach when calculating compensation. After discussing foreign law, Gildenhuis J concluded that market value plays a central role in other jurisdictions, even in those with a property clause in the *Constitution*.¹¹⁵ Therefore, when calculating compensation the courts should first determine the market value of the property (since it is easily quantifiable),¹¹⁶ and then, based on the list in section 25(3), adjust the amount either upwards or downwards.¹¹⁷ Market value was thus elevated to a central or starting position in determining compensation. The Constitutional Court in *Du Toit*,¹¹⁸ relying on *Ex parte former Highlands Residents*, acknowledged that the *Constitution* provides for considerations other than market value, but restricted the influence of the other factors by confirming that one should proceed by first

¹¹² *Du Toit v Minister of Transport* 2003 1 SA 586 (C); *Minister of Transport v Du Toit* 2005 1 SA 16 (SCA); *Du Toit v Minister of Transport* 2006 1 SA 297 (CC).

¹¹³ See Van der Walt 2005 *SAJHR*.

¹¹⁴ *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

¹¹⁵ This might not be entirely true. Many jurisdictions acknowledge that compensation need not be market value. This is particularly so in Germany, where what is required is an equitable balance between the public interest and the interests of those affected. See for example *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

¹¹⁶ Budlender "Constitutional Protection of Property Rights" 1-60 rightly notes that market value is preferred because it is seen as "objective", but yet it is difficult to determine the exact market value because there are many variables that need to be considered when determining it.

¹¹⁷ *Ex parte former Highland Residents; In Re Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

¹¹⁸ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) paras 25-28.

determining market value and then adjusting that amount to fit the constitutional list.¹¹⁹

6 Conclusion

Since starting my doctorate seven years ago, the slow pace of land reform and the reluctance of the state to use its expropriation powers to acquire property only became more significant. If the aim is to transfer 30% of land by 2014 (in the land redistribution plan), something drastic must be done, and most indications are that the move must be away from government (only) employing the willing-buyer-willing-seller model. Confiscation of land (or Zimbabwe-style land grabbing) is not constitutionally permissible, but on the continuum between confiscation and contract there are various other options. One of them is expropriating property. This might in some instances be preferred to an open market transaction, such as where the owner seems to ask an unrealistically high price for the property.

The *Green Paper* is surprisingly quiet on the matter of compensation of expropriation, and thus offers little guidance as to how the state will calculate compensation for expropriations. It only mentions that the LVG will determine compensation, making it clear that it will be in line with the *Constitution* (and other legislation). This is worrisome, especially in light of the importance of compensation, should the government wish to abandon the willing-buyer-willing-seller model. What this paper argues is that there is no need for a radically new legal framework for expropriation, since the *Constitution* already provides such a framework.

The advent of constitutional democracy and the inclusion of a property clause in the Bill Rights should have brought a new dimension to South African property law. A

¹¹⁹ See also *Khumalo v Potgieter* 2000 2 All SA 456 (LCC), where the court had to determine what is just and equitable compensation for property expropriated under the *Land Reform (Land Tenants) Act* 3 of 1996. The court ruled that the determination of compensation is a two-stage process. Firstly, the court had to determine the market value of the property with established methods of valuation (read market value), where after the state must consider how market value should be adjusted according to the principles laid down in s 25(3).

result of negotiations, section 25 is characterised by a tension between the existing (mainly white) secure property rights and the need for transformation in order to secure or create property rights for those who have weak or non-existent (mainly black) property interests. Section 25(2) and (3) especially provides the state with the power to interfere with existing property rights by warranting expropriation if certain requirements are met. Read with section 25(4), the suggestion is that in the land reform context even greater government interference with existing private property rights are warranted in order to meet the transformative goals of the *Constitution*.

Market value still plays a central role in the calculation of compensation. Market value is the starting point of the calculation of compensation, where after the remaining factors in section 25(3) are utilised to adjust the compensation amount upwards or downwards. The problem with such an approach is that if the owner of expropriated property is always compensated at market value the aims of land reform, as instructed by section 25 of the *Constitution*, might be just too expensive to reach. The factors in section 25(3) seem to be specifically aimed at making land reform affordable. Thus, in order to adhere to both sides of section 25 of the *Constitution*, a new method of interpreting expropriation legislation needs to be considered, where the focus is on just and equitable compensation and not just on market value.

The bigger questions that remain unanswered are *when* "constitutional compensation" should be paid, and *how* it should be calculated. The *Constitution* is the supreme law of the land, and all legislation and administrative acts should be in accordance with the *Constitution*. Before the *Constitution*, compensation was paid because it was presumed that the state will not take away rights without compensation, unless clearly stated. The *Constitution* requires that the interests of the individual be weighed against the interests of the public, and this means that the focus shifted to the individual holding property rights in the context of society. Before the *Constitution*, compensation was deemed to be market value. Under the *Constitution*, compensation must be "just and equitable", an amount necessary to

alleviate the burden from the individual in proportion to the gain of the public, presumably also due to the balancing required.

Courts need to be aware of *what* they are protecting when they order the payment of compensation. Not only does this require placing the individual's right to property in a social context, but also that courts situate the compensation question in the broader historical context and applies a proportionality test to ensure fairness. This will shift the emphasis away from market value and enable a transformative approach to the interpretation of constitutional and statutory provisions on expropriation. An individual would not be required to unfairly shoulder the burden of expropriation, but society will likewise not be held accountable for compensation at full market value in the instances where it is not justified.

The pre-constitutional legal culture, still present in constitutional expropriation law, should change. The courts should ask themselves whether a pre-constitutional interpretation of the law they have to apply is still tenable in the new constitutional dispensation. Only if the courts grapple with this question can new, transformative expropriation law be developed through precedent. This may open a door to move away from the strict market-value centred and "scientific" legal culture of expropriation towards a transformative, constitutional and legal culture of expropriation. A new body of context- and history-sensitive case law, treating each case individually and situating it in its proper context, might ensue in time. This will also aid in the project of transformative constitutionalism to bring about "large-scale social change through non-violent political processes, grounded in law. If the courts do not start to develop such a new body of case law, we will be left with a compensation for expropriation legal culture, making the future of expropriation law "curiouser and curiouser".

This can be achieved either through the courts¹²⁰ re-interpreting expropriation legislation when they are called upon for adjudicating on expropriation matters, or

¹²⁰ Klare 1998 *SAJHR* 150.

by the legislature that should give clear guidelines on how "just and equitable" compensation should be paid. The *Green Paper* does not provide for this.

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List of abbreviations

BPLD	Butterworths Property Law Digest
ESTA	Extension of Security and Tenure Act
LVG	Land Valuer-General
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPA	South African Press Association
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg