COMPENSATION FOR EXPROPRIATION IN THE CURRENT CONSTITUTIONAL FRAMEWORK[1]

1 Section 25 of the Constitution within the broader framework

The Constitution declares itself the supreme law of the Republic,[2] calling for all law and conduct to be consistent with it, framing the conversations around compensation for expropriation. By declaring it supreme law, the Constitution established one system of law,[3] there to develop an "algorithm of post-apartheid South African law".[4] When the law is utilised to build such post-apartheid society, it requires that every change be approached tentatively, and it requires us to reflect when things don't go according to plan. We are at such a moment again, where we assess the failures of land reform and the role of the law, and more specifically section 25 and the complexity regarding compensation for expropriation.

Complex problems don't have simple solutions.

The central goal of the Constitution is to achieve certain constitutional goals. It asks from us "that property rights must reflect, and must be accountable to, the fundamental choices we have made in favour of living in a democracy characterised by dignity and equality".[5] The purpose of a property clause is to ensure that legislatures and administrators act within their constitutional powers when trying to attain these goals.[6] But a limited focus on section 25 in seeking to achieve these goals, without taking cognisance of the whole body of law and how this provision interacts with the whole body of law, might miss this crucial point: any promotion or limitation of right must be aimed at achieving the Constitutional goals.

Property rights are thus shaped by the demands of a democratic society – our democracy is the condition that guarantees our property rights. Burdens imposed on existing property rights (such as expropriation of property) to achieve a non-property constitutional goal (such as equality and human dignity), needs to comply with constitutional requirements, and statutory, common law and customary law.[7]

2 The legal framework of expropriation

2.1 Constitutional framework

Section 25 of the Constitution both protects holders of rights in property[8] (section 25(1) – (3)), and initiates reformist imperatives (section 25(5) – (8)). In the one-system-of-law view, the two parts don't stand opposite each other, but form part of the same Constitutional goal and should as such be read together.

Section 25(1) refers deprivation of property for regulatory purposes. A deprivation must take place in terms of a law of general application and no law may permit arbitrary deprivation. Deprivations do not require compensation. In the context of EWC, the *AgriSA* case[9] becomes important. The case dealt with the question whether certain deprivations, namely deprivations caused by a regime change in rights in certain resources, amounted to an expropriation. The Constitutional Court found that, on the

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[1] Prof Elmien du Plessis, Northwest University, Faculty of Law. This is a summary of an opinion presented to the Presidential Panel on Land Reform on 5 February 2019.
[2] Section 2.
[3] See below. This is based on *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) par 44.
[4] Van der Walt *Property and Constitution* 23-24.
[5] Van der Walt 2014 *JL Prop & Soc'y* 102. Section 7 of the Constitution confirms the democratic values of human dignity, equality and freedom, and places a duty on the State to promote this.
[6] Van der Walt 2014 *JL Prop & Soc'y*.
[7] Section 39(3) of the Constitution.
[8] In terms of the Constitution property has a fairly wide meaning. *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) par 51 stated that "judicially unwise to attempt a comprehensive definition of property for purposes of section 25".
Reflect-all 1025cc v MEC for Public Transport, Roads and works, Gauteng Provincial Government 2009 (6) SA 391 (CC) par 32 requires "property" to be understood in its specific historical land social framework.
[9] *Agri South Africa v Minister for Minerals and Energy*

specific facts in front of it, such a deprivation of property does not amount to a compensable expropriation, since the state does not acquire any property.

Section 25(2) allows for expropriation in terms of law of general application, for a public purpose or in the public interest,[10] and subject to compensation.[11] Compensation is paid for various reasons, where arguably the most important reason is that an individual land owner cannot be expected to bear the burden of an expropriation that is for the benefit of the whole public.

Section 25(3) that deals with compensation sets the compensation standard on "just and equitable", and it requires a balance between the person whose property is expropriated and the public interest. This balancing is central to the determination of compensation. All relevant circumstances must be considered, including but not limited to the factors listed in section 25(3)(a)-(e). Market value is listed as only one factor to be taken into account. In *Ex Parte Former Highlands Residents*,[12] Gildenhuys J formulated a two-step approach when calculating compensation: first determine the market value of the property (since it is easily quantifiable),[13] and then, based on the list in section 25(3), adjust the amount either upwards or downwards.[14] This placed market value at the centre of the compensation inquiry.

The *Harvey* case[15] ruled that compensation need not be determined at expropriation, and can be determined afterwards, if it is just and equitable to do so.[16]

The reformist imperatives in section 25(5) – (8) allow the state to infringe on existing property rights for reform purposes. The power to infringe on private property rights[17] developed from a specific historical context in South Africa. This historical context and the aim to redress should be kept in mind when interpreting the property clause, or where the state limits private property. The reformist imperatives stand alongside the protection of existing private property, and should be balanced.

Section 25(8) allows for deprivations, expropriations, and the determination of compensation, in the cases of land reform, and will warrant a more tolerant review because of the provisions in section 25(8). A deprivation, for instance, in terms of section 25(1) that might ordinarily be arbitrary, might be subject to lesser scrutiny, although it must still be reasonable and justifiable in terms of section 36(1). It still requires a balancing, as any infringement of a right in terms of the Constitution, will only be Constitutional if it complies with the limitation clause.

2.2 Legislative framework

When land is expropriated for land reform purposes, it requires a statute that authorises the expropriation (eg. Restitution of Land Rights Act[18] that usually also provides the purpose for the expropriation), it needs to be done in terms of an Act that sets the procedure and the method of calculation of compensation (currently still the Expropriation Act of 1975[19]) and remains subject to the Constitutional framework.

2.3 International law framework

Section 39 states that in the interpretation of section 25, international law must be taken into account.

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[10] And in terms of section 25(4), this includes the nation's commitment to land reform.
[11] Compensation is an integral part of expropriation as a legal instrument of acquiring land, and a requirement in terms of international law – see the main opinion.
[12] *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) pars 34 – 35.
[13] Budlender 1998 *Budlender G, Latsky J and Roux T Juta's New Land Law (Juta Cape Town 1998) Chapter* 1 – 60. See also the discussion on the Department's guidelines below.
[14] *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* pars 34 – 35.
[15] *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP).
[16] In terms of clause 17 (1) of the Expropriation Bill, the holder is entitled to payment of compensation "by no later than the date on which the right to possession passes". Clause 17 (3), however, makes it clear that a dispute about the payment of compensation will not prevent the passing of the right to possession.
[17] Within the bounds of sections 25(1) – (3).
[18] *Restitution of Land Rights Act* 22 of 1994.
[19] Soon to be replaced with the *Expropriation Bill* 2019. In this context, the Property Valuation Act 17 of 2014 is also important, although the interaction between the Expropriation legislation and the Property Valuation legislation is not set out in the legislation itself.

International law is fairly clear on the requirement that compensation must be paid at expropriation (unless it is aimed at nationalising a resource). Compensation need not be market value, but must be "appropriate". A full discussion of international law can be found in the main opinion at 3.2.

2.4 Foreign law

When interpreting section 25, foreign law *may* be taken into account. In terms of 3.3 of the main opinion, it was indicated that some jurisdictions allow for compensation to be less than market value, especially during times of social and economic changes, but does not provide for no compensation (unless, in limited circumstances, when it was followed by nationalisation).

3 Implications in the current EWC conversation

From this short summary, just the following remarks:

1. International law does not allow expropriation of property without the payment of compensation on a large scale.
2. Some commentators[20] are of the opinion that the *AgriSA* case will allow the state to enact redistribution legislation that will enable the transfer of land from one private beneficiary to another, and since the State is not acquiring land, this will not be an expropriation that requires compensation. As set out in paragraph 2.2.4.1 of my main opinion, this is an over-simplification of the legal position. The *AgriSA* case is an example of a regime change, where a scarce resource was taken from the realm of private property, into the realm of state regulation of the resource. It therefore precluded *anyone* from being the private owner of a mineral right. Such a regime change might be constitutionally permissible, but only in limited circumstances. Legislation that is promulgated to effect such a regime change of a particular resource, must therefore delineate the rights appropriately, must have a legitimate aim in line with the Constitution, cannot conflict with the rules of natural justice or just administrative action and must provide for the payment of compensation (or financial loss), in the instances where such a regime change affects an individual harshly.
3. Section 25(3) requires a balancing of rights. It is also in this context that the argument can be made that such a balancing of rights might in very limited circumstances justify nul or nominal compensation. In the main opinion I make the argument that the compensation inquiry should be distinguished from the determination of value. Section 25(3)(c) focusses on value, as does the Property Valuation Act. The compensation principle in section 25(3) is "just and equitable", and this can differ from value in certain circumstances. It is my suggestion that the discretion to determine "compensation" should be limited to the Minister and the courts, who must base their discretion on certain facts placed of them.
4. Such questions of justice and equity are contextual questions, it will be difficult to argue for a policy or legislative intervention that lays down hard and fast rules for the determination of "just and equitable" compensation. The legislature can, by inserting an interpretation clause in the Expropriation Bill, for instance, give guidance to the decision-makers what they have to consider when determining compensation. Since the inquiry is contextual, it is best left for a judicial tribunal like a court, to, based on concrete facts before it to crystallise guidelines as to what is just and equitable. This will in turn guide other decision-makers.
5. As discussed in the main opinion at 2.3.2, there are situations where the state can invoke section 25(8) for reform purposes, in order to limit the payment of compensation in section 25(2). The government will have to show that the payment of compensation will impede land reform. This limitation will be subject to section 36(1) of the Constitution its proportionality analysis.
6. I am of the opinion that the Constitution does not stand in the way in implementing land reform. In my opinion there is no legal reason for an amendment. I am, however, mindful of the political necessity for an amendment to "make explicit that which is implicit" as explained above. In case of an amendment, these are my suggestions:
    a. Section 25 (8) No provision of this section, <u>nor compensation</u>, may impede the state […]; or

[20] See the opinion of Wim Tengrove, made to the Ad Hoc Committee for the amendment of section 25, 8 March 2019, and a draft paper by Tembeka Ngcukaitobi & Michael Bishop entitled "The Constitutionality of Expropriation Without Compensation" Presented at the Constitutional Court Review IX Conference held on 2-3 August 2018 at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg.

b. Section 25(2)(b) to read […] subject to compensation <u>which may be nil compensation</u>, 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; or
c. Section 25(4), generally regarded as the "interpretation clause" for section 25, can make it clear that "just and equitable" can also amount to R0.

7. For any proposed amendment to be Constitutional, it cannot interfere with the proportionality principle. This principle will be applicable in terms of administrative law and section 36(1) in any case, it can lead to interpretative conundrums. The possible argument that proportionality is integral to the rule of law, and therefore a founding provision of the Constitution that requires a 75% majority to amend, should also be taken into account.