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Towards a Clearer Understanding of the Difference between the Obligation to Pay Compensation and the Validity Requirements for an Expropriation

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Abstract

The motion of the National Assembly to review section 25 of the 1996 Constitution to permit expropriation of land without compensation has fuelled the debate regarding the role that expropriation and compensation plays in reaching land reform targets. The fact that the Constitution requires just and equitable compensation is viewed by some as a central obstacle in reaching land reform targets. This article sets out to distinguish between the validity requirements for an expropriation and the obligation on the part of the state to pay compensation. It is argued that compensation does not justify an expropriation. Therefore, an owner is not able to unduly delay an expropriation simply because he or she is not satisfied with the amount of compensation that is offered. Having a clearer understanding of the difference between the validity requirements for an expropriation on the one hand, and the obligation to pay compensation on the other, may placate the idea that land reform processes, such as awarding land to labour tenants in terms of the redistribution programme, is being held up as a result of the dispute surrounding the amount of compensation payable. This understanding may motivate the state to use its power to expropriate and finalise the expropriation process even in cases where the amount of compensation is disputed, provided that it is reasonable to determine compensation at a later stage. In this regard, the obligation to pay compensation will potentially no longer be viewed as an obstacle in reaching land reform targets.

Keywords: expropriation; compensation; land reform

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1 INTRODUCTION

On 27 February 2018, the National Assembly adopted a motion establishing an *ad hoc* committee to review section 25 of the Constitution of the Republic of South Africa, 1996, (and also other sections if deemed necessary) to allow for expropriation of land in the public interest without compensation.[1] The motion was originally proposed by the Economic Freedom Fighters (EFF), and is based on a number of considerations, some of which cannot be disputed. Amongst these are the dispossession of land from black people and the skewed landownership patterns that persist as a result of this dispossession, the fact that the "current land reform programme has been fraught with difficulties since its inception in 1994, and that the pace of land reform has been slow with only 8% of the land transferred to black people since 1994."[2] The EFF placed section 25 at the centre of the state's inability to resolve the land issue in that it protects private property rights and obliges the state to pay compensation when it expropriates land for a public purpose or in the public interest.[3]

The EFF's motion thus identified section 25 as *the* obstacle preventing effective land reform, especially in so far as it protects private property rights (against arbitrary deprivation in section 25(1) and expropriation not sanctioned by section 25(2)), and obliges the state to pay compensation when it expropriates property (section 25(2) and (3)). The EFF's motion therefore called for the establishment of an *ad hoc* committee to review *and* amend section 25 of the Constitution to enable the state to expropriate land in the public interest without compensation.[4]

The African National Congress (ANC) proposed several changes to the EFF's motion. The ANC's motion did not place section 25 alone at the centre of the state's inability to achieve its land reform targets. The ANC's proposed amendment to the EFF's motion instead "[r]ecognises that the current policy instruments, including the willing buyer willing seller policy, and other provisions of section 25 of the Constitution may be hindering effective land reform."[5] The reference to the willing-buyer-willing-seller policy is likely a reference to the government's policy with regard to purchasing land for land reform purposes,[6] as opposed to using its power of expropriation to acquire the property. The ANC's motion therefore did away with the EFF's notion that the obligation to pay compensation for an expropriation stands "at the centre of the present crises."[7] Regardless of the difference in wording between the original motion of the EFF and the amendments proposed by the ANC, the National Assembly ultimately adopted a motion that seeks to review section 25 of the Constitution (and other clauses) to permit the expropriation of land in the public interest without compensation.

The National Assembly's motion brings a number of issues to the fore. Various commentators have commented on the adopted motion, both in opinion pieces in the popular press[8] and in submissions to the constitutional review committee.[9] It is impossible to deal with all of the

1 National Assembly of the Republic of South Africa *Minutes of Proceedings* 27 February 2018.
2 National Assembly of the Republic of South Africa *Minutes of Proceedings* 27 February 2018 para 4 on page 8.
3 National Assembly of the Republic of South Africa *Minutes of Proceedings* 27 February 2018 para 6 on page 8.
4 In the motion that was ultimately accepted after the ANC made some substantive changes, the instruction to "amend" s 25 was deleted, as any amendment that would be proposed by the *ad hoc* committee has to be accepted by a two-thirds majority of the National Assembly and 6 out of the 9 provincial delegations in terms of s 74 of the 1996 Constitution.
5 The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (2017) 206, stresses that the willing-buyer-willing-seller principle is not a constitutional requirement for the expropriation of property.
6 See Du Plessis "Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform" 2014 *PELJ* 800–803.
7 National Assembly of the Republic of South Africa *Minutes of Proceedings* 27 February 2018 para 6 of EFF motion on page 8, amended by ANC in para 1 of page 9.
8 See for instance Du Plessis "Expropriation without Compensation: This is the Legal Framework" https://www.huffingtonpost.co.za/elmien-du-plessis/expropriation-without-compensation-this-is-the-legal-framework_a_23371947/ (accessed 8-11-2018); Pienaar "Onteiening sonder Vergoeding: Voorvereiste vir Suksesvolle Grondhervorming of Populisme?" https://www.litnet.co.za/onteiening-sonder-vergoeding-voorvereiste-vir-suksesvolle-grondhervorming-populisme/ (accessed 8-11-2018).
9 See for instance the submissions to the Constitutional Review Committee of Slade, Pienaar, Boggenpoel and Kotze https://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=5922 (accessed 8-11-2018) and Hall and Cousins http://www.plaas.org.za/news/plaas-submission-constitutional-review-committee-review-section-25-

issues regarding the motion as highlighted by the various commentators in this article. Instead, the article considers the link between the validity requirements of an expropriation and the obligation to pay compensation, and how misconceptions about this link may negatively impact on expropriating land for land reform purposes. Some may assume that the obligation to pay compensation stands in the way of accelerating expropriation of land for land reform purposes, thereby supporting the call to amend the Constitution to permit expropriation without compensation.

From a theoretical view point there seems to be a misconception about the role of compensation and its relation to the validity requirements of an expropriation. It seems as if an owner can delay an expropriation process purely by disputing the amount of compensation that is offered by the state. If the owner disputes the amount offered by the state as compensation (because it is below market value) and institutes court proceedings, it appears that the expropriation process is brought to a halt. In this regard, the property is not transferred from the owner to the state or the new beneficiaries, pending the finalisation of the compensation claim. This plays into the perception that land reform processes, such as awarding land to labour tenants in terms of the redistribution programme, is being held up due to court proceedings. An example of this occurrence is the matter of *Msiza v Uys*.[10] The Land Claims Court approved the award of land to labour tenants in terms of the Land Reform (Labour Tenants) Act[11] on 16 November 2004.[12] It was, however, only in late September 2017 that the Supreme Court of Appeal ruled on the amount of compensation payable to the owner.[13] In the Supreme Court of Appeal, the owners objected to the compensation awarded by the Land Claims Court in 2016.[14] The delay in settling the compensation claim meant that the labour tenants have still not taken transfer of the land awarded to them 13 years earlier. The lengthy court procedures, which potentially delays land reform, naturally frustrate both the state and the beneficiaries. Viewed in this light, the obligation to pay compensation (and agreeing on the amount of compensation), which is the cause of the delay, can justifiably be regarded as *the* major obstacle for effectively implementing land reform.

However, the obligation to pay compensation should not stand in the way of expropriating property and transferring it to the intended beneficiaries. A proper understanding of the difference between the validity requirements for an expropriation and the effects of complying with those requirements on the one hand, and the obligation to pay compensation on the other, may rectify the erroneous perception that land reform is being held up by compensation claims. In this article it is argued that a clear distinction between the validity requirements for an expropriation and the obligation to pay compensation can possibly deflate some of the arguments raised in support of expropriating property without compensation.

Before proceeding to the discussion on the obligation to pay compensation, the validity requirements for an expropriation as well as the compensation provisions, a few general observations regarding the state's power of expropriation will suffice. First, the state's power to expropriate should be used as a last resort. It is possible to argue that an expropriation is not justifiable if there are alternative means available to the state to achieve the acquired outcome.[15] As such, the power of expropriation should only be used in cases where there is no alternative means of realising the public purpose and the owner is unwilling to part with the property, thereby preventing an important purpose from being realised. Second, in the broader land reform programme in the South African context, expropriation has a limited role to play. For instance, in the context of unlocking access to land and redistribution, expropriation is but one of the means through which it can be achieved.[16] Although legislation providing for land tenure reform provides for the expropriation of land for reform purposes, expropriation is in fact rarely utilised for these purposes.

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constitution (accessed 8-11-2018).

10 (LCC39/01) [2004] ZALCC 21 (16 November 2014).

11 3 of 1996.

12 *Msiza v Uys* (LCC39/01) [2004] ZALCC 21 (16 November 2004).

13 *Uys NO v Msiza* 2018 3 SA 440 (SCA).

14 *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC).

15 See generally Slade "The Less Invasive Means Argument in Expropriation Law" 2013 *TSAR* 199–216.

16 In this regard, Pienaar *Land Reform* (2014) 360-371 identifies additional measures for purposes of broader redistribution, namely right of first refusal, regulating land holdings, effective tax measures, and proactive and concentrated land purchasing.

2 THE OBLIGATION TO PAY COMPENSATION

Section 25(2) of the 1996 Constitution permits the state to expropriate property if it is authorised by law of general application, and if it serves a public purpose or is in the public interest. Section 25(2) further states that expropriation is subject to compensation, while section 25(3) sets out the amount, time and manner of payment. Section 25(2) therefore recognises the link between the expropriation of property for public purposes and the payment of compensation. This position is also confirmed in the pre-constitutional Expropriation Act 63 of 1975, which still governs the process of expropriation in South African law. Section 2 of the Act stipulates that the minister of public works "may, *subject* to an obligation to pay compensation, expropriate any property for public purposes."[17]

In terms of the constitutional framework and the legislative scheme, it is clear that an expropriation must take place for a public purpose or in the public interest, and that compensation must be paid. This position was also re-iterated by the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy*.[18] In discussing the difference between deprivation of property in section 25(1) and expropriation of property in section 25(2), the Court remarked that "expropriation entails state acquisition of that property in the public interest and must *always* be accompanied by compensation."[19]

It is therefore clear that there is currently an obligation on the state to compensate an owner for expropriating her property, since she has to sacrifice her property for the public good. What is disputed generally though, is the amount of compensation that must be paid for an expropriation. In the South African context, section 25(3) dictates that the standard of compensation is just and equitable, reflecting an appropriate balance between the individual interest of the owner and the public interest, taking into account various factors. Various commentators have commented on the calculation of compensation under the Constitution.[20]

Regarding the determination of the compensation, section 25(3) of the Constitution dictates that the compensation must either be agreed to by the parties concerned, or decided or approved by a court. It is unlikely that parties will agree to compensation below market value as owners tend to insist on the highest amount possible.[21] Furthermore, if litigation ensues concerning the amount of compensation, courts tend to award compensation that is close, or equal, to market value.[22] The state has thus far been prone to either offer market value in a sale contract for the property concerned,[23] or in the case of expropriation, offered market value compensation. This approach might have led to the state's reluctance to utilise its power of expropriation, which is mandated by the Constitution and in legislation for purposes such as land reform. And even in cases where the state did expropriate property, it paid market value compensation; either because of the agreement that was reached, or because of the courts' approach towards compensation.

17 Own emphasis. See discussion below at 4 for a brief explanation regarding the changes in the Expropriation Bill, 2019 as relevant to the obligation on the state to pay compensation.

18 2013 4 SA 1 (CC).

19 Paragraph 48. Own emphasis.

20 See for instance Van der Walt *Constitutional Property Law* 3 ed (2011) 503–520; Van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" 2005 *SALJ* 765–778; Du Plessis "Valuation in the Constitutional Era" 2015 *PELJ* 1726–1759; Du Plessis 2014 *PELJ* 798–830; Du Plessis *Compensation for Expropriation under the Constitution* (LLD-thesis, Stellenbosch University, 2009).

21 See for instance the owners' insistence on market value compensation in *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) and *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).

22 See for instance, the award of market value compensation in *Uys NO v Msiza* 2018 3 SA 440 (SCA).

23 For instance, after the unsettled dispute regarding the correct amount of compensation in *Mhlanganisweni*, the minister of land reform agreed to purchase the land in question from the owners at market value. See Joubert and Hofstatter "Government to Pay R1 Billion for Mala Mala Game Reserve" https://www.timeslive.co.za/politics/2013-08-04-government-to-pay-r1-billion-for-mala-mala-game-reserve/ (accessed 8-11-2018); Hall and Cousins "Submission to the Constitutional Review Committee" para 10.

The obligation to compensate an owner for the expropriation of his property may, however, lead to the erroneous perception that in South African law, the validity of an expropriation depends on the payment of compensation. If such validity depends on compensating the owner, the latter would be able to prevent an expropriation because the compensation is not what the owner regards as just and equitable. Even though there is a strong link between expropriation and compensation, the validity requirements for expropriation should be carefully distinguished from the obligation to pay compensation, both in theoretical and in practical terms. Understanding this nuanced difference between the authority and validity of an expropriation on the one hand, and the manner and process by which compensation is calculated and paid on the other, may have important implications for the expropriation of land in the land reform context.

3 VALIDITY REQUIREMENTS FOR (FORMAL) EXPROPRIATIONS

Before turning to the constitutional requirements for an expropriation in terms of section 25(2), it is necessary to briefly place this subsection within its broader context. Section 25 contains 9 subsections, divided into two main parts. The first part, section 25(1) to (3), protects existing property interests. Both section 25(1) and (2) requires an interference with existing property interests to be authorised by a law of general application. Section 25(1) prohibits the arbitrary deprivation of property. Section 25(2) renders an expropriation of property that is not for a public purpose or in the public interest invalid. It also requires that just and equitable compensation must be paid for such an expropriation.

The second part of section 25, namely section 25(5) to (9), provides for land and other related reforms. Section 25(5) provides for land redistribution, section 25(6) for land tenure reform, and section 25(7) for land restitution. With regard to land tenure reform, section 25(9) obliges parliament to enact legislation to give effect to the right to security of tenure. To ensure that the protective provisions in section 25(1) to (3) do not prevent reform from taking place, 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." There is therefore a (natural) tension between the protective and the reformist parts of section 25.[24] It has been argued that the tension between the contradictory parts of section 25 should be resolved by interpreting a relevant provision in section 25 with reference to section 25 as a whole, and taking into account the historical as well as constitutional context.[25]

One of the contentious issues with regard to the first part of section 25, namely section 25(1) to (3), is the distinction between deprivation of property in section 25(1) and expropriation of property in section 25(2). In terms of the property clause, section 28, in the Interim Constitution,[26] the Constitutional Court in *Harksen v Lane NO*[27] seemingly treated deprivation and expropriation as two distinct and separate concepts.[28] At one point, the Court stated that "[t]he distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law."[29]

The categorical approach adopted by the Constitutional Court in *Harksen v Lane* was, however, not followed in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[30] (*FNB*), a decision dealing with section 25 of the 1996 Constitution. In *FNB*, the Court stated that deprivation is a wider category of interference, one that also includes expropriation.

24 See Du Plessis 2014 *PELJ* 807–808.
25 See Van der Walt *Constitutional Property Law* 16; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14–23.
26 Act 200 of 1993.
27 1998 1 SA 300 (CC)
28 See Van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" 2004 *SALJ* 854–878 862.
29 *Harksen v Lane NO* 1998 1 SA 300 (CC) para 33.
30 2002 4 SA 768 (CC)

Therefore, all expropriations are deprivations, although not all deprivations rise to the level of expropriation. As a result, the Court set out a series of questions to approach section 25, which places section 25(1) at the start. In this regard, the starting point of any dispute involving the limitation or interference with property must start at section 25(1), which prohibits the arbitrary deprivation of property. Numerous decisions post-*FNB*, have adopted the *FNB* approach.[31] However, from case law there appears to be an exception to the *FNB* guideline of starting every dispute involving the interference with property in whatever format with section 25(1). In cases where property is expropriated through a formal expropriation procedure, the court customarily ignores the *FNB* methodology and proceed directly to consider whether the expropriation complies with the requirements set out in section 25(2) of the Constitution.[32] Ignoring the *FNB* methodology in cases where a formal expropriation has occurred, cannot be faulted. A formal expropriation in this case would be where an administrator, empowered by legislation, serves an expropriation notice on the owner indicating the purpose of the expropriation, the date of the expropriation and (possibly also) the compensation offered in terms of the Expropriation Act.[33] Dugard and Seme are therefore correct in their assessment that there is a textual separation between deprivation in section 25(1) and expropriation in section 25(2), and although expropriation is a subset of deprivation, "expropriation is a distinct sub-set of deprivation requiring a separate investigation."[34] Accordingly, in cases where the state formally expropriates property for land reform purposes, section 25(1) does not come into play. The only requirements that must be satisfied for establishing the legitimacy of the expropriation are found in section 25(2).

Section 25(2) requires an expropriation to take place only in terms of law of general application, it must be for a public purpose or in the public interest, and is subject to compensation. It is argued that state functionaries must be empowered by legislation to expropriate property for public purposes.[35] Various pieces of legislation award various state functionaries the power to expropriate property for various purposes.[36] Apart from awarding the power to expropriate, the Expropriation Act also sets out the procedure that must be adopted when an expropriation takes place. Although the Expropriation Act is a pre-1994 statute and not fully compliant with the Constitution, it remains the primary piece of legislation that sets out the procedure to be followed when an expropriation is effected. The decision to expropriate property is also an administrative decision.[37] The rules of administrative justice, particularly procedural fairness, therefore apply to the decision to expropriate property, which includes providing reasons for the decision to expropriate as well as providing an opportunity for the owner to be heard before a final decision is made.[38]

31 See for instance *Haffejee NO v eThekwini Municipality* 2011 6 SA 134 (CC); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2016 6 SA 125 (CC).

32 The Constitutional Court decisions in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (where the majority considered whether expropriation occurred after it was accepted by the parties that the interference with their property constituted a non-arbitrary deprivation of property that rose to the level of expropriation) and *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 584 (CC) (where the Court incorrectly considered whether compensation for expropriation is payable for development contributions) are exceptions to this general rule established by the Court in *FNB*.

33 63 of 1975. See LAWSA X *Expropriation* paras 28–35 for a description of the expropriation procedure in terms of the Expropriation Act 63 of 1975.

34 Dugard and Seme "Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing act re Restitution and Expropriation' 2018 *SAJHR* 43–44.

35 Although Gildenhuys *Onteieningsreg* 2 ed (2001) 93, argues that there is common law authority for expropriation, that position is not accepted by other authors, like Van der Walt *Constitutional Property Law* 453 and Slade "The 'Law of General Application' Requirement in Expropriation Law and the Impact of the Expropriation Bill of 2015" 2017 *De Jure* 346–362.

36 See for instance the South African National Roads Agency Limited and National Roads Act 7 of 1998 that authorises the minister of transport to expropriate property for the construction of national roads.

37 *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 12.

38 See generally Gildenhuys *Onteieningsreg* 77–85. See also Slade and Walsh "The Marginality of Property in Expropriation Law: A Comparative Assessment" in Muller et al (eds) *Festschrift in Honour of Prof AJ van der Walt* 21–50.

Once a decision to expropriate property for a public purpose or in the public interest has been made, the expropriating authority must serve an expropriation notice on the affected owner. This notice must indicate the property to be expropriated as well as the date of expropriation.[39] Even though the expropriating authority is not obliged to indicate the amount of compensation offered, the owner's attention must be drawn to section 9(1) of the Expropriation Act, which requires the owner (in the absence of a compensation offer by the state) to indicate the amount of compensation requested within 60 days after receiving the notice. It is clear that the expropriation notice, which embodies the expropriating authority's decision to expropriate, does not need to contain an offer for compensation. The fact that compensation is not offered in the expropriation notice, does not detract from the validity of the expropriation, provided that the expropriation is for a valid public purpose and complies with the procedural fairness requirement.

As much was confirmed by the high court in *Harvey v Umhlatuze Municipality*.[40] In *Harvey*, the court agued as follow:

> Whilst both these prerequisites [public purpose/public interest and compensation] are sacrosanct for an expropriation under the Act, the justification for the expropriation lies, not in the payment of compensation, but in the purpose for which the property is expropriated. In other words, the payment of compensation by itself cannot justify an expropriation. It is merely the result of an expropriation which is directed at a particular purpose.[41]

In this case, the court specifically emphasised that the public purpose or public interest served by the expropriation justifies the taking of private property against the will of the owner. The state is therefore not absolved from realising the public purpose for which it originally expropriated the property on the mere fact that it paid compensation to the owner.[42] The matter is of course entirely different when the state concludes a sale contract with the owner to purchase the property. In that case, the state did not acquire the property against the will of the owner, and the state is not held to the same level of account for realising a specific purpose as with the expropriation of property.

Another decision supporting the claim that the payment of compensation is not a validity requirement for an expropriation is *eThekwini Municipality v Haffejee NO; Haffejee v eThekwini*.[43] In this case the applicants argued that the determination of compensation is a prerequisite for the validity of an expropriation. The applicants' property was expropriated for purposes of a bigger canalisation project. The notice of expropriation was served on the applicants without an offer of compensation. One of the arguments of the applicants was that the determination of compensation, or the agreement on compensation, must occur before an expropriation can be considered valid in terms of section 25(2) of the Constitution. In this regard, the applicants argued that the relevant provisions in the Expropriation Act that provide otherwise are in conflict with the Constitution and are invalid.

The high court held that prior determination of compensation (either through agreement or by court order) "is not an express requirement of s 25 of the Constitution."[44] Once there is a decision to expropriate, the provisions in the Expropriation Act set out the process by which to finalise that process, which includes finalising the amount of compensation that is to be paid. The high court reasoned that regarding the agreement on compensation as a requirement before an expropriation is considered valid would be contrary to the state's power in section 25 to expropriate in "an expeditious manner"[45] as it "would create an opportunity for obstructive owners to frustrate legitimate government purposes."[46] This would run contrary to the purpose of expropriation, which, as an original form of acquisition of ownership, occurs against the wishes of an owner. Accordingly, the high court expressly held that "[a] prior agreement or decision in respect of the amount and time and manner of payment of compensation is not an

39 Section 7 of the Expropriation Act.
40 2011 1 SA 601 (KZP).
41 Paragraph 82.
42 See Van der Walt and Slade "Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)" 2012 *SALJ* 219–235; Du Plessis "Restitution of Expropriated Property upon Non-realisation of the Public Purpose" 2011 *TSAR* 579–592.
43 2010 6 BCLR 578 (KZD).
44 Paragraph 23.
45 Paragraph 24.
46 Paragraph 24.

express requirement of section 25 of the Constitution."[47] The Court therefore dismissed the applicant's claim that various provisions of the Expropriation Act are constitutionally invalid because it does not regard the "pre-determination of compensation … [as] a jurisdictional prerequisite for a valid expropriation."[48]

On appeal, the Constitutional Court[49] confirmed that it is not always necessary to determine compensation before an expropriation takes place. The Court had regard to section 25(3), which requires the amount of compensation, as well as the "time and manner of payment" to be just and equitable. According to the Court, it may be just and equitable to determine the compensation before expropriation occurs, especially in cases where the expropriation may affect some socio-economic rights such as impacting the prohibition against arbitrary evictions. However, in other cases, requiring compensation to be determined before expropriation will not be just and equitable as such a prior determination may delay an expropriation, and consequently violate certain socio-economic rights, for instance in a case where land is urgently required for emergency housing purposes as a result of natural disasters.[50] In that case, prior determination of compensation may place a disproportionate burden on the state in realising its constitutional objectives. The Court did, however, emphasise that if compensation is not determined or agreed upon before the expropriation, such determination must take place as soon thereafter as reasonably possible.[51]

The Court therefore held that one must establish in each particular case whether it would be just and equitable to determine compensation before or after an expropriation takes effect. The determination of the amount of compensation as well as the time of payment must be just and equitable. This interpretation, however, does not detract from the general arguments advanced by the high court in *Harvey* and *Haffejee*, namely that compensation does not justify an expropriation. An expropriation undertaken on the basis of legislation, for a public purpose or in the public interest, would be valid, even if there is no agreement regarding the amount of compensation, provided that it is just and equitable to determine compensation later.

The implication of this understanding of the law of expropriation is that an owner will be able to object to an ensuing expropriation on the following grounds. First, the owner can argue that the relevant authority is not empowered by legislation to expropriate property. Second, the owner can argue that the procedure adopted does not comply with the right to just administrative action or conflicts with the procedure set out in the Expropriation Act. Third, the owner can argue that the expropriation is invalid on the basis that it is not undertaken for a public purpose or is not in the public interest. If the owner was unable to object to an expropriation on these terms, the expropriation is valid. The expropriating authority can therefore proceed with the expropriation against the will of an owner, as the validity requirements for the expropriation have been met. If the owner is not satisfied with the compensation offered, the owner can object to the relevant authority or institute court proceedings. If the owner institutes court proceedings, the court will rule, as empowered by section 25(3), on whether the compensation offered by the state is just and equitable. In this regard, it is important to emphasise that the dissatisfaction on the part of the owner with the amount of compensation offered, as well as the court's ruling on the amount of compensation, does not detract from the legitimacy of the expropriation itself, and should not prevent the expropriating authority from continuing with the expropriation procedure. In the land reform context, this would mean that once it has been determined that the expropriation is authorised by legislation, that it is for a public purpose or in the public interest and that the proper procedure was followed, the expropriation process, which entails transfer of the property to other beneficiaries, should be finalised, regardless of any argument concerning the amount of compensation that is still to be settled by the courts. However, finalisation of the expropriation procedure would, in cases where either no agreement has been reached by the parties or the courts have not yet ruled on the amount of compensation, be lawful if it is just and equitable in the circumstance as noted in *Haffejee*, to determine compensation at a later stage.

47 Paragraph 23.
48 Paragraph 21.
49 *Haffejee NO v eThekwini Municipality* 2011 6 SA 134 (CC).
50 In this case, the land can be temporarily expropriated in terms of ss 2 or 5 of the Expropriation Act 63 of 1975.
51 *Haffejee* para 43.

4 CONCLUSION

The motion of the National Assembly to review the relevant provisions in the 1996 Constitution to permit the expropriation of land without compensation has opened up debate about the role of compensation in the expropriation process. Although compensation naturally follows the expropriation of property, it is important to clearly understand the role that compensation plays. Based on an analysis of case law, it was shown above that an expropriation is justified if it serves a public purpose or if it is in the public interest. Furthermore, an expropriation will be deemed valid if duly authorised in legislation, and if all the procedural requirements have been complied with. The obligation to pay compensation exists to make good the sacrifice that the expropriated owner had to make for the greater public good, but it does not justify an expropriation. It is therefore a consequence of a valid expropriation; a "result of an expropriation which is directed at a particular purpose."[52]

Understanding the clear distinction between the validity requirements for an expropriation on the one hand, and the obligation to pay compensation on the other can potentially deflate the notion that compensation stands in the way of expropriation, particularly for land reform purposes. Since the payment of compensation is a necessary consequence of expropriation but not a validity requirement, the state should proceed with an expropriation as long as it is prepared to pay just and equitable compensation. It should not be overly cautious to expropriate merely because the owner may object to the amount of compensation. However, legislation is required to assist expropriating authorities and judges in calculating or determining just and equitable compensation. Unfortunately, the latest Expropriation Bill of 2019 does not go any further in clarifying how compensation for expropriation should be calculated. The only novelty in the Bill is the clause providing for nil compensation in certain clearly defined instances.[53] What is required, is detailed legislation that clearly sets out how compensation should be calculated. By clearly setting out how compensation should be calculated, disagreements between the state and property owners regarding the amount of compensation may decrease. Arguments surrounding compensation would potentially no longer unnecessarily delay finalisation of the expropriation process. In this regard, the argument that compensation is an obstacle in reaching transformative goals, may disappear.

52 *Harvey* para 82.
53 See cl 12(3).