

# **The Justification of Expropriation for Economic Development**

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## DECLARATION

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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## SUMMARY

Section 25(2) of the 1996 Constitution states that property may only be expropriated for a public purpose or in the public interest and compensation must be paid. This dissertation analyses the public purpose and public interest requirement in light of recent court decisions, especially with regard to third party transfer of expropriated property for economic development purposes.

The public purpose requirement is explained in terms of pre-constitutional case law to create a context in which to understand the public purpose and public interest in terms of the 1996 Constitution. This leads to a discussion of whether third party transfers for economic development purposes are generally for a public purpose or in the public interest. The legitimacy of the purpose of both the expropriation and the transfer of property to third parties in order to realise the purpose is considered. Conclusions from a discussion of foreign case law dealing with the same question are used to analyse the South African cases where third party transfers for economic development have been addressed. Based on the overview of foreign case law and the critical analysis of South African cases, the dissertation sets out guidelines that should be taken into account when this question comes up again in future.

The dissertation also considers whether an expropriation can be set aside if alternative means, other than expropriating the property, are available that would also promote the purpose for which the property was expropriated. Recent decisions suggest that alternative and less invasive measures are irrelevant when the expropriation is clearly for a public purpose. However, the dissertation argues that less invasive means should be considered in cases where it is not immediately clear that the expropriation is for a valid public purpose or in the public interest, such as in the case of a third party transfer for economic development.

The role of the public purpose post-expropriation is considered with reference to purposes that are not realised or are abandoned and subsequently changed. In this regard the dissertation considers whether the state is allowed to change the purpose for which the property was expropriated, and also under which circumstances the previous owner would be entitled to reclaim the expropriated property when the public purpose that justifies the expropriation falls away. It is contended that the purpose can be changed, but that the new purpose must also comply with the constitutional requirements.

## OPSOMMING

Artikel 25(2) van die Grondwet van 1996 vereis dat 'n onteining slegs vir 'n openbare doel of in die openbare belang mag plaasvind, en dat vergoeding betaalbaar is. In die proefskrif word die openbare doel en openbare belang geanaliseer in die lig van onlangse regspraak wat veral verband hou met die onteining van grond wat oorgedra word aan derde partye vir doeleindes van ekonomiese ontwikkeling.

Die openbare doel vereiste word geanaliseer in die lig van respraak voor die aanvang van die grondwetlike bedeling om beide die openbare doel en openbare belang in terme van die Grondwet van 1996 te verstaan. Op grond van hierdie bespreking word die vraag ondersoek of die onteining van grond vir ekonomiese ontwikkeling en die oordrag daarvan aan derde partye vir 'n openbare doel of in die openbare belang is. Gevolgtrekkings uit 'n oorsig van buitelandse respraak waarin dieselfde vraag reeds behandel is dien as maatstaf vir die Suid-Afrikaanse regspraak oor die vraag te evalueer. Op grond van die kritiese analise van die buitelandse regspraak word sekere aanbevelings gemaak wat in ag geneem behoort te word indien so 'n vraag weer na vore kom.

Die vraag of 'n onteining ter syde gestel kan word omdat daar 'n alternatiewe, minder ingrypende manier is om die openbare doel te bereik word ook in die proefskrif aangespreek. In onlangse regspraak word aangedui dat die beskikbaarheid van ander, minder ingrypende maniere irrelevant is as die onteining vir 'n openbare doel of in die openbare belang geskied. Daar word hier aangevoer dat die beskikbaarheid van alternatiewe metodes in ag geneem behoort te word in gevalle waar dit onduidelik is of die onteining vir 'n openbare doel of in die openbare belang geskied, soos in die geval van oordrag van grond aan derde partye vir ekonomiese ontwikkelingsdoeleindes.

Ter aansluiting by die vraag of die onteining van grond vir oordrag aan derdes vir ekonomiese ontwikkeling geldig is, word die funksie van die openbare doel na onteining ook ondersoek. Die vraag is of die staat geregtig is om die doel waarvoor die eiendom onteien is na afloop van die onteining te verander. Die vraag in watter gevalle die vorige eienaar van die grond teruggawe van die grond kan eis word ook aangespreek. Daar word aangevoer dat die staat die doel waarvoor die eiendom benut word kan verander, maar dat die nuwe doel ook moet voldoen aan die grondwetlike vereistes.

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## DEDICATION

This dissertation is dedicated to my parents, Frank and Virginia Slade;  
my soon-to-be-wife Samantha;  
and above all, to my dear friend and mentor, Father Jan van Belkum

‘Glory be to the Father, and to the Son, and to the Holy Spirit. As it was in the beginning, is  
now, and ever shall be, world without end’

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# CHAPTER 1: INTRODUCTION

## 1 1 Background to the Research Problem

In the recent decision of *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>1</sup> (*Bartsch*) the municipality expropriated the applicant's land for the purpose of constructing a road and doing all things necessary in connection with constructing the road as indicated in the expropriation notice. The applicant argued that the expropriation of his property was not for a public purpose as required by section 2 of the Expropriation Act 63 of 1975 because the municipality intended to transfer a part of the expropriated property to a private party for the construction of a shopping mall. The applicant further argued that since the municipality only required a portion of his land for the construction of the road, expropriating the property in its entirety was unlawful. In this regard the applicant argued that the expropriation of the entire property was unreasonable 'to the extent that the stated purpose for the expropriation could not be said to be for a public purpose.'<sup>2</sup>

The court held that the expropriation of the applicant's property for the construction of a road was a valid public purpose. It also held that the description of the purpose of the expropriation in the expropriation notice, namely building a road and doing all things necessary in connection with building the road, was wide enough to include the expropriation of property to erect a shopping mall. According to the court, the economic advantages that building a shopping mall would generate, such as increased employment opportunities, are in the public interest even if the property is made available to a third party. The court dismissed the applicant's second argument, namely that the expropriation of the entire property was unlawful since only part of the property was needed for an apparent lawful purpose, on the basis that the applicant confused motive with purpose. When it is clear that the expropriation is for a valid public purpose and exercised in good faith, the motive to expropriate the property is irrelevant in the face of additional options other than expropriation.

The *Bartsch* decision shows that the purpose for which property is expropriated is not subjected to rigorous scrutiny; courts do not seriously consider whether expropriation is strictly necessary for the realisation of a clearly circumscribed public purpose. Accepting

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<sup>1</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>2</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 1 5.

that the expropriation in this case (which involved a third party transfer for economic development purposes) was for a valid public purpose, without a clear legislative foundation or authority, indicates that South African courts apply a low level of scrutiny towards the purposes for which property may be expropriated. The courts also adopt a deferential approach when evaluating the decision of an expropriating authority to expropriate property for a particular purpose. Furthermore, it is arguable that factors such as increased employment opportunities and increased revenue are not sufficient to justify an expropriation that involves a third party transfer of the expropriated property for economic development purposes outside of a legislative scheme.<sup>3</sup>

In a different decision, *Harvey v Umhlatuze Municipality and Others*<sup>4</sup> (*Harvey*), the municipality expropriated the applicant's property for a particular public purpose, namely to create a public open space and conservation area to be used as a recreational facility by the public. When that purpose could not be realised, the municipality decided to change the purpose for which the property was to be used. The applicant argued that since the original public purpose that justified the expropriation fell away, he had a right to re-claim the property. The applicant based his argument on a particular interpretation of the public purpose requirement in section 25(2) of the 1996 Constitution of the Republic of South Africa and on authority in German law.

The court refused to order re-transfer of the expropriated property because there was no precedent or legislation to authorise such an order. The court also held that since the municipality initially expropriated the property in good faith it was allowed to change the use of the property if the original purpose became impossible due to changing circumstances. The changed purpose in this case also involved a third party transfer in the form of a sale of the expropriated property on public tender to a private developer for the establishment of a residential area. However, the court did not consider whether the new purpose, which can be described as economic development by a third party, was also a valid public purpose in terms of the Expropriation Act and the Constitution.<sup>5</sup> This decision raises the question whether the state is allowed to do as it pleases with property post-expropriation, or whether it is bound to use the property only for the specific purpose for

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<sup>3</sup> The validity of the expropriation of property for economic development purposes by third parties was also addressed in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA). The expropriation of property for economic development purposes that did not involve a third party transfer was an issue in *eThekweni Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009. These decisions are discussed in ch 4.

<sup>4</sup> 2011 (1) SA 601 (KZP).

<sup>5</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 227.

which it was expropriated. It is also moot whether the previous owner should be able to reclaim the property once the purpose of expropriation is not realised or if it is abandoned.

The *Bartsch* and *Harvey* decisions show up a number of interesting aspects of expropriation in South African law, especially in relation to the public purpose requirement. In terms of section 25(2) of the 1996 Constitution, an expropriation must be for a public purpose or in the public interest and compensation must be paid. The public purpose or public interest requirement is considered to be the justification for an expropriation,<sup>6</sup> while compensation is considered to be a 'necessary consequence of an expropriation'<sup>7</sup> or, alternatively, the 'result of an expropriation'.<sup>8</sup> Since the public purpose or public interest justifies the expropriation of property it is necessary to determine, with specific reference to the issues raised by these cases, to what extent and under which circumstances the public purpose or public interest requirement can in fact justify the expropriation of property in South African law.

## 1 2 Research Questions and Hypotheses

The *Bartsch* and *Harvey* decisions, together with other recent decisions like *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*,<sup>9</sup> specifically highlight the problems surrounding the transfer of expropriated property to third parties for economic development purposes. Therefore, the central question considered in this dissertation is whether expropriation for economic development that involves a third party transfer is justifiable in terms of section 25 of the 1996 Constitution. This problem, as well as other public purpose or public interest issues, has not been sufficiently dealt with by the South African courts or in South African academic literature to date,<sup>10</sup> but it has been addressed by courts and in academic literature in various foreign jurisdictions.<sup>11</sup> The South African courts routinely accept that the

<sup>6</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82.

<sup>7</sup> *Minister of Minerals and Energy v Agri SA (CALS Amicus Curiae)* (458/11) [2012] ZASCA 93, 31 May 2012 para 18.

<sup>8</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82.

<sup>9</sup> 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>10</sup> The Deputy Chief Justice of the South African Constitutional Court recently said that 'very few cases on land restitution or expropriation or acquisition for public use have reached our [Constitutional] Court.' Address by Dikgang Moseneke to mark the 30<sup>th</sup> anniversary of the assassination of Ruth First, 17 August 2012 ([www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=320188&sn=Detail&pid=71616](http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=320188&sn=Detail&pid=71616) accessed 22 August 2012).

<sup>11</sup> See for example *Kelo v City of New London* 545 US 469 (2005) (United States of America (US)); *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 (United Kingdom (UK)); *Clinton v An Bord Pleanála and Others* [2005] IEHC 84, [2007] IESC 19 (Republic of Ireland); *BVerfGE* 74, 264 [1986] (*Boxberg*) (Germany). These and related foreign decisions are discussed in the chapters that follow.

expropriation of property for purposes of economic development by a third party, even outside of a legislative scheme, is a lawful use of the state's power of expropriation without recognising the numerous problems - as can be observed from foreign case law and commentaries - that this exercise of power may cause.

Section 25(2) of the 1996 Constitution requires an expropriation to be for a public purpose or in the public interest. The inclusion of the public interest requirement arguably broadens the scope of purposes for which property may be expropriated, but it still needs to be determined in every specific case whether the particular purpose in fact satisfies the constitutional requirement. Economic development must therefore satisfy the public purpose or public interest requirement to legitimatise the expropriation of property for such purposes. However, it is uncertain whether the goal of economic development as such, without any further qualification, is a public purpose or in the public interest so clearly as to justify the expropriation of property for that purpose. It is also uncertain whether the transfer of the property to third parties for economic development is for a public purpose or in the public interest. If third party transfers for economic development are allowed, the effects of such a scheme on the protection of property owners in view of section 25 of the 1996 Constitution should be considered, since allowing third party transfer of expropriated property for economic development, without further qualification or controls, may have disproportionate effects on the rights or interests of property owners.

Arguing from first principles, the transfer of expropriated property to third parties for purposes of economic development must be for a valid public purpose or in the public interest if the expropriation is to be justified in the first place. It is generally accepted that the transfer of expropriated property to third parties may be lawful in cases where the third party requires the property to fulfil a specific public purpose on behalf of the state or where it is otherwise deemed to be in the public interest. Given that specific cases of economic development may not be for a public purpose or in the public interest, the transfer of the property to a third party for the fulfilment of such a purpose could consequently also be unlawful. This dissertation will therefore determine whether economic development as such, as well as the transfer of expropriated property to third parties for purposes of economic development is for a public purpose or in the public interest.

In addition to these central questions, it is also necessary to address various ancillary questions that are related to the public purpose or public interest requirement and that arise in the context of economic development of expropriated property by third parties. The first of these ancillary questions is whether the expropriator is entitled to expropriate more property than is immediately necessary for a particular public purpose, as was



contended in the *Bartsch*<sup>12</sup> decision. In that decision the additional property - property not needed for the primary purpose of constructing a road - was to be made available to a third party for purposes of economic development. Stated differently, will an expropriation be valid when the purpose for which the property was expropriated can be realised by expropriating only a portion of the property? Stated slightly more widely, will an expropriation be valid when it is possible for the state to adopt different means, other than expropriation, that would still ensure that the public purpose is realised? It is assumed for the sake of argument that this question only comes up in cases where the expropriation is judged to be for a valid public purpose or in the public interest in general, and the only remaining question is whether the expropriation should be set aside because its purpose can also be realised by different and less invasive means.

Another ancillary question regarding the public purpose requirement that also surfaced in *Harvey*<sup>13</sup> concerns the enduring nature of the public purpose. Should the public purpose endure beyond the initial act of expropriation and, if so, what should happen when the public purpose is not realised, or when it is completed or abandoned? Is the state able to change the purpose when circumstances change to any purpose that it might find useful, or would it at least be able to continue using the property for a different but equally valid public purpose? Furthermore, would the previous owner be able to reclaim the property when the original purpose of the expropriation is not realised or ends, and if the property is then used for a different public purpose? These are questions that relate to the issue of expropriation for economic development in the sense that if the state decides to change the use of the property due to impossibility, completion or abandonment of the original public purpose, the case law indicates that the tendency is then often to transfer the property to a third party for economic development purposes. For example, in the *Harvey* decision the changed purpose involved the sale of land on tender to a private developer for the development of a residential neighbourhood. The question is whether such a change in the purpose is justified in terms of the constitutional requirement.

The central research question in this dissertation is whether third party transfer of expropriated property for economic development purposes complies with the public purpose or public interest requirement in the Constitution of 1996. It is assumed that the inclusion of the public interest phrase in section 25(2) broadens the scope of purposes for which property may be expropriated; it is also accepted that certain third party transfers of

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<sup>12</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>13</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP).



expropriated property may be valid on face value. Third party transfers for economic development may therefore be for a public purpose or in the public interest, but the central hypothesis of this dissertation is that allowing it without any control or qualification may have unforeseen negative effects.

A further question that is raised in this dissertation is whether the availability of less invasive means other than expropriation is a valid defence against an ensuing expropriation. This question comes up in some cases where the lawfulness of a third party transfer for economic development is considered. South African courts show an unwillingness to invalidate an otherwise valid expropriation purely on the basis that there are less invasive means of fulfilling the public purpose. Since the central question in this dissertation, namely the legitimacy of a third party transfer of expropriated property for economic development, arguably implies the further question into the availability of less invasive means the latter question is also relevant and needs to be considered.

This dissertation also considers whether the public purpose or public interest that justifies an expropriation should endure beyond the initial act of expropriation. It is assumed that the public purpose may be changed, but the hypothesis is that in case of necessary change the new purpose must also be a valid public purpose or in the public interest. This question also arises when the validity of a third party transfer for economic development is considered.

### **1 3 Research Method and Outline of Chapters**

To determine whether the transfer of expropriated property to a third party for economic development purposes constitutes a valid public purpose or is in the public interest, the meaning of the 'public purpose' and 'public interest' requirements in the 1996 Constitution must be determined. In Chapter 2 the phrases 'public purpose' and 'public interest' are reviewed with reference to how they were understood before the Interim Constitution Act 200 of 1993. This overview adopts the form of a historical analysis of the public purpose requirement in expropriation legislation and case law. South African expropriation legislation traditionally only refers to the public purpose requirement. Older legislation did not always define the phrase 'public purpose' and the Expropriation Act 63 of 1975, the first general Expropriation Act that does define this phrase, only defines 'public purpose' in broad and vague terms.<sup>14</sup> The interpretation of 'public purpose' as it was adopted by

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<sup>14</sup> The Expropriation Act 55 of 1965, which was the first general expropriation act applicable throughout the Republic of South Africa, did not define the public purpose requirement. In s 1 of the Expropriation Act 63 of

various South African courts prior to 1993 is considered in Chapter 2 to provide some clarity in this regard.

The 1975 Expropriation Act is still the primary legislation used to effect expropriation.<sup>15</sup> Following the tradition of earlier expropriation legislation, the Act only refers to 'public purpose'. Accordingly, the phrase 'public interest' was not considered by courts in earlier expropriation decisions.<sup>16</sup> However, by way of a discussion of South Africa case law that pre-dates the Interim Constitution of 1993, it is shown in Chapter 2 how the public purpose requirement was interpreted either narrowly (relating to government purposes) or broadly (relating to purposes that benefit the public). Following on from this distinction, the Appellate Division of the Supreme Court first introduced the phrase 'public interest' into South African law of expropriation in *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>17</sup> (*Van Streepen*). In this decision the court stated that an expropriation that benefits a third party can never be for a public purpose, but in specific circumstances it can still be valid insofar as it is in the public interest. This decision therefore created the impression that 'public purpose' refers to a narrower, government purpose and 'public interest' to a wider category that could include transfer of the expropriated property to a third party.

Assuming that the pre-1994 understanding of the public purpose and public interest requirement had an impact on the understanding of these phrases as they are used in the Interim Constitution of 1993 and ultimately the Constitution of 1996, the interpretation of the public purpose and public interest requirements in the constitutional era is discussed in Chapter 3. The property clause (section 28) of the Interim Constitution of 1993 only referred to expropriation for public purposes, but the phrase 'public interest' was introduced by section 25(2) of the 1996 Constitution. As a result of the *Van Streepen* decision the public interest alternative was included in section 25(2), and section 25(4)<sup>18</sup> of the 1996 Constitution was added to ensure that expropriation for land reform is not invalidated simply because it may involve a third party transfer of expropriated land.<sup>19</sup>

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1975 public purpose 'includes any purpose connected with the administration of the provisions of any law by an organ of State'.

<sup>15</sup> *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 2. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 566.

<sup>16</sup> The phrase 'public interest' is, however, found in various other areas of law: Du Plessis LM *Re-Interpretation of Statutes* (2002) 167-168; Du Plessis WJ 'n Regsteoretiese Ondersoek na die Begrip "Openbare Belang" (1987) 50 *THRHR* 290-298 at 290. For an analysis of the phrase 'public interest' in various areas of the law, see Du Plessis WJ 'n Regsteoretiese Ondersoek na die Begrip "Openbare Belang" (1987) 50 *THRHR* 290-298.

<sup>17</sup> 1990 (4) SA 644 (A).

<sup>18</sup> S 25(4)(a) states that the public interest includes the nation's commitment to land reform.

<sup>19</sup> See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 591-592; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 462-463.

Apart from section 25(4), the 1996 Constitution does not comprehensively stipulate what is meant by these phrases and it is left up to the courts to interpret them.

Against this backdrop Chapter 3 analyses the public purpose or public interest requirement with specific reference to third party transfers. It is shown there that the transfer of expropriated property to a third party for realisation of a public purpose - as understood narrowly - can be valid. It is possible in these cases that the party responsible for realising the public purpose is irrelevant; it can be either the state or a private party. If the public purpose is to be realised by a third party, transfer of the expropriated property to that party may well be justified. Furthermore, a third party transfer for a purpose that is in the public interest (rather than a narrow public purpose) may also be valid, and in Chapter 3 it is considered when this will be the case and whether the justification of such transfers should be subject to qualification or control of some kind.

In Chapter 4 the distinction between a third party transfer for a public purpose and a third party transfer that is in the public interest is analysed in more detail. The chapter starts with a discussion of the transfer of expropriated property for narrow public purposes, or government purposes as it was described in earlier case law. Furthermore, since legislation sometimes grants administrators the power to expropriate property on behalf of a private party for the fulfilment of a particular project of public importance, the instances where this occurs are considered with reference to foreign law.<sup>20</sup> The position in German and US law is briefly reviewed to show that third party transfers for narrow public purposes are generally unproblematic. This is followed by a discussion of the more problematic examples of expropriation and transfer of property in the public interest, or for broader public purposes. The expropriation of property in the public interest includes instances where the property is not expropriated for a government purpose and will not necessarily be used by the general public after expropriation, but where expropriation and transfer of the property to a third party may be justified for a purpose that is still deemed to be in the public interest. This argument is illustrated by the expropriation and transfer of property for slum clearance and land reform purposes.

In Chapter 4 it is shown how constitutionally required and sanctioned land reform requires property to be expropriated and transferred to third parties for their exclusive use in order to break up the historically unequal distribution of land ownership or to restore land to people who lost their rights as a result of unfair laws and practices. The constitutional framework and the legislation that legitimises third party transfers for land reform purposes in South African law are discussed to show how the legitimate purpose of

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<sup>20</sup> See for instance s 3 of the Expropriation Act 63 of 1975.

these state actions justify both the expropriation and the third party transfer and to indicate how they function. Thereafter, two conflicting examples in foreign law are discussed to indicate that the approach towards the validity of a third party transfer for broader public purposes such as land reform is not as unproblematic as the transfer of expropriated property to third parties for narrow public or government purposes. The US Supreme Court decision of *Midkiff v Hawaii Housing Authority*<sup>21</sup> and the Australian High Court decision of *Clunies-Ross v The Commonwealth of Australia and Others*<sup>22</sup> are discussed to illustrate this point.

The main part of Chapter 4 examines third party transfers for economic development purposes through an analysis of foreign case law. As a point of departure it is assumed that it is unclear whether third party transfers for economic development purposes can at all be for a public purpose or in the public interest. Examples of foreign decisions where this issue has been addressed include the US Supreme Court's infamous decision in *Kelo v City of New London*,<sup>23</sup> the UK Supreme Court decision in *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*,<sup>24</sup> the Irish Supreme Court and high court decisions in *Clinton v Pleanála and Others*,<sup>25</sup> and the *Boxberg*<sup>26</sup> decision of the German Federal Constitutional Court. These cases are analysed to provide a framework for considering the issue in South African law. Despite the differing legal traditions of these jurisdictions, the judicial approaches adopted by the various courts and the factors employed to determine the lawfulness of third party transfers for economic development provide a valuable comparative basis for considering such transfers in South African law. These jurisdictions also provide interesting comparative insights regarding the approach of the various courts towards the purposes for which property may be legitimately expropriated.

The discussion of each of the jurisdictions starts with a brief explanation of the relevant constitutional provisions regulating expropriation, or alternatively the authority to expropriate property in terms of legislation. The focus is on the justification for the expropriation (the public purpose) and not on other aspects of expropriation, such as compensation or the distinction between a deprivation and an expropriation. The overview of foreign law is not aimed at giving an extensive analysis of the law in each jurisdiction but

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<sup>21</sup> 267 US 229 (1984).

<sup>22</sup> (1984) 155 CLR 193.

<sup>23</sup> 545 US 469 (2005).

<sup>24</sup> [2010] UKSC 20.

<sup>25</sup> [2007] IESC 19; [2005] IEHC 84.

<sup>26</sup> BVerfGE 74, 264 [1986] (*Boxberg*).

rather simply to introduce the specific case law where expropriation and third party transfer for economic development of the property has been addressed.

Foreign case law is discussed to point out two opposing views regarding third party transfers for economic development purposes. The US, English and Irish courts seem to allow the expropriation and transfer of property to third parties for economic development more easily than the German courts. A possible reason for the deferential approach of the former jurisdictions is the fact that legislation in those countries usually explicitly authorises the expropriation of property for economic development or regeneration, or the expropriation takes place in terms of a development scheme that specifically allows for expropriation of the property for economic development. The same authorising legislation often provides for transfer of the expropriated property to third parties for the fulfilment of the specified development or regeneration goals. The courts in these jurisdictions therefore seem to accept these broad purposes as legitimate because they are set out in legislation and thus the courts adopt a deferential approach towards the purposes for which property may eventually be expropriated. German courts, on the other hand, adopt a stricter approach and require specific legislation to authorise both the purpose of the expropriation and the transfer of the property for the realisation of the purpose. This renders German law an important comparative tool 'because of the extensive and clear decisions of the German Federal Constitutional Court on the issue of third party transfers.'<sup>27</sup> The two opposing views in foreign law are analysed in some detail in Chapter 4 because they can assist South African courts in eventually deciding which route would be the optimal method for purposes of South African law.

After the overview of foreign law, the South African position is explained in the rest of Chapter 4 with reference to the decisions in *eThekweni Municipality v Sotirios Spetsiotis*,<sup>28</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*,<sup>29</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>30</sup> and *Harvey v Umhlatuze Municipality and Others*.<sup>31</sup> The position in South African law regarding third party transfers for economic development is unclear as it has not been developing systematically but seems to develop on a case-by-case basis, much as in US, English and Irish law. The deductions that can be made from the overview of foreign law enable a conclusion on the question whether the expropriation of property

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<sup>27</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 475-476.

<sup>28</sup> [2009] ZAKZDHC 51, 6 November 2009.

<sup>29</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>30</sup> 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>31</sup> 2011 (1) SA 601 (KZP).

for economic development purposes is more easily justified when it is specifically authorised by legislation. This analysis draws on the similarities between the respective statutes involved in foreign law and how these similar provisions have been interpreted in case law. Although the conclusions drawn by foreign courts will be helpful in this regard, it must still be determined whether economic development complies with the public purpose or public interest requirement in section 25(2) of the 1996 Constitution in the specific context of South African law, especially when the development involves transfer of the expropriated property to a third party. It is therefore further considered whether third party transfers for economic development constitute a public purpose or is in the public interest. In this regard it is assumed that both the expropriation and the transfer must be properly authorised by legislation and comply with section 25(2) of the Constitution. This issue is therefore approached from the side of the legitimacy of the purpose of the expropriation, considered in view of both the transfer of the property to third parties and the nature of the purpose.

Numerous arguments have been raised against the expropriation and transfer of property for economic development purposes in light of decisions such as *Kelo v City of New London*.<sup>32</sup> These range from the unfair and harsh effects that third party transfers for economic development purposes have on less affluent members of society, to the erosion of the security of property rights. These arguments are considered in Chapter 4 because they indicate that third party transfers for economic development may not be desirable in principle, irrespective of the expected employment opportunities and increased tax revenue that they may generate. Several authors advocate for either a complete ban on third party transfers for economic development, or at least an added requirement that courts should be stricter when determining their legitimacy.<sup>33</sup> As a result, evaluative conclusions about the desirability and legitimacy of third party transfers for economic development are drawn from the comparative overview as well as from the discussion of the theoretical arguments.

Chapter 5 analyses a different aspect of the public purpose requirement which can also relate to third party transfers for economic development purposes in certain situations. This chapter considers whether the availability of alternative and less invasive means is a

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<sup>32</sup> 545 US 469 (2005). See Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88; Underkuffler LS 'Kelo's Moral Failure' (2006) 15 *William & Mary Bill of Rights Journal* 377-387; Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23; Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author).

<sup>33</sup> See Goodin AW 'Rejecting the Return to Blight in Post-Kelo State Legislation' (2007) 82 *NYU LR* 177-208 at 191; Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819.



valid defence against an ensuing expropriation. Apart from the consideration of whether expropriation is lawful in terms of the public purpose requirement if the purpose of the expropriation (which is assumed to be a valid purpose) can also be realised without expropriation, by adopting less invasive means, this chapter also takes cognisance of administrative law principles, since the decision of the expropriating authority is invariably an administrative action.<sup>34</sup> The less invasive means argument is therefore considered from both a constitutional property law perspective and an administrative law perspective.

Chapter 5 also considers whether courts should adopt a proportionality-type test in terms of section 25(2) instead of the more lenient rationality-type evaluation, since a stricter test can arguably afford stronger protection to property owners and prevent unfair results. Therefore, it is considered whether the proportionality test, as is also used in administrative law, could be applied to the decision of the administrator to expropriate property for a particular purpose. In German expropriation law, the proportionality principle - together with the public good requirement of article 14.3 of the 1949 German Basic Law<sup>35</sup> - requires that expropriation must be the only possible method to realise a specific public purpose.<sup>36</sup> This would involve a consideration of the availability of alternative measures, since the existence of an alternative measure (other than expropriation) could render the expropriation of the property unlawful in the specific circumstances. However, since the application of a proportionality test is not clear-cut in South African administrative law,<sup>37</sup> it is considered whether a proportionality-type inquiry should be followed in South African expropriation law, as is the case in German expropriation law.

Irish courts are more receptive than the South African courts towards the availability of an argument based on less invasive means to realise a specific public purpose, and the Irish position, as developed in case law, is therefore briefly discussed in Chapter 5. Irish courts are willing to consider whether the expropriating authority took alternative means into account when it decided to expropriate property for a particular public purpose. Therefore, decisions such as *Lord Ballyedmond v The Commission for Energy Regulation*

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<sup>34</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 12; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 36. See also Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 77; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501.

<sup>35</sup> Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949.

<sup>36</sup> *BVerfGE* 24, 367 [1968] (*Deichordnung*); Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 309-310 para 589; Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hoplauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513-514 para 67; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 164.

<sup>37</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344.

*and Others*<sup>38</sup> are discussed in Chapter 5 to show that the Irish courts will seriously consider whether the expropriating authority took (or should have taken) alternative, less intrusive means into account when deciding to expropriate property. However, the strength of an argument based on the availability of alternative means to expropriation would have to depend on the contextual setting to prevent courts from unduly interfering with the decisions of administrators in a way that threatens the separation of powers doctrine.

Chapter 6 considers what should happen in the event that the public purpose for which the property was originally expropriated is not realised or completed, or if it is abandoned. The two questions that this issue raises are firstly whether the state is allowed to use the property for a different purpose and if it is, under which conditions; and secondly whether and under which circumstances the previous owner should be entitled to successfully reclaim the property upon non-realisation, completion or abandonment of the public purpose. The various issues unfold in Chapter 6 through a discussion of the decision in *Harvey v Umhlatuze Municipality and Others*.<sup>39</sup> Additional issues that also surface in *Harvey*, namely whether the state has the same rights as a private owner, and whether good faith justifies the state in changing the use to which expropriated property is put, are also addressed in Chapter 6.

Chapter 6 secondly focuses on the right of the expropriated owner to reclaim the property once the purpose terminates or is abandoned. To this end reference is made to the position in foreign law, namely German, Malaysian, Philippine and English law. German law is considered, not only because the court in *Harvey* considered German authorities, but also because the right to reclaim the property upon non-realisation of the public purpose is contained in German legislation. However, apart from this statutory basis the right to reclaim property upon non-realisation is considered to flow directly from the German Basic Law even in the absence of legislation. Given the similarities between the property clauses in the German Basic Law and the South African Constitution, the German position holds important comparative value for South African law. English law is considered since the Crichton Down Rules<sup>40</sup> that developed in that system compel certain government departments to offer compulsorily acquired property that has become surplus for sale to the previous owner at the current market value. These Rules are fairly detailed and are considered to be an example of how the right of re-transfer can operate in practice. Malaysian and Philippine law are discussed since recent case law from these

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<sup>38</sup> *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206.

<sup>39</sup> 2011 (1) SA 601 (KZP).

<sup>40</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules* Circular 06/2004 (31 October 2004).



jurisdictions has dealt with the same issue that was present in the *Harvey* decision. Legislation does not regulate the re-transfer of property upon termination of the public purpose in these jurisdictions, but the right of re-transfer was developed by the respective courts on a particular interpretation of the public purpose requirement. Since the South African court in *Harvey* refrained from developing such a doctrine the decisions from these jurisdictions offer helpful arguments to consider in developing such a right in future if the legislature does not enact legislation to that effect.

In Chapter 7 the various findings made throughout the preceding chapters are summarised to show the main points that have crystallised in this dissertation. In that chapter recommendations are made to provide possible solutions to the various problems.

## **1 4 Definitions and Qualifications**

Certain terms used in this dissertation need to be defined. The term 'economic development' is used here to describe any project that involves land development that promises the creation of employment opportunities, the increase of the tax base or the general enhancement of economic conditions, but excluding a narrow government purpose or public use of or public access to the land. It would therefore exclude the building of public airports, even if built and managed by private parties, since in those cases the property will still be used by the general public and legislation usually specifically regulates the public-interest operation thereof.

The term 'third party transfer' is used to refer to the situation when the state uses its power of eminent domain to expropriate property with the intention to transfer title to the expropriated property to a third, private party so that the third party can realise the particular purpose of the expropriation. The term is used here to include both a third party transfer in this sense and cases where the third party receives a benefit from the expropriation, such as having the exclusive use of the property.

The US term 'taking' is only used with reference to US law, where it indicates the taking of property through the state's power of eminent domain. Use of this term does not for present purposes include regulatory takings and is therefore restricted to the instances where it corresponds with the term 'expropriation' in South African and German law. The terms 'takings' and 'expropriation' are therefore used interchangeably when discussing US law. The phrase 'compulsory acquisition' derives from Anglo common law and is used with reference to the discussion of expropriation in the UK, Irish and Malaysian law. This phrase does not apply in South African law, since the South African state does not have

the inherent power to expropriate property but only the power to expropriate as granted by legislation. Therefore, the phrase 'compulsory acquisition' is used exclusively as it is applied in foreign jurisdictions from the Anglo tradition. In those instances the term is used interchangeably with expropriation.

It is constitutionally acknowledged that land reform is a legitimate and central purpose in South African law. In terms of third party transfers of expropriated land for land reform purposes the use to which the property is put after expropriation is therefore irrelevant, as long as the expropriation and transfer serve the relevant purpose of land reform. The purpose of redistribution, for example, is to break up the unequal division of land ownership, while the purpose of restitution is to afford previously dispossessed persons the opportunity to have land restored to them. When property is transferred to third parties for one of these land reform purposes the public purpose requirement is thereby fulfilled and what the third party does with the property post-expropriation should in principle be irrelevant. It might even be possible for the third party to use the property for economic development purposes (or even sell it), but this is deemed to be irrelevant for purposes of this dissertation. Furthermore, even if the expropriated property is not used by the third party for any purpose, a right of re-transfer by the previous owner is also irrelevant, since the purpose of the expropriation, namely redistributing or restoring land, has been realised as soon as the property has been expropriated and transferred.

## CHAPTER 2: PUBLIC PURPOSE IN EXPROPRIATION LAW BEFORE THE CONSTITUTIONAL ERA

### 2 1 Introduction

Before the public purpose or public interest requirement in section 25(2) of the 1996 Constitution is analysed, it is necessary to discuss the interpretation given to the public purpose requirement before the 1996 Constitution was promulgated. How the public purpose requirement was understood pre-1996 might clarify its present understanding, since courts often use the terms 'public purpose' and 'public interest' interchangeably to mean the same thing. At present, the Expropriation Act 63 of 1975 is the primary statute used to effect expropriations.<sup>1</sup> In terms of section 2 of this Act, the Minister of Public Works may expropriate property for a public purpose. This includes immovable and movable property.<sup>2</sup> The Expropriation Act of 1975 makes no reference to the public interest, nor does any previous expropriation legislation refer to that term. Even the property clause (section 28) of the Interim Constitution Act 200 of 1993 referred only to public purpose.

Since the Expropriation Act of 1975 is still valid,<sup>3</sup> the interpretation given to the public purpose requirement in terms of this Act is still relevant. However, it must be emphasised that this Act must be interpreted in harmony with the Constitution and any provision in the Act that conflicts with a provision in the Constitution will be invalid.<sup>4</sup> It will be explained below that the interpretation of the public purpose requirement in the pre-1996 legislation has had a long development in case law. The understanding of the public purpose requirement has been developed consistently through the court cases, irrespective of the applicable authorising act. This understanding of the public purpose

<sup>1</sup> *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 2. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 566.

<sup>2</sup> S 1 of the Expropriation Act 63 of 1975. In terms of s 3 of the Act, the Minister may expropriate property on behalf of juristic persons, but 'property' in terms of s 3 is limited to immovable property. See Jacobs M *The Law of Expropriation in South Africa* (1982) 22-25.

<sup>3</sup> In 2008 the South African government wanted to repeal the Expropriation Act 63 of 1975. The Expropriation Bill of 2008 B16-2008, which was tabled in parliament on 16 April 2008, was to replace the Expropriation Act of 1975, but it was so heavily criticised that the government decided to withdraw the Bill. See Van der Walt AJ 'Constitutional Property Law' 2008 *ASSAL* 231-264 at 231-240; Pienaar G 'Die Grondwetlikheid van die Voorgestelde Onteieningsraamwerk vir Suid-Afrika' 2009 *TSAR* 344-352; Du Plessis WJ 'The (Shelved) Expropriation Bill B16-2008: An Unconstitutional Souvenir or an Alarmist Memento?' (2011) 22 *Stell LR* 352-275.

<sup>4</sup> S 2 of the 1996 Constitution states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. With the enactment of the Interim Constitution Act 200 of 1993, South Africa moved away from a parliamentary supremacy to constitutional supremacy. S 4(1) of Interim Constitution stated that '[t]his Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of its inconsistency.'

requirement in pre-constitutional law has, or should have, an effect on the understanding of the public purpose requirement in the constitutional era. Indirectly, the understanding of the public purpose requirement should also have an effect on the understanding of the public interest requirement.

Once the public purpose requirement is understood in terms of pre-1996 law, it might be easier to understand the meaning of the 'public purpose or public interest' requirement in section 25(2) of the 1996 Constitution. This will lead to the discussion, in subsequent chapters, whether or not an expropriation that involves a third party transfer for economic development purposes can be either for a public purpose or in the public interest;<sup>5</sup> whether the less invasive means argument finds application to the public purpose requirement in section 25(2) of the Constitution;<sup>6</sup> and whether the public purpose should endure beyond the initial act of expropriation.<sup>7</sup>

The discussion in this chapter of the pre-1996 cases is divided into three parts. The first part includes a discussion of case law before the enactment of the Expropriation Act 55 of 1965, the first general expropriation act applicable in the Republic of South Africa. These cases include especially *Rondebosch Municipal Council v Trustees of Western Province Agricultural Society*<sup>8</sup> and *Minister of Lands v Rudolph*.<sup>9</sup> Although the phrase 'public purpose' was not interpreted in terms of expropriation legislation in these cases, the meaning attached to the phrase in these decisions is nevertheless important because it was adopted in subsequent decisions that dealt specifically with expropriation legislation.

The Expropriation Act of 1965 was an attempt to unify expropriation legislation in the Republic of South Africa. It was also the first general expropriation act after the Union of South Africa was established in 1910. Therefore, the second part of the discussion will include the cases heard by the courts in terms of the Expropriation Act of 1965. Owing to the fact that the 1965 Expropriation Act was ineffective as a general expropriation act, it was repealed by the Expropriation Act 63 of 1975.<sup>10</sup> The Expropriation Act of 1975 is still valid, but the discussion in this chapter of the cases decided in terms of the 1975 Act is limited to those heard before the Interim Constitution of 1993. The third part of the chapter therefore deals with cases decided between 1975 and 1993.

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<sup>5</sup> See ch 4.

<sup>6</sup> See ch 5.

<sup>7</sup> See ch 6.

<sup>8</sup> 1911 AD 271.

<sup>9</sup> 1940 SR 126.

<sup>10</sup> See Gildenhuys A *Ontheieningsreg* (2<sup>nd</sup> ed 2001) 44-45.

## 2 2 'Public Purpose' in Expropriation Law before the 1965 Expropriation Act

### 2 2 1 Introduction

Before South Africa became a Union in 1910, the two colonies (the Cape Colony and the Natal Colony) and the two republics (the South African Republic and the Republic of the Orange Free State) each had its own expropriation legislation.<sup>11</sup> When the Union of South Africa was established in 1910, the expropriation legislation that applied in the different areas remained in force. Therefore, legislation was enacted to provide for the expropriation of property, mostly for specific purposes such as constructing railways and roads. It was only in 1965 that a general expropriation act, namely the Expropriation Act 55 of 1965, was promulgated to apply throughout South Africa. In terms of this Act, expropriation could take place if it was for a public purpose and if compensation was paid. This Act did not explain what was meant by the public purpose requirement.

However, the phrase 'public purpose' was judicially considered by the courts even before the passing of the 1965 Expropriation Act. In some of the cases discussed below the phrase 'public purpose' was not interpreted in terms of legislation that conferred expropriation powers. For instance, in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*<sup>12</sup> the court had to interpret the phrase 'public purpose' to determine whether the respondent was exempt from paying municipal tax in terms of the Municipal Act 45 of 1882. In another decision, *Slabbert v Minister van Lande*,<sup>13</sup> the court interpreted the public purpose requirement in terms of the Transvaal Expropriation of Land and Arbitration Clauses Proclamation 5 of 1902. The interpretation of the phrase 'public purpose' in these cases was subsequently adopted in the decision of *Fourie v Minister van Lande*,<sup>14</sup> which dealt specifically with the public purpose requirement in the 1965 Act. For this reason, the understanding of the 'public purpose' before the enactment of the 1965 Expropriation Act had an impact on the understanding on this requirement in terms of the Act.

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<sup>11</sup> See Gildenhuys *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 39-43. See also Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 16-20.

<sup>12</sup> 1911 AD 271.

<sup>13</sup> 1963 (3) SA 620 (T).

<sup>14</sup> 1970 (4) SA 165 (O).

## 2 2 2 The Influence of English Law

The argument has been made that English law had a notable impact on the development of South African expropriation law, especially in the Cape Colony and Natal, the two former British colonies.<sup>15</sup> The English Land Clauses Consolidation Act 16 of 1845 is said to have had a profound impact on South African expropriation law.<sup>16</sup> The influence of English law on South African expropriation law as a whole continued even after the Union of South Africa was established.<sup>17</sup> It has also been stated that the English law of expropriation, or compulsory acquisition as it is more commonly known in English law jurisdictions, is a highly practical subject and more attention is paid to the payment of compensation than to the public purpose requirement.<sup>18</sup> This is evident from the general expropriation acts that were applicable in the various jurisdictions in Southern Africa, such as the Cape Lands and Arbitration Clauses Act 6 of 1882,<sup>19</sup> the Natal Lands Clauses and Consolidation Law of 1872,<sup>20</sup> and the Lands and Arbitration Clauses Ordinance 11 of 1905, applicable in the Orange Free State.<sup>21</sup> These acts did not confer expropriation powers, but regulated the expropriation process and contained extensive provisions regarding the calculation of compensation.

As a result of the principle of parliamentary sovereignty,<sup>22</sup> the public purpose served by a compulsory acquisition is established during the debates in parliament and not in the

<sup>15</sup> Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 13. See generally Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 39-43.

<sup>16</sup> Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 14; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 33.

<sup>17</sup> According to Eisenberg A 'Public Purpose and Expropriation: Some Comparative Insight and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 218 fn 68, the early South African cases relied on 'British Law' to interpret the public purpose requirement. Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 33 states that the English Land Clauses Consolidation Act of 1845 served as a model for many expropriation acts, including those adopted in South Africa. See also Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 13.

<sup>18</sup> Taggart M 'Expropriation, Public Purpose and the Constitution' in Forsyth C & Hare I (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998) 91-112 at 91. See further ch 4 at 4 4 2.

<sup>19</sup> This Act also provided that disputes concerning the calculation of compensation could be settled by arbitration and therefore contained wide-ranging arbitration provisions. See Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 40.

<sup>20</sup> This Act was heavily influenced by the English Land Clauses Consolidation Act 16 of 1845. See Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 40; Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 16.

<sup>21</sup> This Ordinance was also a general expropriation act and although it did not make provision for the calculation of compensation, it provided for arbitration in the event that the amount of compensation could not be agreed upon. See Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 43.

<sup>22</sup> The principle of parliamentary sovereignty entails that the parliament is the supreme authority in the country and the decisions of parliament cannot be tested by the judiciary. The 1909 Constitution, which



courts.<sup>23</sup> In this regard the legislature indicated the purposes for which the property might be taken. Therefore, even before the Union of South Africa was established specific legislation was enacted by the legislature to expropriate property for a specific public purpose, such as the construction of railway lines.<sup>24</sup> For instance, the Cape Act 16 of 1833 authorised a company, The Cape Central Railways, to construct a railway line from Worcester to Roodewal via Robertson and to use expropriation powers to construct the railway line.<sup>25</sup> Similarly, in the Orange Free State the Railway Expropriation of Lands Ordinance 46 of 1903 was promulgated to specifically allow for the expropriation of the property for the construction of railway lines.<sup>26</sup> In the Transvaal, the former South African Republic haphazardly expropriated land since there was no general act or procedure governing expropriation.<sup>27</sup> The House of Assembly usually decided to expropriate property for a particular purpose and this decision was regarded as the authority for the expropriation.<sup>28</sup>

As a result of the influence of English law, parliament promulgated legislation specifically aimed at expropriating property for a specific public purpose. For this reason, it is arguable that there was no need for the acts that authorised the expropriation of property for these purposes to refer to a general public purpose requirement. Furthermore, as a result of the adoption of the principle of parliamentary sovereignty and the influence of English law on the expropriation law of South Africa, South African courts were rather deferential to the decisions of parliament. Case law decided before 1994 illustrate this point. However, given that parliamentary sovereignty was replaced with constitutionalism in 1994, it is argued in subsequent chapters that courts may no longer be able to continue applying a mere rationality test when considering the public purpose requirement. The exact meaning of phrases like 'public purpose' and 'public interest' therefore becomes more important than it used to be.

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established the Union of South Africa, was based on the Westminster parliamentary system, of which the sovereignty of parliament was a fundamental doctrine. See Dugard J *Human Rights and the South African Legal Order* (1977) 25-26; Carpenter G *Introduction to South African Constitutional Law* (1987) 77.

<sup>23</sup> Allen T *The Right to Property in Commonwealth Constitutions* (2000) 201.

<sup>24</sup> See Jacobs M *The Law of Expropriation in South Africa* (1982) 3.

<sup>25</sup> See Jacobs M *The Law of Expropriation in South Africa* (1982) 4-5; Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 39-40.

<sup>26</sup> See Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 43.

<sup>27</sup> According to Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 41, it was a common feature that the expropriation occurred through a decision of the House of Assembly, and then the decision to expropriate established both the authority to expropriate and the act of expropriation.

<sup>28</sup> Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 41; Davis NM *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (LLM thesis University of the Witwatersrand 1987) 19.

## 2 2 3 Case Law

### 2 2 3 1 Introduction

After the Union of South Africa was established in 1910, the applicable acts, proclamations and ordinances granting expropriation powers in each of the four provinces remained in force. In fact, the legislature added additional expropriation legislation, adding to the existing bulk of expropriation provisions.<sup>29</sup> It was only in 1965 that the first comprehensive expropriation act, the Expropriation Act 55 of 1965, was promulgated.<sup>30</sup> This Act stated that property may be expropriated for a public purpose, but did not define this requirement. It was therefore up to the courts to interpret and give content to this requirement. However, since the phrase 'public purpose' had been interpreted in earlier case law, albeit with reference to other pieces of legislation, the earlier decisions are analysed since they had a bearing on the interpretation of the public purpose requirement in later expropriation decisions.

### 2 2 3 2 *Rondebosch v Trustees of the Western Province Agricultural Society*

In *Rondebosch v Trustees of the Western Province Agricultural Society*<sup>31</sup> (*Rondebosch*) the respondents claimed that the Agricultural Society was exempt from paying municipal taxes because the land was used for public purposes, namely agricultural shows. The Appellate Division of the Supreme Court had to interpret the meaning of the phrase 'public purpose' in terms of the Municipal Act 45 of 1882 in order to determine whether the respondents' claim that they were exempt from paying municipal taxes could be upheld.

The Appellate Division stated that the word 'public' is one of wide significance but it can have several different meanings, despite their common origin.<sup>32</sup> For instance, in the broad sense 'public' can include things that affect or pertain to the whole public or a local community, such as public opinion, public place or public hall. In the narrower sense it may not include things that affect or pertain to the public, but only things related to the state, such as public revenue and public lands. Therefore, 'public purpose' can mean all purposes benefitting the public in contradistinction to private individuals, or it can mean

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<sup>29</sup> See Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 43-44 at fn 95 for a list of all the legislation passed after 1910 dealing with expropriation.

<sup>30</sup> Jacobs M *The Law of Expropriation in South Africa* (1982) 4; Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed) 2001 44.

<sup>31</sup> 1911 AD 271.

<sup>32</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271 at 283.



only those purposes that relate to the state, which the court termed 'governmental purposes'.

In this case the court applied the narrower interpretation of the public purpose requirement. Therefore, the property that would be exempt from municipal taxes would be limited to property that was used for government purposes. The case is interesting since it distinguishes between the narrow and broad meaning of the phrase 'public purpose'. Although the court interpreted the phrase narrowly in the specific context, subsequent cases acknowledged and applied the distinction between the broad and narrow meaning of the phrase 'public purpose' as it was described in this case.<sup>33</sup>

### **2 2 3 3 *Minister of Lands v Rudolph***

In a later case, *Minister of Lands v Rudolph*<sup>34</sup> (*Rudolph*), the High Court of the then Southern Rhodesia had to decide whether the expropriation of a right of way was for a public purpose. In terms of the Deed of Grant that established the Que Que Township, the Government inserted a condition that allowed it to resume possession of certain land for public purposes. In terms of this condition the government wanted to create a right of way over the plaintiff's land. The government offered compensation and argued that the resumption was for a public purpose.

The plaintiff argued that the creation of the right of way was not for a public purpose, since it would not serve the public generally but only a small section of the inhabitants of Que Que. The High Court of Southern Rhodesia confirmed the position concerning the narrow and broad interpretations of the phrase 'public purpose' as explained in the *Rondebosch*<sup>35</sup> case. Therefore, the court stated that "public purposes" may either be all purposes that pertain to and benefit the public in contradistinction to private individuals or they may be the more restricted purposes relating to the State'.<sup>36</sup> In this decision the court held that the creation of a public right of way was for a public purpose in terms of the broad understanding.

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<sup>33</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 335. See the discussion below of *Slabbert v Minister van Lande* 1963 (3) SA 620 (T); *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O); *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N).

<sup>34</sup> 1940 SR 126.

<sup>35</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 217.

<sup>36</sup> *Minister of Lands v Rudolph* 1940 SR 126 at 129.

## 2 2 3 4 *African Farms & Townships v Cape Town Municipality*

In the subsequent case of *African Farms & Townships Ltd v Cape Town Municipality*<sup>37</sup> (*African Farms*), the court had to determine whether or not the notice of expropriation of the applicant's property was valid. In terms of the empowering provisions,<sup>38</sup> the respondent expropriated the applicant's property 'for the widening of Riebeeck Street and for the implementation of the 1947 Foreshore Plan'.<sup>39</sup>

In terms of section 129 of Ordinance 19 of 1951 a council within a municipality can expropriate property for municipal purposes, which may include a town-planning scheme or any purpose in connection therewith. The applicant argued that the expropriation was invalid since only half of the property would be used for purposes of widening the road, while the other half would be amalgamated with the respondent's property and resold in whole or in lots to private buyers.<sup>40</sup> Therefore, he argued that the expropriation of his entire property was not for planning purposes. The court rejected the argument and stated that the respondent's real purpose of expropriation was for the implementation of the town-planning scheme, which had to be evaluated in its entirety. According to the court the legislation permitted the municipal council to expropriate property for planning purposes and the court first considered whether the expropriation was for planning purposes or in connection with that purposes.<sup>41</sup> The court held that expropriation of the applicant's property was for planning purposes and the 'fact that the respondent will resell the land later does not detract from this purpose'.<sup>42</sup>

The applicant further argued that the provincial council did not have the authority to order the expropriation. In turn, the respondent successfully argued that section 12 of Act 38 of 1945, read with Item 19 of the second schedule, granted the provincial council the authority to expropriate land for 'public purposes'. Item 19 of the second schedule stated that '[t]he expropriation of land for public purposes in a province [is] subject to such terms and conditions as may be prescribed by proclamation.' Relying on the *Rondebosch*<sup>43</sup> case, the applicant argued that the expropriation was not for a public purpose, since it was merely acquired for resale to other private parties. The court was of the opinion that the

<sup>37</sup> 1961 (3) SA 392 (C).

<sup>38</sup> The decision of the Cape Town Municipality Council to acquire the property was made in terms of ss 129 and 130 of Ordinance 19 of 1951 as amended by s 33 of Ordinance 14 of 1953 and s 9 of Ordinance 15 of 1959, as well as in terms of s 134 of Ordinance 19 of 1951, for which the prerequisite permission was obtained from the Administrator.

<sup>39</sup> *African Farms & Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) 393.

<sup>40</sup> The question whether a local authority may expropriate more property than that which is necessary for the stated public purpose is discussed in ch 5.

<sup>41</sup> See *African Farms & Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) 395.

<sup>42</sup> *African Farms & Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) 396.

<sup>43</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271.

reliance on the *Rondebosch* case was not helpful since that case was based on different legislation and a different set of facts.

However, the court accepted that the phrase ‘public purposes,’ as discussed in the *Rondebosch* case, is one of very wide significance and that public purposes can affect either the whole or the local public. According to the court, the Foreshore Plan was for the benefit of the public. As a result, the court stated that the provincial council performed a public function in implementing the town-planning scheme and if it needed to expropriate the property to fulfil that function it was an expropriation for a public purpose.

### **2 2 3 5 *Slabbert v Minister van Lande***

*Slabbert v Minister van Lande*<sup>44</sup> (*Slabbert*) dealt with the Transvaal Expropriation of Land and Arbitration Clauses Proclamation 5 of 1902. Therefore, this is the first decision where the phrase ‘public purpose’ was interpreted specifically in terms of expropriation legislation. In this case the applicant owned a portion of the farm Rietfontein adjacent to a lot named Libertas, the official residence of the Prime Minister of the Republic of South Africa. In terms of the Expropriation of Land and Arbitration Clauses Proclamation as amended by section 1 of the Expropriation Amendment Act 31 of 1958, the respondent gave notice to the applicant of his intention to expropriate the latter’s property. According to the respondent, the purpose of the expropriation was to provide better security and privacy to the Prime Minister. The applicant argued that the expropriation was invalid, given that the expropriation was not for a public purpose as meant in the Expropriation of Lands and Arbitration Clauses Proclamation of 1902. As a result, the issue before the court was whether or not the expropriation was for a public purpose.

Section 2 of the Expropriation of Land and Arbitration Clauses Proclamation of 1902 as amended by section 1 of the Expropriation Amendment Act of 1958 read as follows:

‘The governor may for public purposes acquire by voluntary or compulsory sale any land the property of private persons situated in the Colony. The expression ‘public purposes’ shall include, *without limiting in any manner the general meaning of such expression*:

- (1) The construction and maintenance of works for the defence of this Colony and the erection of buildings for the use of any Police or Defence Force therein.
- (2) The construction and maintenance of railways, tramways, telegraphs, telephones, public roads, streets...<sup>45</sup>

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<sup>44</sup> 1963 (3) SA 620 (T).

<sup>45</sup> The emphasised words were inserted by s 1 of the Expropriation Amendment Act 31 of 1958.

The court accepted that the interpretation of legislation granting expropriation powers to organs of state must be interpreted narrowly, since it has a drastic effect on the affected owners' property rights.<sup>46</sup> From the outset the court accepted that the phrase 'public purposes' was not limited to those purposes mentioned in section 2(1)-(2), but could include other considerations. Therefore, the court considered the general meaning of the phrase 'public purposes'.

Relying on the decisions in *Rondebosch*<sup>47</sup> and *Rudolph*,<sup>48</sup> the court stated that 'public purposes' can have a broad as well as a narrow meaning and that the interpretation would depend on the context of each case. The broad meaning would include things whereby the whole or local public are affected, while the narrow meaning would be limited to government purposes. Furthermore, the court referred to definitions of the phrase 'public purposes' in various dictionaries and came to the conclusion that public purposes should be contrasted with private purposes.

According to the court the safety of the Prime Minister was a public matter, which means that the improvement of any security measure relating to the safety of the Prime Minister was also a public matter. The court was of the opinion that the expropriation of the applicant's property was not for a private or personal purpose, but for the benefit of the country's administration. Therefore, the court found that the public purpose for which the property was expropriated fell within the ambit of what was meant by 'public purposes' in section 2 of the Expropriation of Land and Arbitration Clauses Proclamation 5 of 1902 as amended by section 1 of the Expropriation Amendment Act 31 of 1958.

In *Slabbert* the court therefore adopted the interpretation given to the phrase 'public purpose' in the judgments of *Rondebosch* and *Rudolph*, including the distinction between the wider and the narrower meaning of that phrase and the principle that the correct interpretation must be selected for each individual case on the basis of the facts and the context. As stated earlier, these judgments were not decided in terms of legislation that granted expropriatory powers, but the court assumed that the same meaning given in the *Rondebosch* and *Rudolph* cases could be attributed to the public purpose requirement in terms of the Expropriation of Land and Arbitration Clauses Proclamation of 1902.

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<sup>46</sup> *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) 622.

<sup>47</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271.

<sup>48</sup> *Minister of Lands v Rudolph* 1940 SR 126.

## 2 2 4 Conclusion

The cases discussed in this section illustrate that the public purpose requirement can have either a broad or a narrow meaning. Under the broad meaning it would include all things that affect or benefit the public at large, while in terms of the narrow meaning it pertains to government purposes. While the narrow approach was followed in the *Rondebosch*<sup>49</sup> decision, the broad approach was adopted in *Rudolph*<sup>50</sup> and confirmed in *Slabbert*.<sup>51</sup> These early decisions established the principle that the choice between the wide and the narrow interpretation will depend on the legislation involved and the facts of each case. Therefore, it can be deduced that for an expropriation to be justified by its public purpose it does not necessarily mean that the property has to be used by the state for a purely government purpose, but that the public purpose is also served when the public derives a benefit. Furthermore, on the basis of the *African Farms*<sup>52</sup> decision, it is clear that the public purpose requirement does not oblige the expropriating authority to use all of the expropriated property; it can be used by or transferred to third parties.<sup>53</sup> However, whether or not this is justified depends on the specific context of each case.<sup>54</sup>

## 2 3 'Public Purpose' in Expropriation Law between 1965 and 1975

### 2 3 1 Introduction

The Expropriation Act 55 of 1965 was the first comprehensive expropriation act since the Union of South Africa was established in 1910.<sup>55</sup> Since the Republic of South Africa was established in 1961, this Act was applicable throughout the Republic of South Africa. The aim of this Act was to centralise expropriation on behalf of the central government by conferring expropriation powers on the Minister of Lands, who was forthwith responsible for the expropriation of property on behalf of the central government.<sup>56</sup> In addition to the Minister of Lands, the 1965 Act also gave the Administrator of each province and local authorities the power to expropriate property.<sup>57</sup> Since the 1965 Act did not repeal all expropriation legislation that existed at the time it was promulgated, other state organs

<sup>49</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271.

<sup>50</sup> *Minister of Lands v Rudolph* 1940 SR 126.

<sup>51</sup> *Slabbert v Minister van Lande* 1963 (3) SA 620 (T).

<sup>52</sup> *African Farms and Townships v Cape Town Municipality* 1961 (3) SA 392 (C).

<sup>53</sup> See Eisenberg A 'Public Purpose and Expropriation: Some Comparative Insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 219-220.

<sup>54</sup> See further ch 4.

<sup>55</sup> See Gildenhuis A *Onteieningreg* (2<sup>nd</sup> ed 2001) 44.

<sup>56</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 44.

<sup>57</sup> Gildenhuis A *Onteieningreg* (2<sup>nd</sup> ed 2001) 44. In terms of the Expropriation Act 55 of 1965, the local authority could only expropriate property with the authorisation of the Administrator of the relevant province.

were still able to expropriate property in terms of different legislation. Therefore, expropriation continued to be carried out in terms of other legislation.<sup>58</sup>

In terms of section 2 of Act the Minister of Lands (which includes an Administrator of a province) may expropriate property for a public purpose and subject to the payment of compensation. Unlike the Expropriation Act 63 of 1975, the 1965 Act did not define 'public purpose'. Therefore, it was up to the courts to determine the meaning of this requirement in terms of the 1965 Act. During the period that the 1965 Expropriation Act was in force the public purpose requirement in the Act was considered in one important decision, namely *Fourie v Minister van Lande*.<sup>59</sup>

### 2 3 2 *Fourie v Minister van Lande*

*Fourie v Minister van Lande en 'n Ander*<sup>60</sup> (*Fourie*) concerned the validity of the expropriation of the applicant's property situated in the town of Vrede. It was undisputed that Vrede was an important town in the country's telephone and telegram network. The expansion and continued maintenance of the telephone network in Vrede was important for government activities, business enterprises of the private sector as well as for individual citizens. To maintain this telephone network, the Department of Post and Telegram Services needed to provide affordable accommodation for its technicians in the town where such maintenance was required from time to time. For this reason it was the department's policy to purchase dwellings for its technicians. These dwellings remained the property of the state and were rented to the technicians at a reduced rate.

The department and the applicant (*Fourie*) concluded an agreement that granted the department first option to buy *Fourie's* erf in Vrede. *Fourie* was of the opinion that the option lapsed because the department had failed to exercise it. Consequently, *Fourie* decided to sell the property to *Ferreira*. The department, under the impression that the agreement between itself and *Fourie* was still in force, gave notice to *Fourie* of its intention to execute its option. When *Fourie* refused to accept that the agreement was still valid, the department decided to expropriate the property.

The second respondent (the deputy Postmaster-General) thereupon served an expropriation notice on *Fourie*. The notice concerned the expropriation of *Fourie's* land in the town of Vrede. *Fourie* argued that the expropriation of his property was not for a valid public purpose as contemplated by section 2(1) of the Expropriation Act 55 of 1965, since

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<sup>58</sup> See 2 4 below for a detailed discussion.

<sup>59</sup> 1970 (4) SA 165 (O).

<sup>60</sup> 1970 (4) SA 165 (O).



the provision of housing for the technicians of the department was a private matter. Therefore, he argued that the expropriation could not be for a public purpose and he sought an order declaring the expropriation invalid. The respondents, on the other hand, argued that the expropriation was for a valid public purpose. In terms of the department's policy, the department had already bought 28 houses in the Orange Free State to be used by its technicians. The question that the court had to decide was whether the expropriation of Fourie's property was for a valid public purpose.

The court stated that the power of expropriation was contained in legislation.<sup>61</sup> In terms of the 1965 Expropriation Act the state cannot simply expropriate property; it must be for a public purpose and compensation should be paid. Furthermore, it is the duty of the courts to ensure that the expropriation is done strictly in terms of the Act. According to the court, the term 'public purpose' was interpreted by courts in terms of previous legislation and that interpretation was still in force. The court stated that when a particular meaning had been given to a particular word and that word is used in subsequent legislation that is *in pari materia* with the previous legislation, there is a presumption that the meaning in the current act is the same as given by the courts in terms of the previous legislation.<sup>62</sup> Therefore, although the term 'public purpose' was interpreted by the courts in terms of previous legislation, as was the case in *Slabbert v Minister van Lande*,<sup>63</sup> the interpretation given there was still applicable since the legislature did not indicate otherwise. In *Fourie*,<sup>64</sup> the court therefore accepted the *Slabbert* judgment concerning the broad interpretation of the public purpose requirement.

Section 2(1) of the Expropriation Act 55 of 1965 allowed the Minister to expropriate property for public purposes on condition that compensation is paid. According to the court, the phrase 'public purpose' already had an established meaning when the legislature included it in the legislation. Since the legislature did not indicate that this requirement should be interpreted differently, the meaning given to this phrase in previous case law, decided in terms of different legislation, should also apply in this case.

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<sup>61</sup> The court, relying on *Jooste v The Government of the SA Republic* (1897) 4 Off Rep 147 and *Pretoria City Council v Modimola* 1966 (3) SA 250 (A), stated that the state had the power to expropriate property through the use of *dominium eminens*, but since expropriation had such a drastic effect on the property rights of the effected landowner, a requirement later developed that expropriation must be for a public necessity and that the effected landowner had to be compensated.

<sup>62</sup> The court relied on an English case, *Mersey Docks & Harbour Board v Cameron; Jones v Mersey Docks & Harbour Board* 11 ER 1405, and on South African decisions including *Ex Parte Minister of Justice: In re R v Bolon* 1941 AD 345 and *R v Sharp* 1957 (3) SA 703 (C).

<sup>63</sup> 1963 (3) SA 620 (T). See also *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C), discussed above at 2 2 3 4.

<sup>64</sup> *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O).

In *Fourie*, the court stated that 'public purpose' should be interpreted broadly, which means that the public purpose is established when the expropriation serves either the broader public or the local public.<sup>65</sup> The broad meaning of the public purpose requirement includes the narrow meaning, which is restricted to government purposes. As a result, the court had to consider for which purpose the property was expropriated and also what the role of the department was in society.

The court stated that the department's mandate to effectively maintain and expand the country's telecommunications network was an important government purpose. Not only was this mandate given in terms of legislation, but the function of the department was important for the safety of the Republic as well as maintaining economic growth. Therefore, the court stated that the expropriation could be for government purposes and that it could be included in the narrow meaning of the public purpose requirement. However, the court further explained the importance of the telecommunications network for the public at large and the negative effect it would have on the public if the network were not maintained properly. As a result, the court explained that the function of the department could also be understood under the broad meaning of the public purpose requirement, because it also affected the broader public. Since the maintenance and expansion of the communication network was not only a government purpose but also a public purpose in terms of the broad understanding of the phrase, the court found that the expropriation of the applicant's property to provide housing for the technicians of the department was a public purpose as meant in section 2(1) of the Expropriation Act 55 of 1965.

### 2 3 3 Conclusion

The *Fourie* decision is the first decision in which a court interpreted the phrase 'public purpose' in terms of a general expropriation act applicable throughout the Republic of South Africa. The court accepted the distinction between the broad and narrow meanings of the phrase 'public purpose' as established in previous case law. Furthermore, the court held that the broad meaning of the public purpose requirement (purposes which affect the whole public) includes the narrow meaning of the public purpose requirement

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<sup>65</sup> Similarly, in *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C) the court held that the expropriation of the applicant's property in order to widen the street to serve the residents of that particular street fell within the function of the Municipality, which is able to expropriate property for town planning purposes.



(governmental purposes). In this decision the court evaluated whether both the narrow and the broad understanding were satisfied.

It has been established in previous case law that the public purpose can be understood broadly, relating to matters that benefit or affect the public at large. The public purpose requirement is therefore not restricted to government purposes. In *Fourie*, another dimension was added, namely that the public purpose is also served when the local public derives a benefit from the expropriation. Therefore, in terms of the broad understanding of the public purpose requirement it is not necessary that the public at large benefit from the expropriation; it is sufficient if only the local public receives the benefit.

## **2 4 ‘Public Purpose’ in Expropriation Law between 1975 and 1993**

### *2 4 1 Introduction*

As discussed above, the Expropriation Act 55 of 1965 was the first comprehensive expropriation act applicable in the Republic of South Africa. Since the Expropriation Act 55 of 1965 did not repeal all other expropriation legislation, ministers other than the Minister of Lands were still able to expropriate property in terms of other expropriation legislation that remained in force. This position was untenable<sup>66</sup> and the need arose for a uniform expropriation act that could streamline both the procedure of expropriation and the calculation of compensation.<sup>67</sup> Therefore, after lengthy negotiations between various state departments, the Expropriation Act 63 of 1975 was promulgated. Due to initial flaws in the 1975 Act, it has been subjected to numerous amendments.<sup>68</sup> The 1975 Expropriation Act was substantially amended by the Expropriation Act Amendment Act of 1992.<sup>69</sup>

The Expropriation Act 63 of 1975 came into operation on the 1<sup>st</sup> of January 1977. Since the Act is still applicable, the requirements for a valid expropriation and especially the public purpose requirement will be discussed here with reference to this Act. In terms of section 2(1) of the 1975 Expropriation Act, the Minister of Public Works has the power to expropriate immovable and movable property for public purposes. The Minister may also temporarily expropriate such property for a public purpose. Property that may be expropriated is not limited to immovable and tangible movable property, but is given a

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<sup>66</sup> According to Gildenhuys A *Ontheieningreg* (2<sup>nd</sup> 2001) 44, this situation was unsatisfactory because the procedures and method of calculating compensation differed in the various pieces of legislation, which affected legal certainty negatively.

<sup>67</sup> Jacobs M *The Law of Expropriation in South Africa* (1982) 4.

<sup>68</sup> See Jacobs M *The Law of Expropriation in South Africa* (1982) 4 for a list of amendments to the original Expropriation Act 63 of 1975.

<sup>69</sup> Act 45 of 1992.

broad meaning.<sup>70</sup> Therefore, in terms of the Act, property includes ‘(i) rights of ownership over movable and immovable things; (ii) mineral rights; (iii) existing or new limited real rights; or (iv) personal or immaterial property rights.’<sup>71</sup> When the Minister expropriates property, she has an obligation to pay compensation and the calculation of the compensation is regulated extensively and exclusively in terms of this Act, even when the expropriation is authorised by other legislation.<sup>72</sup> However, the calculation of compensation in terms of the 1975 Expropriation Act is now subject to section 25(3) of the 1996 Constitution.<sup>73</sup>

In terms of the Expropriation Act of 1975, there are two prerequisites that have to be met before an expropriation can be valid: The expropriation must be for a public purpose and compensation must be paid. Unlike the 1965 Expropriation Act, the 1975 Act defines ‘public purpose.’ In terms of section 1 of the 1975 Act, “public purposes” includes any purpose connected with the administration of the provisions of any law by an organ of State.’ It is unclear as to why this vague formulation of the public purpose requirement was included in this Act. It is possible to argue that since this Act is regarded as the primary act conferring expropriation powers and has to be able to justify the expropriation of property for various purposes, the legislature did not want to limit the scope of purposes in the Act. Since the public purpose serves as the justification for the expropriation,<sup>74</sup> attention is given below to cases that involved the public purpose requirement.

#### 2 4 2 *White Rocks Farm v Minister of Community Development*

In *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*<sup>75</sup> (*White Rocks*) the Minister of Community Development expropriated the plaintiffs’ properties in terms of the 1975 Expropriation Act. The purpose of the expropriation was to establish a

<sup>70</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5<sup>th</sup> ed 2006) 559.

<sup>71</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5<sup>th</sup> ed 2006) 560 (footnotes omitted).

<sup>72</sup> Ss 10-22 of the Expropriation Act 63 of 1975. For discussion of the compensation requirements generally see Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 503-520; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The Law of Property* (5<sup>th</sup> ed 2006) 568-578.

<sup>73</sup> In terms of s 25(3) of the Constitution, ‘[t]he amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances...’ The section continues by referring to a number of factors, such as the market value of the property, the current use of the property and the purpose of the expropriation. The factors mentioned in s 25(3) do not constitute a closed list, since other factors may also be considered.

<sup>74</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82; *Minister of Minerals and Energy v Agri SA (CALSA Amicus Curiae)* (458/11) [2012] ZASCA 93, 31 May 2012 para 18. See the discussion in ch 3 at 3 3 2.

<sup>75</sup> 1984 (3) SA 785 (N). The Mountain Catchment Areas Act 63 of 1970 does not provide for expropriation but only provides for the conservation, use, management and control of land situated within a declared mountain catchment area.

mountain catchment area in the Natal Drakensberg. The plaintiffs argued that the land was not required for the stated purpose and that the purpose was not a public purpose in accordance with section 2(1) of the Act. The purposes for the establishment of the mountain catchment area included the protection of the upper catchment of a number of rivers flowing from the Drakensberg; protecting the national plants communities within the area; and to guarantee the flow of silt free water in and from such areas.<sup>76</sup>

The plaintiffs argued that the establishment of a mountain catchment area was not a public purpose in terms of the Expropriation Act of 1975 because the establishment of such areas is specifically provided for in the Mountain Catchment Areas Act 63 of 1970. The plaintiffs further argued that when parliament promulgated the Expropriation Act of 1975 it must have been aware of the Mountain Catchment Areas Act and must have intended that the Expropriation Act should not apply to mountain catchment areas. The court rejected this argument and stated that the power to expropriate property in terms of section 2 of the Expropriation Act is unlimited, since it refers to 'any property'. Furthermore, the court was of the opinion that if the legislature wanted the Mountain Catchment Areas Act to apply instead of the Expropriation Act of 1975, it would have been clear from the Mountain Catchment Areas Act.

Therefore, the court considered whether the expropriation of the plaintiffs' properties was for a public purpose as contemplated by section 2(1) of the 1975 Expropriation Act. The court stated that the term 'public purposes' had already been interpreted judicially in cases such as *Slabbert v Minister van Lande*<sup>77</sup> and *Fourie v Minister van Lande*.<sup>78</sup> In the *Slabbert* judgment, the court decided that the public purpose requirement can have a broad or a narrow meaning and that the particular interpretation would depend on the context of each case. In the *Fourie* judgment the court stated that the phrase 'public purposes' must have the same meaning as the established interpretation and that it should be construed broadly. The court in this case agreed with the *Fourie*<sup>79</sup> judgment and stated as follows:

'There is no difference between the power to expropriate for public purposes granted to the Minister in the Expropriation Act 55 of 1965 and the powers to expropriate granted to the Minister in the Expropriation Act 63 of 1975.'<sup>80</sup>

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<sup>76</sup> *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) 791.

<sup>77</sup> 1963 (3) SA 620 (T).

<sup>78</sup> 1970 (4) SA 165 (O).

<sup>79</sup> *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O).

<sup>80</sup> *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) 794.

Accordingly, the legislature must have had the established interpretation of 'public purposes' in mind when drafting the 1975 Expropriation Act and intended the present Act to bear the same established meaning. As a result, the court accepted the broad meaning of the public purpose requirement as it had already been accepted in previous case law. The preservation and conservation of the water systems affect the people of South Africa as a whole. Therefore, the court decided that the establishment of a mountain catchment area falls within the broad meaning of the public purpose requirement and is a public purpose as meant by section 2(1) of the 1975 Expropriation Act.

Another argument brought forward by the plaintiffs was that the reason the defendant decided to expropriate the properties in terms of the 1975 Expropriation Act rather than declare it a mountain catchment area in terms of the Mountain Catchments Areas Act of 1970 was a financial one. It was argued that declaring a mountain catchment area would have been more costly. The court rejected this argument on the basis that it confused motive with purpose. Since the expropriation was for a valid public purpose, the motive behind the decision to expropriate the property in terms of the legislation is irrelevant.<sup>81</sup>

In terms of the *White Rocks*<sup>82</sup> case the public purpose requirement in section 2(1) of the 1975 Expropriation Act has the same meaning as that which was already established in earlier case law. Therefore, the public purpose requirement is understood broadly in this case, which means that the public purpose requirement is met when the public (even the local public) receives a benefit.

### *2 4 3 Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*

A case heard by the Appellate Division of the Supreme Court that concerns expropriation but that was not decided in terms of the Expropriation Act 63 of 1975, *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd*<sup>83</sup> (*Van Streepen*), is interesting for the reasons explained below. In this case the Administrator of Transvaal expropriated the respondent's property in terms of section 7(1) of the Transvaal Roads Ordinance 27 of 1957. The Administrator of the Province had to ease traffic congestion in

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<sup>81</sup> In this regard the court referred to *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) 270, where it was held that if the expropriation is for a valid public purpose and exercised in good faith the motive is irrelevant to the consideration whether the power of expropriation was validly exercised. See the discussion of *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 with specific reference to the relevance of motive in the decision to expropriate property in ch 5 at 5 3.

<sup>82</sup> *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N).

<sup>83</sup> 1990 (4) SA 644 (A).

the Kempton Park area. However, undertaking the steps that were necessary to reduce traffic congestion was problematic since there was a private railway line running parallel to one of the roads earmarked for widening. This railway line was operated by the private company Sentrachem (the second respondent) and ran over the property of one of its subsidiaries. Sentrachem had secure title to make use of the land on which the railway line was originally situated. In order to alleviate the congestion by widening the relevant roads, the railway line had to be relocated. The proposed relocation traversed a substantial portion of the respondent's property. The Administrator, by virtue of section 5(1)(b) and Notice 2161,<sup>84</sup> commenced constructing the new road and railway line.<sup>85</sup>

The Administrator was informed that the respondent intended to challenge his authority to declare a public road, which included the widening of the road reserve and the relocation of the railway line. The Administrator realised that if the respondent succeeded in its intended challenge, the administration would suffer serious financial loss due to the delay in construction. At the same time, Sentrachem became concerned about its security of title to use the new railway line.<sup>86</sup> Therefore, in terms of Notice 1909,<sup>87</sup> the Administrator expropriated Van Streepen's property in order to transfer it to Sentrachem.

The respondent challenged the decisions of the Administrator and the matter for consideration in the Appellate Division was whether the expropriation of the respondent's land fell within the Administrator's powers in terms of section 7(1) of the Ordinance.<sup>88</sup> Section 7(1) of the Ordinance authorises the Administrator to acquire any land 'for the construction or maintenance of any road for any purpose in connection with the construction or maintenance of any road'.<sup>89</sup>

The respondent argued that section 7(1) of the Ordinance does not grant the Administrator the authority to expropriate his property and transfer it to another third party 'for the latter's use and benefit'.<sup>90</sup> The court rejected this argument, stating that because section 7(1) of the Ordinance permits the state to acquire property, it does not necessarily mean that it should be acquired to be used by the state. Interpreting the Ordinance strictly, the court stated that the fundamental problem was whether section 7(1) of the Ordinance permitted the Administrator to acquire the property of one person for the benefit of another.

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<sup>84</sup> Administrator's Notice 2161 of 18 December 1983.

<sup>85</sup> S 5(1)(b) of the Transvaal Road Ordinance 22 of 1957 authorises the Administrator to declare that a public road shall exist on any land when certain procedures have been followed.

<sup>86</sup> Since the railway line formed an integral part of Sentrachem's business activities, considerable losses would have occurred if Sentrachem lost secure title over the railway line.

<sup>87</sup> Administrator's Notice 1909 of 4 September 1985.

<sup>88</sup> The second, but for purposes of this chapter less important matter that the court had to consider, was whether Notice 1909 was valid 'for want of an adequate description of the expropriated land'.

<sup>89</sup> S 7(1) of the Transvaal Road Ordinance 27 of 1957.

<sup>90</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 661.

According to the court, an expropriation must 'generally speaking'<sup>91</sup> be for a public purpose or in the public interest. This was the first clear reference to the phrase 'public interest' in modern South African expropriation case law. In previous case law reference was only made to the public purpose requirement, which could either be understood broadly or narrowly. In this case the court apparently introduced the notion of 'public interest' to refer to the broad meaning previously associated with 'public purpose'.

According to the court, the Administrator had to consider the 'practical and economic implications of the project as a whole in deciding what would best serve the public interest'.<sup>92</sup> On the facts of the case the court accepted that Sentrachem's activities were of national importance and that the loss of the railway line that transported the necessary raw materials would disrupt Sentrachem's 'production of strategically important products'.<sup>93</sup> Therefore, the court held that the power of the Administrator in terms of section 7(1) of the Ordinance can include the acquisition of land for the benefit of a third party.<sup>94</sup> According to the court, the power to expropriate property and transfer it to another private party exists, but the manner in which it was exercised may be open to challenge. Such a challenge may be brought if the Administrator acted in bad faith or not in the public interest.

In this decision the court stated that an expropriation must generally be for a public purpose or in the public interest. In earlier case law a distinction was made between the narrow and broad understanding of the public purpose requirement. The narrow understanding was said to relate to government purposes, while the broad understanding relates to a purpose that benefits the public at large. Since the court in *Van Streepen* stated that the expropriation of property for the benefit of another private party can never be for a public purpose, it is possible to argue that when it referred to the public purpose it only referred to the narrow understanding of the public purpose requirement, namely government purposes. However, since the expropriation of the property and the transfer of it to another third party benefit the public at large, it could be said that it falls within the broad understanding of the public purpose requirement. Since the court did not refer to the broad and narrow understandings of the public purpose requirement, but to the public purpose and the public interest, it is arguable that the court equated the broad understanding of the public purpose requirement with the public interest, while the

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<sup>91</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 662.

<sup>92</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 661.

<sup>93</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 661.

<sup>94</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 661.



reference to the public purpose is limited to the narrow understanding of the public purpose requirement as it was understood in earlier case law.

## 2 5 Conclusion

This chapter provides an overview of South African expropriation law before the Interim Constitution of 1993 was promulgated, particularly in relation to the public purpose requirement. The case law considered in this chapter is limited to judgments handed down before the commencement of the 1993 Constitution, since later case law is discussed in the next chapter. The term 'public purpose' is investigated not only in relation to expropriation legislation, but also in terms of other legislation where the term was used and that had a bearing on the understanding of the public purpose requirement in subsequent expropriation case law.

Before the Expropriation Act 55 of 1965 there was specific legislation that expropriated property for a specific public purpose and general expropriation legislation that set out the expropriation procedure and the manner in which compensation was to be calculated.<sup>95</sup> The general expropriation acts did not grant expropriation authority, and therefore there was no need to include a general public purpose requirement. Therefore, it was the duty of the courts to interpret and give meaning of the phrase 'public purpose.' Generally speaking, the meaning of the public purpose requirement was not a central issue in case law because it was assumed, in terms of the doctrine of parliamentary sovereignty, that parliament decided whether a particular expropriation would be for a valid purpose and that the courts should defer to that decision unless there was proof of bad faith or improper behaviour.

Furthermore, in earlier case law the courts generally contrasted public purpose with private purposes, finding that an expropriation is for a public purpose if it benefits the public and not private individuals.<sup>96</sup> In other decisions, the court equated public purpose with government purposes.<sup>97</sup> It eventually became evident that the public purpose requirement can have a broad or a narrow meaning depending on the specific facts and the context.<sup>98</sup> In terms of the broad understanding, the public purpose is fulfilled when the expropriation benefits the public at large or even the local public. In terms of the narrow

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<sup>95</sup> See Jacobs M *The Law of Expropriation in South Africa* (1982) 3-4.

<sup>96</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271; *Minister of Lands v Rudolph* 1940 SR 126.

<sup>97</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271; *Minister of Lands v Rudolph* 1940 SR 126.

<sup>98</sup> See *Slabbert v Minister van Lande* 1963 (3) SA 620 (T); *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O).



understanding the expropriation would only be justified if the property would be used for government purposes.

In the 1965 Expropriation Act the phrase 'public purpose' was not defined and the court in *Fourie v Minister van Lande*<sup>99</sup> held that the established meaning of the phrase should also apply to the public purpose requirement in terms of the Act. The 1975 Expropriation Act defined 'public purposes' and the court in *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*<sup>100</sup> held that the interpretation of the phrase 'public purpose' before the enactment of the 1965 Act as well as the interpretation thereof in the 1965 Act should also apply to the interpretation of the public purpose requirement in terms of the 1975 Act. Therefore, the understanding of the phrase 'public purpose' since the interpretation thereof in *Rondebosch Municipal Council v Trustees of the Western Province Agricultural*<sup>101</sup> is also applicable to the understanding of this phrase in terms of the 1975 Act.

Furthermore, it was illustrated that in terms of expropriation law, it is not a requirement that the property must be used by the state after expropriation had taken place.<sup>102</sup> In *Fourie*,<sup>103</sup> although the state acquired the property through expropriation, it was to be used by the employees of the Department of Post and Telegram Services. This means that the expropriated property can be used by private individuals provided that the purpose of expropriation - in this case ensuring the maintenance of the communication network - is still a valid public purpose.

The issue of third party transfers came to light in at least two decisions before the 1996 Constitution was promulgated. In *African Farms & Townships Ltd v Cape Town Municipality*<sup>104</sup> the court indicated that the expropriation would be valid even when the property is to be used by another private party. In *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>105</sup> the court decided that the expropriation of the applicant's property in order to transfer it to another party may be in the public interest even if it is not strictly for a narrow public purpose. It was pointed out above that the court in *Van Streepen* did not refer to the broad and narrow understanding of the public purpose requirement as was done in earlier case law, but instead referred to the public purpose as opposed to the public interest requirement. The court indicated that the public interest is

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<sup>99</sup> 1970 (4) SA 165 (O).

<sup>100</sup> 1984 (3) SA 785 (N).

<sup>101</sup> 1911 AD 271.

<sup>102</sup> See *African Farms & Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (C).

<sup>103</sup> *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O).

<sup>104</sup> 1961 (3) SA 392 (C).

<sup>105</sup> 1990 (4) SA 644 (A).

broader than the public purpose. There is no reference to the notion of 'public interest' in the authorising legislation or in previous case law. Therefore, it seems probable that when the court referred to the public interest it referred to the broad understanding of the public purpose requirement as it was defined in earlier case law. As a result, the reference to the public purpose seems to be limited to the narrow understanding of the public purpose requirement.

With the dawning of the new constitutional dispensation, these cases and the interpretation given to 'public purpose' pre-1993 should have a bearing on the understanding of the requirement post-1993. However, the interpretation given before 1993 cannot merely be adopted in a democratic South Africa. There are bound to be certain adaptations that have, or had, to be made given that the principle of parliamentary sovereignty was replaced with constitutional supremacy. In the following chapter, the public purpose requirement in the 1993 Interim Constitution and the 'public purpose or public interest' requirement in the 1996 Constitution are discussed. The discussion is limited to cases that dealt with the public purpose and public interest requirements and does not address the other constitutional factors with regard to expropriation, namely law of general application and compensation, in detail.

# CHAPTER 3: PUBLIC PURPOSE OR PUBLIC INTEREST IN THE CONSTITUTIONAL ERA

## 3 1 Introduction

In Chapter 2 the public purpose requirement is analysed as it was understood before the Interim Constitution Act 200 of 1993 came into effect in 1994. It is pointed out there that the first general and comprehensive expropriation act applicable throughout the Republic of South Africa, namely the Expropriation Act 55 of 1965, required an expropriation to be for a public purpose. The courts attributed the established meaning of the phrase 'public purpose' as it developed in earlier case law to the public purpose requirement in terms of this Act. The Expropriation Act of 1965 was replaced with the Expropriation Act 63 of 1975. The 1975 Act, which is still valid, only refers to 'public purpose' as a requirement for a valid expropriation. In terms of section 1 of this Act 'public purpose' is any purpose that is 'connected which the administration of the provisions of any law by an organ of state'. The courts have indicated that the established meaning of the phrase 'public purpose' should also apply to the public purpose requirement in terms of this Act.<sup>1</sup>

Although the 1975 Expropriation Act is still valid, both the Interim Constitution of 1993 and the 1996 Constitution had an effect on the understanding of the public purpose requirement in the Act. The Interim Constitution only referred to 'public purpose', while section 25(2) of the 1996 Constitution refers to 'public purpose or public interest' as a requirement for a valid expropriation.

It is explained in Chapter 2 that the pre-1994 courts were deferential to the decision of the legislature as to what constitutes a public purpose. This can be attributed to the principle of parliamentary sovereignty that was part of South African law before the enactment of the Interim Constitution.<sup>2</sup> In this regard courts were unable to test legislation that has been duly passed by the legislature.<sup>3</sup> Furthermore, the case law discussed in Chapter 2 indicates that the public purpose requirement could be interpreted either narrowly or broadly.<sup>4</sup> In terms of the narrow understanding the public purpose was said to

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<sup>1</sup> See *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) discussed in ch 2 at 2 4 2.

<sup>2</sup> The principle of parliamentary sovereignty entails that parliament, as the elected representatives, governs as the supreme authority in a particular state: Carpenter G *Introduction to South African Constitutional Law* (1987) 77.

<sup>3</sup> See Carpenter G *Introduction to South African Constitutional Law* (1987) 77.

<sup>4</sup> Although the Interim Constitution Act 200 of 1993 was in force from 1994-1997, courts did not have the opportunity to evaluate the public purpose requirement in terms of the property clause (s 28) of the Interim

relate to government purposes, while the broad meaning includes things that benefit the public at large.

However, case law prior to 1994 also indicates that an expropriation can be justified if it is for a public purpose or in the public interest. With reference to *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>5</sup> (*Van Streepen*), where the then Appellate Division of the Supreme Court stated that the expropriation of property for the benefit of another private party cannot be for a public purpose but it can be in the public interest, it is concluded in Chapter 2 that the term 'public purpose' refers to the narrow understanding of the public purpose requirement established in earlier case law, namely government purposes. The notion of 'public interest' therefore refers to the broad understanding of the phrase 'public purpose,' namely purposes that benefit the public outside of narrow government purposes.

Similar to the expropriation legislation such as the 1965 and 1975 Expropriation Acts, section 28 of the Interim Constitution of 1993 only required that an expropriation be for a public purpose. Section 28(3) stated that '[w]here any rights in property are expropriated ... such expropriation shall be permissible for public purposes only'. However, if public purpose refers to government purposes only it would have been difficult to justify expropriation for land reform purposes, since that is arguably not an expropriation for government purposes, although it could be for the benefit of the public. Furthermore, since the Interim Constitution abolished parliament supremacy it is possible that expropriation for land reform purposes would have been struck down by the courts, since it would not have complied with the constitutional provisions. Therefore, because of uncertainty regarding the constitutional validity of expropriation of property for land reform purposes, the drafters of the Constitution included the reference to the public interest in section 25(2) of the 1996 Constitution.<sup>6</sup> Section 25(2) now states that '[p]roperty may be expropriated ... for a public purpose or in the public interest'.

As a result, it can be inferred that there is a distinction between public purpose on the one hand and public interest on the other in the section 25(2) requirement. The case law discussed in Chapter 2 indicates that the public purpose can be understood narrowly and broadly. However, based on the *Van Streepen* decision it is argued here that the public purpose refers to the narrow understanding of the public purpose requirement, while the public interest refers to the broad understanding of the public purpose requirement.

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Constitution during that period. See the discussion of *Harksen v Lane NO* 1998 (1) SA 300 (CC) at 3 2 below.

<sup>5</sup> 1990 (4) SA 644 (A), discussed in ch 2 at 2 4 3.

<sup>6</sup> The reason for the inclusion of the public interest in s 25(2) of the 1996 Constitution is discussed below.

Depending on the circumstances of each case, either the public purpose (the narrow understanding of the public purpose requirement) or the public interest (the broad understanding of the public purpose requirement) can justify expropriation. In this regard it is arguable that it is no longer necessary to refer to the narrow or the broad reading of the public purpose requirement since the public interest part of the constitutional requirement has now replaced the broad reading of the public purpose requirement.

In terms of section 25(2), expropriation is therefore justified in terms of the public purpose or public interest that is served by the expropriation.<sup>7</sup> This justificatory requirement therefore consists of two elements, but it remains one requirement. Given that an expropriation can be for a public purpose *or* in the public interest, it is not necessary that both the public purpose and the public interest need to be served in order to justify an expropriation.<sup>8</sup>

However, it is unclear where the public purpose ends and where the public interest starts, or how far the public interest can justify an expropriation that is not for a public purpose. Section 25(4)(a) of the 1996 Constitution provides an indication of what the public interest includes,<sup>9</sup> but there are still instances where the broad formulation of the public purpose requirement creates uncertainty. Because of the potential confusion regarding the public purpose or public interest requirement, as is evident from case law, this chapter attempts to explain the understanding of the public purpose or public interest requirement in section 25(2)(a) of the Constitution, especially with regard to the transfer of the property to third parties.

### 3 2 The Interim Constitution of 1993 and 'Public Purposes'

The Interim Constitution Act 200 of 1993 was promulgated in 1994. Although the protection of property in the bill of rights was a contested subject,<sup>10</sup> a property clause was eventually included in the bill of rights. Section 28(3) of the Interim Constitution stated that

<sup>7</sup> See *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82 and the discussion below at 3 3 2.

<sup>8</sup> Compare *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) discussed in ch 2 at 2 3 2, where the court considered whether the expropriation was justified in both the narrow and the broad understanding.

<sup>9</sup> S 25(4)(a) states the public interest in s 25(2) 'includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. See further 3 2 below.

<sup>10</sup> See Van der Walt AJ 'Property Rights, Land Rights, and Environmental Rights' in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 455-501 at 478-480; Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 131-132; Chaskalson M 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222-240; Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J & Roux T *Juta's New Land Law* (OS 1998) ch 1 at 1.

'[w]here any rights in property are expropriated pursuant to a law ... such expropriation shall be permissible for public purposes only ...'

The interpretation of the public purpose requirement in the Interim Constitution was a contested subject among academics during the short period that the Interim Constitution was in force. One of the main issues was whether expropriation for land reform purposes would constitute a public purpose.<sup>11</sup> The underlying issue was whether the expropriation of private property in order to transfer it to another private party would satisfy the public purpose requirement.<sup>12</sup>

Van der Walt<sup>13</sup> is of the opinion that these reservations were not unfounded, since similar expropriations have been declared invalid in certain foreign jurisdictions. In the Australian decision of *Clunies-Ross v The Commonwealth of Australia and Others*,<sup>14</sup> the court held that the compulsory acquisition of the plaintiff's land to reduce the unequal distribution of land was invalid because it was not for a public purpose. The court interpreted the public purpose requirement narrowly and consequently held that property can only be compulsorily acquired if it is strictly needed or used for a specific public purpose. According to the court, land reform does not serve such a purpose.<sup>15</sup> Similarly, in *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seereeram*,<sup>16</sup> the Trinidad and Tobago Court of Appeal held that the expropriation of the property of one person to transfer it to another does not constitute a public purpose.<sup>17</sup>

In relation to the issue of third party transfers and land reform in view of section 28 of the Interim Constitution, various authors relied on *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>18</sup> to explain the public purpose requirement.

<sup>11</sup> Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 136-138; Chaskalson M 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222-240 at 238; Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J, Roux T *Juta's New Land Law* (OS 1998) ch 1 at 48; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 340.

<sup>12</sup> Expropriating property and transferring it to another private party is also known as third party transfers or private-to-private transfers: Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law* Vol VI (2011) 1-38 at 10.

<sup>13</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 463.

<sup>14</sup> (1984) 155 CLR 193. See further the discussion of this decision in ch 4 at 4 3 3 3.

<sup>15</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 57-58.

<sup>16</sup> (1975) 27 WIR 329 (CA).

<sup>17</sup> *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seereeram* (1975) 27 WIR 329 at 329. See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 386-393 for a discussion of the case. Allen T *The Right to Property in Commonwealth Constitutions* (2000) 210-211 criticises the Trinidad and Tobago Court of Appeal for relying on US case law in which the public use was viewed narrowly, while ignoring the US Supreme Court's 'subsequent repudiation of the narrow use doctrine'. See the discussion of *Berman v Parker* 348 US 26 (1954); *Midkiff v Hawaii Housing Authority* 267 US 229 (1984) and *Kelo v City of New London* 545 US 469 (2005) in ch 4.

<sup>18</sup> 1990 (4) SA 644 (A).



According to Budlender,<sup>19</sup> it might seem as if the *Van Streepen* decision 'offers support for the proposition that the expropriation of land for the benefit of a private individual cannot be for public purposes, even though it may be in the public interest'. However, he argues that there are several reasons why this approach should not be followed. Budlender argues that in *Van Streepen* Smallberger JA did not interpret the phrase 'public purpose' but rather relied on a provincial ordinance which permitted the Administrator to 'acquire any land and cause it to be registered in the name of the state for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road'.<sup>20</sup> Accordingly Budlender argues that the 'different context of this limited power is quite apparent'.<sup>21</sup>

Furthermore, the case must be understood in light of its specific facts. The main purpose of the expropriation was to establish a railway link for a private entity, while the secondary purpose was to reduce the amount of compensation that would have been payable. Budlender<sup>22</sup> argues that under those circumstances it is understandable that the expropriation was not regarded as an expropriation for a public purpose, although it may have been in the public interest, since the expropriation was clearly for the benefit of another private party. Budlender<sup>23</sup> also states that the negotiators and drafters of the Interim Constitution intended that there should be a broad constitutional authorisation for expropriation. He therefore concludes that land reform would constitute a public purpose in terms of section 28 of the Interim Constitution.

Eisenberg,<sup>24</sup> also relying on the *Van Streepen*<sup>25</sup> decision as well as on US<sup>26</sup> and Indian case law,<sup>27</sup> states that the public purpose has not been interpreted literally to mean *use by the public*. She comes to the conclusion that expropriation for land redistribution programmes has been held to fall within the definition of public purpose. Therefore she states that, given the unusual facts of the *Van Streepen* decision, it 'cannot be used as

<sup>19</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J & Roux T *Juta's New Land Law* (OS 1998) ch 1 at 49.

<sup>20</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J & Roux T *Juta's New Land Law* (OS 1998) ch 1 at 49-50.

<sup>21</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J & Roux T *Juta's New Land Law* (OS 1998) ch 1 at 50.

<sup>22</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J, Roux T *Juta's New Land Law* (OS 1998) ch 1 at 50.

<sup>23</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J, Roux T *Juta's New Land Law* (OS 1998) ch 1 at 48.

<sup>24</sup> Eisenberg A 'Public Purpose and Expropriation: Some Comparative Insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 221.

<sup>25</sup> *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A).

<sup>26</sup> *Mt Vernon-Woodberry Cotton Duck Power Co v Alabama Interstate Power Co* 60 L ed 507 (1916); *Berman v Parker* 348 US 26 (1954); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

<sup>27</sup> *Hamabai Framjee v Secretary of State for India*; *State of Bihar v Sir Kameshwar Singh* AIR 1952 SC 252.



authority that the expropriation of private property and transfer to another private party cannot constitute a public purpose'.<sup>28</sup>

Chaskalson<sup>29</sup> argues that interpreting section 28(3) as a prohibition against land reform would run counter to chapter 8 of the Interim Constitution<sup>30</sup> and the principles of restitution and reconstruction. If a third party transfer for land reform purposes was held to be invalid, Chaskalson<sup>31</sup> argues, it would also be contrary to foreign law, given that foreign courts are generally hesitant to declare an expropriation invalid on the basis that it is not for a public purpose.<sup>32</sup>

Before the *Van Streepen* decision, the phrase 'public purpose' was interpreted either in broad or in narrow terms. It is possible to argue that expropriation for land reform purposes would be valid in terms of the broad understanding of the phrase 'public purpose.' However, *Van Streepen* - as indicated in Chapter 2 - differentiated between the public purpose (the narrow understanding of the public purpose requirement) and the public interest (broad understanding of the public purpose requirement). Because the Interim Constitution of 1993 only referred to 'public purpose,' there was concern that expropriation would only be allowed if it satisfied a narrow public purpose, namely government purposes. As a result, several authors argued that *Van Streepen* should not be used as authority that expropriation for land reform purposes, which involves transferring expropriated land to other private parties, is not for a public purpose.

The only decision heard in terms of section 28 of the Interim Constitution, *Harksen v Lane NO*<sup>33</sup> (*Harksen*), did not address this issue, since the Constitutional Court held that it did not involve an expropriation. Therefore, it did not deal with the public purpose requirement, nor did the case involve land reform. In *Harksen* the constitutionality of section 21 of the Insolvency Act 24 of 1936 was attacked on the basis that it conflicted with

<sup>28</sup> Eisenberg A 'Public Purpose and Expropriation: Some Comparative Insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 220.

<sup>29</sup> Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137.

<sup>30</sup> Ss 121-123 in ch 8 of the Interim Constitution Act 200 of 1993 made provision for land reform. Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137, referring to s 123(1)(b), states that provision is made for 'expropriating for the purposes of satisfying individual land claims of private individuals and communities.'

<sup>31</sup> Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137, relying on *Berman v Parker* 348 US 26 (1954); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); *Keystone Bituminous Coal Association v De Benedictis* 480 US 470 (1987).

<sup>32</sup> Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137 emphasises that even the US Supreme Court, which vigorously protects property rights, has upheld expropriation for land reform purposes that involves a third party transfer. Chaskalson states that *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) is of particular relevance, because it involved the expropriation of property for urban land reform.

<sup>33</sup> 1998 (1) SA 300 (CC).

section 28 of the Interim Constitution.<sup>34</sup> In terms of section 21 of the Insolvency Act the assets of a solvent spouse are subject to attachment by the Master of the High Court upon the sequestration of the insolvent spouse's estate. The applicant argued that section 21(1) of the Insolvency Act constituted an expropriation of her property without making provision for the payment of compensation. Therefore, she argued that section 21(1) was in conflict with section 28(3) of the Interim Constitution. For purposes of this judgment, the Court accepted that section 21 results in the passing of full ownership in the solvent spouse's property to the trustee of the insolvent estate.<sup>35</sup>

After considering the difference between a deprivation and an expropriation the Court found that section 21(1) of the Insolvency Act does not constitute an expropriation of property.<sup>36</sup> According to the Court an expropriation involves the 'acquisition of rights in property by a public authority for a public purpose', while a deprivation of property falls short of such an acquisition.<sup>37</sup> Therefore, the Court found it unnecessary to consider whether the vesting of the property in the Master was for a public purpose. As a result, it remained unclear whether the expropriation of private property for transfer to other private parties would constitute a public purpose.

Therefore, during the period that the Interim Constitution was in force it remained uncertain whether the expropriation and transfer of property to third parties in terms of the land reform programme would be justified in terms of the public purpose requirement. The decision in *Van Streepen*, where the court stated that an expropriation for the benefit of a third party can never be for a public purpose but it can be in the public interest, led to this uncertainty. For this reason several authors argued that the *Van Streepen* decision should be read in its specific context and that it cannot be used as authority for prohibiting expropriation for land reform purposes, since it would also be contrary to foreign law and

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<sup>34</sup> The constitutionality of s 21 of the Insolvency Act 24 of 1936 was attacked on the basis that it was in conflict with s 28(3) (the expropriation provision) and s 8 (the equality clause), but for purposes of this chapter the challenge based on equality is not addressed, even though the case was ultimately decided on the equality clause.

<sup>35</sup> In this regard the Court relied on *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A).

<sup>36</sup> Although s 21(1) has the effect that the property of the solvent spouse is transferred to the Master or trustee of the insolvent spouse's estate, the Court held that it does not constitute an expropriation since such a finding would ignore the purpose of the Act as a whole. The purpose of the Act is not to divest the solvent spouse of property without compensation, but to ensure that the insolvent estate is not deprived of property to which it is entitled. Furthermore, the transfer of property to the Master or the trustees is not of a permanent nature but to determine whether such property is in fact that of the insolvent estate: *Harksen v Lane NO* 1998 (1) SA 300 (CC) paras 36-38. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 337.

<sup>37</sup> To draw this distinction the Court relied on *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) and two decisions of the Zimbabwean Supreme Court, namely *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZSC) and *Davies v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC). See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 336-337.

the constitutional principle of restitution.<sup>38</sup> Nevertheless, the uncertainty persisted since the courts never had an opportunity to decide this matter.

### 3 3 Section 25 of the 1996 Constitution

#### 3 3 1 Introduction

After the promulgation of the Interim Constitution in 1994, the debate concerning the desirability of a property clause in the bill of rights came to an end and attention shifted towards the 'content and meaning of the property clause'.<sup>39</sup> A differently worded property clause, section 25, was included in the 1996 Constitution. The objections that were raised against the formulation of the property clause in the case of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the South Africa, 1996*<sup>40</sup> were rejected by the Constitutional Court.<sup>41</sup>

Section 25 protects property against arbitrary deprivation (section 25(1)); sets out the requirements for a valid expropriation (section 25(2)) and principles regarding the calculation of compensation (section 25(3)); and makes provision for land reform (section 25(5)-(9)). Section 25(4) of the Constitution is an interpretation provision that applies to both the protective (section 25(1)-(3)) and land reform (section 25(5)-(9)) provisions.<sup>42</sup> It has been argued that the courts can give effect to these seemingly contradictory provisions by interpreting section 25 purposively.<sup>43</sup>

#### 3 3 2 Section 25 and 'Public Purpose or Public Interest'

Section 25(2) of the 1996 Constitution reads as follows:

<sup>38</sup> Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J & Roux T *Juta's New Land Law* (OS 1998) ch 1 at 48-50; Eisenberg A 'Public Purpose and Expropriation: Some Comparative Insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 220-221; Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137.

<sup>39</sup> Van der Walt AJ *The Constitutional Property Clause* (1997) 3.

<sup>40</sup> 1996 (4) SA 744 (CC).

<sup>41</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 4-5.

<sup>42</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 16.

<sup>43</sup> In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 49-50, the Constitutional Court stated that s 25 cannot be viewed in isolation, but should be interpreted in the context of the whole of s 25, the rest of the Constitution and the historical context. Furthermore, the Court stated that '[t]he purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest ... and also as striking a proportionate balance between these two functions'. See Du Plessis L 'Interpretation' in Woolman S, Bishop M & Brickhill J (eds) *CLOSA Vol II* (2<sup>nd</sup> ed OS 2008) ch 32 at 52-56; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 523-524; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 29-31.

‘Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation...’

In terms of this section an expropriation is valid if it takes place pursuant to a law of general application, is for a public purpose or in the public interest and if compensation is paid. The requirement ‘law of general application’ includes original and delegated legislation, rules of the common law,<sup>44</sup> and customary law.<sup>45</sup> It has been stated that internal administrative policy documents will probably not qualify as ‘law of general application’.<sup>46</sup> Given that all expropriations are effected in terms of legislation,<sup>47</sup> the ‘law of general application’ requirement seldom gives rise to difficulties.<sup>48</sup>

In terms of section 25(2)(b) the amount of compensation can either be agreed upon by the concerned parties or decided or approved by a court. Section 25(3) states that the

<sup>44</sup> *S v Thebus* 2003 (6) SA 505 (CC) para 65; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93. Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 453, relying on Roux T ‘Property’ in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* (2002) 429-472 at 458, argues that since the power of the state to expropriate property stems exclusively from legislation, the common law will probably not be ‘invoked or become the source of controversy in expropriation cases’.

<sup>45</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 334.

<sup>46</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 233.

<sup>47</sup> In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), the Supreme Court of Appeal left the question open whether a court can effect the expropriation of property. However, in *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA), the Supreme Court of Appeal reversed the order of the high court (*Dada and Others NNO v Unlawful Occupiers of Portion 41 of the Farm Rooikop and Another* 2009 (2) SA 492 (W)) in which it ordered the municipality to purchase the land that the occupiers were occupying unlawfully. The Supreme Court of Appeal held that such an order is too technical for a court to make and therefore should be made by the properly authorised administrators. Furthermore, the Supreme Court of Appeal held that courts should not replace the administrator’s decision with its own unless it is of the opinion that the administrator’s decision cannot be upheld on rational grounds. According to Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 385-386, the Supreme Court of Appeal’s decision in *Ekurhuleni Metropolitan Municipality v Dada NO and Others* is correct, since the courts do not have the inherent power to effect the expropriation of property. See also Van der Walt AJ ‘Constitutional Property Law’ 2009 (2) *JQR* at 2.4; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 49.

<sup>48</sup> Currie I & De Waal J *The Bill of Rights Handbook* (5<sup>th</sup> ed 2005) 542 explain that the Constitutional Court in both *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) and *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) had no difficulty in finding that the legislation in question was law of general application. Furthermore, the authors argue that, given the prominent role played by the arbitrariness analysis, ‘the law of general application requirement is unlikely to have much of a role to play in s 25 cases’. Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 232-233 adds that law must apply generally in terms of this requirement; if it singles out specific persons or is discriminatory it will be invalid. See also Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5<sup>th</sup> ed 2006) 565-566.

compensation must be just and equitable and lists certain factors that could be considered in determining the amount.<sup>49</sup>

The public purpose or public interest requirement in section 25(2)(a) of the Constitution is considered to be the justification for expropriation, while the payment of compensation is merely a result of (and not justification for) a valid expropriation.<sup>50</sup> The public purpose or public interest must be strong enough to justify an infringement of an individual's constitutionally protected property right. Therefore, the public purpose or public interest, which serves as the justification for the compulsory loss of the previous owner's property, needs to be analysed carefully to ensure that the state does not abuse its expropriation power.

It is generally accepted that the function of a public purpose requirement is to ensure that the expropriated property is used to the advantage of the public.<sup>51</sup> If the property is expropriated for the sole purpose of benefitting an individual there is no justification for the expropriation and the expropriation is unlawful.<sup>52</sup> Therefore, an expropriation must be for a public purpose and not a private purpose. An expropriation that is for an improper purpose, such as enriching the state or for the primary benefit of a third party, will be invalid in any case.

<sup>49</sup> For a discussion on the compensation requirement in terms of the 1996 Constitution, see Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 161-179; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 568-578; Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD thesis Stellenbosch University 2008); Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 503-520.

<sup>50</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82; *Minister of Minerals and Energy v Agri SA (CALSA Amicus Curiae)* (458/11) [2012] ZASCA 93, 31 May 2012 para 18. Van der Merwe CG *Sakereg* (2<sup>nd</sup> ed 1989) 291 states that the advancement of the public interest is the *ratio* for expropriation. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 458-461. In German law, to which the court referred in *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP), the property guarantee in art 14 of the Basic Law for the Federal Republic of Germany 1949 is regarded as a guarantee of the property itself and not of its equivalent in money: Currie DP *The Constitution of the Republic of Germany* (1994) 291. Similarly, it is accepted in Irish law that the payment of compensation does not validate an interference with property rights that is not justified as being for the common good: Hogan G & Whyte G (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) para 7 7 88; *Clinton v An Bord Pleanála and Others* [2005] IEHC 84.

<sup>51</sup> Murphy J 'Interpreting the Property Clause in the Constitution Act of 1993' (1995) 10 *SAPL* 107-130 at 125; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 95. See also generally Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388-1389; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459-460.

<sup>52</sup> In *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) at 171 the court stated that the expropriator has no authority in terms of the empowering legislation to expropriate property for the sole purpose of promoting the private interests of individuals. Furthermore, in *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 114, the court - after considering the law of expropriation in various foreign jurisdictions - concluded that expropriation must serve some 'greater common good of the public, as opposed to any self-serving interest of the State or its institutions'. See also Murphy J 'Interpreting the Property Clause in the Constitution Act of 1993' (1995) 10 *SAPL* 107-130 at 125; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 95; Roux T 'Property' in Woolman S, Bishop M & Brickhill J (eds) *CLOSA Vol III* (2<sup>nd</sup> ed OS 2003) ch 46 at 33; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 566.



According to Van der Walt, the public purpose requirement further ensures that 'expropriations are strictly necessary' and prevents the state from using its power of expropriation arbitrarily.<sup>53</sup> The public purpose requirement can also be understood as having both a limiting and a controlling function. The state's power of expropriation is limited, because it prevents or stops the expropriation of private property for an improper or unlawful purpose.<sup>54</sup> The public purpose also controls expropriation by the state by ensuring that it exercises its expropriation power legitimately.<sup>55</sup>

Furthermore, Van der Walt<sup>56</sup> argues that the public purpose requirement in section 25 has a double function. It controls the justification and authority for expropriation, while at the same time ensuring that expropriation for land reform is not hindered. Therefore, to ensure that this double function is served Van der Walt states that

'the public purpose requirement in section 25(2) should be interpreted strictly to ensure that the power of expropriation is not abused, but it also has to be interpreted leniently in recognition of the fact that much-needed and constitutionally legitimated land reform may, in certain reasonably well-defined instances, require expropriation of private property in favour of other private beneficiaries'.<sup>57</sup>

This does not mean that the courts should be completely deferential to the decisions of the state, but courts should not frustrate essential reforms unnecessarily either. An expropriation that benefits a private third party may still be for a public purpose or in the public interest. However, in those cases the courts should ensure that the property is strictly needed for the public purpose in question and not for any other illegitimate purpose and that the specific legislation duly authorises the expropriation and, if it is applicable, any third party transfer that follows upon the expropriation.<sup>58</sup>

The uncertainty that existed during the time that the Interim Constitution was in force regarding the expropriation of property involving a third party transfer for land reform purposes was overcome by the inclusion in section 25(2) of the additional phrase 'or in the public interest' and the explanation of that phrase in section 25(4)(a) of the Constitution of 1996.<sup>59</sup> Section 25(4) of the Constitution states that

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<sup>53</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459.

<sup>54</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459.

<sup>55</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459.

<sup>56</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459-460.

<sup>57</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 460.

<sup>58</sup> This strict yet lenient approach is also evident in German expropriation law: Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 476-483. See also the discussion on German law in ch 4.

<sup>59</sup> According to Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 591-592, the issue regarding expropriation for land reform purposes was solved in two ways: Firstly

'the public interest includes the nation's commitment to land reform, and to reforms to bring about the equitable access to all South Africa's natural resources ... and [that] property is not limited to land'.

According to Badenhorst, Pienaar and Mostert,<sup>60</sup> the public interest in section 25(2) is a broader category than public purpose. Therefore, transferring land to individuals for land reform purposes would be in the public interest even if it is not for a public purpose.<sup>61</sup> It has also been argued that section 25(4)(a) was specifically included to ensure that expropriation in the area of land reform is not invalidated simply because it involves a third party transfer.<sup>62</sup>

Although section 25(4) of the Constitution indicates that the expropriation of property for land reform purposes (which may include the transfer of the expropriated land to a third party) is in the public interest, there are certain aspects of the public purpose or public interest requirement that still present difficulties of interpretation. These include expropriation of property for a public purpose where there is an alternative to expropriation that would achieve the same result; the question whether expropriated property should be returned to its original owner when the public purpose for which the property is used falls away; and the transfer of expropriated property to third parties for economic development purposes not involving land reform.

### *3 3 3 Understanding the Phrase 'for a Public Purpose or in the Public Interest' with regard to Third Party Transfers*

In *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>63</sup> the Appellate Division of the Supreme Court stated that an expropriation for the benefit of a third party cannot be for a public purpose but it can be valid if it is in the public interest. Given this distinction between the public purpose or public interest requirement in pre-1996 law and the inclusion of both phrases in the 1996 Constitution, it is evident that there is a difference between these two provisions. The public purpose refers to the narrow understanding of the public purpose requirement, while the public interest refers to the broad understanding of the public purpose requirement, as this distinction was established

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by reformulating the purposes for which property can be expropriated, and secondly by inserting a new subsection to ensure that land reform would not be hindered unduly.

<sup>60</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 591-592. See also Chaskalson M 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222-240 at 237.

<sup>61</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 592.

<sup>62</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 462-463.

<sup>63</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A).



in early case law. However, although section 25(4) of the Constitution indicates what the public interest might include, it remains unclear precisely what would qualify as an expropriation in the public interest.<sup>64</sup> Furthermore, with regard to third party transfers it seems unclear how the notions of public purpose and public interest are to be distinguished, since in some instances it seems as if these two notions overlap.

However, what can be deduced from the discussion above is that the public interest is a wider category than public purpose.<sup>65</sup> In *Van Streepen* the court held that the expropriation of property for the benefit of a third party cannot be for a public purpose, but because the third party's business enterprise in that case was important for the public as a whole it was accepted that it was in the public interest and consequently valid. This was also accepted in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*.<sup>66</sup> In this decision the court accepted that the expropriation of property for the benefit of a third party cannot be for a public purpose, but 'it could qualify as a valid act of expropriation if it could be brought within the realm of an act performed in the public interest.'<sup>67</sup> On the basis of these decisions it is arguable that the public purpose is not able to justify an expropriation that is undertaken for the benefit of a third party. However, this should be distinguished from situations where the expropriated property is transferred to a third party to enable the third party to realise a public purpose. In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>68</sup> (*Offit*) the Supreme Court of Appeal stated that '[t]here is no apparent reason why the identity of the party undertaking the relevant development as opposed to the character and purpose of the development should determine whether it is undertaken for a public purpose.' Therefore, in cases where the property is transferred to a third party for the fulfilment of a public purpose - such as the building of roads or railways - the expropriation and subsequent transfer

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<sup>64</sup> The phrase 'public interest' also appears in various other areas of the law: Du Plessis LM *Re-Interpretation of Statutes* (2002) 167-168; Du Plessis WJ 'n Regsteoretiese Ondersoek na die Begrip "Openbare Belang" (1987) 50 *THRHR* 290-298 at 290. Although this term seems to be indeterminable, Du Plessis WJ 'n Regsteoretiese Ondersoek na die Begrip "Openbare Belang" (1987) 50 *THRHR* 290-298 at 293-294 identifies certain aspects that can be used to determine the public interest. These include state security, economic interests, individual interests as collective interest, legal interests, administrative interests and strategic interests. At 298 she comes to the conclusion that 'the public interest' is a generic term used to describe interests worthy of protection that have crystallised over time and that are determined both objectively and subjectively to ensure that the proper balance is struck between the interest of the community and the interest of the individual who is part of the community.

<sup>65</sup> See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 592; Chaskalson M 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222-240 at 237.

<sup>66</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>67</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5.2.

<sup>68</sup> 2010 (4) SA 242 (SCA).

would be for a public purpose; the mere fact that the property is transferred to a third party does not automatically invalidate the expropriation.<sup>69</sup>

As a result, certain expropriations that also involve a third party transfer are deemed to be for a public purpose. The purpose of the expropriation is for the fulfilment of a public purpose and the fact that the purpose is to be realised by a third party does not detract from the legitimacy of the expropriation. In this regard the third party may also receive a benefit, but because the benefit is merely incidental to the fulfilment of the public purpose it is irrelevant. The purpose of the expropriation is not to benefit the third party but to allow the third party to fulfil its obligation, usually in terms of a legislative scheme, on behalf of the state. In these cases the purpose of the expropriation would qualify as an expropriation in terms of the narrow understanding of the public purpose requirement.

For example, in terms of section 3 of the Expropriation Act 63 of 1975 the Minister of Public Works may expropriate immovable property on behalf of a juristic person that is incorporated in terms of a law for the fulfilment of a public purpose.<sup>70</sup> If the Minister is satisfied that the juristic person requires the property for the achievement of that purpose, she may expropriate the immovable property if it cannot be acquired on 'reasonable terms'.<sup>71</sup> Although the Minister of Public Works expropriates the property, the juristic person becomes owner of the property on the date of expropriation.<sup>72</sup>

In order to meet its constitutional obligations the state may expropriate property for the purposes of building public utilities such as roads, schools, hospitals or schools.<sup>73</sup> Therefore, if the state expropriates property for purposes of these public utilities, the justification is not questioned. However, it often occurs that a third party is responsible for constructing, providing for, or managing the utilities on behalf of the state. In the event that property is expropriated to enable the third party to build the necessary infrastructure it is deemed to be for a public purpose, provided that the third party fulfils a public function on behalf of the state.<sup>74</sup> It is also accepted that the state must rely on private or semi-private

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<sup>69</sup> This approach is also adopted by the German Federal Constitutional Court; see *BVerfGE* 74, 264 [1986] (*Boxberg*) and the discussion in ch 4.

<sup>70</sup> See Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 54-55; Jacobs M *The Law of Expropriation in South Africa* (1982) 22-25.

<sup>71</sup> S 3(1) of the Expropriation Act 63 of 1975.

<sup>72</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 55. See further ch 4 at 4 2.

<sup>73</sup> See Malloy RB & Smith JC 'Private Property, Community Development, and Eminent Domain' in Malloy RB (ed) *Private Property, Community Development, and Eminent Domain* (2008) 1-14 at 10; Currie I & De Waal J *The Bill of Rights Handbook* (5<sup>th</sup> ed 2005) 555.

<sup>74</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 491. This is also accepted in the jurisdictions of the US, England and Germany, although the justification for the expropriation is judged differently in each of these jurisdictions. See ch 4.

companies to aid in the building of infrastructure.<sup>75</sup> Therefore, in *Offit* the Supreme Court of Appeal stated that the ‘expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself ...’<sup>76</sup>

Therefore, if the expropriation is for a public purpose the expropriation would be valid regardless of the fact that a third party is responsible to fulfil the purpose. However, even if the expropriation does not serve a public purpose (as defined narrowly) but benefits a third party the expropriation can still be valid if it can be ‘brought within the realm of an act performed in the public interest.’<sup>77</sup> In other words, it should be evaluated whether the expropriation of the property is valid in terms of the broad understanding of the public purpose requirement, or in the ‘public interest’ as it was termed in *Van Streepen* and to which section 25(2) of 1996 Constitution refers.

Land reform is an example where the expropriation of the property for purposes of transferring the land to a third party does not serve a narrow public purpose, since the property is to be transferred to and used exclusively by the third party post-expropriation. In other words, none of the advantages that usually accompany an expropriation for a public purpose, such as the building of necessary infrastructure and ensuring the safety of the country’s administration, is present. The expropriation of property for transfer to another third party resembles a private expropriation that should generally be invalid.<sup>78</sup> However, third party transfers for land reform purposes are explicitly allowed for in the 1996 Constitution and are, therefore, *prima facie* justifiable in terms of the public interest element of the requirement. This kind of expropriation also forms part of a legislative scheme, which is an important consideration when determining the justification for third party transfers.<sup>79</sup>

However, it should be established when an expropriation moves beyond the point where it is no longer even in the public interest to expropriate the property and transfer it to

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<sup>75</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15.

<sup>76</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15.

<sup>77</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5 2.

<sup>78</sup> See Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 13.

<sup>79</sup> For example Schultz D ‘What’s Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London?*’ (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234 argues that a distinctive factor in differentiating between an allowable public taking and an impermissible private taking is the existence of a comprehensive development plan. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 491 and the subsequent discussion in ch 4.

third parties. It is questionable whether such an expropriation is justified without any legislative indication authorising the expropriation and third party transfer. This question is especially controversial when the property is expropriated and transferred to a private party for economic development purposes, such as building a shopping mall or establishing an exclusive residential area. The expropriation of property that also involves a third party transfer for economic development purposes has been a contested subject in foreign jurisdictions.<sup>80</sup> This issue is addressed more fully in Chapter 4.

### 3 4 Other Public Purpose or Public Interest Issues in Case Law

Apart from third party transfers for economic development, there are also other areas in which the public purpose requirement recently received the attention of the courts. In some recent decisions the question was not whether the expropriation was for a public purpose or in the public interest, but whether the court could invalidate the expropriation on the basis that there are arguably less invasive means to achieve the required public purpose.<sup>81</sup> In these cases, either the property owner accepts that the expropriation is for a public purpose or the court has already decided that the expropriation is for a public purpose, but the plaintiff argues that the expropriation is unlawful (in terms of the public purpose requirement) since there is a less drastic option than expropriation available to the state to fulfil the (admittedly valid) public purpose. In this case the expropriation is deemed to be valid, in other words for a public purpose or in the public interest, and the only question is whether the expropriation can be set aside simply because there is an alternative and less invasive means to fulfil the public purpose or public interest.

In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*,<sup>82</sup> the court held that once it is established that an expropriation is for a public purpose, the question whether there are less intrusive means to fulfil the purpose is irrelevant to the question whether the

<sup>80</sup> For example, in *Kelo v City of New London* 545 US 469 (2005) the US Supreme Court upheld the taking of private property for economic development purposes. This judgment was criticised by various authors: Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 64-67; Gray K 'There's no Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568; Gray K 'Human Property Rights in Land: The Propriety of Expropriation' (2005) 16 *Stell LR* 398-412. See also Crow S 'Compulsory Purchase for Economic Development: An International Perspective' 2007 *Journal of Planning and Environmental Law* 1102-1115; Malloy RB & Smith JC 'Private Property, Community Development and Eminent Domain' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* 1-14 at 9-13.

<sup>81</sup> See *eThekweni Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010; [2011] ZASCA 246, 1 December 2011; *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>82</sup> [2010] ZAGPPHC 154, 12 October 2010.

expropriation is for a public purpose. Although it was accepted in pre-constitutional case law that the courts will not easily question the decision of the expropriator to expropriate property if it is for a public purpose and if the decision was taken in good faith,<sup>83</sup> it remains unclear whether this pre-constitutional position of the courts is still valid in terms of section 25(2) of the Constitution if other means were available to the expropriator to fulfil the public purpose.

In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>84</sup> the applicant argued that the expropriation of his entire parcel of land was unlawful since the expropriator only needed a portion of the property to construct the necessary road. Therefore, the applicant argued that the expropriation of excess property not strictly needed for the public purpose was unlawful. The court dismissed the applicant's claim on the basis that the applicant confused motive with purpose. When an expropriation is for a valid public purpose, the motive behind the decision is irrelevant when considering whether the expropriator validly exercised its powers.<sup>85</sup> The question whether the deferential approach, in terms of which the courts apply a mere rationality test to the decision of the expropriating authority to expropriate the property and do not investigate further whether the public purpose could have been achieved by less intrusive means, can still be accepted in post-1996 constitutional property law is discussed in Chapter 5.

Another matter concerning the public purpose requirement that recently received the attention of the courts relates to the enduring nature of the public purpose requirement. In *Harvey v Umhlatuze Municipality*<sup>86</sup> the court had to consider whether it is possible to grant an order effecting the re-transfer of property to its original owner if the purpose for which the property was originally expropriated is no longer possible. The court held that there is no legislative basis on which such an order can be made. Therefore, the court refused to order re-transfer of the property to the previous owner simply because the purpose for which the property was expropriated failed to materialise or was abandoned. Furthermore, the court did not investigate whether the new purpose for which the property was in fact to be used was also a valid public purpose, but merely relied on the

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<sup>83</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 77. See for instance *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) discussed in ch 2 at 2 4 2.

<sup>84</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>85</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 6.

<sup>86</sup> 2011 (1) SA 601 (KZP).

expropriator's good faith at the time of the initial expropriation.<sup>87</sup> This decision holds significant implications for the law of expropriation and particularly for the public purpose requirement. If the expropriating authority can expropriate property for a public purpose but later changes its use to a purpose that is not a public purpose, the state can easily abuse its power of expropriation. This issue is addressed in more detail in Chapter 6.

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<sup>87</sup> See also Van der Walt AJ 'Constitutional Property Law' 2010 *ASSAL* at 251-294 at 292; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' 2012 (129) *SALJ* 219-235 at 225-226.



# CHAPTER 4: THIRD PARTY TRANSFERS FOR ECONOMIC DEVELOPMENT

## 4 1 Introduction

In Chapter 3 the 'public purpose or public interest' requirement in section 25(2) of the 1996 Constitution is briefly evaluated in relation to third party transfers. A third party transfer occurs when the state expropriates property from one party and transfers it to a different party; also known as a private to private transfer.<sup>1</sup> It is generally accepted that the state may not expropriate property and transfer it to another party solely for the latter's benefit.<sup>2</sup> However, it is argued that the expropriation of property for transfer to another private party to make it possible for the third party to realise a public purpose is justified in terms of the public purpose requirement.<sup>3</sup> Furthermore, it is possible to expropriate and transfer property to another private party even if the expropriation is not for a narrow public purpose, provided that it is in the public interest more broadly speaking and is authorised in terms of a legislative scheme.<sup>4</sup> The classic example of such an expropriation is land reform, which for South African law purposes is authorised by the 1996 Constitution<sup>5</sup> and regulated in terms of legislation. Therefore, land reform is one example of an expropriation that is exclusively for a third party's benefit, but is nevertheless justified in terms of the public interest requirement.

In this chapter it is investigated whether economic development constitutes a public interest so as to legitimise both the expropriation and the transfer of the property to another third party for purposes of economic development. It is argued that both the purpose of the expropriation and the subsequent transfer of the property to a third party for the fulfilment of the purpose of the expropriation should be evaluated in cases of this kind. Van der Walt argues that

[t]he question whether the public purpose requirement excludes instances where the expropriated property is transferred to another private person only comes up once it has been established that the transfer is properly authorised by valid legislation that forms part

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<sup>1</sup> Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law* Vol VI (2011) 1-38 at 10.

<sup>2</sup> See Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388-1389; Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law* Vol VI (2011) 1-38 at 10.

<sup>3</sup> See the discussion in ch 3.

<sup>4</sup> See the discussion in ch 3 at 3 3 3.

<sup>5</sup> S 25(2) read with s 25(4) of the 1996 Constitution.



of a legitimate state programme that serves a legitimate public purpose, such as land reform, provision of public housing, or private provision of public utilities'.<sup>6</sup>

For this reason the relevant question for purposes of South African law is whether expropriating property for economic development purposes satisfies the public interest requirement. Furthermore, it is considered whether the public interest excludes the transfer of the expropriated property to a third party for economic development. Expropriating property for economic development purposes would exclude instances where the expropriated property is needed for a government or a public use or for the primary benefit of the public. In other words, the property should not be needed by the state (or a third party) to construct necessary infrastructure such as roads, administration buildings, hospitals and schools. It should not be needed for the primary benefit of the public, such as establishing water catchment areas to ensure the sustainability of safe water reserves or securing the safety of the State President, either.

In South African law the courts consider an increase in employment opportunities,<sup>7</sup> increased revenue,<sup>8</sup> 'strategic economic advantages',<sup>9</sup> and development regarding a major sporting event<sup>10</sup> as constituting economic development that might justify an expropriation. Compared to the building of roads or hospitals, increased employment opportunities and revenue as well as strategic economic advantages seem to be ill-defined justificatory factors since their eventual realisation depends on a prior development or project that brings about increased employment and revenue. Once a public road is built the public purpose is met and the expropriation of the property is justified. However, since increased employment opportunities and revenues depend on the success of a preceding project the courts' focus on the benefits, rather than on the project that will bring about these benefits, seems misguided.

However, as is argued below, once the courts accept that the expropriation of property in order to increase employment opportunities and revenue is for a valid public purpose, they do not always consider whether the transfer of the property to third parties for these purposes is justified. Economic development, made possible by expropriating property and transferring it to a third party, is also said to include 'any situation in which the

<sup>6</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 465.

<sup>7</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>8</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>9</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5 2.

<sup>10</sup> *eThekweni Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009.

state transfers non-blighted property from one private party to another in order to increase the number of jobs, the size of the tax base, or the effective utilization of property.<sup>11</sup> Even though it seems as if the expropriation and transfer can be justified in terms of the public interest requirement since the public will benefit from an increase in jobs, the benefits that the public will receive is perceived as incidental to the primary purpose, namely to generate profit for a different party at the expense of the loss of property for a different owner. Therefore, economic development could include purposes primarily aimed at generating profit for a third party.

In foreign law, the courts approach the purpose for which property can be expropriated differently. In certain jurisdictions, such as German law, the purpose for which property can be expropriated is evaluated strictly and the expropriation of property to realise this purpose must be absolutely necessary. In other jurisdictions, such as the United States (US), the courts adopt a deferential attitude towards the decision of the state to expropriate property for a public purpose and allow an expropriation that might be vaguely beneficial to the public more easily. Furthermore, the transfer of expropriated property to third parties is also approached differently in foreign jurisdictions. In some jurisdictions it is allowed more easily, while in others stricter scrutiny is applied.<sup>12</sup> Since the question of the justifiability of an expropriation involving a third party transfer for economic development has been answered differently in the foreign jurisdictions, the varying approaches in foreign law are described below. This will lead to the subsequent discussion of the South African case law where the issue of a third party transfers for economic development purposes has surfaced.

It is argued below that when the purpose is a narrow public purpose, there is generally no problem with a third party transfer. In that sense the expropriation is deemed to be for a valid public purpose, as defined narrowly, and the third party transfer does not retract from the validity of the expropriation. Even if the purpose is not a public purpose as defined narrowly, but nevertheless in the public interest, the expropriation and transfer can also be justified. Transfer of property to third parties for broader public purposes or in the public interest is usually made possible in terms of legislation aimed at a specific purpose, such as promoting public health and safety. The transfer of property for narrow public purposes and broader public purposes (public interest) is discussed separately below before third party transfers for economic development purposes are discussed.

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<sup>11</sup> Kelly DB 'The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchase and Private Influence' (2006) 92 *Cornell LR* 1-65 at 50.

<sup>12</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 491-492.

## 4 2 Transfer of Expropriated Property to Third Parties for Narrow Public Purposes

In Chapter 3 it is argued that in South African law certain expropriations that also involve a third party transfer are nevertheless deemed to be for a public purpose. If the purpose of the expropriation is a valid public purpose as understood narrowly to refer to a government purposes, such as constructing roads or an electricity plant, the private identity of the party responsible for realising the purpose is less relevant. Therefore, the purpose can be realised either by the state or by third parties. If the purpose is realised by the state, the expropriation of property for a public purpose - as defined narrowly - is not subjected to rigorous scrutiny. Similarly, if a third party is responsible for fulfilling the public purpose, the expropriation and the transfer of the property to the third party is not subjected to strict scrutiny, provided the third party is tasked to perform the public function in terms of legislation or in terms of a contract with the state.

It is widely accepted that the state has to rely on private or semi-private parties to construct and manage necessary infrastructure. In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>13</sup> (*Offit*) the Supreme Court of Appeal indicated that a third party transfer is justified if the third party is responsible for rendering a public function on behalf of the state. The court used the example of the state constructing low-cost housing in order to meet its constitutional obligation of providing access to adequate housing in terms of section 26(1) of the 1996 Constitution. According to the court the 'expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself using the same contractors.'<sup>14</sup> Therefore, according to the Supreme Court of Appeal, once the purpose of the expropriation is a valid public purpose, the fact that a third party is responsible for the realisation of the purpose and that the property is therefore transferred to that party does not detract from its validity.

Furthermore, provision is made in South African law for the expropriation of property on behalf of third parties. Section 3 of the Expropriation Act 63 of 1975 authorises the Minister of Public Works to expropriate immovable property on behalf of a juristic person. The juristic person has to prove that the immovable property is needed for an

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<sup>13</sup> 2010 (4) SA 242 (SCA).

<sup>14</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15.

objective of public importance, in which case the Minister will expropriate the property. If the Minister expropriates property in terms of this section, it is deemed to have been expropriated for a public purpose. The juristic person will have to pay all the charges, fees and duties as if it had purchased the property itself. On the date of expropriation the juristic person will become owner of the property.

In terms of the Act the juristic person includes educational institutions such as universities, colleges and technikons as well as any other juristic person 'established by or under any law for the promotion of any matter of public importance'.<sup>15</sup> In the *Offit*<sup>16</sup> decision, the applicants argued that the Coega Development Corporation is not a juristic person for purposes of promoting a matter of public importance. The Supreme Court of Appeal stated that it is irrelevant whether the company was incorporated for the specific objective of public importance or whether it was a dormant company whose purposes changed to include a matter of public importance. According to the court, the industrial development that brings about benefits such as increased employment opportunities and economic stimulation is a matter of public importance and therefore also for a public purpose. Therefore, the expropriation of the property to realise this objective was permissible in terms of section 3(2)(h) of the Act.

In terms of section 3 of the Expropriation Act, the Minister can therefore expropriate property on behalf of a juristic person for the achievement of a public objective. The juristic person to whom the Act specifically refers is usually, but not limited to, educational institutions whose purpose is undoubtedly a public purpose. Furthermore, legislation such as the Higher Education Act 101 of 1997 sets out certain regulations with regard to the management of higher education institutions. Therefore, the expropriation of property for purposes of an objective of public importance is lawful, irrespective of whether the property is expropriated in favour of a third party. This can also be distinguished from the transfer of expropriated property to third parties for economic development purposes in that the primary aim of the third parties in terms of section 3 is a matter of public importance, such as education, and not to generate profit.

It is also accepted in foreign jurisdictions that property may be expropriated and transferred to third parties for the fulfilment of a narrow public purpose. For instance, in German law it is trite that property cannot be expropriated and transferred to a third party solely for the third party's benefit. However, the expropriation and transfer can be valid if

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<sup>15</sup> S 3(2)(h) of the Expropriation Act 63 of 1975.

<sup>16</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).

the expropriation would allow the third party to fulfil a public function, which should be for a narrow public purpose, such as supplying electricity.<sup>17</sup> In situations where the third party's business is specifically aimed at the fulfilment of a particular public purpose, the scrutiny as to the justifiability of the transfer is not as strict as in situations where the fulfilment of the particular public purpose is just one, or an ancillary, function of the third party's business concern. Nevertheless, German courts are strict in evaluating whether the legislation authorises the expropriation and transfer of the property and whether the purpose of the expropriation and transfer complies with the public good requirement in terms of article 14.3 of the German Basic Law.<sup>18</sup>

In the United States, the condemnation and transfer of property to a third private party was initially regarded as being 'against all reason and justice'.<sup>19</sup> A taking, coupled with a transfer to a third party, was therefore regarded as being against the principles of social contract and could not be regarded as a legitimate 'exercise of legislative authority'.<sup>20</sup> However, it was always regarded as acceptable that a taking and transfer of property to third parties could be valid if the third party was regarded as a public agent that required the property for a public good.<sup>21</sup> To ensure the constitutionality of the taking it was assumed that the third party, usually a utility company such as a railway or electricity company, held the property in 'quasi public trust' to ensure that each citizen equally received 'fair, reasonable and non-discriminatory service'.<sup>22</sup> Therefore, it seems probable that expropriated property that is transferred to a third party will not be invalidated as long as the expropriation facilitates the achievement of a public purpose, as defined narrowly, by the third party.<sup>23</sup>

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<sup>17</sup> Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148; Van der Walt *AJ Constitutional Property Law* (3<sup>rd</sup> ed 2011) 482. See also Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 para 162; Papier HJ 'Art 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 306-307 paras 581, 583. See also Currie DP *The Constitution of the Federal Republic of Germany* (1994) 292.

<sup>18</sup> Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949. See the discussion on German law at 4.4.4 below.

<sup>19</sup> *Calder v Bull* 3 Dall US 386 (1798). See Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

<sup>20</sup> *Calder v Bull* 3 Dall US 386 (1798). See Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

<sup>21</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

<sup>22</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

<sup>23</sup> See Van der Walt *AJ Constitutional Property Law* (3<sup>rd</sup> ed 2011) 490. See also Goodin AW 'Rejecting the Return to Blight in Post-Kelo State Legislation' (2007) 82 *NYU LR* 177-208 at 180. See also Justice O'Connor's dissenting opinion in *Kelo v City of New London* 545 US 469 (2005) 498.

## 4 3 Transfer of Expropriated Property to Third Parties for Broader Public Purposes or in the Public Interest

### 4 3 1 Introduction

Above it was argued that if property is expropriated for a narrow public purpose the fact that a third party is responsible for the fulfilment of that purpose and that the property is therefore transferred to that party does not detract from the legitimacy of the expropriation. However, an expropriation that involves a third party transfer has also been upheld on the basis that it is in the public interest.<sup>24</sup> This includes cases where the property is not expropriated for a public purpose (as defined narrowly) but for a purpose that benefits the public in a broader sense. In other words, the property is not expropriated for a government purpose and not necessarily for use by the public but for a purpose that is nevertheless deemed to be in the public interest.

An example of an expropriation that involves a third party transfer that is not for a narrow public purpose but considered to be in the public interest is the expropriation of property for the purposes of slum clearance. In the US various programmes aimed at eliminating slum neighbourhoods were set in motion during the Great Depression with the purpose of promoting commercial development.<sup>25</sup> Some courts were reluctant to allow the state to use the power of eminent domain for these purposes, since the projects led to the condemned property being transferred or occupied by different private parties.<sup>26</sup> However, it was argued that the removal of blighted areas, which led to the improvement of public health, welfare and safety, falls within the government's police power.<sup>27</sup> As a result, the US Supreme Court held in *Berman v Parker*<sup>28</sup> that because the object falls within the authority of the legislature, the use of the power of eminent domain to achieve the purpose is acceptable.<sup>29</sup>

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<sup>24</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 490.

<sup>25</sup> Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 510.

<sup>26</sup> Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 510.

<sup>27</sup> *Berman v Parker* 348 US 26 (1954) 32. See also Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 512.

<sup>28</sup> 348 US 26 (1954). See also Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 512.

<sup>29</sup> In *County of Wayne v Hathcock* 684 NW 2d 765 (Mich, 2004) the court indicated that property can be condemned and transferred to third parties when the land so condemned is a public concern, the primary example being the condemnation and transfer of property to third parties for slum clearance purposes. See the discussion on this decision at 4 4 1 3 below.



A different example of a third party transfer where the purpose of the expropriation is not a narrow public purpose, but still in the public interest is the expropriation and transfer of property to third parties in terms of a land reform programme.<sup>30</sup> In this regard, the property is usually expropriated and transferred to third parties for the third parties' exclusive use and enjoyment. Therefore, in this sense there is no government or public use of the property post-expropriation. Nevertheless, the purpose of land reform is deemed to be in the public interest, thus legitimising the transfer of the expropriated property to third parties.

#### 4 3 2 *Slum Clearance: Berman v Parker*

*Berman v Parker*<sup>31</sup> (*Berman*) concerned the taking and transfer of property to third parties for slum clearance. In *Berman*, one of the petitioners - an owner of a non-blighted department store - objected to the taking of his property in terms of the District of Columbia Development Act of 1945. The District of Columbia passed the Act for the purpose of erasing slums in a district of Washington DC in order to enhance the health, safety, morals and general welfare of citizens residing in the district. Under the redevelopment plan, property taken would be used to erect public facilities such as schools, churches and parks, which would in turn be sold or leased to other private parties. The development plan would also include the construction of low-cost housing.

The owner argued that his property, although forming part of the area, could not be classified as blighted property and should therefore not be condemned. He also argued that his property was commercial and not residential in nature; that after the taking the property would be managed by a private agency; and that the property would be developed for private and not public use. Therefore, he argued that if the property was condemned and transferred to other private parties and developed for private use it would not be for a public use as required by the Public Use Clause of the Federal Constitution.<sup>32</sup>

The Supreme Court deferred to the legislature and stated that if the purpose of the condemnation is within the authority of Congress, the state may exercise its power of

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<sup>30</sup> In this regard Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 567 argue that expropriating property under the Expropriation Act 63 of 1975 for purposes of land reform would be valid in terms of the public interest requirement. Therefore, the authors argue that 'land reform programmes for the benefit of private individual(s) would also meet the requirement of "public interest."' Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) at 301-302 also argue that expropriations for land reform would meet the public interest requirement and be 'constitutionally sound.'

<sup>31</sup> 348 US 26 (1954).

<sup>32</sup> Constitution of the United States of America 1787, Fifth Amendment 1791.

eminent domain for the achievement of that purpose.<sup>33</sup> In this regard the power of eminent domain is regarded simply as the means to an end. According to the Court, it can review the legislature's decision as to what is in the public interest, but its ability to do so is limited.<sup>34</sup> Since the Court agreed that the redevelopment plan has to be considered as an integrated whole, it is not open to the courts to decide which property should or should not be taken. The Court therefore refrained from interfering in the manner in which the state exercised its discretion in terms of the legislation, and given that the petitioners received compensation it held that their property rights in terms of the Public Use Clause were not violated.

The *Berman*<sup>35</sup> decision also shows that property can be condemned and transferred to private parties to eradicate slums in an attempt to increase the general welfare of the area. Furthermore, it illustrates that the literal interpretation of the Public Use Clause has been abandoned. Therefore, the Court now accepts that broad-ranging purposes comply with the Public Use Clause. The Court is also deferential towards the legislature when reviewing the determination of the relevant authority to expropriate for a public purpose. This position was clear in *Berman v Parker* where the Court reasoned as follows:

'Subject to certain constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.'<sup>36</sup>

It has been argued that the *Berman* decision had two effects on eminent domain law.<sup>37</sup> Firstly, it expanded the public use requirement to include the transfer of condemned property to private parties for redevelopment purposes. Secondly, it restricted the 'scope of judicial review.'<sup>38</sup> As seen below, the *Berman* decision served as the basis for the later decisions in *Midkiff v Hawaii Housing Authority*<sup>39</sup> and *Kelo v City of New London*.<sup>40</sup>

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<sup>33</sup> *Berman v Parker* 348 US 26 (1954).

<sup>34</sup> *Berman v Parker* 348 US 26 (1954) 33.

<sup>35</sup> 348 US 26 (1954).

<sup>36</sup> *Berman v Parker* 348 US 26 (1954) 32.

<sup>37</sup> Mansnerus L 'Public Use, Private Use, and Judicial Review in Eminent Domain' (1983) 58 *NYU LR* 409-456 at 415-416.

<sup>38</sup> Mansnerus L 'Public Use, Private Use, and Judicial Review in Eminent Domain' (1983) 58 *NYU LR* 409-456 at 416.

<sup>39</sup> 267 US 229 (1984).

<sup>40</sup> 545 US 469 (2005).

### 4 3 3 Land Reform

#### 4 3 3 1 South African Law

Above it was argued that third party transfers for land reform purposes would generally satisfy the public interest requirement. The purpose of certain land reform legislation, such as the Restitution of Land Rights Act 22 of 1994, is specifically aimed at authorising the expropriation of land for land restitution purposes. Section 42E(1) of the Act<sup>41</sup> states that '[t]he Minister may purchase, acquire in any other manner or, ... expropriate land, a portion of land or a right in land' in respect of a claim that has been lodged in terms of this Act. The property expropriated in terms of this Act is to be transferred to the private parties who have lodged a claim for restitution in terms of this Act. Therefore, this Act effectively authorises the state to expropriate property in order to transfer it to another private party.

There is explicit authority in section 25(2), read with section 25(4)(a), of the Constitution for the expropriation of property for purposes of transferring it to other private parties in terms of the land reform programme.<sup>42</sup> Section 25(4)(a) states that the public interest referred to in section 25(2) 'includes the nation's commitment to land reform'. Therefore, in South African law there is 'little doubt that the restitution process, including transfer of the property to another private person, is authorized by the Constitution and that land may be expropriated for it.'<sup>43</sup> The fact that the expropriation and transfer of property is legitimised by the Constitution and regulated by statute is therefore an important consideration in the determination of whether the transfer of expropriated property is justified in land reform cases. To date there have been no challenges against the constitutionality of transferring expropriated property to third parties for land reform purposes.

#### 4 3 3 2 US Law

The taking and transfer of expropriated property for land reform purposes has also been upheld by the US Supreme Court in *Hawaii Housing Authority v Midkiff*<sup>44</sup> (*Midkiff*). *Midkiff* concerned the condemnation of property for the purpose of eradicating an existing land

<sup>41</sup> S 42E was inserted into the Restitution of Land Rights Act 22 of 1994 by s 5 of the Restitution of Land Rights Amendment Act 48 of 2003. See Van der Walt AJ *Constitutional Property Law* (2005) 307. The updated Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) does not include a section on land reform.

<sup>42</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 567.

<sup>43</sup> Van der Walt AJ *Constitutional Property Law* (2005) 307. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 567; Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 301-302.

<sup>44</sup> 467 US 229 (1984). See Merrill TW 'The Economics of Public Use' (1986) 72 *Cornell LR* 61-116 at 62-63.

oligopoly on Hawaii whose existence allegedly perpetuated unfavourable social and economic problems. This decision followed the *Berman v Parker*<sup>45</sup> decision and was in turn used as the basis for condoning the taking of property for economic development purposes in *Kelo v City of New London*.<sup>46</sup> In *Midkiff* the Supreme Court had to consider whether the state of Hawaii was prevented from taking, with just compensation, the property of the lessors and transferring it to the lessees in order to reduce the oligopoly of land ownership in the area. It was estimated that 47% of the land was owned by 72 private landowners and this resulted in inflated land prices and deteriorated public welfare and tranquillity.<sup>47</sup> Previous attempts by the legislature to force the property owners to break up their estates and sell off some of their lands had failed. The property owners refused to sell their land partly due to the significant tax that accompanied the sale of immovable property. Therefore, the legislature enacted the Land Reform Act of 1976, which authorised the Hawaii Housing Authority to expropriate land and sell it to the lessees of the land. This Act also reduced the tax that became payable upon the sale of the land.

Justice O'Connor, who wrote for a unanimous Court, relied on *Berman v Parker*<sup>48</sup> and stated that the courts have a limited role to play in reviewing the legislature's decision as to what constitutes a public use. The Court confirmed that the mere fact that the expropriated land is transferred to a different private party does not necessarily mean that the taking is for a private purpose, since the literal interpretation of the public use requirement has long since been abandoned. It held that a purely private taking, one that is undertaken simply to benefit a third party, would not withstand the public use enquiry, but since the purpose of the legislation in this case was for the benefit of the public it served a legitimate public purpose.<sup>49</sup> Therefore, the Court found that the taking of the property was rationally connected to the public purpose of eradicating the oligopoly in relation to land ownership, and since it was accompanied by compensation, the taking was not prohibited by the Takings Clause.

### **4 3 3 3 Australian Law**

The compulsory acquisition of property for land reform purposes has been rejected by the Australian High Court in *Clunies-Ross v The Commonwealth of Australia and Others*.<sup>50</sup> In

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<sup>45</sup> 348 US 26 (1954).

<sup>46</sup> 545 US 469 (2005).

<sup>47</sup> *Midkiff v Hawaii Housing Authority* 267 US 229 (1984) 232.

<sup>48</sup> 348 US 26 (1954).

<sup>49</sup> *Midkiff v Hawaii Housing Authority* 267 US 229 (1984) 241.

<sup>50</sup> (1984) 155 CLR 193.

this case the compulsory acquisition and transfer of land was not for a specific government or public use, but for purposes of breaking down the 'social and political relationship'<sup>51</sup> between the plaintiff and the inhabitants of the Cocos Islands. It was the respondents' aim to exclude the plaintiff from the Cocos Islands to ensure that he and his family would not be able to vote or be able to influence the voting process in conflict with the Island inhabitants' right to self-determination. As a result, the respondent expropriated the plaintiff's land. According to the majority of the Australian High Court the purposes for which property can be expropriated is limited to purposes where the land is specifically needed to be used for the fulfilment of a specific public purpose, and this will exclude expropriating property for land reform.<sup>52</sup> Therefore, in terms of Australian law a narrow interpretation of the public purpose was adopted.<sup>53</sup> However, it has been argued that this narrow interpretation of the public purpose requirement cannot be applied to other jurisdictions, such as South Africa and the United States, where the public purpose is said to justify the expropriation of and transfer of property for purposes of land reform purposes.<sup>54</sup>

#### 4 3 4 Conclusion

In this section it was argued that the expropriation and transfer of property to third parties can be valid in situations where the property is not needed for a narrow public purpose such as state or public use or even the provision of public services, but for a purpose that serves a wider public interest. In this regard the property is expropriated for neither government or public use, nor for allowing a third party to fulfil a public function. Instead, the property is expropriated and transferred to a third party for the third party's own use and benefit, but the expropriation and transfer are still deemed to be in the public interest because they serve some other valid state goal that is in the public interest. In the slum clearance examples the public interest that is served relates to the removal of blighted areas with all its concomitant social problems, such as health and safety concerns. In the area of land reform the public interest is to allow designated groups the opportunity to reclaim property that they originally lost through unfair, discriminatory practices. In both the slum clearance and land reform programmes the relevant legislation specifically authorises

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<sup>51</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 57.

<sup>52</sup> See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 473; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 57.

<sup>53</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 57.

<sup>54</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 57 fn 100. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 473.

the expropriation and transfer of property for the relevant purposes, or at least foresees that the property will be used by different parties after it has been expropriated.

In the next section it is considered how foreign jurisdictions evaluate the legitimacy of an expropriation and transfer of property for economic development purposes against the public purpose requirement. Expropriation of property for purposes of economic development is not an expropriation for a narrow public purpose. It is also not apparent that the expropriation and transfer of the property for economic development would necessarily qualify as an expropriation for a broader public purpose or in the public interest in the same sense as the slum clearance or land reform examples discussed above.

## **4 4 Transfer of Expropriated Property to Third Parties for Economic Development in Foreign Jurisdictions**

### *4 4 1 US Law*

#### **4 4 1 1 Introduction**

In the United States of America, the Fifth Amendment read with the Fourteenth Amendment to the 1787 Federal Constitution of the United States embodies the property clause.<sup>55</sup> This property clause consists of two parts, namely the 'Due Process Clause' and the 'Takings Clause'. The Due Process Clause entails that no one may be deprived of property without due process of law, while the Takings Clause provides that property shall not be taken for public use without just compensation.<sup>56</sup> The Takings Clause has two requirements that apply to both formal takings and regulatory takings.<sup>57</sup> The taking has to be for a *public use* and just compensation must be paid.

The public use requirement is said to prevent property from being taken for a private use.<sup>58</sup> In principle, the public use requirement in terms of the Federal Constitution

<sup>55</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398.

<sup>56</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-399.

<sup>57</sup> Formal expropriation or compulsory acquisition is exercised in terms of the power of eminent domain, while regulatory takings come about when a state action in terms of the regulatory police power of the state is in effect regarded as a taking, because it goes too far. Therefore, 'taking' in terms of the Fifth Amendment includes the narrower concept of (formal) expropriation as well as the wider category of regulatory takings: AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 423, read with *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415 [9].

<sup>58</sup> See Singer JW *Introduction to Property* (2<sup>nd</sup> ed 2005) 743. See also Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 1. However, private takings - taking property for the benefit of another private party - have been allowed, especially in the so called 'Mills Acts'. These Acts usually allowed upper riparian owners to build dams that sometimes led to the flooding of neighbouring land or allowed the owner to build various structures on neighbouring properties. Initially, the Mill operators had to grind grain for public consumption, satisfying the public use requirement. In this regard Schultz D 'What's Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?' (2006) 24 *UCLA*



can be understood in two ways. First, a very literal interpretation would require that the property must be used by the public.<sup>59</sup> A general example would be where property is expropriated in order to build a road.<sup>60</sup> The second, broader understanding of the public use requirement necessitates the taking to be for a public purpose in a wider sense, meaning that a public advantage or public benefit would justify the taking.<sup>61</sup> It is accepted that the second, broader understanding of the public use requirement currently prevails.<sup>62</sup> In *Midkiff v Hawaii Housing Authority*<sup>63</sup> Justice O'Connor stated as follows:

'The [Supreme] Court long ago rejected any literal requirement that condemned property be put into use for the general public.'<sup>64</sup>

In terms of this broad or wider understanding of the public use requirement property may be taken 'for future use by the public'<sup>65</sup> or taken and transferred to another private party, provided the taking still satisfies a public purpose.<sup>66</sup> While it has been stated that the government is not allowed to take the property of X to give it to Y,<sup>67</sup> the US Supreme Court

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*Journal of Environmental Law and Policy* 195-234 at 201 states that the 'Mills Acts gave new meaning to "public use" by allowing states to use eminent domain as an economic development tool, even when the property taken was not transferred to the public.' However, opposition towards private takings in terms of the Mills Acts increased, since it was felt that the economic benefit used as a justification for the taking was too vague. Therefore, many states opted to repeal the Mills Acts. See Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 6-8; Waring EJM *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) 57-60; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 501-502.

<sup>59</sup> Singer JW *Introduction to Property* (2<sup>nd</sup> ed 2005) 743; Berger L 'The Public Use Requirement in Eminent Domain' (1978) 57 *Oregon LR* 203-246 at 205; Merrill TW 'The Economics of Public Use' (1986) 72 *Cornell LR* 61-116 at 67-68. Rubenfield J 'Usings' (1993) 102 *Yale LJ* 1077-1163 advocates an extreme version of this narrow interpretation of the public use clause, but this view is not supported by the US Supreme Court or by the majority of academic commentators.

<sup>60</sup> Singer JW *Introduction to Property* (2<sup>nd</sup> ed 2005) 743.

<sup>61</sup> Berger L 'The Public Use Requirement in Eminent Domain' (1978) 57 *Oregon LR* 203-246 at 205; Schultz D 'What's Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?' (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234 at 199.

<sup>62</sup> In *Kelo v City of New London* 545 US 469 (2005) at 478 the US Supreme Court has indicated that it embraces 'the broader and more natural interpretation of public use as "public purpose."' See Merrill TW 'The Economics of Public Use' (1986) 72 *Cornell LR* 61-116 at 67; Schultz D 'What's Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?' (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234 at 199; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 494, 500.

<sup>63</sup> 267 US 229 (1984).

<sup>64</sup> *Midkiff v Hawaii Housing Authority* 267 US 229 (1984) 244.

<sup>65</sup> Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 180.

<sup>66</sup> Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 180.

<sup>67</sup> See Justice Thomas' dissenting opinion in *Kelo v City of New London* 545 US 469 (2005) 510-511 where he states, with reference to *Calder v Bull* 3 Dall US 386 (1798), that it could not have been the Constitutional drafter's intention that the taking of property from X to give to Y would constitute a public use. See further Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 494.

usually upholds such takings if they are for a public purpose.<sup>68</sup> Furthermore, the Court generally defers to the legislature in condemnation cases.<sup>69</sup> The decisions discussed below not only illustrate the US Court's lenient approach to the meaning of the public use requirement but also its attitude of judicial deference towards the decision of the legislature as to what constitutes a public use.<sup>70</sup>

#### **4 4 1 2 Poletown Neighborhood Council v City of Detroit**

The *Poletown Neighborhood Council v City of Detroit*<sup>71</sup> (*Poletown*) decision is not a US Supreme Court decision, but it is important since it involved the condemnation of land to enable a third party to develop the property economically. The Detroit Economic Development Corporation Act 1974 PA 338 was promulgated to provide for the general health and safety of the State of Michigan, to alleviate poverty, and to stimulate the economies of distressed areas. In terms of the development plan the Detroit Economic Development Corporation wished to provide General Motors with sufficient property to construct a new assembly plant in an attempt to prevent the company from moving to a different city. In terms of the development plan a residential neighbourhood in Detroit and several small businesses had to be expropriated and relocated to different areas to make the land available to General Motors. Therefore, the question in this case was whether the Corporation could condemn property and transfer it to General Motors to construct and manage an assembly factory.

The plaintiffs challenged the constitutionality of the relevant legislation that provided for the condemnation of their properties to transfer it to another private party for economic development. They argued that the condemnation would be invalid since it served a private purpose irrespective of the benefits that may accrue to the public. The court stated that a taking for private use by a third party is unconstitutional regardless of the fact that certain benefits may accrue to the public. Therefore, the court considered 'whether the proposed condemnation is for the primary benefit of the public or a private user.'<sup>72</sup>

The court adopted a deferential attitude and stated that the determination of what constitutes a public purpose is mainly determined by the legislature and only reviewable by

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<sup>68</sup> See *Berman v Parker* 348 US 26 (1954); Singer JW *Introduction to Property* (2<sup>nd</sup> ed 2005) 743.

<sup>69</sup> See Merrill TW 'The Economics of Public Use' (1986) 72 *Cornell LR* 61-116 at 63; Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 180.

<sup>70</sup> In this regard see especially the discussion of *Kelo v City of New London* 545 US 469 (2005) below at 4 4 1 4. See also Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 180-182.

<sup>71</sup> 410 Mich 616 (Mich, 1981).

<sup>72</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 632.

the courts if the power of eminent domain was abused or if its effect was arbitrary.<sup>73</sup> Since the condemnation in this decision was part of a larger legislative regeneration scheme, the court was of the opinion that its power to review the condemnation was limited even further. The court accepted the evidence presented by the City of Detroit relating to the harsh economic situation, which would be alleviated through the development of the particular area, and was satisfied that the City was justified in using the power of eminent domain to achieve this aim. According to the court the purpose of the taking was to alleviate unemployment and to revitalize the local economy and therefore it constituted a taking for a public purpose. Since the taking was not primarily for the benefit of the private party and the benefits that the private party would receive were, according to the court, incidental to the achievement of the purpose, the majority of the court upheld the taking and the transfer of the property.

Justice Fitzgerald wrote a dissenting opinion. He distinguished the taking in this decision from the clearing of slums, which had been held to be for a public purpose even though the property was transferred to private parties. The clearing of slums is meant to benefit public health and welfare and the fact that the taking benefits private parties is incidental. However, in the instant case the taking that benefited the third party could not be incidental, since the private party needed the property before the purpose of the taking, namely alleviating poverty and increasing employment, could be achieved. Therefore, Justice Fitzgerald argued that 'it is the economic benefits of the project that are incidental to the private use of the property'<sup>74</sup> and not the benefit to the third party.

Justice Fitzgerald thus disagreed with the majority of the court in their opinion that the concept of public use is an evolving one.<sup>75</sup> In his view, if increased employment, increased tax revenue and general economic stimulation can justify the taking of property and the transfer of it to another private party, there is practically no limit on the use of the power of eminent domain to assist private business, since all businesses generate some public benefit.<sup>76</sup> As a result, Justice Fitzgerald argued that the taking was for a private use and should be set aside.

Justice Ryan also wrote a dissenting opinion. After an examination of case law, Justice Ryan stated that three indicators have crystallised where the taking of land - with

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<sup>73</sup> The court relied on its previous decision in *Gregory Marina Inc v Detroit* 144 NW2d 603 (1966), and also referred to *Berman v Parker* 348 US 26 (1954).

<sup>74</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 641.

<sup>75</sup> To the contrary see Justice Stevens' opinion in *Kelo v City of New London* 545 US 469 (2005) 482, where he argued that the needs of society - the fulfilment of which is made possible through the power of eminent domain - changes over time and differs from place to place.

<sup>76</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 644.

economic development inferences - can be upheld on the public use requirement even though the property is transferred to private parties. Firstly, he identified the taking of land where it is needed by the private party in order to perform a public function such as constructing or maintaining highways and railroads. In this regard Justice Ryan noted that the property needed for the construction of railways and highways are for 'public necessity of the extreme sort otherwise impracticable.'<sup>77</sup> Therefore, if the power of eminent domain was not available to these private parties, the construction of railway lines, which requires narrow and 'generally straight' parcels of land, would be impossible.

Secondly, he argued that the retention of public accountability after the property was transferred to a private party can justify the transferring of condemned property to private parties.<sup>78</sup> As an example, Justice Ryan referred to railroad companies, which are subject to numerous regulations. These regulations include the guaranteed use of the railroad by the public in a fair and equitable manner. In this regard, Gray<sup>79</sup> argues that corporations responsible for railroad and telegraph systems were regulated in terms of statute, since they were committed to serving a public purpose. As a result, the state often delegated the power of eminent domain to these corporations to further their objectives and in return, these corporations were obliged to 'serve the public in a fair, reasonable and impartial manner'.<sup>80</sup> Furthermore, in a previous decision of the Michigan Supreme Court it was held that '[I]and cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it'.<sup>81</sup> However, a natural consequence of delegating condemnation powers to private corporations meant that it could take property for the benefit of the corporation and its shareholders. To justify such takings, it was said that the property was condemned for the primary benefit of the public, and not exclusively for the benefit of the private corporation.<sup>82</sup> Therefore, it was accepted that the corporation could only be given the power of condemnation in legislation if its primary purpose was to realise a public purpose.<sup>83</sup>

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<sup>77</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 675.

<sup>78</sup> Justice Ryan noted as an example the railway companies that must adhere to certain regulations imposed by the state: *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 677.

<sup>79</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 232-233.

<sup>80</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 233.

<sup>81</sup> *Berrien Springs Water-Power Co v Berrien Circuit Judge* 133 Mich 48; 94 NW 379 (1903) 53.

<sup>82</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

<sup>83</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 234.

Thirdly, Justice Ryan maintained that when property is condemned on behalf of a private party, the determination as to whether that specific land is to be condemned is made taking into account the interest of the public and not the interest of the private party. In this regard it would seem as if the negative effect that the condemnation of the Poletown community's properties would have on the community should carry more weight than the potential benefits that would arise as a result of the condemnation. According to Justice Ryan the taking in this case did not fall into any of these categories and therefore it should be set aside.

In the *Poletown* decision, the legislation authorised the Development Corporation to condemn property to stimulate the economy. The majority of the court accepted that its power to review the decision of the state to expropriate property within an authorising scheme is limited and therefore a low level of scrutiny is required. As a result, the condemnation of property for the purposes of alleviating unemployment and stimulating the economy was held to be a valid public purpose. Regarding the third party transfer the majority took the view that since the primary purpose of the condemnation was for the benefit of the public and not the third party, the transfer was warranted. According to the majority the benefit that the third party would receive was incidental to the benefits to the public that arose as a result of the taking.

According to Justice Fitzgerald this logic is flawed since the benefits that would accrue to the third party were not incidental. The third party required the property before any of the public benefits would materialise. Justice Ryan emphasised that public accountability over the use of the condemned property can indicate that the transfer of the condemned property to a third party should be allowed. However, in this case no provision was made for public accountability. As a result, Justice Ryan argued that the condemnation should be set aside.

#### **4 4 1 3 *County of Wayne v Hathcock***

In *County of Wayne v Hathcock*<sup>84</sup> (*Hathcock*) the Michigan Supreme Court had to consider whether the condemnation of the respondent's property to construct a 1300 hectare business park was for a public use. In terms of article 10 of the Michigan Constitution of 1963 property 'shall not be taken for public use without just compensation'. The purpose of this business park was to stimulate the struggling economy in the area. Based on the

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<sup>84</sup> 684 NW 2d 765 (Mich, 2004).

previous decision in *Poletown Neighborhood Council v City of Detroit*<sup>85</sup> both the Wayne Circuit Court and the Court of Appeals allowed the taking.

However, the Michigan Supreme Court held that the taking and transfer of property to private parties are inconsistent with the understanding of the public use requirement in the 1963 State Constitution. Justice Young, delivering the opinion of the court, stated that the public use requirement prevents takings for a private use. Relying on the three indicators formulated by Justice Ryan in the *Poletown* decision to determine whether a taking and transfer of property for economic development should be upheld, Justice Young determined whether the taking and transfer of property in this decision was for a public use. Firstly, Justice Young held that the establishment of the business park did not depend on the use of the specific property earmarked for condemnation. There was therefore no public necessity that required that specific property to be condemned. Secondly, the business park, which would be operated by private entities, excluded any form of public accountability to guarantee that the property would be used for the advancement of the public purpose after it had been sold to private parties. Thirdly, the act of condemnation did not primarily serve a public benefit; it was only after the property had been put to private use that certain public benefits might come into existence. The court concluded that the understanding of the public use requirement does not permit the taking of property for purposes of erecting a business park owned by a different private party. The court referred to slum clearance where the condemnation and transfer of property is for a public purpose. However, in that regard the act of condemnation for purposes of slum clearance is a public purpose; the purpose to which the property is put after condemnation is irrelevant.

The court effectively overruled the *Poletown* decision on the basis that the acceptance of factors such as alleviating unemployment and stimulating the economy to constitute a public use had no basis in the court's eminent domain jurisprudence. The court effectively placed a categorical ban on economic development takings, except if any of the three exceptions as indicated by Justice Ryan in *Poletown* is present.<sup>86</sup> As a result, property can be condemned and transferred to third parties if it can be justified in terms of the public use requirement in the 1963 Michigan Constitution. The circumstances under which it can be valid is when the property is strictly needed by the third party to fulfil a public function; if there is some sort of public accountability to ensure that the private party

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<sup>85</sup> 410 Mich 616 (Mich, 1981).

<sup>86</sup> See Somin I 'Overcoming *Poletown*: *County of Wayne v Hathcock*, Economic Development Takings, and the Future of Public Use' 2004 *Mich State LR* 1005-1039 at 1008.



perform the task for the benefit of the public; and if the public's interest outweighs the private interest of the third party.

#### **4 4 1 4 *Kelo v City of New London***

In 2005, the US Supreme Court gave judgment in *Kelo v City of New London*<sup>87</sup> (*Kelo*). Due to economic decline in the area state officials identified New London, specifically the area of Fort Trumbull, for economic revitalisation. To this end the New London Development Corporation (NLDC), a private non-profit entity, set up an integrated development plan for the area that was approved by the City of New London. The City approved the development plan that included 115 privately owned properties, as well as the construction of a shopping mall, a waterfront development with shops and restaurant, a hotel, and office and research facilities. The city council gave the NLDC permission to purchase or acquire property by using the power of eminent domain in the City's name. After the property had been acquired by the NLDC it would lease the property for a period of 99 years to a private developer for an amount of \$1 per year.

The NLDC successfully purchased the majority of the properties it required for its purposes. However, nine petitioners - Susette Kelo and others - refused to sell their properties. Therefore, the NLDC used the power of eminent domain to condemn their properties. The petitioners first approached the New London Superior Court on the basis that the taking was a violation of the public use requirement. The Superior Court granted a permanent restraining order prohibiting the taking of some of the properties. On appeal, the majority of the Supreme Court of Connecticut upheld the taking of all the properties. On appeal to the United States Supreme Court, the Court had to decide 'whether the city's decision to take property for the purpose of economic development satisfied the "public use" requirement of the Fifth Amendment'.<sup>88</sup>

Justice Stevens, who wrote the opinion for the Court, confirmed that property cannot be taken for the purposes of conferring a private benefit on a particular third party. Furthermore, he stated that the narrow view, constricting the public use requirement to mean actual use by the public, is no longer tenable. Therefore, to satisfy the Fifth Amendment it has to be considered whether a taking is for a public purpose. According to Justice Stevens, the public purpose has been defined broadly and its interpretation reflects the 'longstanding policy of deference to legislative judgments in this field'.<sup>89</sup> In this regard

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<sup>87</sup> 545 US 469 (2005).

<sup>88</sup> *Kelo v City of New London* 545 US 469 (2005) 477.

<sup>89</sup> *Kelo v City of New London* 545 US 469 (2005) 480.

he referred to the earlier decisions of *Berman v Parker*<sup>90</sup> and *Midkiff v Hawaii Housing Authority*.<sup>91</sup>

According to Justice Stevens the development plan in this case warranted deference on the part of the Court. The city implemented the integrated development plan to rejuvenate a distressed area by, amongst others, creating new jobs and increasing the tax base. To achieve these aims the city endorsed the NLDC to use eminent domain in its name to encourage the economic development of the area. Accordingly, the plan served a public purpose and the taking of property for these purposes satisfied the public use requirement of the Fifth Amendment.<sup>92</sup>

The petitioners argued that the Court must adopt a 'bright-line rule that economic development does not qualify as a public use'.<sup>93</sup> According to Justice Stevens, it is impossible to distinguish economic development from other recognized public purposes. The court referred to *Berman* and *Midkiff* and concluded that it was unwise to distinguish the development of the Fort Trumbull area on the basis that it had less of a public character than those identified in *Berman* and *Midkiff*. Therefore, Justice Stevens held that there was no plausible reason to justify the exclusion of economic development from the understanding of public purpose.

The petitioners argued that the use of eminent domain for economic development purposes might blur the distinction between public and private takings. Justice Stevens dismissed this argument, stating that it often occurs that the achievement of a public purpose inevitably results in a private party receiving a benefit. Referring to *Berman*, Justice Stevens stated that it is plausible that a public purpose can be more effectively implemented when undertaken by a private party than by a government department.<sup>94</sup>

Accordingly, Justice Stevens held that the taking of the petitioner's land for economic development purposes was a public purpose that satisfies the public use requirement of the Fifth Amendment. He took cognisance of the fact that many states have

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<sup>90</sup> 348 US 26 (1954).

<sup>91</sup> 267 US 229 (1984). In *Kelo v City of New London* 545 US 469 (2005) 482 Justice Stevens also referred to *Ruckelshaus v Monsanto Co* 467 US 986 (1984) 482. In that decision the Court upheld the taking in terms of the Federal Insecticide, Fungicide and Rodenticide Act 7 USC §136 et seq (1996). In terms of the Act the Environmental Protection Agency could consider the data of one pesticide company (even if it contained trade secrets) when it evaluated a new pesticide company's application for approval for entry into the market. The new pesticide company had to pay compensation for the use of the data. The court accepted that the direct benefactor is the new company but nevertheless upheld the taking on the basis of *Berman* and *Midkiff*.

<sup>92</sup> Schultz D 'What's Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?' (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234 at 220-221 argues that Justice Stevens regarded the existence of a comprehensive regeneration plan as a determining factor in upholding the taking.

<sup>93</sup> *Kelo v City of New London* 545 US 469 (2005) 484.

<sup>94</sup> *Kelo v City of New London* 545 US 469 (2005) 486.

additional restrictions on the use of the power of eminent domain, such as limiting the instances for which private property may be taken. However, in this decision the Court was only concerned with the question whether the taking complied with the public use requirement in the Fifth Amendment.

Justice O'Connor - who wrote the opinion in the *Midkiff* decision - wrote a dissenting opinion in *Kelo*.<sup>95</sup> According to Justice O'Connor the majority ruling has the effect that all properties are vulnerable to be taken and transferred to another private party if it can be put to better use.<sup>96</sup> She argued that the acceptance of takings for economic development purposes indeed blurs the distinction between public and private takings and effectively renders the public use requirement useless.<sup>97</sup> Justice O'Connor approved of the Court's deferential stance towards the decision of the legislature whether takings benefit the public, but argued that restraint is called for to save the public use requirement from total irrelevance.

Justice O'Connor identified three categories of takings that would comply with the public use requirement.<sup>98</sup> Firstly, the state may transfer expropriated property to public ownership for the construction of roads and hospitals. Secondly, the state may transfer expropriated property to private parties who are responsible for providing railroads or other public utilities.<sup>99</sup> According to Justice O'Connor the first two examples are 'relatively straightforward and uncontroversial.'<sup>100</sup> Thirdly, takings have been upheld even if the property was earmarked for private use, such as in the *Berman* and *Midkiff* decisions. However, Justice O'Connor doubted whether an economic development taking is for a public use. Justice O'Connor clearly distinguished between the condemnation in the *Berman* and *Midkiff* cases and the taking in the *Kelo* decision and found that the taking of property for economic development purposes does not constitute a public use.<sup>101</sup> In both

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<sup>95</sup> Chief Justice Rehnquist and Justices Thomas and Scalia joined in Justice O'Connor's dissent.

<sup>96</sup> Justice O'Connor, *Kelo v City of New London* 545 US 469 (2005) 503, stated that '[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory'.

<sup>97</sup> However, Schultz D 'What's Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?' (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234 argues that the public use requirement is not to be seen as being deleted from the Public Use Clause. According to Schultz, the differentiating factor between a taking for public use and for private use is the existence, in the latter case, of a comprehensive development plan.

<sup>98</sup> See also Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 524.

<sup>99</sup> *Kelo v City of New London* 545 US 469 (2005) 498.

<sup>100</sup> *Kelo v City of New London* 545 US 469 (2005) 497.

<sup>101</sup> In a different dissenting opinion, Justice Thomas argued - based on historical analysis of the term 'public use' - that the term 'public use' must be narrower than 'public purpose;' that *Berman* and *Midkiff* were wrongly decided; and that it should be overturned. See also Malloy RB & Smith JC 'Private Property, Community Development, and Eminent Domain' in Malloy RB (ed) *Private Property, Community*

*Berman* and *Midkiff* the circumstances were such that before condemnation the areas were rife with social and economic problems. The areas were, therefore, adequately described as blighted areas. In the *Kelo* decision the petitioner's property was well-maintained and was not the source of any social harm.<sup>102</sup> According to Justice O'Connor, the Court's confirmation of the taking of the petitioner's property for economic development purposes means that the government can take any private property and transfer it to another private party for private use as long as the latter uses the property in a manner that generates secondary benefits, such as increased tax revenue or more job opportunities.<sup>103</sup>

Justice O'Connor concluded by referring to *Poletown*, where Justice Fitzgerald stated that no 'homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for benefit of another private interests that will put it to "higher" use.'<sup>104</sup> According to Justice O'Connor any property can now be taken for the benefit of a private party. The private party that stands to gain will almost always surely be those with the power to influence the political process, which includes large corporations and development firms. Accordingly, Justice O'Connor concluded that the taking of the petitioners' properties was unconstitutional.

Justice Thomas agreed with Justice O'Connor's dissenting opinion but felt that the 'Court's error runs deeper.'<sup>105</sup> Justice Thomas argued that the move away from the literal interpretation of the public use requirement as it was originally intended and applied is due to two factors. Firstly, the phrase 'public purpose' was adopted and applied instead of the public use requirement. Secondly, the courts deferred to the legislature to decide what would constitute a valid public purpose, as is evident from the *Berman* and *Midkiff* decisions.

Justice Thomas made some interesting remarks concerning the Court's deference to the decision of the legislature as to what constitutes a public use in condemnation cases. He argued that it is unthinkable to leave it up to the legislature to decide under which circumstances the searching of a home would be possible. It is even more unthinkable 'to adopt a searching standard of constitutional review for non-traditional

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*Development, and Eminent Domain* (2008) 1-14 at 12 and the discussion of Justice Thomas' dissenting opinion below.

<sup>102</sup> Malloy RB & Smith JC 'Private Property, Community Development, and Eminent Domain' in Malloy RB (ed) *Private Property, Community Development, and Eminent Domain* (2008) 1-14 at 12 point out that the department store in the *Berman* decision was not a blighted building, nor did it add to the presence of the blight.

<sup>103</sup> *Kelo v City of New London* 545 US 469 (2005) 501.

<sup>104</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 645.

<sup>105</sup> *Kelo v City of New London* 545 US 469 (2005) 506.

property interests, such as welfare benefits ... while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property'.<sup>106</sup> Justice Thomas came to the conclusion that the Court has always respected the sanctity of the home and it is therefore unthinkable that the Court would so easily allow an even more intrusive infringement, like taking the petitioners' homes and demolishing them.<sup>107</sup> Accordingly, Justice Thomas argued that he would prefer to revert to the original meaning of the public use clause, which obliged the government to actually use the property or give the public a 'legal right to use the property.'<sup>108</sup>

The US Supreme Court's decision in *Kelo* generated a fair amount of criticism.<sup>109</sup> However, some authors argue that the *Kelo* decision was decided correctly.<sup>110</sup> Cohen agrees that the *Kelo* decision is correct in terms of judicial precedent but advocates a pragmatic solution, namely a complete ban on economic development takings.<sup>111</sup> Cohen also notes his uneasiness with the absence of any 'legally binding assurances that the

<sup>106</sup> *Kelo v City of New London* 545 US 469 (2005) 518.

<sup>107</sup> Justice Thomas in *Kelo v City of New London* 545 US 469 (2005) 518 stated that '[t]hrough citizens are safe from the government in their homes, the homes themselves are not.' Various authors argue that the condemnation of property that is used for residential purposes should be subjected to heightened scrutiny. See Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 407-408; Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 191; Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 799-801.

<sup>108</sup> *Kelo v City of New London* 545 US 469 (2005) 521. In this regard Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82-83 notes his unease with the *Kelo* decision, since the private developer would hold the expropriated property on exclusionary terms. The developer would, apart from not being publicly accountable with regard to the use of the land, also be able to select the 'tenants, occupiers and users of the redeveloped site'. See further Malloy RB & Smith JC 'Private Property, Community Development, and Eminent Domain' in Malloy RB (ed) *Private Property, Community Development, and Eminent Domain* (2008) 1-14 at 12 and the discussion below at 4 7.

<sup>109</sup> See Wolf MA 'Hysteria versus History: Public Use in the Public Eye' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 15-33 for an overview of the reaction to the *Kelo* decision in the popular media. See also Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568; Gray K 'There is no Place like Home' (2007) 11 *Journal of South Pacific Law* 73-86; Somin I 'Controlling the Grasping Hand: Economic Development Takings after *Kelo*' (2007) 15 *Supreme Court Economic Review* 183-271.

<sup>110</sup> Bell A & Parchomovsky G 'The Uselessness of Public Use' (2006) 106 *Col LR* 1412-1449 at 1415 argue that *Kelo* was decided correctly and that the criticism against this decision are 'ill conceived and misguided.' Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 496 states the '*Kelo* decision was correct as a matter of law ... and consistent with American judicial and legislative approaches to the public use question ...'. See also Merrill TW 'Six Myths about *Kelo*' (January-February) 20 *Probate and Property* 19-23; Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 68-70.

<sup>111</sup> Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 498. Similarly, Somin I 'Controlling the Grasping Hand: Economic Development Takings after *Kelo*' (2007) 15 *Supreme Court Economic Review* 183-271 at 187, 210-223 also advocates for a complete ban on economic development takings, but also cautions against the overextensions of the exceptions to this rule. At 210-223, Somin argues that alternative measures to a complete ban on economic development takings, such as heightened security and increased compensation for property owners, are not effective.



projected economic benefits actually will occur'<sup>112</sup> in the legislation that permits takings for economic development purposes. This adds to the reservations about the sustainability of the economic development after the property has been condemned. In this respect the concerns are not ill-founded, especially if one considers the fact that the development plan that gave rise to the dispute in *Kelo* has since the condemnation not yet been implemented.<sup>113</sup> Gray states that he is 'deeply troubled'<sup>114</sup> by the *Kelo* decision and wonders 'whether there remains any content *at all* in the concept of property'.<sup>115</sup> Therefore, it seems unsurprising that many states in the United States of America have promulgated legislation that prevents condemning of property for the purposes of economic development or increasing the tax base, but allowing condemnation for the redevelopment of slums or blighted areas.<sup>116</sup>

## 4 4 2 English Law

### 4 4 2 1 Introduction

In English law the compulsory acquisition of land is regulated by statute, particularly the Acquisition of Land Act of 1981, the Land Compensation Act of 1961, the Town and Country Planning Act of 1990 and the Planning and Compulsory Purchase Act of 2004.<sup>117</sup> Therefore, parliament grants the power to compulsorily acquire property to the authorities identified in legislation and modern legislation offers authorities 'a broad range of powers

<sup>112</sup> Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 545. See also Somin I 'Controlling the Grasping Hand: Economic Development Takings after *Kelo*' (2007) 15 *Supreme Court Economic Review* 183-271 at 192-197.

<sup>113</sup> Similarly Somin I 'Overcoming *Poletown*: *County of Wayne v Hathcock*, Economic Development Takings, and the Future of Public Use' 2004 *Mich State LR* 1005-1039 at 1014, with reference to the condemnation in the *Poletown* decision, indicates that of the 6150 projected employment opportunities only about 3600 have materialised.

<sup>114</sup> Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406; Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82.

<sup>115</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82. See also Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1392.

<sup>116</sup> See Somin I 'The Limits of Backlash: Assessing the Political Response to *Kelo*' (2009) 93 *Minnesota LR* 2100-2178 for a general overview of the federal and state legislation (as well as its effectiveness) that was passed after *Kelo* to prevent economic development takings. Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 argues against legislation that disallows condemnation for economic development purposes but allows it for the redevelopment of slums, since the former can have a disproportionate effect on low-income households. See also Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 558-566; Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 65-66. See further the discussion below at 4 7.

<sup>117</sup> See Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388.



for the compulsory acquisition of land for a variety of purposes'.<sup>118</sup> For instance, in terms of section 226(1)(a) of the 1990 Town and Country Planning Act, as amended by section 99 of the Planning and Compulsory Purchase Act of 2004, a specified authority can compulsorily acquire land if it 'facilitate[s] the carrying out of development, redevelopment and improvement on or in relation to the land'.<sup>119</sup> The courts generally adopt a deferential approach towards the decision of the authority to compulsorily acquire property.<sup>120</sup> However, they will not allow a compulsory acquisition if the power is used for an improper purpose.<sup>121</sup>

In English law compulsory acquisition is regarded as a highly practical subject.<sup>122</sup> Land is usually acquired in terms of a compulsory purchase order (CPO) made by the authority authorised to do so in terms of the relevant legislation.<sup>123</sup> The CPO then has to be confirmed by the relevant government minister, which in the case of land development is the Deputy Prime Minister. If there are any objections to the CPO, an Inspector is appointed to conduct a public inquiry. After the public inquiry the Inspector makes a recommendation to the Minister. Based on this recommendation, the Minister may either confirm, reject or amend the CPO.<sup>124</sup> If the owner of the land still objects the CPO's validity may also be challenged in court once the notice of confirmation has been published, but only on limited grounds. The objection basically boils down to determining whether the

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<sup>118</sup> Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 86. See also Waring ELJ *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) 123-124; Waring EJJ 'Private Takings from Across the Pond' (2010) [www.law.syr.edu/media/paper/2010/3/private\\_takings\\_from\\_across\\_the\\_pond.pdf](http://www.law.syr.edu/media/paper/2010/3/private_takings_from_across_the_pond.pdf) (accessed 15 March 2012) 5.

<sup>119</sup> However, in terms of s 226(1)(A) the acquisition should not proceed if it will promote or improve the economic, social or environmental well-being of the area. See Waring EJJ 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 12-13. See also the discussion of *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 below.

<sup>120</sup> See Waring EJJ 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 22.

<sup>121</sup> Allen T *The Right to Property in Commonwealth Constitutions* (2000) 201. It is accepted that the compulsory acquisition of property for the benefit of another private person is impermissible: Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388-1389.

<sup>122</sup> According to Taggart M 'Expropriation, Public Purpose and the Constitution' in Forsyth C & Hare I (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998) 91-112 at 91 more attention is paid to the payment of compensation than to the principle of public purpose. Similarly, Waring EJJ 'Private Takings from Across the Pond' (2010) [www.law.syr.edu/media/paper/2010/3/private\\_takings\\_from\\_across\\_the\\_pond.pdf](http://www.law.syr.edu/media/paper/2010/3/private_takings_from_across_the_pond.pdf) (accessed 15 March 2012) 1 also states that '[t]raditionally ... [English law] relating to compulsory purchase has centred on procedural and compensatory matters; threshold questions about the constitutionality and desirability of taking land has rarely been a matter of wide public debate.'

<sup>123</sup> See Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388.

<sup>124</sup> See Waring ELJ *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) 116-117.

acquisition took place outside the scope of the relevant statutory power.<sup>125</sup> Given the broad scope of instances for which property can be acquired it is difficult to succeed in challenging the compulsory acquisition based on the public interest requirement.<sup>126</sup>

Nevertheless, it is generally accepted that the power of compulsory acquisition can only be exercised in the public interest.<sup>127</sup> The 2004 Circular on *Compulsory Purchase and the Crichton Down Rules* states that '[a] compulsory purchase order should only be made where there is a compelling case in the *public interest*'.<sup>128</sup> Various court decisions<sup>129</sup> and commentaries<sup>130</sup> also illustrate the fact that the public purpose requirement has a role to play in compulsory acquisition cases. Gray and Gray<sup>131</sup> state that as a result of privatisation, compulsory acquisition is no longer solely directed towards the realisation of a public purpose that benefits all citizens.<sup>132</sup> Given the 'complacency in English law'<sup>133</sup> regarding this matter it is possible that the power of compulsory purchase may be abused to take property from one private party and transfer it to another private party. However, with the advent of the Human Rights Act of 1998, which made the European Convention

<sup>125</sup> Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 86. See *Ainsdale Investments Ltd v First Secretary of State and Another* [2004] EWHC 1010 (Admin) para 22.

<sup>126</sup> Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 86.

<sup>127</sup> For instance, in *Prest v Secretary of State for Wales* (1982) 81 LGR 193 at 198, Lord Denning stated that property can only be taken against the will of the owner if it is in the public interest and if adequate compensation is paid. This was also confirmed by the UK Supreme Court in *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20. See also Waring EJM 'Private Takings from Across the Pond' (2010) [www.law.syr.edu/media/paper/2010/3/private\\_takings\\_from\\_across\\_the\\_pond.pdf](http://www.law.syr.edu/media/paper/2010/3/private_takings_from_across_the_pond.pdf) (accessed 15 March 2012) 6-7.

<sup>128</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules* Circular 06/2004 (31 October 2004) 6 para 17 (own emphasis).

<sup>129</sup> For example, in *Ainsdale Investments Ltd v First Secretary of State* [2004] HLR 956 the defendant claimed that the compulsory acquisition was in the wider public interest and should, therefore, be upheld. The court confirmed that a compulsory purchase order should only be made if there is a sufficient public interest and the authority should ensure that the interest justifies an interference with art 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222. However, the court accepted that an appropriate balance had been struck between the protection of property and the public interest and upheld the compulsory acquisition. See also *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18; *Sole v Secretary of State for Trade and Industry and Others* [2007] EWHC 1527; and Lord Walker's judgment in *Regina (Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20. See further Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388-1389.

<sup>130</sup> As Taggart M 'Expropriation, Public Purpose and the Constitution' in Forsyth H & Hare I (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (1998) 91-112 at 102-103 explains: '[P]arliamentary private bill procedures in relation to expropriation powers ensured that a public case had to be made out before a Parliamentary Committee justifying the bestowal of those powers (often on private companies) in the public interest.'

<sup>131</sup> Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1389. See also Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law Vol VI* (2011) 1-38 at 29.

<sup>132</sup> Therefore, Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (Copy of paper on file with the author) 11 states that '[t]oday ... private takings occur most frequently as part of urban redevelopment and regeneration schemes rather than transport and infrastructure projects.'

<sup>133</sup> Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1389-1390.

for the Protection of Human Rights and Fundamental Freedoms<sup>134</sup> binding in English Law, English courts are urged to apply a proportionality test instead of the more limited reasonableness test.<sup>135</sup>

Article 1 of Protocol 1 to the Convention makes it clear that a taking of property may only occur if it is in the public interest.<sup>136</sup> However, it does not impose severe restrictions on the purposes for which property can be acquired.<sup>137</sup> This can be attributed to the wide margin of appreciation given to the national states to decide whether an acquisition is in the public interest.<sup>138</sup> Therefore, Allen argues that the European Court of Human Rights allows the relevant state to interpret the public interest requirement broadly, making it difficult to perceive how a redistribution of property from one private party to another would not be in the public interest.<sup>139</sup> In *James v United Kingdom*,<sup>140</sup> the European Court of Human Rights accepted that the compulsory transfer of property from one private party to another may constitute a valid means of promoting the public interest, depending on the specific circumstances.<sup>141</sup>

The public interest requirement in article 1 of Protocol 1 to the European Convention on Human Rights<sup>142</sup> concerning the justification for the compulsory acquisition is not the subject of many disputes.<sup>143</sup> However, the question whether the compulsory

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<sup>134</sup> (1950) 213 UNTS 222.

<sup>135</sup> See Crow S 'Compulsory Purchase for Economic Development: An International Perspective' 2007 *Journal of Planning and Environmental Law* 1102-1115 at 1106.

<sup>136</sup> Art 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, states that '[e]very legal person is entitled to the peaceful enjoyment of his possessions [and] [n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' The reference to deprivation of possession is usually associated with the regulation of property, but it is clear that in this context, 'deprivation' means the compulsory acquisition of property. In this regard, see Allen T *Property and the Human Rights Act 1998* (2005) 112-113.

<sup>137</sup> See Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 76-77.

<sup>138</sup> See Allen T *Property and the Human Rights Act 1998* (2005) 125-126, 131-132.

<sup>139</sup> Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 78.

<sup>140</sup> [1986] 8 EHRR 123.

<sup>141</sup> *James v United Kingdom* [1986] EHRR 123. In this decision the applicant's secondary argument was that the compulsory acquisition of his property did not serve a public purpose, but a private purpose. In this decision, the legislation that allowed long lease tenants to buy the property they occupied was challenged. The applicant argued that the power to take property is narrower than the power to regulate property, given the public interest requirement that is applicable to acquisition of property and the general interest requirement that applies to the control of property. The European Court of Human Rights held that in this instance there is no fundamental difference between these two concepts. See also Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 79; Waring ELJ *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) 53.

<sup>142</sup> First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952; 213 UNTS 222, ETS 5.

<sup>143</sup> See Allen T 'Controls over the Use and Abuse of Eminent Domain in England: A Comparative Overview' in Malloy RB (ed) *Private Property, Community Development and Eminent Domain* (2008) 75-100 at 78. Waring ELJ *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) at

acquisition of property for economic development purposes is in the public interest and, therefore, justified has recently received attention from the English courts. Furthermore, English courts have considered whether the compulsory acquisition and transfer of property to third parties for economic development purposes is justified. Therefore, an overview of English jurisprudence concerning the questions whether economic development is in the public interest, and whether the transfer of the property to third parties for purposes of economic development is justified, follows below.

#### **4 4 2 2 Acquisition of Property for Economic Development Purposes**

##### *4 4 2 2 1 Smith v Secretary of State for Trade and Industry*

In *Smith v Secretary of State for Trade and Industry*<sup>144</sup> (*Smith*), the London Development Agency made a compulsory purchase order in terms of section 20(1) of the Regional Development Agencies Act of 1998,<sup>145</sup> which caused the compulsory acquisition of the claimants' leases. The claimants were Romani gypsies and Irish travellers who would find it difficult to find alternative accommodation to maintain their lifestyle once evicted from the property.<sup>146</sup> The purpose of the acquisition was to facilitate and secure economic development, regenerating the land, and promoting employment in an effort to ensure the sustainable development of the area. The land was to be developed for purposes of providing facilities for the 2012 Olympic and Paralympic Games.<sup>147</sup> After a public inquiry was held the Inspector recommended that the CPO should be confirmed, but only if the displaced persons were given suitable relocation sites. The Secretary of State confirmed the CPO without identifying suitable relocation sites on the basis that the need to develop the area for the Olympic Games required the whole area to be under the control of the state as soon as possible, even if relocation sites were not immediately available.

The claimants argued that the confirmation of the CPO by the defendant violated their rights in terms of article 8 of the European Convention on Human Rights.<sup>148</sup> The

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49-50 argues that the incorporation of art 1 of Protocol 1 does not provide additional protection given the 'breadth of the provision and the deference accorded to State decisions'.

<sup>144</sup> [2007] EWHC 1013 (Admin).

<sup>145</sup> S 20(1) of the Regional Development Agencies Act of 1998 authorises a regional development agency to acquire land for its purposes or for purposes incidental thereto by agreement or compulsorily. In terms of s 1(a) of the Act one of the purposes of a Regional Development Agency is the furtherance of 'economic development'.

<sup>146</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 467.

<sup>147</sup> *Smith v Secretary of States for Trade and Industry* [2007] EWHC 1013 (Admin) para 5. The area was specifically targeted because of economic decline due to a high unemployment rate.

<sup>148</sup> Art 8(1) of the Convention states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence' and art 8(2) states that there shall be no interference with this right except if it is in 'accordance with the law and is necessary in a democratic society in the interests of national security,

Secretary of State argued that the infringement was justified, since it was in accordance with domestic law and necessary for the economic well-being of the country.<sup>149</sup> The court pointed out that the intrusion on the claimants' rights must be proportionate in order for it to be justified. According to the court, the test for proportionality requires a balancing exercise. If the acquisition is reasonably necessary in the public interest it would be justified. Furthermore, it is not strictly necessary that the least intrusive measure should be adopted.<sup>150</sup> The court held that the decision of the defendant to expropriate the properties in question was proportionate to its purpose, namely the advancement of economic development that would benefit the whole country, even if no alternative site had been identified for occupation by the claimants. Therefore, in this instance the violation of the claimants' right in terms of article 8 of the European Convention on Human Rights was justifiable.

#### 4 4 2 2 2 *Sole v Secretary of State for Trade and Industry*

Similarly, in *Sole v Secretary of State for Trade and Industry*<sup>151</sup> (*Sole*) a compulsory purchase order was issued in terms of section 20(1) of the Regional Development Agencies Act of 1998 for the purpose of facilitating the necessary development for the 2012 Olympic Games. The purpose of the acquisition was to construct the Athletes' Village and other sport facilities that would be used by the competing athletes during the Games. The applicant did not deny the benefits of developing the area for the stated purposes but argued that the interference with his rights in terms of article 8 of the European Convention on Human Rights was disproportionate, since the CPO should have been delayed until a relocation strategy could be finalised.

The court held that the Secretary adequately proved that the interference with the applicant's rights was proportionate. The Secretary argued that the loss suffered by the applicant was outweighed by the benefits that would arise from hosting the Olympic Games, which was 'in the interest of the economic well-being of the country.'<sup>152</sup> Therefore, the Secretary - by showing that an appropriate balance had been struck between the protection of human rights and the public interest - proved that the interference was proportionate and the court rejected the applicant's case.

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public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>149</sup> *Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) para 28.

<sup>150</sup> *Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) para 38.

<sup>151</sup> [2007] EWHC 1527 (Admin).

<sup>152</sup> *Sole v Secretary of State for Trade and Industry* [2007] EWHC 1527 (Admin) para 42. See also Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law Vol VI* (2011) 1-38 at 21.



Both *Smith v Secretary of State for Trade and Industry*<sup>153</sup> and *Sole v Secretary of State for Trade and Industry*<sup>154</sup> dealt with the compulsory acquisition of land for economic development purposes. In neither case was there a post-acquisition third party transfer of the property. The compulsory acquisition in both the *Smith* and the *Sole* decisions was made in terms of section 20(1) of the 1998 Regional Development Agencies Act that, read with section 1 of the Act, authorises the Regional Development Agency to compulsorily acquire land to further economic development. Therefore, legislation specifically allows for the acquisition of property for economic development purposes and, given the courts' limited role to review the decisions of parliament, the compulsory acquisition of property for economic development purposes was upheld in both decisions.

#### **4 4 2 3 Transfer of Compulsorily Acquired Property to Third Parties for Economic Development Purposes**

##### *4 4 2 3 1 Alliance Spring Co Ltd v The First Secretary of State*

In *Alliance Spring Co Ltd and Others v The First Secretary of State*<sup>155</sup> the local authority issued a compulsory purchase order in terms of section 226 of the 1990 Town and Country Planning Act. The purpose of the acquisition, which included 134 parcels of land, was to secure the acquisition of land for the completion of a development scheme that included a new football stadium, a replacement Arsenal Sports and Community Centre, refurbished houses, health clubs and community health facilities. In terms of the CPO the property was to be transferred to Arsenal Football Club to build a new stadium. The property that was not needed by Arsenal for the new stadium was to be sold for purposes of housing and commercial development and the profits derived from this sale was to be used to fund the construction of the new stadium and the various facilities.<sup>156</sup>

After a public inquiry was held the Inspector recommended that the CPO should not be confirmed. One of the reasons put forward for this recommendation was that the scheme was rooted in Arsenal Football Club's need for a larger stadium. The Inspector stated that the arguments based on the redevelopment scheme (to ensure that the compulsory purchase complies with the relevant legislation) were abused to effect 'a privately motivated redevelopment scheme'.<sup>157</sup> The Inspector also stated that

<sup>153</sup> [2007] EWHC 1013 (Admin).

<sup>154</sup> [2007] EWHC 1527 (Admin).

<sup>155</sup> [2005] EWHC 18 (Admin).

<sup>156</sup> See Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law* Vol VI (2011) 1-38 at 24.

<sup>157</sup> Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law* Vol VI (2011) 1-38 at 25.



'[o]pportunism in matters concerning regeneration is understandable and not necessarily wrong. However, in the absence of objectives that are informed by local needs, there is a danger that the benefits of the community will be *overly constrained* by private interest.'<sup>158</sup>

The First Secretary of State rejected the Inspector's recommendation and confirmed the CPO. According to the First Secretary of State the main purpose of the CPO was for the implementation of a regeneration scheme. Furthermore, he argued that the regeneration scheme was in the public interest and thus authorised in terms of the Town and Country Planning Act. The applicants instituted court proceedings on the basis that the real purpose of the acquisition was to make it possible for Arsenal Football Club to erect a new football stadium and that this purpose could not be included under the ambit of the regeneration scheme. Furthermore, the applicants argued that the power of compulsory purchase cannot be used to provide Arsenal Football Club with a new stadium on property that it could not obtain on the open market.

The court held that the acquisition constituted an interference with article 1 of Protocol 1 to the European Convention on Human Rights but that the interference was proportionate.<sup>159</sup> The court upheld the CPO, thereby also dismissing the claim that the acquisition was primarily for the benefit of Arsenal Football Club and stated that many regeneration schemes are undertaken by private parties.<sup>160</sup> In this decision, the acquisition was allowed for in terms of legislation, which provided for very wide discretionary powers. What is evident from this decision is that it is irrelevant who performs (and even who benefits from) the development or redevelopment, as long as the overall purpose is authorised and can be justified in terms of the relevant legislation.<sup>161</sup>

#### 4 4 2 3 2 *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*

In *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*<sup>162</sup> a compulsory purchase order was also issued in terms of section 226 of the 1990 Town and Country Planning Act. The CPO related to the property owned by Sainsbury's Supermarkets Ltd at

<sup>158</sup> *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18 (Admin) para 13 (own emphasis added). The Inspector also argued that the main beneficiaries of the erection of a new stadium were not those living in the area, but people living elsewhere. See Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law Vol VI* (2011) 1-38 at 25, 26-27 for the argument that the building of sport stadiums is not always an effective means of ensuring economic benefit or growth and therefore should not always be able to justify the compulsory acquisition of property.

<sup>159</sup> See Crow S 'Compulsory Purchase for Economic Development: An International Perspective' 2007 *Journal of Planning and Environmental Law* 1102-1115 at 1109.

<sup>160</sup> See Crow S 'Compulsory Purchase for Economic Development: An International Perspective' 2007 *Journal of Planning and Environmental Law* 1102-1115 at 1109.

<sup>161</sup> See Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law Vol VI* (2011) 1-38 at 26.

<sup>162</sup> [2010] UKSC 20.

the Raglan Street site. Sainsbury owned or controlled 86% of the Raglan Street site, while its competitor - Tesco Stores Ltd - owned the remaining 14%. Both Sainsbury and Tesco wanted to develop the Raglan Street site. The development plans included the construction of a supermarket, a petrol station, small shops and private flats.

Sainsbury's 86% share in the Raglan Street site was compulsorily acquired to allow Tesco the opportunity to develop the site. The local authority was persuaded to grant the CPO in favour of Tesco since Tesco undertook to develop the Royal Hospital site if it was given the opportunity to develop the Raglan Street site. The Royal Hospital site, owned by Tesco, was situated about 850 metres from the Raglan Street site and was in a poor, dilapidated condition. The local authority had on several occasions been unsuccessful in urging Tesco to redevelop the Royal Street site. In an effort to ensure that it would be allowed to develop the Raglan Street site, Tesco agreed to also develop the Royal Hospital site by means of cross-subsidising.

Sainsbury, who also submitted plans to develop the Raglan Street site, argued that it was illegitimate for the local authority to consider the regeneration of the Royal Hospital site when issuing a CPO with respect to the Raglan Street site. From the facts it was clear that Tesco would not develop the Royal Hospital site if it could not also develop the Raglan Street site.<sup>163</sup> The local authority accepted a report which concluded that a CPO in favour of Tesco would contribute to the economic, social and environmental well-being of the area and that it would be in the public interest. Therefore, the CPO issued in terms of section 226(1)(a) of the Town and Country Planning Act in favour of Tesco was confirmed.

Sainsbury argued that the local authority could not take the promised redevelopment of the Royal Hospital site by Tesco into account in considering who should redevelop the Raglan Street site.<sup>164</sup> Tesco, on the other hand, argued that it was a relevant consideration and both the court of first instance and the Court of Appeal found in favour of Tesco.

In the UK Supreme Court, Lord Collins gave the lead majority judgment. Lord Collins held that a local authority may take off-site benefits into account, but there must be a 'real rather than fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made'.<sup>165</sup> Lord Collins was of the opinion that a real connection was not established in this case and held that the local

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<sup>163</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 para 26.

<sup>164</sup> See Waring E.J.L. 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 13.

<sup>165</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 para 71.

authority was not justified in taking into account the development of the Royal Hospital site when it considered the development of the Raglan Street site.<sup>166</sup>

Lord Walker agreed with Lord Collins but gave the reasons for his opinion in his own words.<sup>167</sup> According to Lord Walker, this case concerned the compulsory acquisition of land for planning purposes. However, the land would end up in private ownership (not in public ownership) and would be used for retail and residential purposes.<sup>168</sup> Section 226(4) of the Town and Country Planning Act authorises the local authority to make the land available to a private party to allow the private party to realise the purposes in terms of section 226(1).<sup>169</sup> Therefore, Lord Walker accepted that economic regeneration facilitated by urban redevelopment is a public good, but argued that private to private acquisitions should be dealt with cautiously since it often generates large profits for big businesses.<sup>170</sup>

Accordingly, Lord Walker stated that private to private acquisitions constitute a serious infringement on an individual's property interest. As a result, these types of acquisitions should be subjected to stricter control. It was for this reason that Lord Walker agreed with Lord Collins that a real connection must be established between the off-site benefits and the proposed development.<sup>171</sup>

#### 4 4 3 Irish Law

##### 4 4 3 1 Introduction

In Irish law, it is accepted that expropriation of property results in a serious interference with property rights and it is therefore the role of the courts to carefully scrutinise the power

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<sup>166</sup> According to Lord Collins in *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 para 72 the only connection between the developments of the Raglan Street site and the Royal Hospital site was that Tesco contractually agreed to develop the Royal Hospital site, but only if it could develop the Raglan Street site. According to Lord Collins the council was persuaded to allow Tesco to develop Raglan Street site because it also wanted the Royal Hospital site to be developed. In this regard Tesco was eager to undertake an un-commercial development (the development of the Royal Hospital site) in order to develop the Raglan Street site, a development it desperately wanted. Lords Walker and Mance and Baroness Hale agreed with Lord Collins on this issue, while Lords Phillips, Hope and Brown disagreed.

<sup>167</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 paras 80-89.

<sup>168</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 para 81.

<sup>169</sup> S 226(4) of the Town and Country Planning Act of 1990 states that '[i]t is immaterial by whom the local authority propose that any activity or purpose mentioned in subsection 1 ... [of section 226] should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).' Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 13 argues that the inclusion of s 226(4) indicates that the legislature intends private parties to be involved in redevelopment schemes if it will facilitate 'development and financial investment.'

<sup>170</sup> In this instance Lord Walker referred to the US Supreme Court's decision in *Kelo v City of New London* 545 US 469 (2005). See also Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 15.

<sup>171</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 para 84.

to expropriate so that the power is not abused.<sup>172</sup> Articles 43 and 40.3.2 of the Irish Constitution of 1937 constitute the property clause. The right to private property is guaranteed in article 43 of the Irish Constitution, while article 40.3.2 states that property rights, amongst other personal rights, are protected from unjust attack.<sup>173</sup> Expropriation may only take place in terms of legislation.<sup>174</sup> However, the expropriation of property is subject to the provisions of article 43.2 and has to be in the public interest.<sup>175</sup> Therefore, property is protected from unjust attack by the ‘principles of social justice’<sup>176</sup> and ‘the exigencies of the common good’.<sup>177</sup>

In a series of cases, which Rachael Walsh describes as ‘the Irish development cases,’ Irish courts have upheld the expropriation of property for purposes of redevelopment and regeneration by private parties.<sup>178</sup> Although the Irish courts accept that property can only be expropriated for a public good, they are easily satisfied that redevelopment and regeneration of land satisfy that requirement.<sup>179</sup>

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<sup>172</sup> See *Egan v An Bord Pleanála* [2011] IEHC 44 para 6 2; *Clinton v An Bord Pleanála and Others* [2007] IESC 19.

<sup>173</sup> Art 40.3.2 states that ‘[t]he state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life ... and property rights of every citizen’. Initially, Irish courts were uncertain how these two articles should be applied. In *Blake v Attorney General* [1982] IR 177 the Supreme Court held that art 43 affords protection against legislation that seeks to generally limit property rights or that removes the right to transfer, bequeath and inherit property permanently. In terms of this decision, all other interferences with property rights should be considered under art 40.3, which is regarded as a ‘guarantee against all forms of unjust attack’. However, since the decision in *Dreher v Irish Land Commission* [1984] ILRM 94, arts 40.3.2 and 43 are read together. Since these two arts mutually inform each other, both are relevant when the courts consider an infringement of property rights. According to Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 234, arts 40.3 and 43.2 can be regarded as a double property guarantee; art 40.3 as an individual property guarantee and art 43.2 as an institutional guarantee. See further Casey J *Constitutional Law in Ireland* (1987) 523; Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 727-730; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 232-234; Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) para 7 3 46-47.

<sup>174</sup> Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 732 states that property may not be expropriated without legislative authority, even in times of war.

<sup>175</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 239; Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 734. See also Walsh R ‘“The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 1-2.

<sup>176</sup> Art 43.2.2 of the Irish Constitution.

<sup>177</sup> Art 43.2.3 of the Irish Constitution. See Van der Walt AJ ‘The Protection of Private Property under the Irish Constitution: A Comparative and Theoretical Perspective’ in Carolan E & Doyle (eds) *The Irish Constitution: Governance and Values* (2008) 398-411 at 402; Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 734.

<sup>178</sup> Walsh R ‘“The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 5; Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 238.

<sup>179</sup> See Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 238.

#### **4 4 3 2 *Central Dublin Development Association v The Attorney General***

The *Central Dublin Development Association v The Attorney General*<sup>180</sup> decision is regarded as the first modern decision involving the expropriation of property for development purposes.<sup>181</sup> In terms of section 77 of the Local Government (Planning and Development) Act of 1963, a planning authority can expropriate property for the purpose of redeveloping obsolete areas. The applicant argued that the legislation that permits the expropriation of its property for redevelopment purposes undertaken by a private party is unconstitutional.

In terms of the development scheme the development company would develop the expropriated properties and would lease it from the planning authority at a fixed rate.<sup>182</sup> Although the planning authority would retain ownership of the expropriated properties, the profits flowing from the development would accrue to both the development company and the local authority. The court dismissed the applicant's case, stating that in certain circumstances the best way to redevelop an obsolete area would be through private developers and that it would not be unconstitutional, especially when the local authority also receives the gains from the development.<sup>183</sup> Therefore, Walsh argues that this decision indicates that private property may be expropriated for redevelopment purposes even if the private party undertaking the development does so for profit.<sup>184</sup>

#### **4 4 3 3 *Crosbie v Custom House Docks Development Authority***

A similar issue arose in *Crosbie v Custom House Docks Development Authority*<sup>185</sup> (*Crosbie*). In 1988, the respondent wanted to expropriate the plaintiff's land in terms of section 5 of the Urban Renewal (Amendment) Act of 1987 for purposes of erecting a National Sports Centre. To bring about this development the Custom House Dock Development Authority was appointed as the development agent on behalf of the Minister of Education. Although the applicant resisted the compulsory acquisition on the basis of his own development plans relating to the property,<sup>186</sup> he later agreed to sell his property to the authority. However, the plaintiff - after learning that the project had been abandoned

<sup>180</sup> [1975] 109 ILTR 69.

<sup>181</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 5.

<sup>182</sup> *Central Dublin Development Association v The Attorney General* [1975] 109 ILTR 69 at 87.

<sup>183</sup> *Central Dublin Development Association v The Attorney General* [1975] 109 ILTR 69 at 89.

<sup>184</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 6.

<sup>185</sup> [1996] 2 IR 531 (HC).

<sup>186</sup> The plaintiff planned to erect a Science Technology Park on his property in co-operation with Trinity College, Dublin.



- instituted proceedings to set aside the sale of his property. The property was no longer to be used for a public purpose but developed by other private parties for commercial purposes.<sup>187</sup>

The court rejected the plaintiff's plea. Relying on section 9 of the Urban Renewal Act of 1986 the court held that the land can be used by private parties for economic development purposes. Section 9 of the Act authorises the relevant authority to 'acquire, hold and manage land in that Area for its development, redevelopment or renewal either by the Authority or by any other person'. Therefore, the court recognised that the development of the plaintiff's land fell within the ambit of the Act since the compulsory purchase order did not expressly specify that the property was to be used for the building of a National Sport Centre, but merely stated that it was acquired for renewal purposes.<sup>188</sup> Since the property was still to be used for renewal purposes, the court dismissed the case. As a result, the court deferred to the expropriating authority to expropriate for purposes of urban renewal made possible by private development.<sup>189</sup>

#### **4 4 3 4 Clinton v An Bord Pleanála**

*Clinton v An Bord Pleanála*<sup>190</sup> concerned a compulsory purchase order to regenerate the area of Upper O'Connell Street. The appellant company, the Carlton Partnership, obtained the necessary planning permission to develop Upper O'Connell Street, which would have fulfilled the Dublin City Council's regeneration scheme of the area. However, it later emerged that the redevelopment by the Carlton Partnership would not take place and the local authority issued a compulsory purchase order in respect of the property. The appellant claimed that the statutory purpose of development was 'unacceptably general'; for the validity of the compulsory purchase order a specific purpose must be clearly established.

The high court held that compulsory acquisition, which constitutes an interference with the property owner's constitutionally protected property rights, must serve the public

<sup>187</sup> *Crosbie v Custom House Docks Development Authority* [1996] 2 IR 531 (HC) 540.

<sup>188</sup> The court also stated that it could not go behind the stated purpose to suggest that the authority had a different purpose in mind. In this regard Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 239 states that although this decision creates the 'impression that the public-purpose requirement is not enforced strictly, or at least that the declared purpose of the acquiring authority is seen as sufficient proof that the requirement has been met ... the case has to be read in context: the declared purpose of the acquisition concerned the acquiring authority's general statutory duty, not necessarily equated with the actual development that was selected or considered to take place on the acquired land'. See also Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 6-7, 11.

<sup>189</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 11.

<sup>190</sup> [2005] IEHC 84; [2007] IESC 19.



good.<sup>191</sup> This interference is not justified by the payment of compensation.<sup>192</sup> The court held that the local authority was entitled, in terms of the legislation, to acquire the property for the statutory purpose of ‘development’. According to the court, reliance on a statutory purpose is sufficient to justify the compulsory purchase order, even if the property is transferred to a private party.<sup>193</sup> Therefore, if the acquisition is in the public interest the means adopted to realise that public interest is a matter to be decided by the relevant authorities.<sup>194</sup>

The Supreme Court<sup>195</sup> stated that ‘because the property was required for the legitimate purpose of regeneration of the O’Connell Street area, the precise nature of the specific development was not required to be proved even if it be the case that in some other situations it might have to be done.’<sup>196</sup> According to the Court the local authority’s regeneration purpose in terms of the compulsory purchase order was expressly authorised by the national parliament. However, the national parliament could not have envisaged how the local authority would realise this purpose. In this instance, the Court accepted that the acquisition was for regeneration purposes and the local authority adequately proved that it was in the public interest, even if no detailed plans regarding the regeneration were in place.<sup>197</sup> Therefore, the Supreme Court accepted that since the appellant’s property was acquired for the regeneration of O’Connell Street, which was in the public interest, the acquisition was justified.

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<sup>191</sup> *Clinton v An Bord Pleanála and Others* [2005] IEHC 84.

<sup>192</sup> In this regard the court accepted the argument of Hogan G & Whyte G (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) para 7 7 88, where the authors argue that ‘compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good. Any other view would mean that Article 43 merely guarantees a right to compensation, rather than a right to property per se.’ See also Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 242.

<sup>193</sup> See Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 8.

<sup>194</sup> See Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 8; Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 242-243.

<sup>195</sup> *Clinton v An Bord Pleanála and Others* [2007] IESC 19.

<sup>196</sup> *Clinton v An Bord Pleanála and Others* [2007] IESC 19. This reported decision is neither paragraphed nor paginated.

<sup>197</sup> Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 10 states that the ‘complex and indeterminate nature of “regeneration”, particularly where private developers will be involved, means that detailed plans may not be in place for the future use of a site before the property is compulsorily acquired’. Compare the US Supreme Court decision of *Kelo v City of New London* 545 US 469 (2005) where detailed plans relating to the redevelopment were in place. See further Schultz D ‘What’s Yours Can be Mine: Are there any Private Takings after *Kelo v City of New London*?’ (2006) 24 *UCLA Journal of Environmental Law and Policy* 195-234.

## 4 4 4 German Law

### 4 4 4 1 Introduction

In German law, the expropriation provision is found in article 14.3 of the Basic Law. It states that:

‘Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation.’<sup>198</sup>

It is accepted in German law that expropriation must be authorised by legislation.<sup>199</sup> In this regard expropriation can be effected in two ways, namely through statutory expropriation or administrative expropriation.<sup>200</sup> In the case of statutory expropriation the legislation promulgated by the legislature brings about the expropriation automatically and directly, while in the case of administrative expropriation the expropriation takes place as a result of an administrative act based on powers granted in legislation.<sup>201</sup> The former occurs only in exceptional cases and is subject to stricter scrutiny.<sup>202</sup> Furthermore, the legislation that authorises the expropriation must also make provision for compensation.<sup>203</sup>

The German courts interpret the public interest requirement strictly, requiring that expropriation must be the only possible way of achieving the required result (which must be in the public interest) and the expropriation must be strictly necessary to satisfy that

<sup>198</sup> Basic Law for the Federal Republic of Germany 1949, print version October 2010, translated by C Tomuschat and DP Currie and revised by C Tomuschat and DP Kommers in cooperation with the Language Service of the German Bundestag: [www.btg-bestellservice.de/pdf/80201000.pdf](http://www.btg-bestellservice.de/pdf/80201000.pdf) (Accessed 14 February 2012).

<sup>199</sup> Papier HJ ‘Art. 14’ in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 279 para 522; Wendt R ‘Eigentum, Erbrecht und Enteignung’ in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 paras 158-159; Schmidt-Aßmann B ‘Expropriation in the Federal Republic of Germany’ in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 81-103 at 81; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 291.

<sup>200</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147; Kleyn D ‘The Constitutional Protection of Property: A Comparison between the German and South African Approach’ (1996) 11 *SAPL* 402-445 at 435-436.

<sup>201</sup> Wendt R ‘Eigentum, Erbrecht und Enteignung’ in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 paras 158-159. See also Kleyn D ‘The Constitutional Protection of Property: A Comparison between the German and South African Approach’ (1996) 11 *SAPL* 402-445 at 436.

<sup>202</sup> Wendt R ‘Eigentum, Erbrecht und Enteignung’ in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 paras 158-159. See also Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 284; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147; Kleyn D ‘The Constitutional Protection of Property: A Comparison between the German and South African Approach’ (1996) 11 *SAPL* 402-445 at 435-436.

<sup>203</sup> Art 14 of the Basic Law is in essence a guarantee of property and the payment of compensation cannot justify an expropriation, which is similar to the position in South African law. See Currie DP *The Constitution of the Federal Republic of Germany* (1999) 292. See also Kleyn D ‘The Constitutional Protection of Property: A Comparison between the German and the South African Approach’ (1996) 11 *SAPL* 402-445 at 435. See further *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82.

need.<sup>204</sup> Therefore, the purpose of the expropriation must be in the public interest and it must be in the public interest to expropriate the property to realise the purpose. It has been argued that although the German approach can be characterised as strict, it is still lenient enough to ensure that the courts' limitation of the state's power does not unnecessarily frustrate social and economic reform.<sup>205</sup> Van der Walt states that an expropriation that benefits a third party would be constitutional if the expropriation would allow the private party to provide a public necessity in the public interest and is not intended to simply benefit the third party.<sup>206</sup> The examples usually include a third party that is responsible for providing public transport or generating electricity.<sup>207</sup> However, in these instances the courts carefully scrutinise the public purpose and interpret it narrowly.<sup>208</sup> Even in instances where it is clear that the expropriation serves a justifiable public purpose, the courts will still consider whether the legislation properly authorises the expropriation and transfer in fulfilment of the stated public purpose.<sup>209</sup>

#### **4 4 4 2 Dürkheimer Gondelbahn<sup>210</sup>**

Teufelstein is a popular holiday destination in Germany. Members of the community and the local authority incorporated a company to build and manage a cableway that would grant easier access to the Teufelstein area. However, the cableway would have to extend over several properties. Attempts on the part of the company to purchase the necessary servitudes to allow it to traverse the relevant properties failed. Consequently, the company applied to the provincial authorities to expropriate the properties or servitudes over them which the cableway would traverse, but this request was denied.

<sup>204</sup> Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 para 160; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147.

<sup>205</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 476.

<sup>206</sup> Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 482. See also Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 para 162; Papier HJ 'Art. 14' Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar Vol II* (53<sup>rd</sup> update 2008) 306-307 paras 581, 583; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 292.

<sup>207</sup> Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar Vol II* (53<sup>rd</sup> update 2008) 306 para 581 explains that the power of expropriation was initially used to allow a third party to construct railroads. The third party would be responsible for constructing and maintaining the railroad, therefore rendering a public service while still making a profit in the process. See also Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 para 162.

<sup>208</sup> Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hoplauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513 para 66; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628-629 para 162.

<sup>209</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 482.

<sup>210</sup> *BVerfGE* 56, 249 [1986].

In terms of the legislation pertaining to the building of public railroads, the local authority implemented a development plan necessitating the expropriation of servitudes for purposes of erecting the cableway. According to the local authority the cableway would be in the public interest since it would contribute to public transport. On this basis the provincial authority gave permission to expropriate the necessary servitudes over the properties to enable the company to construct the cableway.

The majority of the Federal Constitutional Court confirmed that an expropriation must be for a public purpose and must be authorised by legislation. The legislation should also grant the power to the expropriating authority to expropriate property for the specific purpose. Furthermore, the Court accepted that the payment of compensation does not justify an infringement of the right to property. It held that the local authority was not authorised to expropriate the property in terms of the relevant legislation for the stated purpose. Therefore, the majority of the Court invalidated the expropriation, not on the basis that it is not for a public purpose but because of the absence of a legislative basis that allows the local authority to expropriate the specific property for the specific purpose for which it was to be used.

Böhmer J wrote a separate concurring judgment in which he explained this finding on the basis of the public purpose requirement.<sup>211</sup> According to Böhmer J, the public purpose requirement is the central feature of expropriation since it justifies the expropriation. Therefore, a sufficient public purpose must be established before the expropriation would be constitutional. A public action that serves a public interest or that benefits the public is not necessarily enough to satisfy the public interest requirement in article 14.3 of the Basic Law.<sup>212</sup> Therefore, not everything that benefits the public is in the public interest as required by article 14.3. According to Böhmer J, the expropriation of the property in this case was unconstitutional because it was not in the public interest to create easy access to the Teufelstein area, even though it would benefit the public. Furthermore, the expropriation was undertaken for the benefit of a third party that was not rendering a public service on behalf of the state.

Böhmer J acknowledged that in certain instances the expropriation of property for the benefit of a third party can be justified in terms of article 14.3 of the Basic Law. The expropriation of property to allow a third party to fulfil its duty would be legitimate if the third party fulfils a public function, such as supplying electricity or building roads.<sup>213</sup>

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<sup>211</sup> *BVerfGE* 56, 249 [1986] (*Dürkheimer Gondelbahn*).

<sup>212</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148.

<sup>213</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 149.

Therefore, property can be expropriated and made available to a third party, but the third party should require the property to fulfil the public purpose and the legislation should specifically authorise the expropriation for that purpose.

#### **4 4 4 3 Boxberg**

In the *Boxberg*<sup>214</sup> decision the local authority expropriated several properties in terms of federal planning legislation. It was the aim of the local authority to consolidate the expropriated properties and transfer it to another private party, Daimler Benz AG, for economic development purposes. The towns of Boxberg and Assamstadt had a high unemployment rate and a suffering economy. It was argued that the development of a testing ground by Daimler Benz AG in the area would be in the public interest because it would create employment opportunities and stimulate the economy and that expropriation of land for that purpose would therefore comply with article 14.3 of the Basic Law. The affected property owners argued that the expropriation would be in conflict with article 14.3 of the Basic Law. Referring to *Gondelbahn*<sup>215</sup> they argued that the legislation that authorises the expropriation, in this case the federal planning legislation, does not authorise the expropriation of property for economic development purposes. Furthermore, they argued that expropriation powers cannot be used in favour of a third party.

The Federal Constitutional Court held that the expropriation was invalid due to a lack of statutory authority. It found that the legislation did not authorise the expropriation for the specific purpose for which it was used in this case and that the expropriation was therefore inadmissible.<sup>216</sup> Since the planning legislation only permits expropriation for planning purposes, the court held that the authority to expropriate was limited to planning purposes and did not justify expropriation for other purposes.

The Court acknowledged that an expropriation that also benefits a third party may be valid if the third party performs a public function that is in the public interest, but even then the expropriation must be authorised by legislation and strictly necessary for the fulfilment of the public purpose.<sup>217</sup> According to the Court, if the expropriation is authorised by legislation and satisfies the public purpose requirement, the identity of the party to realise the public purpose is less relevant; it can be the state or a private party. However, even in such an event strict control should be exercised over the legitimacy of the purpose and the exercise of the expropriation in terms of the legislation to ensure that the purpose

<sup>214</sup> BVerfGE 74, 264 [1986].

<sup>215</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*).

<sup>216</sup> BVerfGE 74, 264 [1986] (*Boxberg*) 286.

<sup>217</sup> See generally Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 481-482.



of the expropriation is realised. Furthermore, if the primary objective of the third party's enterprise does not involve providing a public utility, legislation should provide stricter conditions for the validity of the expropriation, and the courts will scrutinise the expropriation more strictly compared to instances where the main objective of the third party's business is the provision of a specific public necessity.<sup>218</sup>

## 4 5 Evaluation of Foreign Law Overview regarding Third Party Transfers for Economic Development Purposes

Regardless of the different terminology that is used in foreign jurisdictions with regard to the justificatory requirement for an expropriation, the foreign case law discussed above indicates that an expropriation must be for a public purpose.<sup>219</sup> In the previous section it was considered how the foreign courts deal with the issue of third party transfers for economic development purposes. It is said that an expropriation involving a third party transfer for purposes of economic development is the most contentious issue of third party transfers.<sup>220</sup> The public reaction to the US Supreme Court decision in *Kelo v City of New London*<sup>221</sup> adequately illustrates that.

It is clear in all the jurisdictions discussed above that the courts require some sort of legislative basis that authorises the expropriation. However, the level of scrutiny applied towards the purposes for which the legislature may grant condemnation powers and the deference towards the decision of the expropriating authority to expropriate property for the purposes laid down in legislation, differs. Regarding third party transfers for economic development purposes, the discussion shows that foreign courts do not always distinguish between an expropriation for purposes of economic development and the transfer of expropriated property to third parties for economic development purposes. In certain jurisdictions it is accepted that once the legislation authorises the expropriation of property for development or redevelopment purposes the courts easily find that the expropriation is

<sup>218</sup> See *BVerfGE* 74, 264 [1986] (*Boxberg*) 286.

<sup>219</sup> This conclusion was also reached by the court in *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) para 114, where the court held that '[i]n virtually all the jurisdictions ... the raison d'être for the expropriation is for some public purpose, use, interest, benefit or necessity.' Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 1 also argues that '[a] basic principle of constitutional property law in most jurisdictions is that the State cannot take an individual's property and transfer it to another person in order confer a private benefit. Rather the State must have a public purpose of some kind to support its use of compulsory acquisition powers.'

<sup>220</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 492; Gray K & Gray SF *Elements of Land Law* (5<sup>th</sup> ed 2009) 1388-1389.

<sup>221</sup> 545 US 469 (2005).



for a valid public purpose and does not even question the third party transfer for achieving the public purpose, even if the legislation does not provide for it.

The legislation that authorised the taking in the US decision of *Poletown Neighborhood Council v City of Detroit*<sup>222</sup> specifically authorised the condemnation for purposes of redeveloping an economically distressed area. Evaluating whether the benefits of the condemnation, namely the increased employment opportunities and alleviation of the harsh economic conditions, constitute a public purpose the court stated that it should be deferent towards the decision of the legislature to condemn private property. Furthermore, the court stated that in the event that the condemnation forms part of a larger regeneration plan, additional deference is called for. As a result, the court upheld the taking on the basis that it complies with the public use requirement. Similarly, in *Kelo v City of New London*<sup>223</sup> the purpose of the condemnation was to revitalize a struggling local economy. The majority of the US Supreme Court accepted that the development plan, which would create jobs and increase the tax base, constitutes a valid public purpose. The Court also stated that deference is called for towards the decision of the legislature to condemn properties. As a result, the Court upheld the taking for purposes of economic development.

Given this deferential attitude towards the legislature's decision regarding purposes for which the property can be condemned in terms of legislation, the US courts are also deferent as to how this purpose is realised. If the purpose is a valid public purpose, the manner in which the purpose is realised is not easily questioned by the courts since the state's power of eminent domain is regarded merely as a means to an end. Therefore, the courts do not seriously consider whether the legislation itself enables or at least foresees that a third party may be in a better position to realise a public purpose. Once the court decides that the purpose of the condemnation is a valid public purpose, the decision of the authority to condemn the property and transfer it to another private party is not evaluated strictly.

To the contrary, in the *County of Wayne v Hathcock*<sup>224</sup> decision the court evaluated more strictly whether the taking and the transfer of the property to a third party complies with the public use requirement in the 1963 Michigan State Constitution. Relying on the dissent of Justice Ryan in the *Poletown* decision the court in *Hathcock* evaluated whether the taking and transfer of property for economic development, namely building a business

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<sup>222</sup> 410 Mich 616 (Mich, 1981).

<sup>223</sup> 545 US 469 (2005).

<sup>224</sup> 684 NW2d 765 (Mich, 2004).

park, was justifiable. Accordingly, the court would not allow a taking and transfer of property unless the property is needed by the third party to fulfil a public function such as building a railway line; or if there is some sort of public accountability that ensures that the anticipated benefits materialise; or if the benefits that the use of the specific property will outweigh the private interest of the property owner.

In her dissenting opinion in *Kelo*, Justice O'Connor also attempted to limit the purposes for which property can be condemned. According to Justice O'Connor, there are three categories of takings that comply with the public use requirement in the Federal Constitution. Firstly, if property is condemned and transferred to public ownership for the building of roads or similar public facilities the taking is justified. Secondly, if the condemned property is transferred to a third party for the building of roads or other public utilities, both the taking and the transfer are justified. In cases where the condemned property is transferred to third parties for private use, the condemnation and transfer may also be justifiable. However, in *Berman v Parker*<sup>225</sup> and *Midkiff v Hawaii Housing Authority*,<sup>226</sup> where the US Supreme Court upheld such takings, the public purpose that was served was the elimination of harm to society. Therefore, since the condemnation directly led to the achievement of a public purpose, the fact that the property was turned over to third parties warranted deference on the part of the Court.<sup>227</sup> However, in *Kelo* the purpose of the condemnation was not eliminating any form of social harm but for purposes that would directly benefit a private party. As a result, Justice O'Connor argued that stricter scrutiny was called for, since leaving it up to the legislature to impose restrictions on economic development takings would be an abdication of the Court's responsibility.<sup>228</sup>

Similarly, Justice Thomas, who also wrote a dissenting opinion in *Kelo* argued for a restricted interpretation of the public use clause to include only matters where the public has access to use the condemned property or if the public has a legal right to use the property post-condemnation. Furthermore, Justice Thomas stated that the Court should be less deferent to the decision of the legislature as to what constitutes a public use. As a result, the *Kelo* minority argued that stricter scrutiny should be applied when they evaluated the purposes for which property can be condemned.

In English law, the purpose of the compulsory acquisition is also determined by parliament as contained in the authorising legislation. Due to the principle of parliamentary supremacy, the courts' power to review legislation is severely limited. In the English

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<sup>225</sup> 348 US 26 (1954).

<sup>226</sup> 267 US 229 (1984).

<sup>227</sup> *Kelo v City of New London* 545 US 469 (2005) 500.

<sup>228</sup> *Kelo v City of New London* 545 US 469 (2005) 504.

decisions of *Smith v Secretary of State for Trade and Industry*<sup>229</sup> and *Sole v Secretary of State for Trade and Industry*,<sup>230</sup> the legislation - section 20(1) of the Regional Development Agencies Act of 1998<sup>231</sup> - specifically allowed for the compulsory acquisition of property to stimulate economic development. In *Smith* and *Sole*, the courts held that the purpose of sustained economic development of the area was important enough to justify the compulsory acquisition of the claimants' properties even if it meant that the plaintiffs would not be given alternative sites to use for residential purposes. In this regard the courts applied a low level of scrutiny. The courts accepted that when the interference with the claimants' rights is proportionate to the purpose, the interference is justified.

In *Alliance Spring Co Ltd and Others v First Secretary of State*<sup>232</sup> (*Alliance Spring*) and *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*<sup>233</sup> (*Sainsbury's Supermarket*) the plaintiffs' properties were compulsorily acquired and transferred to third parties to ensure the development of the relevant areas in terms of section 226 of the 1990 Town and Country Planning Act. Section 226(4) of the Act specifically legitimises the transfer of the acquired property to a third party to fulfil the purposes of the Act. In *Alliance Spring* the property was to be used by Arsenal Football Club to erect a larger stadium. In this decision the court held that the development by Arsenal Football Club formed part of a regeneration scheme and was authorised in terms of the legislation. As a result, the court held that the acquisition and transfer of the property to realise the regeneration of the area was justified in terms of the Act, and the fact that the property was transferred to a third party was irrelevant since many regeneration schemes are undertaken by private parties. This decision indicates that where a compulsory purchase order is made in terms of legislation and effected in terms of a larger regeneration scheme, the transfer of the acquired property is not subjected to rigorous scrutiny.

In the *Sainsbury's Supermarket* decision the compulsorily acquired property was to be used by a different company to erect a supermarket and other smaller shops. The majority of the Court held that there was no real connection between the off-site benefits that the city took into account when it decided to grant the CPO and the development for which the compulsory acquisition was made. As a result, the majority of the Court held that the need for making the compulsory acquisition order was not proved. Lord Walker, who

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<sup>229</sup> [2007] EWHC 1013 (Admin).

<sup>230</sup> [2007] EWHC 1527 (Admin).

<sup>231</sup> S 20(1) of the Regional Development Agencies Act of 1998 authorises a regional development agency to acquire land for its purposes, or for purposes incidental thereto, by agreement or compulsorily. In terms of s 1(a) of the Act one of the purposes of a Regional Development Agency is the furtherance of 'economic development'.

<sup>232</sup> [2005] EWHC 18 (Admin).

<sup>233</sup> [2010] UKSC 20.

wrote a separate concurring judgment, stated that section 226 of the Town and Country Planning Act allows the relevant authority to acquire property for planning purposes and permits the transfer of the property to a third party for these purposes. Lord Walker therefore accepted that the economic regeneration facilitated by urban redevelopment is for a public purpose. However, in view of the courts' deferential approach towards the decision of the relevant authority to compulsorily acquire property in terms of legislation, Lord Walker argued that stricter scrutiny should be applied in cases where property is compulsorily acquired and transferred to third parties, even if the purpose of the acquisition is authorised by legislation and for a public purpose. Therefore, Lord Walker accepted that legislation can in principle authorise the compulsory acquisition and transfer of property to different third parties, but that the courts should carefully scrutinise the ultimate purpose for which the property is acquired.

Although a deferent attitude is evident in the *Smith, Sole* and *Alliance Spring* decisions the judgment of Lord Walker in the *Sainsbury's Supermarket* decision calls for stricter scrutiny when property is compulsorily acquired and transferred to third parties for economic regeneration,<sup>234</sup> suggesting that the English courts might be moving away from the earlier apparently completely deferential approach towards a slightly more controlled approach. Lord Walker argued that even if economic development is for the public good, 'private to private' acquisitions generally produce profits for private companies and should therefore be regarded as a sensitive matter.<sup>235</sup> As a result, the compulsory acquisition in these circumstances constitutes a serious invasion of an owner's property rights that should be evaluated strictly.<sup>236</sup>

Irish courts initially indicated that they would apply heightened scrutiny in the context of compulsory acquisition, since they accept that property can only be compulsorily acquired for a public good.<sup>237</sup> However, the Irish decisions discussed above indicate that the courts are willing to accept broad development purposes such as 'regeneration' and 'development' as valid reasons for an acquisition, even if the development is carried out by

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<sup>234</sup> Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 15.

<sup>235</sup> *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 at 81. See also Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 15.

<sup>236</sup> However, Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 23 suggest that it is difficult to see how a stricter approach would work. See 4 7 below.

<sup>237</sup> Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 238-242.

or benefits private parties.<sup>238</sup> Therefore, Walsh argues that Irish courts accept that broad public purposes, such as regeneration and development, are sufficient to justify the compulsory acquisition of private property, which means that the heightened scrutiny to which the courts initially referred to has lost most of its value.<sup>239</sup>

Legislation such as the Urban Renewal (Amendment) Act of 1987 allows the compulsory acquisition of property for regeneration purposes carried out by the state or another private party. In *Central Dublin Development Association v The Attorney General*<sup>240</sup> the court upheld the acquisition of the plaintiff's land for purposes of redeveloping obsolete areas, even though a private party was developing the land for profit.<sup>241</sup> This decision was reinforced in *Crosbie v Custom House Docks Development Authority*<sup>242</sup> where the court held that it is irrelevant whether the private party benefits from the acquisition of the plaintiff's land.<sup>243</sup> In *Crosbie*, the legislation that permitted the acquisition of property for development purposes was held to be valid, even if a third party is tasked to develop the property (in this case by building a sports centre). In *Clinton v An Bord Pleanála and Others*<sup>244</sup> the court relied on the statutory purpose of development to justify the compulsory purchase order even when the property was transferred to a private party.<sup>245</sup>

Accordingly, the Irish courts accept that broad purposes such as redevelopment or regeneration - as permitted by legislation - are in the public interest and that the means adopted to realise the specific public interest is a matter to be decided by the relevant authorities.<sup>246</sup> As a result, the courts do not seem to pay much attention to the fact that the property is transferred to a third party especially if the legislation, such as the Urban Renewal (Amendment) Act of 1987, foresees it. Therefore, Irish courts are deferent towards the decision of the authority to compulsorily acquire property in terms of the purposes laid down in the legislation. However, it is questionable whether the factors of

<sup>238</sup> See Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 1; Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 239.

<sup>239</sup> Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 238.

<sup>240</sup> [1975] 109 ILTR 69.

<sup>241</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 6.

<sup>242</sup> [1996] 2 IR 531 (HC).

<sup>243</sup> Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 239-240.

<sup>244</sup> [2005] IEHC 84.

<sup>245</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 8.

<sup>246</sup> See *Clinton v An Bord Pleanála and Others* [2007] IESC 19; Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 8; Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 242-243.

'regeneration' and 'redevelopment' can include purposes such as economic development, where the primary purpose is to benefit the third party and the benefits that may accrue to the public is merely incidental.<sup>247</sup>

In German law, the public purpose requirement is interpreted strictly in terms of the authorising legislation. The legislation must specifically authorise the expropriation of property for a specific public purpose and the courts can test it against the constitutional requirement since it cannot be amended by legislation or administrative decisions.<sup>248</sup> The purpose of the expropriation is evaluated in every case and the expropriation for the public purpose must be absolutely necessary to justify the infringement with an individual owner's property rights.<sup>249</sup>

In *Dürkheimer Gondelbahn*<sup>250</sup> the Federal Constitutional Court held that the expropriation of the plaintiff's land was invalid, since the legislation did not authorise the expropriation for the specific purpose for which it was used. Similarly, in *Boxberg*<sup>251</sup> the legislation did not authorise the expropriation of property for economic development purposes, but only for planning purposes. As a result, the Court in *Boxberg* invalidated the expropriation for lack of statutory authority to expropriate the property for economic development purposes. These decisions show that the purpose of the expropriation must be clearly authorised in the authorising legislation. It is therefore possible that legislation can provide for the expropriation of property for economic development purposes, but the courts will still strictly evaluate whether the purpose of economic development is in the public interest and whether the expropriation of property to realise this purpose is strictly necessary.

Given the strict approach towards the expropriation of property for a public good, an expropriation that benefits a third party is generally not allowed. However, this does not mean that an expropriation that benefits a third party will automatically be invalid, but only

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<sup>247</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 12-17 distinguishes the Irish development cases from the US decisions of *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) and *Kelo v City of New London* 545 US 469 (2005). Although both the Irish development cases and the *Poletown* and *Kelo* decisions concerned the compulsory acquisition for redevelopment purposes, the Irish cases concerned the redevelopment of city centres, while the redevelopment in *Poletown* and *Kelo* dispossessed individuals of their homes. Walsh therefore, argues that if a *Kelo*-type taking should occur in Irish law and the use of compulsory acquisition powers have a disproportionate impact on the property rights of vulnerable communities, the principles of social justice should persuade the Irish courts to prevent the state from using its compulsory acquisition powers to make private redevelopment possible. See further 4 7 below.

<sup>248</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 476.

<sup>249</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 477.

<sup>250</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*).

<sup>251</sup> BVerfGE 74, 264 [1986] (*Boxberg*).



that it will be subjected to strict scrutiny.<sup>252</sup> Therefore, if the expropriation involves a third party transfer stricter scrutiny is applied as to the purpose of the expropriation, the authorising legislation, as well as the nature of the third party's business enterprise.<sup>253</sup> In this sense the expropriation must be primarily for a public purpose and that public purpose must necessitate the expropriation of the particular property and its transfer to the third party to realise the purpose. The expropriation should not be predominantly for the benefit of the third party, since that would invalidate the expropriation. The legislation in question must also clearly authorise the expropriation and the purpose for which the property is to be used. Furthermore, it is argued that the nature of the business will play an important role in the justification for the expropriation. If the third party's primary business is not related to the fulfilment of the purpose, the courts will scrutinise the purpose of the expropriation as well as the authorising legislation more strictly.

As a result, the German courts will firstly consider whether the purpose of the expropriation is authorised in terms of legislation and whether the purpose, as laid down in legislation, is for a public good as required by article 14 of the Basic Law. If the expropriation is not authorised the expropriation would be invalid. Similarly, if the purpose of the expropriation is not for a public good, the expropriation will also be invalid. When the expropriation involves a third party transfer, it is also considered whether the transfer of the property to a third party is necessary so that the third party can perform a function that is for a public good. Furthermore, the legislation should also specifically authorise the expropriation for the fulfilment of that particular public good.

Based on the overview of foreign law it is possible to argue that the purpose of expropriating property for economic development or redevelopment of a specific area must be authorised in terms of legislation. In the US, English and Irish decisions discussed above the economic development or redevelopment was specifically mandated in terms of the authorising legislation. The manner in which the legislation is judged against the constitutional requirement of public purpose, public use or public good differs from jurisdiction to jurisdiction. In the US, the courts accept that when the legislature decides that a particular purpose is for a public use, the courts' role in testing and possibly setting aside the condemnation is severely limited. Therefore, condemnation of property for purposes of economic development is allowed more easily. In the English tradition, where the decision on the legitimacy of the compulsory acquisition is taken in parliament, the purpose of the expropriation was not traditionally tested by the courts in terms of

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<sup>252</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 478-479.

<sup>253</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 480.

constitutional review, but rather in terms of administrative review and the interpretation of the particular legislation.<sup>254</sup> Even though the European Convention on Human Rights also applies to the law of the United Kingdom, it is argued that the 'English tradition of parliamentary sovereignty and administrative review nevertheless largely preclude strict judicial review of expropriation decisions on the basis of the public purpose requirement.'<sup>255</sup> Therefore, the courts still easily defer to the purposes for which a local authority may compulsorily acquire property. However, recent case law suggests that stricter scrutiny may be in order if the property is transferred to a third private party for economic development. In Irish law there is also specific legislation that authorises the compulsory acquisition of property for economic development or for the redevelopment of a particular area. Irish courts easily accept that the regeneration and redevelopment of an area are for a public purpose and therefore do not strictly scrutinise these purposes against the Irish Constitution of 1937. When Irish courts accept that the purposes of regeneration, as authorised in terms of legislation, is lawful they do not seriously question the means adopted to achieve the purposes. In this regard they accept that the parliament could not have envisaged how the regeneration was to be implemented.<sup>256</sup> Therefore, it is arguable that the courts defer to the expropriating authority when it decides to expropriate property for the purposes laid down in legislation.

In German law, the expropriation of property for economic development is invalid if there is no authority to expropriate for that specific purpose in terms of legislation. In the German decisions discussed above the legislation did not authorise the expropriation of property for the specific purpose for which it was expropriated and the Court held that the expropriation was invalid. As a result, the legislation must state explicitly that the property is expropriated for economic development and this purpose would still be judged strictly against the constitutional requirements.

With regard to the transfer of expropriated property to third parties for economic development purposes, foreign law indicates two opposing views. In US, English and Irish law, the courts do not always consider seriously whether the transfer of property to a third party is legitimate once they have decided that the purpose of the expropriation is lawful and for a public purpose. To the contrary, the German Federal Constitutional Court indicated that apart from the purpose of the expropriation that must be specifically

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<sup>254</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 466.

<sup>255</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 466.

<sup>256</sup> See *Clinton v An Bord Pleanála and Others* [2007] IESC 19; Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 10.

authorised in terms of the authorising legislation, the transfer of the property to a third party to realise the purpose must also be authorised in terms of the legislation. Therefore, both the purpose and the transfer of the property to realise this purpose must be clearly authorised in terms of legislation and both the expropriation and the transfer of the property to realise the purpose are judged strictly against the public purpose requirement in article 14 of the German Basic Law.

## **4 6 Transfer of Expropriated Property to Third Parties for Economic Development in South African Law**

### *4 6 1 Introduction*

South African courts have recently considered whether the transfer of property to a third party generally is for a public purpose or in the public interest. The courts have also considered whether economic development constitutes a valid public interest and whether it is justified to transfer the property to a third party for the fulfilment of this purpose. The decisions discussed below indicate that the courts do not seriously consider whether the transfer of the property to another third party is also justified. Once they have decided that the purpose of the expropriation is in the public interest, the means of realising the public interest is not subjected to rigorous scrutiny. Therefore, the courts have not always separated the two questions that arise, namely whether economic development constitutes a public interest and is therefore justified in terms of the Constitution, and whether the public interest excludes the transfer of the property to a third party for economic development purposes.

The question regarding the justifiability of an expropriation that involves a third party transfer for economic development purposes can and should be separated into two discrete issues. The first question relates to whether economic development is in the public interest. In this regard it should be considered whether economic development is specifically authorised in terms of the authorising legislation and if so, whether the authority to expropriate for economic development purposes complies with the public purpose or public requirements in section 25(2) of the Constitution. If the legislation does not specifically provide for the expropriation of property for purposes of economic development it should still be considered whether expropriation for that purpose is for a public purpose or in the public interest as understood in earlier case law and in terms of the understanding of these requirements in terms of the Constitution. It is arguable that in cases where the legislation does not specifically provide for the expropriation of property

for economic development purposes the determination as to whether it complies with the constitutional requirements should be stricter than in cases where legislation specifically authorises it.

Secondly, it should be considered whether the transfer of expropriated property to third parties for economic development purposes is for a public purpose or in the public interest. Therefore, on the assumption that economic development constitutes a valid public purpose or is in the public interest it should be considered independently whether the transfer of the property to third parties is also authorised in terms of legislation and if so, whether it complies with the public purpose or public interest requirement in section 25(2) of the Constitution. If the legislation does not provide for the transfer of the expropriated property to third parties for the realisation of the purpose it should be evaluated strictly whether the transfer is justified in terms of the public purpose or public interest requirement.

#### 4 6 2 Case Law

##### 4 6 2 1 *eThekweni Municipality v Sotirios Spetsiotis*

The question whether the expropriation of property for economic development purposes would be for a public purpose or in the public interest came up in *eThekweni Municipality v Sotirios Spetsiotis*.<sup>257</sup> The eThekweni municipality was the owner of a building on the Beachfront area from which the respondent operated a restaurant business. The respondent signed a lease agreement with the municipality that was due to expire towards the end of 2014. In preparation for the 2010 Soccer World Cup the municipality wanted to demolish the building to realise its redevelopment plan of the Beachfront area. To achieve this goal the municipality expropriated the respondent's lease. The respondent argued that the expropriation of his lease was not rationally connected to a public purpose or in the public interest as required by section 25(2)(a) of the Constitution.<sup>258</sup>

The court did not address the question of whether the expropriation of the respondent's lease for purposes of developing it for the World Cup was for a public purpose or in the public interest.<sup>259</sup> It therefore missed an opportunity to decide whether economic development (that does not involve a third party transfer) is for a valid public

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<sup>257</sup> [2009] ZAKZDHC 51, 6 November 2009.

<sup>258</sup> The respondent also argued that the demolition of the building was unnecessary since the relocation of some of his restaurants' outside seating area would have allowed the development to continue. See further the discussion in ch 5.

<sup>259</sup> Van der Walt AJ 'Constitutional Property Law' 2009 ASSAL 231-264 at 254.

purpose or in the public interest. The court merely held that the applicant proved the need to demolish the building, therefore establishing 'a rational connection between the expropriation and the redevelopment of this part of the beachfront which is for a public purpose'.<sup>260</sup>

#### **4 6 2 2 *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality***

In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>261</sup> (*Bartsch*) the applicant sought to review and set aside the decision of the respondent to expropriate his property. The respondent decided to expropriate the applicant's land for the purpose of constructing municipal roads. The applicant argued that the court should set aside the expropriation on the basis that part of his land would not be used for the construction of municipal roads, but for the ulterior purpose of making the land available to a private land developer. The applicant alleged that it was the private developer's aim to erect a shopping complex on the property. Therefore, the applicant argued that the expropriation of his entire parcel of land was unlawful since the expropriation was not for a public purpose as required by section 2 of the Expropriation Act 63 of 1975.<sup>262</sup>

The court first considered the meaning of the phrase 'public purpose' in pre-1996 decisions. Referring to *Fourie v Minister van Lande*<sup>263</sup> and *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*,<sup>264</sup> the court accepted that the public purpose requirement should be interpreted broadly. According to the court, '[t]he Expropriation Act 63 of 1975 limits the power to expropriate to public purpose while section 25(2) of the Constitution extends that power to incorporate expropriation in the public interest'.<sup>265</sup> Therefore, in terms of the Act an expropriation must be either for a public purpose or in the public interest.<sup>266</sup>

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<sup>260</sup> *eThekweni Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009 para 7. See Van der Walt AJ 'Constitutional Property Law' 2009 ASSAL 231-264 at 254.

<sup>261</sup> [2010] ZAFSHC 11 (4 February 2010).

<sup>262</sup> The applicant also argued that since the proposed road would only traverse a part of his property, it was unnecessary to expropriate the whole of the property. This issue, together with other expropriation related issues is addressed in ch 5.

<sup>263</sup> 1970 (4) SA 165 (O), discussed in ch 2 at 2 3 2.

<sup>264</sup> 1911 AD 271, discussed in ch 2 at 2 2 3 2.

<sup>265</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 4 3.

<sup>266</sup> The court accepted the approach adopted in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and subsequently followed in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE) that the Expropriation Act 63 of 1975 must be interpreted by reading in the 'public interest' requirement.

Although the applicant argued that the respondent expropriated its property solely for the benefit of the third party, the court was of the opinion that the dispute was comparable to the issue in *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty)*<sup>267</sup> (*Van Streepen*). In the *Van Streepen* decision, the Appellate Division of the Supreme Court clearly distinguished between the primary purpose (construction of roads) and the secondary purpose (doing anything necessary relating to the construction or maintenance of any road) of the expropriation. Similarly, the court in *Bartsch* distinguished between the primary purpose (construction of roads) and the secondary purpose (the development of a shopping complex) of the expropriation.<sup>268</sup> Since the secondary purpose related to 'all things necessary in connection with the construction of the road',<sup>269</sup> referred to as the primary purpose, the court held that both the primary and secondary purpose were provided for in the respondent's expropriation notice. According to the court, the use of the applicant's land for the building of the shopping complex fell within the ambit of the secondary purpose.

The court accepted that the expropriation of the applicant's land for the construction of roads (the primary purpose) was for a valid public purpose. However, it is a different question whether the building of the shopping complex (the secondary purpose) was for a valid public purpose. Although it was argued that the building of a shopping complex is causally connected to the primary purpose, it is not immediately clear how the building of a shopping mall is causally connected to the building of a road. According to the court, the expropriation of the applicant's land for the benefit of the private third party can never be for a public purpose.<sup>270</sup> However, if it can be shown that the expropriation would be in the public interest, it may be valid. Given the economic advantages that the development would bring the court in *Bartsch* accepted that the expropriation of property for the benefit of a third party is in the public interest.

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<sup>267</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A), discussed in ch 2 at 2 4 3 and ch 3 at 3 3 3.

<sup>268</sup> Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 282-285.

<sup>269</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 1 2.

<sup>270</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5 2. However, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA), discussed below, the Supreme Court of Appeal stated that an expropriation that benefits a third party may still be for a public purpose since the character and purpose of the development is more important to the consideration whether the expropriation is for a valid public purpose than the identity of the party undertaking the development.



#### **4 6 2 3 Offit Enterprises (Pty) Ltd v Coega Development Corporation**

Similarly, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>271</sup> (*Offit*) the applicants argued that the intended expropriation of their property to transfer it to a third party was not for a valid public purpose. The applicants were the owners of a piece of land situated in the Coega Industrial Development Zone (the 'IDZ'). The first respondent was the Coega Development Corporation, which operated the IDZ in terms of a permit issued in terms of the Manufacturing and Development Act 187 of 1993. The second, third and fourth respondents were the Premier of the Eastern Cape Province, the Minister of Public Works and the Minister of Trade and Industry respectively.

The second respondent attempted to expropriate the applicant's land on behalf of the first respondent in 2005 and again in 2007. The high court confirmed that the second respondent does not have the authority in terms of the Expropriation Act 63 of 1975 or the Eastern Cape Land Disposal Act 7 of 2000 to expropriate property.<sup>272</sup> The third and fourth respondents have expropriating authority but indicated that they had no intention of expropriating the applicant's land. The applicant argued that the (intended) expropriation of its property would be unlawful because it would be for the benefit of the first respondent and therefore not for a public purpose. As the case progressed through the various courts, several arguments were raised by the applicants.<sup>273</sup> The discussion in this chapter is limited to the argument that the expropriation of the applicant's land would not be for a public purpose because the intended expropriation was undertaken to benefit a third party.<sup>274</sup>

<sup>271</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA); 2011 (1) SA 293 (CC).

<sup>272</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE) 666-667.

<sup>273</sup> In the high court decision (*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE)) the applicant argued that the expropriation of its property for the benefit of another third party would be unlawful since the Coega Development Corporation operated the Coega IDZ with an invalid permit. Furthermore, he argued that the expropriation would not be for a public purpose as required by the 1975 Expropriation Act. In the Supreme Court of Appeal (*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA)) the applicant raised three arguments regarding the unlawfulness of the expropriation. Firstly, the applicant argued that the operator permit that allowed the Coega Development Corporation to operate in the IDZ was unlawfully issued and extended. Secondly, the applicant argued that the expropriation fell outside the ambit of the authorising legislation. The third argument was that any expropriation of his land would be in conflict with his right to just administrative action. The Constitutional Court (*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC)) directed the parties to address the following issues: Whether the applicants was deprived of its property and if so, by whom, and what would the appropriate relief be: *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*, Directions Dated 29 March 2010, [www.constitutionalcourt.org.za/Archimages/15016.PDF](http://www.constitutionalcourt.org.za/Archimages/15016.PDF) (accessed 7 November 2011).

<sup>274</sup> This argument was considered only in the high court (*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE)) and the Supreme Court of Appeal

The applicant argued that the expropriation of its property would be invalid because it would not be for a public purpose as required by the Expropriation Act and section 25(2) of the 1996 Constitution. Since the second respondent did not have the authority to expropriate the property and the third and fourth respondent who had the authority to expropriate property had no intention of expropriating the property, there was never a real threat of expropriation. Nevertheless, both the high court and the Supreme Court of Appeal considered whether the expropriation of the applicant's land for the benefit of the first respondent would be for a public purpose.<sup>275</sup>

The high court acknowledged that the applicant's land was constitutionally protected; section 25(1) of the Constitution protects property against arbitrary deprivation and section 25(2) sets out the requirements for a valid expropriation. The court stated that the Expropriation Act is law of general application that is subject to the Constitution. Referring to *Du Toit v Minister of Transport*,<sup>276</sup> the court stated that if the provisions of the Expropriation Act are inconsistent with the Constitution, the Act should be interpreted by 'reading in'<sup>277</sup> the relevant provision of the Constitution. Accordingly, an expropriation is only valid in terms of the Constitution and the Act if it is for a public purpose or in the public interest.<sup>278</sup> This was also accepted by the Supreme Court of Appeal.<sup>279</sup>

Although section 1 of the Expropriation Act defines public purpose, the high court agreed with the third respondent that it is not an exclusive definition. Both the high court<sup>280</sup> (relying on *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*)<sup>281</sup> and the Supreme Court of Appeal (relying on *Fourie v Minsiter van Lande*)<sup>282</sup> and *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*)<sup>283</sup> approved the wide meaning of the public purpose requirement adopted in these pre-constitutional decisions, before the *Administrator, Transvaal and Another v Van*

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(*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA)).

<sup>275</sup> Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 275.

<sup>276</sup> 2006 (1) SA 297 (CC).

<sup>277</sup> With the 'reading in' remedy a court saves the particular legislation from invalidity by adding words to the legislation that cure the flaw: Bishop M 'Remedies' in Woolman S, Bishop M & Brickhill J (eds) *CLOSA Vol I* (2<sup>nd</sup> ed OS 2006) ch 9 at 104-105. See also Liebenberg S *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 383-388.

<sup>278</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE) 675.

<sup>279</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 11.

<sup>280</sup> Van der Walt AJ 'Constitutional Property Law' 2008 ASSAL 231-264 at 260 states that the high court was correct in formulating the public purpose requirement widely.

<sup>281</sup> 1984 (3) SA 785 (N).

<sup>282</sup> 1970 (4) SA 165 (O).

<sup>283</sup> 1984 (3) SA 785 (N).

*Streepen (Kempton Park) (Pty) Ltd*<sup>284</sup> decision introduced the broader public interest interpretation of this requirement.

Both the high court and the Supreme Court of Appeal referred to *Van Streepen* where the then Appellate Division of the Supreme Court stated that an expropriation that benefits a third party might not be for a public purpose, but it could be in the public interest. In *Van Streepen*, the Appellate Division did not indicate why such an expropriation might not be for a public purpose. In *Offit*,<sup>285</sup> Wallis AJA, writing for the Supreme Court of Appeal, contended that a possible reason for the approach adopted in *Van Streepen* is the different role that the state - as opposed to private individuals - played at the time when *Van Streepen* was heard. In recent times traditional public functions are no longer solely performed by the state, but by the state in co-operation with private parties. According to the Supreme Court of Appeal, private partnerships (state and private enterprise partnerships) are becoming a common feature. Therefore, it stated that

[t]here is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose.<sup>286</sup>

However, as is argued in previous chapters this is only the case when the purpose in itself is a valid public purpose. In this regard the Supreme Court of Appeal points out that the first question to be asked is whether the purpose of the expropriation is a valid public purpose because if it is, the fact that the property is transferred to a third party is irrelevant.

Therefore, both the high court and the Supreme Court of Appeal dismissed the applicant's argument that if the expropriation had occurred it would not have been for a public purpose or in the public interest purely because it would benefit a third party. The courts easily accepted that economic development - with the benefits to which the courts referred - is in the public interest without placing any qualifications on its legitimacy, such as the existence of a legislative scheme. In terms of the *Offit* decisions it seems as if the courts separated the issue regarding third party transfers for economic development by first considering whether the expropriation is for a valid public purpose or in the public interest. However, once the courts accepted that the purpose is justifiable the third party transfer issue became less relevant.

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<sup>284</sup> 1990 (4) SA 644 (A).

<sup>285</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).

<sup>286</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15.

#### 4 6 2 4 *Harvey v Umhlatuze Municipality*

The primary issue in *Harvey v Umhlatuze Municipality and Others*<sup>287</sup> (*Harvey*) did not concern the legitimacy of the expropriation and eventual transfer of property to another private party for economic development purposes. The high court had to consider whether it was competent to order the re-transfer of the applicant's expropriated property because the purpose for which the property was expropriated was subsequently abandoned.<sup>288</sup> When the original purpose was abandoned the municipality awarded the property, on tender, to a third party for purposes of establishing a medium-density residential area. Therefore, when the court addressed the issue of re-transfer it also considered whether an expropriation that benefits a third party because the property is transferred to that party for economic development could be for a public purpose if the development does not form part of a land reform programme.

The applicant relied on De Waal and Currie for its argument that 'public purpose' should be defined in contrast to 'private purpose'. If the state expropriates property to build a road or a hospital the expropriation would be valid.<sup>289</sup> However, if the expropriation specifically benefits an individual or increases the state's wealth, it would not be for a valid public purpose and would therefore be unlawful.<sup>290</sup>

According to the court, the argument that an expropriation for the benefit of a third party is invalid is broadly in accordance with the 'jurisprudential principles applicable to expropriation of property in South Africa'.<sup>291</sup> However, there might be instances where an expropriation that incidentally benefits third parties could still be for a public purpose or in the public interest. The court referred to *Offit*,<sup>292</sup> where the Supreme Court of Appeal held that in exceptional cases, and outside the context of a land reform programme, an expropriation might still be valid even if the ultimate beneficiaries of the expropriation are private parties.<sup>293</sup> The court in *Harvey*<sup>294</sup> agreed with the *Offit* decision but cautioned against expropriation of property under the guise of a public purpose, while the property is actually expropriated in order to increase the wealth of the state or for the exclusive private

<sup>287</sup> 2011 (1) SA 601 (KZP).

<sup>288</sup> See the discussion of this issue in ch 6.

<sup>289</sup> Currie I & De Waal J *The Bill of Rights Handbook* (5<sup>th</sup> ed 2005) 555.

<sup>290</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 124.

<sup>291</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 125.

<sup>292</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).

<sup>293</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 125. See Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 585-586.

<sup>294</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP).

benefit of a third party.<sup>295</sup> Therefore, an expropriation that also benefits a third party can still be valid (for a public purpose or in the public interest), provided that the third party performs a public function and requires the property for that purpose.<sup>296</sup>

#### *4 6 3 Legislative Authority to Expropriate Property for Economic Development Purposes*

Traditionally property was expropriated for public purposes that included the building of roads, various government facilities and securing the safety of the President. Above it was also argued that it is usually accepted that property can be expropriated and turned over to third parties responsible for providing a public service, such as electricity and railway companies, in order to fulfil a public purpose.<sup>297</sup> In terms of the 1996 Constitution the purposes for which property can be expropriated were extended to include the expropriation of property for land reform purposes, even if it involved the transfer of the property to third parties.<sup>298</sup> Given that expropriation for economic development purposes has not traditionally been regarded as being for a public purpose or in the public interest, the question that should be asked is whether expropriating property for purposes of economic development is authorised in terms of legislation. If legislation does not provide for the expropriation of property for economic development purposes and if it is found that economic development is not justified in terms of the public purpose or public interest requirement the expropriation would be invalid and the question regarding the transfer of the expropriated property to third parties does not come up. Therefore, it should first be considered whether legislation provides for the expropriation of property for economic development purposes.

Legislation in foreign jurisdictions, such as the US, English and Irish law discussed above, often specifically authorises the expropriation of property for purposes of redevelopment or regeneration. In South African law, where most expropriations are still carried out in terms of the Expropriation Act 63 of 1975, no reference is made to the expropriation of property for economic development purposes. However, recourse could be had to the legislation in terms of which the development takes place. The Manufacturing Development Act 187 of 1993 that was used to effect the development that

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<sup>295</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 125.

<sup>296</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 462, 491; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 586.

<sup>297</sup> See the discussion above at 4 2.

<sup>298</sup> See the discussion above at 4 3.

gave rise to the dispute in the *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>299</sup> decisions made no reference to the expropriation of property for purposes of development. In fact the Act does not confer expropriation powers at all. The Eastern Cape Land Disposal Act 7 of 2000 grants the Premier of the province the authority to expropriate property, but it does not refer to the expropriation of property for economic development purposes. Furthermore, in the *Offit* decisions the Premier had no intention of expropriating property.

In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*,<sup>300</sup> the expropriation notice allowed the local authority to expropriate property for purposes of constructing a road and doing all things necessary in connection with building that road. The court held that the provision was wide enough to legitimise the expropriation of the applicant's land for economic development purposes. According to the court this development would enhance the economy of the town of Harrismith and was therefore in the public interest.<sup>301</sup>

It is arguable that the legislation, although allowing expropriation for purposes of doing all things necessary in connection with building a road, cannot be read this broadly. In *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd*<sup>302</sup> the court held that the relocation of water or electricity pipes was in connection with the construction of the road. Expropriating gravel along the road in order to build the road is also an action in connection with building the road and, therefore, justifiable.<sup>303</sup> Expropriating property to allow a petrol company to erect a petrol filling station alongside the road may also be justifiable in terms of the expropriation legislation. However, the erection of a shopping mall is perhaps too far removed from doing all things necessary in connection with building the road to justify the expropriation for that purpose.

As a result, there is no established precedent in case law where the expropriation of property for economic development purposes has been upheld. There is also no apparent legislation that authorises such an expropriation. This does not necessarily mean that the expropriation of property for the purpose of economic development can never be for a public purpose or in the public interest. It does, however, mean that the determination as to whether economic development does in fact constitute a valid public purpose or whether

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<sup>299</sup> 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA); 2011 (1) SA 293 (CC).

<sup>300</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>301</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5 2.

<sup>302</sup> *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) 659.

<sup>303</sup> See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).



it is in the public interest should arguably be subjected to stricter scrutiny in cases where the authorising legislation does not authorise expropriation for economic development specifically.

#### *4 6 4 Is Economic Development in the Public Interest?*

In the absence of legislation that specifically authorises the expropriation of property for economic development purposes, the courts have considered whether economic development is for a public purpose or in the public interest to justify the expropriation. In previous chapters it was shown that the public interest refers to purposes that benefit the public as opposed to public purpose, which is defined more narrowly and mainly refers to government purposes or actual public use. In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>304</sup> the court considered whether the expropriation of the property for economic development purposes would be in the public interest. The court stated that the development, which included the construction of a shopping complex, would be for the benefit of the public because it would provide economic advantages to the community. These advantages included increased financial income as well as fostering a healthier and wealthier society. Therefore, the expropriation of the applicant's property to stimulate the economy was held to be in the public interest. Once the court accepted that the purpose of economic development is in the public interest, it upheld the expropriation and did not evaluate whether the transfer of the property to a third party to realise the purpose is also legitimate.

In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>305</sup> both the high court and the Supreme Court of Appeal referred to the economic advantages that the development in the Coega IDZ would bring as justification for the expropriation. The high court accepted that the development would create numerous permanent and temporary employment opportunities and would provide additional social benefits, such as increasing the per capita income. Additionally, the investment potential of the development exceeded R20 billion. Accordingly, the high court was satisfied that the development scheme fell within the scope of the broad meaning of 'public purpose', since it would benefit all the people in South Africa, and more specifically the local community of Port Elizabeth. Therefore, the high court concluded that the expropriation of the applicant's land for the economic development of the area would be in

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<sup>304</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>305</sup> 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

the public interest and therefore valid as long as the property was used to achieve that public interest. Furthermore, the Supreme Court of Appeal considered the stake that the Eastern Cape government and the Department of Trade and Industry had in the Coega development project. The responsibility of the Coega Development Corporation is of national and provincial importance and is clearly set out in legislation. As a result, the Supreme Court of Appeal stated that the 'industrial development with all its concomitant benefits of employment and economic growth is manifestly a public purpose, and indeed a central public purpose in South Africa'.<sup>306</sup> Therefore, the high court and the Supreme Court of Appeal dismissed the applicant's argument that if the expropriation had occurred it would not have been for a public purpose or in the public interest purely because it would benefit a third party.<sup>307</sup>

As a result, in the *Bartsch* and *Offit* decisions the respective courts accepted that economic development with the concomitant benefits of increased employment opportunities and revenue is in the public interest and therefore justifiable in terms of the Expropriation Act and the 1996 Constitution. The courts effectively opened up the public interest requirement to include the expropriation of property for economic development purposes, even in the absence of legislative authority, purely on the basis of a particular interpretation of the public interest requirement.

In the absence of clear and specific legislative authority, increased employment opportunities, increased revenue and the general improvement of the economy are possibly not enough to justify the expropriation of property for the state to implement projects of economic development. In German law, it is required that the legislation that authorises the expropriation must clearly and specifically authorise the expropriation of property for a very specific purpose. This purpose is further strictly judged against article

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<sup>306</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 17.

<sup>307</sup> The applicants appealed to the Constitutional Court (*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC)). The Constitutional Court directed the parties to address the issue whether the continuous threats of expropriation amounted to arbitrary deprivation of property in contravention with s 25(1) of the Constitution. The Court referred to *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57, where it was held that any interference with the use, enjoyment or exploitation of property is a deprivation of property for purposes of s 25(1). However, the Court in *Offit* relied on a later decision, namely *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 32, where it was found that a deprivation is only established if there is a 'substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment'. On the specific facts, the Court in *Offit* decided that although the threats of expropriation annoyed the applicants, they did not amount to a deprivation of the applicant's property.

14 of the German Basic Law.<sup>308</sup> Since economic development is not traditionally regarded as constituting a valid public purpose or public interest, it is possible to argue that without any legislative basis, the expropriation of property for economic development purposes should be invalid for a lack of statutory authority or in the least be subjected to heightened scrutiny as suggested by Lord Walker in *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council*.<sup>309</sup>

Furthermore, in most cases where the state has a specific objective in mind, for instance improving the security of the President's estate to ensure his safety and privacy, it has a strategic plan on how to realise the specific objective.<sup>310</sup> If in the course of that objective the state needs to expropriate property (which should only be the case if there is no other way of achieving the public purpose)<sup>311</sup> it would be allowed to do so if the purpose of the plan is a public purpose or in the public interest. Therefore, it can be argued that the state needs to have a development plan in place before it can expropriate property in order to realise a particular development objective. As a result, it can be argued that without a legislative scheme, which includes the existence of a development plan, the state would not be able to expropriate property for economic development just because it might increase employment opportunities and promote a wealthier society. In terms of a legislative scheme, the increase of employment opportunities can merely be evidence that the development plan may eventually be in the public interest in the broadest and vaguest sense possible.

#### *4 6 5 Is the Transfer of Property to Third Parties for Economic Development Justifiable?*

Since it is arguable that economic development, at least in the absence of a legislative scheme, is not for a public purpose or in the public interest and since third party transfers of expropriated property are also a contentious issue at least in some cases, the transfer of expropriated property to private parties for economic development purposes poses a double problem. Above it was argued that outside of a legislative scheme the expropriation of property for economic development, with vague and undefined advantages such as

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<sup>308</sup> Basic Law for the Federal Republic of Germany 1949.

<sup>309</sup> [2010] UKSC 20. See also the discussion of this decision at 4 4 2 3 2.

<sup>310</sup> See *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010; *Works* [2011] ZASCA 246, 1 December 2011 and the discussion of this decision in ch 5.

<sup>311</sup> See the discussion in ch 5.

increased employment opportunities and revenue, may not be sufficiently justified in terms of the public purpose or public interest requirement.

With regard to third party transfers, the court in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>312</sup> held that the expropriation of property for the benefit of a third party can never be for a public purpose, but it can be in the public interest. It is unclear whether the court would have conceded that an expropriation can be for a public purpose even if the property is expropriated for the benefit of a third party. In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*,<sup>313</sup> the high court held that the fact that the property, if expropriated, would be transferred to a third party does not render the expropriation invalid from the outset. The public interest requirement is wide enough to justify expropriations that also benefit third parties. The Supreme Court of Appeal adopted the same approach and held that an expropriation cannot be invalidated simply because the ultimate owner of the land is a private party.<sup>314</sup> It does not matter whether, in the fulfilment of the public purpose, the property is retained by the state or whether it would be transferred to a private party. In this regard, the Supreme Court of Appeal stated that

‘the expropriation of land in order to enable the private developer to construct low-cost housing is as much an expropriation for public purpose as it would be if the municipality or province had undertaken the task itself, using the same contractors.’<sup>315</sup>

Therefore, *Offit*,<sup>316</sup> as well as *Harvey v Umhlatuze Municipality and Others*,<sup>317</sup> demonstrate that an expropriation that benefits a third party may still be for a public purpose provided that the third party requires the property to perform a public function that in itself is for a public purpose or in the public interest. This qualification concerning the justification for expropriating property and transferring it to third parties is important when considering expropriation for economic development purposes. If the expropriation is for a clear public purpose, applying a low level of scrutiny with regard to the transfer of the property to a third party in order to realise the purpose is not necessarily exceedingly troublesome. However, in the event that the purpose of the expropriation is in itself difficult to justify in

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<sup>312</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>313</sup> 2009 (5) SA 661 (SE).

<sup>314</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).

<sup>315</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15.

<sup>316</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA).

<sup>317</sup> 2011 (1) SA 601 (KZP).

terms of the public purpose or public interest requirement - because there is no authority for the expropriation or because the purpose in itself is controversial - the determination as to whether the transfer of the property to third parties to realise the purpose is lawful, should be subjected to strict scrutiny.

In the *Bartsch* decision, the court upheld an expropriation that benefited a third party on the basis that it would also bring about economic advantages. This decision illustrates the low level of scrutiny that the courts apply when they determine whether an expropriation that benefits a third party is in the public interest. It was already indicated that the legislation did not specifically authorise the expropriation of property for purposes of promoting, enhancing or stimulating the economy. The expropriation notice indicated that the power of expropriation in terms of the Expropriation Act of 1975 would be used to expropriate property to construct a road and doing all things necessary in connection with building the road. In the *Bartsch* decision there was no evidence relating to the number of employment opportunities that would be created. The indicators relied upon to justify the expropriation, such as 'strategic economic advantages' and 'creating a healthier and wealthier environment'<sup>318</sup> are too vague to justify the expropriation of the additional property. There are also no assurances that these advantages would occur and that the third party who receives the property will in fact implement projects that would generate these advantages.

A general concern, also in foreign jurisdictions, is the lack of statutory conditions to ensure that the promised economic benefits actually materialise.<sup>319</sup> Furthermore, the third party can in most instances not be held accountable if the various benefits do not materialise or if they do not in fact benefit the public in some way. Therefore, in the absence of some control mechanism there is a real possibility that the anticipated benefits, factors used to justify the expropriation, will not in fact materialise. The projected employment opportunities that the new General Motors plant in the City of Detroit, that gave rise to the dispute in *Poletown Neighborhood Council v City of Detroit*,<sup>320</sup> would have generated never fully materialised<sup>321</sup> and the planned development that resulted in the dispute in *Kelo v City of New London*<sup>322</sup> has to date not been implemented.<sup>323</sup>

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<sup>318</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 5 2.

<sup>319</sup> Somin I 'Controlling the Grasping Hand: Economic Development Takings after *Kelo*' (2007) 15 *Supreme Court Economic Review* 183-271 at 192-197; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 544-545.

<sup>320</sup> 410 Mich 616 (Mich, 1981).

<sup>321</sup> General Motors projected to create around 6000 new employment opportunities but in effect only around 3600 new employment opportunities have been created: Somin I 'Controlling the Grasping Hand: Economic

Therefore, in the event that the state insists that the expropriation is justified since it would provide a certain number of jobs or a certain amount of revenue, the courts should be wary if there is no form of oversight on the part of the state in order to ensure that the projected benefits actually materialise, nor any manner in which the third party can be held accountable in the event that the benefits do not materialise.<sup>324</sup> In *County of Wayne v Hathcock*<sup>325</sup> the Michigan Supreme Court placed a ban on economic development takings except where the state retains some sort of oversight.<sup>326</sup>

As a result, the transfer of property for economic development purposes outside of a legislative scheme that authorises and regulates both the purpose of the expropriation and the transfer should be evaluated strictly. It has been argued that allowing expropriations of this kind has several negative effects on owners' rights to property as well as other human rights, such as the right not to be evicted from one's home in an arbitrary manner.<sup>327</sup> Numerous arguments against allowing the expropriation of property for economic development purposes that also involves a third party transfer have been raised by various authors. These arguments are briefly outlined below before an argument is made that stricter scrutiny, similar to the scrutiny applied in German law, should be applied in South African law to both the purpose of the expropriation and the transfer of the property in terms of legislation.

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Development Takings after *Kelo*' (2007) 15 *Supreme Court Economic Review* 183-271 at 195. See also Somin I 'Overcoming *Poletown: County of Wayne v Hathcock*, Economic Development Takings, and the Future of Public Use' 2004 *Mich State LR* 1005-1039 at 1013-1016.

<sup>322</sup> 545 US 469 (2005).

<sup>323</sup> Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 23.

<sup>324</sup> Somin I 'Overcoming *Poletown: County of Wayne v Hathcock*, Economic Development Takings, and the Future of Public Use' 2004 *Mich State LR* 1005-1039 at 1015 recognises that placing a binding obligation on a third party such as General Motors to create an identified number of employment opportunities may lead to inefficiency, since it might have to forego certain technologies in order to employ a certain amount of people. Although placing binding obligations on private business entities poses to be a serious difficulty, Somin argues that 'it also provides a strong argument against permitting economic development takings in the first place.'

<sup>325</sup> 684 NW2d 765 (Mich, 2004).

<sup>326</sup> Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 233-236 notes that because certain corporations, such as railroad, gas and electricity companies were endowed with expropriation powers it was accepted that these companies held the expropriated property in quasi-public trust and that they were duty bound to use the property only in the public interest, which entailed, amongst others, that 'in the absence of express authority from the state in legislative form no such corporation could sell, lease or mortgage its franchise or any property essential to its enterprise'.

<sup>327</sup> See in this regard Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 and the discussion below at 4 7.



## 4 7 Arguments against the Transfer of Expropriated Property to Third Parties for Economic Development Purposes

In the discussion of the US decisions of *Kelo v City of New London*<sup>328</sup> and *Poletown Neighborhood Council v City of Detroit*<sup>329</sup> it was shown that the respective courts easily accepted the condemnation of property for purposes of development or redevelopment if the proposed development was authorised by legislation and would proceed according to a development plan, even though the expropriation involved a third party transfer. However, the mere fact that the development was properly authorised and planned is not enough to satisfy all critics of these expropriations. Although some authors argue that the *Kelo* decision was decided correctly in terms of the US Supreme Court's jurisprudence,<sup>330</sup> Gray notes his uneasiness with the expropriation of Kelo's primary home for the benefit of a third party.<sup>331</sup> The sanctity of the home has always been respected.<sup>332</sup> Therefore, Gray argues that allowing the expropriation of a person's home for the economic benefit of another party has a significant impact on home owners, whose homes might be their only possessions and a 'symbol of the security and quality of their lives.'<sup>333</sup> Walsh argues that although the *Kelo* and *Poletown* decisions are comparable to the Irish decisions of *Crosbie v Custom House Docks Development Authority*<sup>334</sup> and *Clinton v An Bord Pleanála and Others*,<sup>335</sup> since they also involved the expropriation of property for development purposes effected by a third party, the *Kelo* and *Poletown* decisions sparked more public outcry than the Irish decisions because the *Kelo* and *Poletown* decisions concerned the expropriation of homes, while the Irish cases concerned the expropriation of city centre properties.<sup>336</sup>

<sup>328</sup> *Kelo v City of New London* 545 US 469 (2005).

<sup>329</sup> 410 Mich 616 (Mich, 1981).

<sup>330</sup> Bell A & Parchomovsky G 'The Uselessness of Public Use' (2006) 106 *Col LR* 1412-1449 at 1415; Cohen CE 'Eminent Domain after *Kelo v City of New London*: An Argument for Banning Economic Development Takings' (2006) 29 *Harvard Journal of Law and Policy* 491-568 at 496; Merrill TW 'Six Myths about *Kelo*' (January-February) 20 *Probate and Property* 19-23; Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 68-70.

<sup>331</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82. See also Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406; Gray K 'Recreational Property' in Bright S (ed) *Modern Studies in Property Law Vol VI* (2011) 1-38 at 33-34.

<sup>332</sup> Justice Thomas' dissent in *Kelo v City of New London* 545 US 469 (2005) 518.

<sup>333</sup> *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) 658; Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82.

<sup>334</sup> [1996] 2 IR 531 (HC).

<sup>335</sup> [2005] IEHC 84; [2007] IESC 19.

<sup>336</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 13.

Therefore, the Irish owners merely lost the right to choose how to use their asset, while plaintiffs in *Kelo* and *Poletown* lost their actual homes.<sup>337</sup>

It has therefore been suggested that expropriation for development of certain categories of property, for instance a person's home, should not be allowed since such property is important to 'an individual's sense of personhood'.<sup>338</sup> However, Fee argues that a complete ban on the takings of homes is probably not the best solution.<sup>339</sup> Certain public purposes such as the building of roads and other public utilities will clearly justify the expropriation of property even when it includes homes.<sup>340</sup> However, this general justification arguably does not extend to expropriation for economic development. Although an expropriation for a narrow and easily justified public purpose like road building would sometimes require that families or communities have to relocate to a different area, it is difficult to understand why they have to lose their homes and relocate just so that someone else can make a profit. Therefore, Fee argues that instead of placing homes - as a class of property - outside the reach of the state's power of eminent domain it would be better to subject the expropriation of a home generally to higher scrutiny.<sup>341</sup>

Apart from the economic cost that materialises when people are forced to relocate to a different area because their houses had been expropriated, there are also other costs involved. This is more apparent in cases where the compensation offered does not account for the actual loss suffered by the expropriated owners.<sup>342</sup> With reference to

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<sup>337</sup> Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 13.

<sup>338</sup> See Goodin AW 'Rejecting the Return to Blight in Post-*Kelo* State Legislation' (2007) 82 *NYU LR* 177-208 at 191. Radin MJ 'Property and Personhood' (1982) 34 *Stanford LR* 957-1015 wrote a seminal article on the concept of property and personhood. At 1005-1006 she argues that 'one might expect to find an implied limitation on the eminent domain power. That is, one might expect to find that a special class of property like a family home is protected against the government by a "property rule" and not just a "liability rule." Or one might expect to find that a special class of property is protected against taking unless the government shows a "compelling state interest" and that taking it is the "least intrusive alternative."'

<sup>339</sup> Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 799-800.

<sup>340</sup> Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 799-800.

<sup>341</sup> Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 801. Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 99 also argues that heightened judicial scrutiny is required when expropriation and land-use regulation, which is aimed at economic or general redevelopment result in the eviction of people from their homes. Van der Walt also argues that the protection of the home interest cannot always prevent the expropriation of the property for a public purpose, but in such circumstances the expropriation should serve a 'real and serious' public purpose. See also Justice Thomas' dissent in *Kelo v City of New London* 545 US 469 (2005).

<sup>342</sup> Michelman FI 'Property as a Constitutional Right' (1981) 38 *Wash & Lee LR* 1097-1114 at 1112; Michelman FI 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harv LR* 1165-1258 at 1214. See also Walsh R "The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16; Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82.

*Poletown Neighborhood Council v City of Detroit*,<sup>343</sup> Michelman famously argued that property can represent more than just money, 'because it may represent things that money can't buy - place, position, relationship, roots, community, status ... and security,' but security in a different and deeper sense than just 'investment-backed expectations.'<sup>344</sup> Michelman coined the term 'demoralization cost' to denote the additional and often not accounted for losses that expropriations of this nature might cause.<sup>345</sup> Walsh argues that these additional costs can also include the loss of a support system from the previous neighbourhood that may not be present in the new neighbourhood.<sup>346</sup> Informal arrangements concerning child-care as well as community assistance to an elderly person may disappear, which cannot automatically be transplanted into a new neighbourhood.<sup>347</sup> Furthermore, it might be impossible to afford the same type of residence in a different but comparable neighbourhood.<sup>348</sup>

Apart from the additional cost that expropriation of homes for economic development might cause, Waring argues that the purpose of regeneration or economic development is hard to justify because it is vague, indefinable and difficult to predict.<sup>349</sup> With regard to third party transfers for building of roads or railways, the expropriation is usually justified by its serving of 'geographically discrete and temporally-limited

<sup>343</sup> 410 Mich 616 (Mich, 1981).

<sup>344</sup> Michelman FI 'Property as a Constitutional Right' (1981) 38 *Wash & Lee LR* 1097-1114 at 1112.

<sup>345</sup> Michelman FI 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harv LR* 1165-1258 at 1214-1216.

<sup>346</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16.

<sup>347</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16. Waring E.J.L. *Aspects of Property: The Impact of Private Takings* (PhD thesis Cambridge University 2009) 87-88, with reference to Gilbert MR 'Identity, Difference, and the Geographies of Working Poor Women's Survival Strategies' in Miranne KB & Young AH (eds) *Gendering the City: Women, Boundaries, and Visions of Urban Life* (2000) 65-87 at 71, notes the difficulties that women especially face when forced to relocate to a different area. At 87-88 Waring argues that because 'women have multiple roles as employee, mother and potential family provider leading to severe geographic and time constraints on their lives ... the removal of a home or link with an area cause upheaval in women's plans and strategies for combining their multiple roles ... [and] can also lead to a loss of employment opportunities.'

<sup>348</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16.

<sup>349</sup> Waring E.J.L. 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 20-24 argues that because s 226 of the English Town and Country Planning Act of 1990 - that gave rise to the decisions in *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18 (Admin) and *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 - is framed in a subjective manner and requires a low threshold that 'there is little room for the courts do to anything other than be deferential in the face of such wide discretion.' Although Lord Walker in the *Sainsbury's Supermarket* decision argued that stricter scrutiny should be applied in cases that involve a private to private transfer, Waring argues that this will be difficult given the express approval of parliament that envisages the involvement of third parties in regeneration and redevelopment schemes. As a result, Waring offers several reasons why courts should be hesitant in accepting that the transfer of property for purposes of economic development is justifiable.

projects,<sup>350</sup> but with economic development projects this is not the case. Economic development or the improvement of economic conditions can appear in any place at any given time, which means that property rights can become fragile because no-one can be sure whether such an expropriation might affect their property.<sup>351</sup> This ultimately also undermines the right to security of possession generally.<sup>352</sup> Property owners can therefore question why economic use should be the main criterion when determining whether the property should be expropriated, especially since the owners whose properties are targeted for economic development purposes are usually the most vulnerable and the least affluent members of society.<sup>353</sup> Underkuffler also argues that the price of condemnation does not fall on those with social, political or economic power, but on those who live in more moderate neighbourhoods.<sup>354</sup> Furthermore, Underkuffler argues that in light of the *Kelo* decision, run-down neighbourhoods or trailer parks will not fare well in terms of a development plan with expensive homes with 'manicured lawns and gardens.'<sup>355</sup> As a result, third party transfers for economic development could have disproportionately harsh effects on the less affluent members of society.

Gray indicates a further reason why third party transfers for economic development purposes are troublesome.<sup>356</sup> Gray states that the third party, 'courtesy of the state,'<sup>357</sup> would be able to hold the expropriated property on exclusionary terms.<sup>358</sup> As opposed to the expropriation of property to allow a third party to fulfil a public function and the application of 'common carrier' regulations that ensured that access to the public service rendered on the expropriated property was fair and equal, the developer in the *Kelo* decision would be able to freely select who would be eligible to use the property in future as occupiers or tenants.<sup>359</sup> As a result, Gray argues that '[t]here was to be no public accountability, no public control, as the price of access to the public power of eminent

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<sup>350</sup> Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 21.

<sup>351</sup> Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 21.

<sup>352</sup> Waring EJL 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law Vol VII* (forthcoming 2013) (copy of paper on file with the author) 21.

<sup>353</sup> See also Justice O'Connor's dissent in *Kelo v City of New London* 545 US 469 (2005).

<sup>354</sup> Underkuffler LS '*Kelo's* Moral Failure' (2006) 15 *William & Mary Bill of Rights Journal* 377-387 at 386.

<sup>355</sup> Underkuffler LS '*Kelo's* Moral Failure' (2006) 15 *William & Mary Bill of Rights Journal* 377-387 at 386.

<sup>356</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82; Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>357</sup> Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>358</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82; Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>359</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82-83; Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406. See also Gray K 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney LR* 221-241 at 228-232.

domain.<sup>360</sup> Public power is therefore used to bring about the expropriation, resulting in private ownership and exploitation of the resource, without any public oversight or accountability.

Gray also argues that private takings result in a situation where property rules are replaced with liability rules and that consequently there is no security of property left.<sup>361</sup> The state would be able to reallocate resources in an unfair and unpredictable manner and the persons who would be the most negatively affected will be those unable to protect themselves.<sup>362</sup> In this regard Walsh argues that the right to security of possession is reduced to security of value if private takings are allowed.<sup>363</sup> She argues that the acceptance of ill-defined purposes such as 'redevelopment' or 'regeneration' gives the state an unfettered power to expropriate property.<sup>364</sup> When the state is able or prepared to pay compensation there seems to be no way of preventing the expropriation of property since 'regeneration' and 'redevelopment' can in almost all cases justify an expropriation. Therefore Walsh states that

'[j]udicial acceptance of ill-defined public purposes as a justification for the exercise of compulsory acquisition powers significantly undermines security of possession of property, and reduces the right to private property to a right to compensation.'<sup>365</sup>

Walsh also argues that the courts' deference towards the non-specific purposes for which property can be expropriated renders a public purpose requirement meaningless. As a result, the state would be able to justify the condemnation of property for the benefit of another person easily, thereby 'washing out any distinction between private and public use of property'<sup>366</sup> effectively deleting the phrase 'for public use' from the Takings Clause.<sup>367</sup>

Furthermore, Gray argues that perhaps the most important objectionable factor of takings that resemble the *Kelo*-type taking is the fact that someone is losing her

<sup>360</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 83.

<sup>361</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 84, with reference to Calabresi G & Melamed AD 'Property Rules, Liability Rules and Alienability: One View of the Cathedral' (1972) 85 *Harv LR* 1089-1128.

<sup>362</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 84, with reference to Justice O'Connor's judgment in *Kelo v City of New London* 545 US 469 (2005).

<sup>363</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 13-14.

<sup>364</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 14.

<sup>365</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 14.

<sup>366</sup> *Kelo v City of New London* 545 US 469 (2005) 494. See also Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 84.

<sup>367</sup> *Kelo v City of New London* 545 US 469 (2005) 494.



property so that someone else, namely a private developer, can make more money.<sup>368</sup> This result resembles expropriation for purely private purposes, which is unacceptable. According to Gray there is some immorality involved in taking someone's home so that a different person can make a profit in which the previous property owner would have no share.<sup>369</sup> Ultimately, the power of condemnation should only be available in circumstances where there is a direct benefit to the public, or if it involves public use and not when the primary benefit of the taking goes to a private party and the secondary benefits such as increased employment opportunities accrue, if it does materialise, to the public.<sup>370</sup>

Given the arguments presented above concerning the problems resulting from a deferent attitude concerning the expropriation and transfer of property for economic development purposes, it is advisable that the South African courts should not be as deferent as the US, English and Irish courts, since the transfer of expropriated property for economic development purposes has the potential to unfairly burden the less affluent members in society. Furthermore, the potential benefits that the expropriation may bring with it often seem to be secondary to the primary purpose of the expropriation, namely the financial benefit of the third party. Because the secondary benefits are not guaranteed courts should be wary when easily accepting the ill-defined benefits as a justification for the expropriation.

As a result, it is submitted that the courts should follow the German approach since it can arguably prevent the expropriation of property that lead to the unjust results described above. In terms of German law the expropriation of property for a public purpose must be authorised in legislation and must comply with the public good requirement in article 14.3 of the Basic Law of 1949. Furthermore, the property must be absolutely necessary for the fulfilment of the particular public purpose and the courts evaluate the legislation that authorises the expropriation and the purpose of the expropriation strictly. Third party transfer is possible, but only if the third party is responsible for realising a public purpose as defined narrowly. However, the legislation must provide for the expropriation and the transfer and the courts exercises strict control over its legitimacy. In that regard the protective function of article 14 of the Basic Law, which guarantees property, is fulfilled.

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<sup>368</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 83; Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>369</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 83.

<sup>370</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 83-84.



## 4 8 Conclusion

The main purpose of this chapter is to discuss third party transfers for economic development purposes. However, third party transfers for narrow and broader public purposes are also discussed. If the purpose of the expropriation can be described as a narrow public purpose, such as building roads, railways or an electricity plant, the party responsible for the realisation of the purpose is irrelevant; it can be the state or a private party. Therefore, if the third party is responsible for rendering the public service in terms of a contract with the state or in terms of legislation, the expropriation and transfer of the property to that party is not easily questioned. However, even in those instances the German courts investigate the nature of the third party's business, since stricter scrutiny is applied in cases where the third party was not established for the fulfilment of that particular public purpose.

If the property is expropriated for a broader public purpose, or in the public interest, it may still be valid even if the property is transferred to third parties. In terms of a land reform programme the expropriated property is transferred to third parties. Similarly, slum clearance projects usually involve the transfer of expropriated property to third parties or it enables third parties to occupy or make use of the expropriated property. As a result, the expropriated property is not used for a government or a public use, but the restitution of property or the elimination of slum is regarded as being in the public interest. For this reason, the expropriation and transfer of property for land reform purposes or for the elimination of slum areas are specifically authorised in terms of legislation. In South African law, the transfer of expropriated property for land reform purposes is also specifically legitimised by the 1996 Constitution and regulated in terms of a legislative scheme. Therefore, even when property is expropriated for broader public purposes the courts still evaluate whether there is some sort of legislative scheme or aim that would be realised by the expropriation.

With regard to third party transfers for economic development purposes it is argued here that both the purpose of the expropriation and the transfer of the property to a third party in order to realise the purpose of development are problematic and that both should be subjected to appropriate levels of judicial scrutiny. It was argued that, unlike the expropriation and transfer of property for land reform or slum clearance purposes, neither economic development nor the transfer of property to third parties for economic development is usually authorised or regulated in terms of a legislative scheme. Whenever there is no legislative scheme that authorises the development the courts should scrutinise

both the expropriation and the transfer more strictly in terms of the public purpose and public interest requirement of section 25(2) of the Constitution. The courts refer to the economic advantages that can include increased employment opportunities,<sup>371</sup> increased financial income<sup>372</sup> and fostering a healthier and wealthier society<sup>373</sup> as sufficient justification for the expropriation of property, even it involves a third party transfer.

However, it was argued that outside of a legislative scheme the expropriation of property for economic development and the transfer of property to a third party for economic development should be subjected to stricter scrutiny. It is suggested that the South African courts approach the question concerning the lawfulness of the transfer of expropriated property for economic development purposes in the same manner as the German courts do.

Therefore, South African courts should first consider whether the purpose, namely economic development, is specifically authorised in terms of legislation. If the legislation does not provide for the expropriation of property for purposes of economic development the expropriation could be declared unlawful for lack of statutory authority. If the legislation does provide for the expropriation of property for economic development purposes, the courts should still consider whether it is a valid purpose and whether expropriating the property is strictly required for the realisation of the public purpose. However, it is arguable that the level of scrutiny could be lower in cases where there is a legislative scheme. Nevertheless, it requires the courts to evaluate whether the purpose of the expropriation necessitates the expropriation of property. If the economic development also involves a third party transfer even stricter scrutiny should be applied to both the lawfulness of the purpose and the legitimacy of the transfer in order to realise the purpose.

In the following chapter it is considered whether the availability of less invasive means, other than expropriation, is a valid defence against an ensuing expropriation that is otherwise for a valid public purpose. Therefore, this question only comes up when the purpose of the expropriation has been judged to be for a valid public purpose, therefore justified in terms of the Expropriation Act and the Constitution, but it is argued that the expropriation of property is excessive since the purpose can be realised without expropriating the property.

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<sup>371</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>372</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>373</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

## CHAPTER 5: THE LESS INVASIVE MEANS ARGUMENT IN EXPROPRIATION LAW

### 5 1 Introduction

In terms of section 25(2) of the 1996 Constitution, an expropriation must be for a public purpose or in the public interest and just and equitable compensation must be paid. In previous chapters it is shown that recent case law and commentaries have confirmed that the justification for an expropriation lies in the public purpose or public interest that is served by the expropriation, while the payment of compensation is merely the result of an expropriation that is for a valid public purpose or in the public interest.<sup>1</sup> Therefore, it is necessary that the public purpose or public interest that is served by an expropriation should be scrutinised properly by the courts to ensure that the expropriation is justified. In the previous chapter it was suggested that if the purpose of the expropriation is not subjected to rigorous scrutiny, it may lead to unjust results in certain situations. This is especially true when the purpose of the expropriation is not a narrow public purpose or more broadly in the public interest but for an even wider purpose such as expropriating property for economic development purposes. Furthermore, the previous chapter shows that the courts do not always strictly evaluate the lawfulness of transferring the expropriated property to third parties for the fulfilment of such broad purposes.

In this chapter a different but related aspect of the public purpose requirement is analysed, namely whether the availability of an alternative, less invasive means - other than expropriation - to realise the purpose is a valid defence against a proposed expropriation. Generally, this argument relates to the question whether expropriating property is justified if the public purpose that necessitates the expropriation of property can also be realised by other, less invasive means. Applied to the expropriation for economic development purposes, the question that could be asked is whether there is another possible means to realise the benefits of economic development, namely increased employment opportunities and revenue, without expropriating the property. This question should be even more pressing if the expropriation also involves a third party transfer, since it can be asked why that specific property is absolutely necessary for the third party to realise the desired development or redevelopment goal.

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<sup>1</sup> See *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 500.

The decision of the expropriating authority (the expropriator) to expropriate property for a public purpose constitutes administrative action.<sup>2</sup> Therefore, in addition to meeting the requirements of section 25(2) of the 1996 Constitution the decision of the expropriator to expropriate property must also be lawful, reasonable and procedurally fair as stipulated in section 33 of the Constitution.<sup>3</sup> The Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to the constitutional right to just administrative action.<sup>4</sup>

Therefore, when property is expropriated both section 25(2), which affords protection against expropriation that is not for a public purpose or that is unaccompanied by just and adequate compensation, and administrative law principles in section 33 of the Constitution and PAJA are implicated. Consequently, two constitutional rights are directly relevant when property is expropriated. This chapter will investigate how these two constitutional rights have a bearing on the argument that an expropriation is not justified since the proposed public purpose can be achieved by adopting a different and less invasive measure. The less invasive means argument can be aimed at the adoption of a different and less invasive measure such as a regulatory scheme that does not require expropriation of the property. The less invasive measure can also relate to the expropriation of only a portion of land instead of the entire parcel. Therefore, the adoption of such a different measure ensures that the public purpose is met, but without expropriating the property or the whole of the property.

In recent case law the courts have indicated that they will not easily question the expropriator's decision to expropriate property (or a specific volume of property) for a public purpose. This can be attributed to the deference traditionally shown towards the choices made by the administrator and the rationality test that the courts customarily apply in expropriation cases.<sup>5</sup> In terms of the rationality test the decision of the administrator must be supported by the facts. If there is a rational connection between the decision that was taken and the aim that the state sets out to achieve, the decision of the administrator will be rational. In terms of this test, the impact that the decision - in this case the decision

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<sup>2</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 12; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 36. See also Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 77; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501.

<sup>3</sup> S 33(1) of the 1996 Constitution states that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'.

<sup>4</sup> In the long title of PAJA it is stated that the purpose of the act is '[t]o give effect to the right to administrative action that is lawful, reasonable and procedurally fair ... as contemplated in section 33 of the Constitution'. See Hoexter C *Administrative Law* (2<sup>nd</sup> ed 2012) 118.

<sup>5</sup> With reference to *Lebowa Minerals Trust Beneficiaries Forum Ltd v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) and Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 98-99, Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 567 state that '[c]ourts generally respect the choices made by the legislature or executive as to where the public interest lies'.

to expropriate - has on the expropriated owner is not taken into account. Therefore, the availability of alternative less invasive means is also not considered.

However, there might be instances where the application of a thin rationality test and ignoring the existence of an alternative, less invasive means are problematic, especially when it is not immediately clear that the expropriation is for a valid public purpose or in the public interest. Therefore, in this chapter it is also investigated how the decision of the expropriator is reviewed by the courts to illustrate the problems that might not be addressed by the application of a thin rationality test.

## **5 2 The Less Invasive Means Argument in South African Expropriation Law**

### *5 2 1 Expropriating More Property than Strictly Necessary: Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*

In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>6</sup> (*Bartsch*) the respondent expropriated the applicant's land for the construction of a road. The applicant attacked the validity of the expropriation on the basis that it was not an expropriation for a public purpose because the expropriation was for the benefit of a third party. In the alternative, the applicant argued that the respondent was not justified in expropriating the whole property since only half of the property was needed for the public purpose.<sup>7</sup> In this decision a distinction was made between the primary purpose of expropriation, namely the building of a road, and the secondary purpose of making the additional land available to a third party to erect a shopping mall.<sup>8</sup> In terms of the expropriation notice the expropriation was for the purpose of constructing a road as well as doing all things necessary in connection with building that road. According to the court the secondary purpose related to 'all things necessary in connection with the construction of the road'. Because the expropriation notice was wide enough to include the primary and the secondary purpose, the court held that the expropriation of the applicant's land in its entirety was for a public purpose.

According to the applicant, despite the fact that the respondents only required one third of its property for the building of the road, the property was expropriated in its entirety

<sup>6</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>7</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 6.

<sup>8</sup> This issue was also addressed in ch 4.

in order to transfer the property that was not needed for the construction of the road to a third party. Therefore, the validity of the purpose for expropriating the additional land, namely to allow the third party to erect a shopping mall, was contested.

The court dismissed the applicant's arguments, stating that the applicant confused motive with purpose. Having established that the expropriation was for a valid public purpose and that it was done in good faith, the court held that the motive behind the decision to expropriate was irrelevant 'to the question whether the power of expropriation had been validly exercised.'<sup>9</sup> Because the applicant could not prove that the expropriating authority acted in bad faith in expropriating its land, the court could find no fault in the decision of the respondent to expropriate the entire property.<sup>10</sup> In this regard the court did not consider whether the expropriation of the additional property for purposes of allowing the third party to erect a shopping mall was for a public purpose. If the court held that the expropriation of property for the construction of a shopping mall was also a valid public purpose that was covered by the authorising legislation, then the expropriation of the entire parcel of land would have been lawful. Because the court was of the opinion that the expropriation of the additional property to allow the third party to erect a shopping mall on the property was allowed for in the expropriation notice, it did not consider the argument of the applicant that there was a less invasive means available to the applicant that, if resorted to, would not have had any impact on the fulfilment of the primary purpose.

The *Bartsch* decision is interesting from a constitutional property law as well as an administrative law perspective. The court in *Bartsch* stated that the respondent is entitled to expropriate property in terms of the Expropriation Act 63 of 1975, subject to the 1996 Constitution, and that expropriating the property constitutes administrative action.<sup>11</sup> Therefore, the decision to expropriate can be evaluated from both a constitutional property law and an administrative law perspective.

In terms of section 25, the Expropriation Act and the public purpose requirement, the applicant in *Bartsch* argued that the respondent's decision to expropriate the entire parcel was unreasonable 'to the extent that the stated public purpose for the expropriation

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<sup>9</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 6. See the discussion on the relevance of motive in the decision to expropriate below at 53.

<sup>10</sup> The court failed to consider whether the purpose for which the additional property was expropriated was a valid public purpose.

<sup>11</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 15.



could not be said to be a public purpose.<sup>12</sup> There was evidence that the respondent planned to transfer the additional property to another party for the erection of a shopping mall. This case demonstrates various issues that may arise in the context of expropriation law, namely whether the expropriator is entitled to expropriate additional land not needed for the public purpose; whether the motive behind the expropriation is relevant in determining whether the expropriation is for a public purpose; whether an applicant will succeed in a claim that the expropriation is unnecessary since there is a different, less invasive means that can be employed; and whether the expropriation of property for transfer to a third party for economic development purposes is in the public interest. The question regarding third party transfer for economic development is addressed in Chapter 4. Therefore, the remaining issues are addressed in this chapter.

As indicated, one of the questions that surfaced in the *Bartsch* decision is whether the expropriator is entitled to expropriate more property than is strictly necessary to fulfil the public purpose that justifies the expropriation in the first place. According to Gildenhuis<sup>13</sup> the expropriating authority may expropriate more property than necessary if it foresees that it might require the additional property in future<sup>14</sup> or that it will have to pay more compensation if the additional land is expropriated at a later stage.<sup>15</sup>

However, if the excess property is not needed for the fulfilment of the public purpose but is intended for other purposes, such as selling the surplus land for a profit or transferring the land to a third party for development purposes, the expropriation of the surplus land can be challenged.<sup>16</sup> In the pre-1996 decision of *African Farms & Townships Ltd v Cape Town Municipality*,<sup>17</sup> the court upheld the expropriation of the owner's entire parcel of land, although a substantial portion of the land would eventually be sold to other

<sup>12</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010 para 1 5.

<sup>13</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 88.

<sup>14</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 88, with reference to *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) 268-270 and *Estates Development Co v Western Australia* (1952) 87 CLR 126. In the *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* decision, the court held that the expropriator's power of expropriation is not limited to the expropriation of property for its immediate purpose, thereby indicating that the expropriator may expropriate additional property than is immediately necessary. Again this is less troublesome when the purpose of the expropriation is for a narrow public purpose such as building roads, hospitals or schools, but if the additional property is expropriated for purposes that are further removed from the public interest, accepting that the expropriator may expropriate additional property may lead to unjust results.

<sup>15</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 88, with reference to *Thorcon Enterprises Ltd v District of West Vancouver* (1988) 39 LCR 311, *Gray v Oshawa City* (1971) 19 DLR 3d 524 and *Lynch v Ku-ring-gai Municipal Council and the Minister of Public Works* (1947) 16 LGR 144.

<sup>16</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 89. This is especially suspect when the additional land is transferred to a private party for economic development, in which case the private party is to receive substantial financial returns. See also Van der Walt *AJ Constitutional Property Law* (3<sup>rd</sup> ed 2011) 503.

<sup>17</sup> 1961 (3) SA 392 (C), discussed in ch 2 at 2 2 3 4.

private parties. Despite this decision, it is questionable whether an expropriation is justified when a part of the expropriated property will not be used for a public purpose. However, if an entire parcel of land is expropriated but the primary purpose of the expropriation (for which a large part of the property is expropriated) and the secondary purpose (for which the remainder is expropriated) are both for a valid public purpose, the expropriation of the entire parcel of land would be justified.

Van der Walt<sup>18</sup> argues that an expropriation should be invalid if more land is expropriated than is strictly required for the intended public purpose(s). On the basis of the *Bartsch* decision, Van der Walt argues that the validity of the primary purpose of the expropriation - the building of a public road - cannot simply justify the secondary purpose of transferring the excess land to a third party for economic development purposes.<sup>19</sup> It was already indicated that the expropriation notice authorised the expropriation for constructing a road and doing all things necessary in constructing that road, and since the building of a shopping mall is arguably not included in this purpose to the extent that it is not necessary for the construction of a road to build a shopping mall next to it, the justifiability of the expropriation for purposes of building of the shopping should have been evaluated more strictly.

In terms of South African law, the expropriator can only expropriate property in terms of authorising legislation. The legislation, namely the 1975 Expropriation Act as read with the 1996 Constitution, permits the expropriator to expropriate property for a public purpose or in the public interest. If the expropriator expropriates the property for a public purpose, such as building a road, the expropriator is arguably not justified to expropriate additional property to be used for a different purpose that might in itself not be a valid public purpose or that, even if it might be a valid purpose in itself, is not covered by the authorising legislation or necessary for the fulfilment of the primary purpose. If the additional property was expropriated for a public purpose - for instance for the purpose of establishing a service and recreation space where long-distance travellers could stop to refresh - expropriation of the additional property would have been justified.<sup>20</sup> Alternatively, if the court in *Bartsch* tested the purpose for which the additional property was to be used and found that it was also a legitimate public purpose in terms of the authorising legislation, there would not have been an issue. In that event the expropriation of the

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<sup>18</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 503.

<sup>19</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 503. It should have been evaluated whether the development was for a public purpose, since such a finding could have justified the expropriation of the additional property. See the analysis in ch 4.

<sup>20</sup> See ch 4 at 4 6 3.

additional property would also have been justified. However, the failure of the court to consider whether the additional property would be used for a valid public purpose leaves room for an expropriating authority to abuse its expropriation power.

## *5 2 2 Expropriation of Property Unnecessary*

### **5 2 2 1 *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works***

In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*<sup>21</sup> (*Erf 16 Bryntirion*) the Minister of Public Works expropriated the applicant's land for purposes of improving the security of the Bryntirion estate. The official residence of the President of South Africa, the state guest house and the houses of some cabinet members are situated in the Bryntirion estate. The applicant's property was the only property in the estate that was not owned by the government. The Minister was of the view that the state had to own all the properties within the estate to ensure that the estate was properly secured.

According to the Minister the security of the Bryntirion estate as a whole could only be upgraded effectively if the applicant's property could be incorporated into the estate. The applicant, on the other hand, argued that the overall security of the Bryntirion estate could be improved without expropriating his property but by adopting other means such as constructing high walls around his property. The Minister was of the opinion that the building of high walls around the applicant's property would not address the security issue due to the position of the applicant's property in relation to the new entrance to the estate. The Minister argued that the applicant's property 'offers the prime possibility' of setting up surveillance equipment to monitor traffic movements in and out of the estate; spying on the security methods applied in the estate; and housing persons who may intend to commit acts of sabotage or install equipment to jam telecommunications within the estate.<sup>22</sup>

The high court considered whether the expropriation was for a public purpose in accordance with the Expropriation Act 63 of 1975, whether the expropriation was justified in terms of the reasons given by the Minister, and whether the expropriation was procedurally fair. The court confirmed that the decision of the Minister to expropriate property in terms of the Expropriation Act was administrative action as contemplated by PAJA.<sup>23</sup> Therefore, it considered whether the decision to expropriate was rational, justifiable and procedurally fair. The high court held that the decision was rational, because

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<sup>21</sup> [2010] ZAGPPHC 154, 12 October 2010; [2011] ZASCA 246, 1 December 2011.

<sup>22</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010 para 20.

<sup>23</sup> Promotion of Administrative Justice Act 3 of 2000.

the decision to expropriate addressed a legitimate security concern. It also held that the decision to expropriate was justifiable, because the Minister proved that the security measures could not be effectively implemented without incorporating the applicant's property. Furthermore, it held that the decision to expropriate was procedurally fair since the applicant was given at least four opportunities to make representations to the Minister as to why the property should not be expropriated.

The high court also considered whether the expropriation was for a public purpose in terms of the Expropriation Act. The court referred to *Slabbert v Minister van Lande*<sup>24</sup> (*Slabbert*), where it was held that the expropriation of property to improve the security and privacy of the Prime Minister was for a public purpose. In *Slabbert* the court held that the expropriation of property to improve the security of the Prime Minister was not an expropriation for a private purpose but for the advancement of the administration of the state and consequently for a public purpose. Therefore, the high court concluded that 'the present case manifestly falls within the requirements of the Act [and] ... is an expropriation for public purposes'.<sup>25</sup> Once the court found that the expropriation was for a valid public purpose, the applicant's argument relating to the availability of less invasive means to achieve the public purpose was addressed. The high court held that if the expropriation was for a valid public purpose the fact that there are other, possibly less intrusive means to achieve the result was irrelevant.<sup>26</sup>

On appeal the Supreme Court of Appeal also considered whether the decision of the Minister to expropriate was rational and procedurally fair.<sup>27</sup> It confirmed that the decision of the Minister was rationally connected to address a security concern and that it was procedurally fair. According to the Supreme Court of Appeal the high water mark of the applicant's case was that the expropriation of his property was unnecessary, since there are other means available to the Minister to address the security concerns, such as incorporating his property in the new, upgraded estate. In this regard, the Supreme Court of Appeal held as follows:

'It is for the expropriating authority to decide how best to achieve its purpose. The evaluation of whether an expropriation is expedient or necessary lies with the expropriating

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<sup>24</sup> 1963 (3) SA 620 (T). This case is discussed in ch 2 at 2 2 3 5.

<sup>25</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010 para 59.

<sup>26</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010 para 54, with reference to *Fourie v Minister van Lande* 1970 (4) SA 165 (O) and *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A). See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501.

<sup>27</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011.

authority. The fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a “public purpose”.<sup>28</sup>

Therefore, both the high court and the Supreme Court of Appeal held that if an expropriation is for a valid public purpose, the argument that there are other, less intrusive measures to fulfil the public purpose will not be entertained. According to Van der Walt, this decision confirms the ‘standard view of the authority to take the decision to expropriate.’<sup>29</sup> If the expropriation is for a public purpose, the decision of the expropriating authority cannot be questioned by the relevant parties or even by the courts,<sup>30</sup> provided that the decision was made in good faith and without an ulterior motive.<sup>31</sup> Since the decision of the Minister of Public Works to expropriate the applicant’s land was rationally connected to the intended purpose, both the high court and the Supreme Court of Appeal held that the decision to expropriate was not open to attack.<sup>32</sup>

### **5 2 2 2 eThekweni Municipality v Sotirios Spetsiotis**

In *eThekweni Municipality v Sotirios Spetsiotis*,<sup>33</sup> the applicant wanted to develop a beach front area for purposes of the 2010 Soccer World Cup. The respondent operated a restaurant on the beach front area in terms of a lease agreement between itself and the applicant. To develop the area the applicant had to demolish the premises on which the respondent was conducting its business. To achieve this aim the applicant expropriated the respondent’s lease.

The respondent did not deny the potential benefits that the development would generate, but argued that there was no need to expropriate his lease for purposes of the development. According to the respondent, it was unnecessary for the applicant to demolish the building in which he operated his restaurant business since the redevelopment plan could be realised by simply relocating some of the restaurant’s outside seating area. Therefore, the respondent argued that there was no rational connection between the expropriation of its lease and the public purpose it intended to serve.

<sup>28</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 16.

<sup>29</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501, with reference to *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 77, 92.

<sup>30</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501; Van der Walt AJ ‘Constitutional Property Law’ 2010 ASSAL 251-294 at 273.

<sup>31</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 77.

<sup>32</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501-502.

<sup>33</sup> [2009] ZAKZDHC 51, 6 November 2009.

The court held that the development plan was for a public purpose and that there was a rational connection between the expropriation of the lease and the development plan. It did not consider whether the relocation of the respondent's outside seating area would render the expropriation unnecessary because, according to the court, the respondent relied on the initial redevelopment scheme that was subsequently changed by the applicant. In terms of the changed redevelopment scheme the demolition of the building was inevitable. However, the court failed to consider whether the demolition of the building was strictly necessary for the purpose for which the lease was expropriated.

### 5 2 3 Analysis

The less invasive means argument presents itself in each of the three decisions discussed above, but in different forms. In the *Bartsch*<sup>34</sup> decision the question relating to the less invasive means argument was based on the assumption that the expropriator could have elected to expropriate only two-thirds of the applicant's property rather than the entire piece of property. In the *Erf 16 Bryntirion*<sup>35</sup> and *eThekwini Municipality v Sotirios Spetsiotis*<sup>36</sup> decisions the less invasive means argument related to the implementation of alternative means to expropriation that would still have resulted in the realisation of the public purpose. In the *Erf 16 Bryntirion* decisions the courts stated that alternative, less invasive measures are irrelevant when it has already been established that the expropriation is for a valid public purpose.<sup>37</sup> The Supreme Court of Appeal also stated that there was no basis on which the expropriation of the applicant's property for purposes of upgrading the security of the estate could be perceived as being irrational.<sup>38</sup> In *eThekwini Municipality v Sotirios Spetsiotis* the court did not consider the alternative means since there was a rational connection between the expropriation and the fulfilment of the valid public purpose. In the *Bartsch* decision the court did not consider the alternative means, namely expropriating only the property strictly needed for the public purpose, since the court was of the opinion that the applicant confused motive with purpose.

From these decisions it seems probable that the courts will not, in terms of section 25(2), consider alternative means as an argument to invalidate an expropriation. This is

<sup>34</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>35</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010.

<sup>36</sup> *eThekwini Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009.

<sup>37</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 16. See also *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010 para 54.

<sup>38</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 10.



partly due to the rationality test that the courts apply in expropriation cases. The courts also adopt a deferential approach to the decision of the expropriator to expropriate property for a public purpose.<sup>39</sup>

However, in terms of the logic advanced by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>40</sup> (*FNB*), Van der Walt<sup>41</sup> argues that the public purpose requirement could also be tested against the non-arbitrariness requirement in section 25(1). In *FNB* the Constitutional Court held that expropriation is a subset of deprivations and that review of all infringements with property has to start with the requirements for a valid deprivation in section 25(1).<sup>42</sup> Although the Supreme Court of Appeal in *Minister of Minerals and Energy v Agri SA*<sup>43</sup> stated that it is unnecessary to go through the deprivation analysis if both parties agree that the deprivation is not arbitrary and the only issue to be resolved is either whether there is in fact an expropriation or, in the event that there is an expropriation, the amount of compensation is attacked, there remain instances where the analysis has to start with section 25(1). For instance, when the lawfulness of the expropriation is attacked by one of the parties, in other words where the issue is whether the expropriation is for a valid purpose or in the public interest, the analysis should in all probability start with section 25(1). The reason for this is that any factor that would render the expropriation unconstitutional because it is not for a public purpose would also probably mean that it is an arbitrary deprivation in terms of section 25(1). Therefore, apart from the specific requirements of section 25(2), considering whether the expropriation is justified in terms of the public purpose requirement because

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<sup>39</sup> See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 567.

<sup>40</sup> 2002 (4) SA 768 (CC).

<sup>41</sup> Van der Walt AJ 'Constitutional Property Law' 2012 (1) *JQR* 2 1; Van der Walt AJ 'Constitutional Property Law' 2010 (4) *JQR* 2 4 1.

<sup>42</sup> Roux T 'Property' in Woolman S, Bishop M & Brickhill J (eds) *CLOSA Vol III* (2<sup>nd</sup> ed OS 2003) ch 46 at 2-3 argues that the methodology adopted by the Constitutional Court in *FNB* has a telescoping effect; all the stages of the property clause inquiry are 'telescoped' into the question whether or not the deprivation is arbitrary. If Roux's argument is followed, it is unlikely that an infringement of property will be subjected to an analysis of s 25(2)-(3), since all disputes concerning deprivation and expropriation will be decided on the basis of the arbitrary deprivation test. However, in a number of decisions delivered after *FNB*, courts have considered the s 25(2) requirements for a valid expropriation without considering s 25(1) of the Constitution. This occurs when an expropriation has already taken place and the claimants argue that the expropriation is invalid since it is not for a public purpose or in the public interest or if the issue to be decided is whether the compensation offered complies with the Constitutional provision. In this regard see *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Haffejee NO and Others v eThekweni Municipality and Others* [2011] ZACC 28, 25 August 2011. In *Minister of Minerals and Energy v Agri SA (CALSA Amicus Curiae)* (458/11) [2012] ZASCA 93, 31 May 2012 the Supreme Court of Appeal explicitly stated that it is possible in certain instances to proceed directly to the s 25(2) inquiry.

<sup>43</sup> (458/11) [2012] ZASCA 93, 31 May 2012.

there a less intrusive means available to the expropriator could also involve testing the expropriation against the requirements of section 25(1).<sup>44</sup>

In terms of section 25(1), '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' The requirement 'law of general application' is also found in section 25(2) and seldom gives rise to difficulties in expropriation cases, since all expropriations rest on a legislative basis and is effected in terms of legislation, most notably the Expropriation Act 63 of 1975.<sup>45</sup> A deprivation may also not be arbitrary. A deprivation of property will be arbitrary if there is insufficient reason for it or if it is procedurally unfair.<sup>46</sup> In terms of the procedurally unfair analysis, the test would resemble the procedural fairness test in terms of administrative law, but will probably only apply in cases where the deprivation is brought about directly by the legislation, without intervening administrative action.<sup>47</sup> Since expropriation is almost always brought about by administrative action in South African law, this aspect of the arbitrariness test probably holds little if any meaning for expropriation cases. In terms of the test for substantive arbitrariness, namely whether there is sufficient reason for the deprivation, the test for non-arbitrariness could either be a rationality test or a proportionality test, depending on the relevant circumstances.<sup>48</sup>

Van der Walt<sup>49</sup> argues that in cases dealing with the core police power, for instance public health and safety, a rationality test would suffice, but in cases that go beyond the core police power a proportionality test would be more suitable. Instances where the application of the proportionality test would be more suitable than a rationality test include

<sup>44</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 222-224.

<sup>45</sup> See ch 3 at 3 3 2.

<sup>46</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also Van der Walt AJ 'Procedurally Arbitrary Deprivation of Property' (2012) 23 *Stell LR* 88-94 at 88.

<sup>47</sup> Van der Walt AJ 'Procedurally Arbitrary Deprivation of Property' (2012) 23 *Stell LR* 88-94 at 90 argues that in terms of the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) and *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) decisions, procedural arbitrariness must be adjudicated in terms of s 25(1), but based on administrative law principles. However, because of the principle of subsidiarity that has been formulated in recent Constitutional Court decisions Van der Walt submits that the test for procedural arbitrariness should be judged in terms of PAJA that was specifically promulgated to 'give effect to the right to just administrative action (including procedural fairness)' and not in terms of s 25(1). See further Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 267. On subsidiarity see Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 66-69.

<sup>48</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also Van der Walt *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 245-246; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 545-546.

<sup>49</sup> Van der Walt AJ 'Constitutional Property Law' 2012 (1) *JQR* 2 1. See also Van der Walt AJ 'Constitutional Property Law' 2010 (4) *JQR* 2 4 1.

the expropriation of property for the wider category of expropriation in the public interest such as broadly defined economic development purposes.<sup>50</sup> In terms of the proportionality test the owner that bases his claim on the justifiability of the expropriation and not on the amount of compensation that is offered would be afforded additional protection by the application of a proportionality-type enquiry. In terms of the proportionality inquiry the effect that the expropriation has on the individual owner can be considered in addition to the rational link between the purpose of the expropriation and the means selected to realise it, which in turn means that the deprivation inquiry can include an investigation into whether alternative means are available to realise the purpose.

However, given the decision in *Erf 16 Bryntirion*<sup>51</sup> it is unclear whether the section 25(1) inquiry would add anything in view of the rationality test applied in that inquiry and the rationality test applied in administrative law.<sup>52</sup> Furthermore, decisions heard after *FNB* indicate that courts do not consistently apply the methodology, as adopted in *FNB*, according to which the arbitrariness test should be applied in all instances where property rights have been infringed.<sup>53</sup> For instance, in *Du Toit v Minister of Transport*<sup>54</sup> the Constitutional Court skipped the section 25(1) inquiry and proceeded directly to the question whether the compensation offered complied with section 25(3) of the Constitution. Although the applicability of this truncated approach in cases where it is agreed by all parties that there was an expropriation and where the amount of compensation is the only issue was confirmed in *Minister of Minerals and Energy v Agri SA*,<sup>55</sup> it was argued above that in certain situations the analysis necessarily has to start with section 25(1). This is arguably particularly the case when the justifiability of the public purpose supposed to be served by the expropriation is in issue, and by extension also when it is alleged that there are alternative, less invasive means available to satisfy the purpose. However, in view of the case law discussed earlier it remains uncertain whether the courts will apply a proportionality test, in terms of the non-arbitrariness test established in terms of section 25(1) by the Court in *FNB*, to expropriation cases of this kind. In that sense the alternative measures will possibly not be considered either.

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<sup>50</sup> Van der Walt AJ 'Constitutional Property Law' 2012 (1) *JQR* 2 1.

<sup>51</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011.

<sup>52</sup> Van der Walt AJ 'Constitutional Property Law' 2012 (1) *JQR* 2 1.

<sup>53</sup> See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC). See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 224-225, 285.

<sup>54</sup> 2006 (1) SA 297 (CC).

<sup>55</sup> (458/11) [2012] ZASCA 93, 31 May 2012.

However, the argument of Van der Walt<sup>56</sup> in terms of the *FNB* and *Erf 16 Bryntirion* decisions concerning the test for arbitrariness in terms of section 25(1) can probably be extended to expropriation, in other words to section 25(2) cases. In the event that the expropriation concerns a function of government (akin to the core police-power functions) such as the building of roads and hospitals or the establishment of water catchment areas, the application of a rationality test will probably not have any negative effects for the affected property owner. However, in instances where the purpose of the expropriation moves away from these 'traditional' types of core purposes to a purpose that is not clearly defined or that is merely vaguely in the public interest an argument can be made for the application of a proportionality-type inquiry in terms of the section 25(2) public purpose requirement. In the Irish case law discussed below the proportionality inquiry involves the consideration as to whether the expropriator took alternative means into account when it decided to expropriate the property. The decision of the expropriator is therefore subjected to heightened scrutiny in a more contextual approach, taking into account various alternatives that might have been available. Nevertheless, it is uncertain whether the South African courts will in fact develop this type of test in terms of section 25(2) of the Constitution, given the uncertainty that exists in case law concerning the distinction between the public purpose and public interest requirements.

Because expropriation has such a drastic impact on an individual's constitutionally protected property rights there must be a sufficient and pressing public purpose or public interest to justify the expropriation of one owner's property for the benefit of the community.<sup>57</sup> In principle the state should only be permitted to expropriate property that is strictly necessary for the fulfilment of the public purpose and the state's expropriation power should be regarded as a tool to be used only when all other possibilities to realise the public purpose have proved to be ineffective. For instance, if the state wants to declare a portion of a person's farm an environmentally sensitive area and wants to prevent development on that piece of property, it would first have to consider whether a non-expropriatory, regulatory measure, such as placing a ban on development on the environmentally sensitive area, will sufficiently preserve the environment. Only if such a 'less invasive' regulatory measure will be ineffective in achieving the relevant public purpose will the state be justified in expropriating the land. The state should also have considered buying the property and only if an agreement to buy proves to be impossible or

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<sup>56</sup> Van der Walt AJ 'Constitutional Property Law' 2012 (1) *JQR* 2 1. See also Van der Walt AJ 'Constitutional Property Law' 2010 (4) *JQR* 2 4 1.

<sup>57</sup> See generally Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 459, 465, 475-483.

ineffective should it consider expropriating the land. However, if the regulatory measure would be just as effective - and would pass the non-arbitrariness test in terms of section 25(1) - the public purpose requirement should prevent the expropriation since the expropriation is not strictly necessary for the achievement of the public purpose.

Therefore, if the community can enjoy a benefit without one owner having to sacrifice his property through expropriation, the expropriation of his property to enable the community to enjoy the same benefit raises concern. This concern is not necessarily adequately addressed through the application of a thin rationality test since it excludes an inquiry into the availability of alternative and less invasive means. Since the decision to expropriate property is also administrative action, it should be investigated whether there is a mechanism in administrative law that would persuade the court to consider alternative means in terms of a different test.

### 5 3 The Relevance of Motive in the Decision to Expropriate

An ancillary issue in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>58</sup> (*Bartsch*) is the relevance of motive in the decision to expropriate property. In *Bartsch* the court stated that the motive behind the decision of the expropriator to expropriate is irrelevant when the power of expropriation was validly exercised. According to Gildenhuis,<sup>59</sup> it is accepted that if the expropriation is for a public purpose, the motive behind the decision to expropriate is irrelevant. Gildenhuis refers to *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development*<sup>60</sup> (*White Rocks Farm*), where the applicant argued that the real reason for the expropriation was of a financial nature, namely to save money. In the *White Rocks Farm* decision the court also held that the applicant confused motive with purpose. The purpose was a valid public purpose and the decision as to the best way to realise the purpose is the motive behind the decision. Since the purpose was a valid public purpose the motive behind the decision to expropriate the property rather than to adopt a different measure is irrelevant. In another decision, *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*,<sup>61</sup> the applicant argued that his property was expropriated prematurely in order to avoid paying more compensation at a later stage. The court held that if the purpose of expropriation is a valid purpose and if the expropriation is undertaken in good faith, the motive behind the decision

<sup>58</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>59</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 92.

<sup>60</sup> 1984 (3) SA 785 (N).

<sup>61</sup> 1969 (2) SA 256 (C).



to expropriate is irrelevant.<sup>62</sup> Therefore, the motive in itself will not invalidate the expropriation.<sup>63</sup>

Hoexter<sup>64</sup> states that this line of argument, which has also been adopted in various other cases decided during the apartheid era, is not to be preferred. She refers to *Broadway Mansions (Pty) Ltd v Pretoria City Council*<sup>65</sup> and *Olifantsvlei Townships Ltd v Group Areas Development Act*,<sup>66</sup> where the court also refused to question the relevant administrator's motives, 'even if these might have been of a reprehensible kind.'<sup>67</sup> Hoexter argues 'that where a legitimate purpose has been pursued by a functionary, the court will not concern itself with the true motives of the functionary.'<sup>68</sup> However, Hoexter prefers the approach taken in cases such as *Waks v Jacobs*<sup>69</sup> and *Hart v Van Niekerk NO*,<sup>70</sup> where the courts were prepared to question the motives behind the decisions of the administrators.<sup>71</sup> For instance, *Waks v Jacobs* concerned the placing of a reservation on certain public parks for the exclusive use of white citizens. The purpose of the reservation was to solve a 'black nuisance problem'<sup>72</sup> in a white residential area. The court held that this reservation, which was made possible in terms of the Reservation of Separate Amenities Act 49 of 1953, conflicted with section 63 of the Transvaal Local Government Ordinance 17 of 1939, which required the local authority to maintain parks for the benefit of all members of the public. Furthermore, the court held that the real reason for the reservation was politically motivated and not, as stated, for solving a nuisance problem.<sup>73</sup>

<sup>62</sup> See Baxter L *Administrative Law* (1984) 513; Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 705.

<sup>63</sup> Baxter L *Administrative Law* (1984) 512 argues that since determining the administrator's motive requires a subjective inquiry it was accepted that 'the courts should only concern themselves with the objective intention or purpose of the public authority, not its motives of subjective reasons for acting in the way it did.' See also Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 703.

<sup>64</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 311.

<sup>65</sup> 1955 (1) SA 517 (A). In this decision the applicant demolished the physical structures on his property with the intention of redeveloping the property. However, after he was granted approval by the local authority to proceed with the redevelopment, the local authority served an expropriation notice on him with regard to the said property for purposes of upgrading the road system. The applicant argued that the local authority decided to expropriate his property to avoid paying more compensation at a larger stage when the redevelopment might be completed. According to the Appellate Division of the Supreme Court the allegation of the applicant was immaterial. The Appellate Division held that the local authority had the power to expropriate the property for the stated purposes and that its power is not limited to property that is needed only for its immediate purposes. See also Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 704-705.

<sup>66</sup> 1964 (3) SA 611 (T).

<sup>67</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 311. See also Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719.

<sup>68</sup> Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 704.

<sup>69</sup> 1990 (1) SA 913 (T).

<sup>70</sup> 1991 (3) SA 689 (W).

<sup>71</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 311.

<sup>72</sup> Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 714.

<sup>73</sup> Hoexter C 'Administrative Justice and Dishonesty' (1994) 111 SALJ 700-719 at 714.



Baxter<sup>74</sup> also argues that the motive behind an administrator's decision to expropriate property for a public purpose cannot be irrelevant when a court reviews the decision of the administrator. He argues that the law should concern itself with whether the public authority was motivated by spite or ill-will towards the individual or whether the authority took unfair advantage of its powers.<sup>75</sup> Hoexter agrees with Baxter's argument that the motive behind the expropriation is relevant in so far as it can aid in the discovery of the real purpose.<sup>76</sup> In this regard Gildenhuis also argues that the expropriator's motive can be an indication that the stated purpose of expropriation is not the real purpose, which could render the expropriation invalid.<sup>77</sup>

Quinot<sup>78</sup> also points out that the court in *Bartsch*<sup>79</sup> failed to recognise that motive (together with ulterior purpose) is an independent ground of review in terms of section 6(2)(e)(ii) of PAJA.<sup>80</sup> Furthermore, Quinot<sup>81</sup> criticises the court's reliance on pre-1996 administrative law decisions and the failure on the court's part to recognise that authorised reasons (section 6(2)(e)(i)) and good faith (section 6(2)(e)(v)) are further grounds of review in terms of PAJA.

In *Bartsch*, the motive behind the decision of the administrator to expropriate the additional property may have been to stimulate the economy. To realise this goal, the administrator expropriated the entire parcel of property under the pretence that it was needed for the building of a public road when in reality part of the property was to be transferred to a third party for the construction of a shopping mall. The motive seems to be an indication of whether the property was to be expropriated - in its entirety - for a public purpose. Therefore, the motive cannot be totally irrelevant, because it can be an indication of where the public purpose really lies.<sup>82</sup> In this decision it is arguable that the motive behind the decision to expropriate the property was to facilitate economic development of the property by a third party. That purpose in itself may be valid and may even be authorised by the relevant legislation, but in the absence of closer scrutiny it is unclear

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<sup>74</sup> Baxter L *Administrative Law* (1984) 513.

<sup>75</sup> Baxter L *Administrative Law* (1984) 513.

<sup>76</sup> Baxter L *Administrative Law* (1984) 513-514 also argues that the exercise of public power is 'a kind of public trust' and that the state should exercise this power in the public interest. Furthermore, on the basis of French law Baxter argues that the courts must serve as the 'conscience of the administration'. See also Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 90, 104-105.

<sup>77</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 92.

<sup>78</sup> Quinot G 'Administrative Law' 2010 ASSAL 41-76 at 57.

<sup>79</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>80</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>81</sup> Quinot G 'Administrative Law' 2011 ASSAL 41-76 at 57. See also Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 311-312.

<sup>82</sup> See Baxter L *Administrative Law* (1984) 513.

whether this was in fact the case. Therefore, the motive behind the decision to expropriate property should be a relevant consideration when determining whether the expropriation is for a valid public purpose or in the public interest, at least in some cases.

## 5 4 Administrative Law Implications

### 5 4 1 The Administrative Law Principle of Reasonableness: Rationality and Proportionality

In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*<sup>83</sup> the high court considered whether the decision of the administrator was rational. It held that the decision to expropriate 'had a rational purpose relating [to] legitimate security concerns'.<sup>84</sup> The Supreme Court of Appeal<sup>85</sup> also confirmed that the decision of the Minister to expropriate the property was rationally connected to a security concern. In *eThekweni Municipality v Sotirios Spetsiotis*<sup>86</sup> the court held that the expropriation of the applicant's lease was rationally connected to the development of the beach front area. In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>87</sup> the court did not consider whether there was a rational connection between the building of the road (the purpose of the expropriation) and the expropriation of the additional property. According to Van der Walt,<sup>88</sup> the traditional view favoured by the courts, in which the decision to expropriate is 'open to no more than rationality review',<sup>89</sup> should be re-considered in light of the new constitutional principles of legality and reasonableness.

In terms of the administrative justice requirement of reasonableness, an administrator's decision must be rational and proportional.<sup>90</sup> In terms of the rationality question, the decision of the administrator must be supported by the facts that the administrator had at his disposal when making the decision and this decision must be supported by the reasons for the decision.<sup>91</sup> Therefore, if there is a rational connection

<sup>83</sup> [2010] ZAGPPHC 154, 12 October 2010.

<sup>84</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010 para 57.

<sup>85</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011.

<sup>86</sup> [2009] ZAKZDHC 51, 6 November 2009.

<sup>87</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>88</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501-502; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 273-274.

<sup>89</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501.

<sup>90</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 340, 343-344.

<sup>91</sup> In *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 37 the Labour Appeals Court put the question concerning rationality as follows: '[I]s there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?' See Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 339-340.

between the decision that was taken and the aim set out to be achieved, the decision of the administrator will be rational.

A decision would also be irrational if it serves no lawful government purpose.<sup>92</sup> In the *Erf Bryntirion*<sup>93</sup> decisions it was accepted that the decision to expropriate was for a governmental purpose and that it was rational. Even if the decision of the expropriator was subjected to stricter scrutiny it is unlikely that the decision to expropriate would have been overturned, given that the expropriation was clearly for a public purpose and the Minister of Public Works showed that expropriation was the only way in which to improve the security of the Bryntirion estate.<sup>94</sup>

However, in *Bartsch* the decision to expropriate was taken for the apparently ulterior purpose of benefiting a third party, and the fact that the court did not investigate whether the expropriation to benefit a third party was for a public purpose or in the public interest demonstrates the court's deference towards the decision of the expropriator to expropriate property. This also implies that the court neglected to consider alternative means, since that would have involved questioning the expropriator's decision.

The approach of the courts to test the decision of the administrator only on the basis on rationality stems from the English law tradition based on the principle of parliamentary supremacy.<sup>95</sup> In current South African law, where constitutional supremacy replaced parliamentary supremacy, it might be necessary for the courts to reconsider, in light of the new constitutional notion of reasonableness, its reluctance to decide whether less invasive means would have been available to the state to fulfil the desired purpose.<sup>96</sup> This could also involve the proportionality test, which is the second leg of the reasonableness question.<sup>97</sup>

In terms of the proportionality test, the adopted measure (in this case the decision to expropriate property) must be proportional to the aim (the purpose) that is to be

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<sup>92</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC) para 84; *Van der Merwe v RAF (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) para 48; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 10.

<sup>93</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010.

<sup>94</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 502; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 274.

<sup>95</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501-503.

<sup>96</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 501-502; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 274.

<sup>97</sup> The principle of proportionality originates from German law: Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344; De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) 203. The principle of proportionality, as applied in German constitutional law, is discussed below at 5 4 2.

achieved by the expropriation.<sup>98</sup> This proportionality principle includes three sets of questions. Firstly, it should be considered whether the adopted measure is suitable to achieve the aim.<sup>99</sup> In other words, it should be established whether there is an appropriate balance between the means adopted and the end result.<sup>100</sup> Secondly, it should be established whether the adopted measure is strictly necessary.<sup>101</sup> According to De Ville, this involves considering whether any 'lesser form of interference with the rights of a person was possible in order to achieve the desired aim (such alternative measures being equally effective to the measure taken)'.<sup>102</sup> Thirdly, if the adopted measure is both suitable and strictly necessary, it should be considered if it does not place an unfair or disproportionate burden on the individual whose rights are affected.<sup>103</sup>

The status of proportionality as a ground for review is controversial in South African law.<sup>104</sup> Proportionality was not specifically included in PAJA as a ground for review, but substituted with section 6(2)(h), 'a ground dealing with unreasonable effects'.<sup>105</sup> Although there are fears that the courts would be overburdened by this type of review or that courts would replace the decision (or policy) of administrators with its own policy preferences,<sup>106</sup> Hoexter argues that the meaning of reasonableness supposes 'an area of "legitimate diversity,"'<sup>107</sup> an area in which many reasonable choices can be made.<sup>108</sup>

Although the status of this ground of review is controversial in South African administrative law,<sup>109</sup> it is worth considering whether this principle should not apply in South African expropriation law as it does in German expropriation law. Therefore,

<sup>98</sup> See Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 343-346.

<sup>99</sup> De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) 203.

<sup>100</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344.

<sup>101</sup> De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) 203; Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344.

<sup>102</sup> De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) 203. See also Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344.

<sup>103</sup> De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) 203.

<sup>104</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344. However, at 345 Hoexter argues that proportionality has recently gained judicial support in addition to the support from some academics, such as De Ville JR *Judicial Review of Administrative Action in South Africa* (1<sup>st</sup> rev ed 2005) and Plasket C *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis Rhodes University 2002).

<sup>105</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 345. S 6(2)(h) of PAJA states that an administrative action can be reviewed if 'the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function'.

<sup>106</sup> Asimow M 'Towards a South African Administrative Justice Act' (1997) 3 *Michigan Journal of Race and Law* 1-27 at 13-14; Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 346-347.

<sup>107</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 347.

<sup>108</sup> See also Hoexter C 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484-519 at 509-510.

<sup>109</sup> Hoexter C *Administrative Law in South Africa* (2<sup>nd</sup> ed 2012) 344.

German expropriation law is discussed with a focus on the constitutional principle of proportionality that also specifically applies to expropriation law.

#### 5 4 2 Proportionality in German Expropriation Law

As indicated in the previous chapter, article 14.3 of the 1949 Basic Law for the Federal Republic of Germany states that property can only be expropriated if it is undertaken for a public good.<sup>110</sup> It was also argued that article 14 of the Basic Law is a guarantee of the substance of property and not its equivalent in monetary value. As a result, an expropriation of property is not justified by the payment of compensation.<sup>111</sup> The Federal Constitutional Court, which has authority to test whether actions of the state or legislation complies with the Basic Law, scrutinizes the expropriation, and specifically the purpose of the expropriation, carefully.<sup>112</sup> In terms of article 14.3 expropriations must be authorised by a valid law and, in terms of the linking clause (*Junktim-Klausel*), the law has to determine the manner and extent of the compensation that has to be paid.<sup>113</sup> In the event that the limitation results in an expropriation of property without making provision for compensation, the limitation will be invalid.<sup>114</sup>

The expropriation must be for the public good (*zum Wohle der Allgemeinheit*)<sup>115</sup> but it is up to the legislature to decide for which purpose the expropriated property is to be

<sup>110</sup> See ch 4 at 4 4 4.

<sup>111</sup> Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 para 160; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 291. See also Kleyn D 'The Constitutional Protection of Property: A Comparison between the German and South African Approach' (1996) 11 *SAPL* 402-445 at 414.

<sup>112</sup> Currie DP *The Constitution of the Federal Republic of Germany* (1994) 219; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 302.

<sup>113</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147. According to Kleyn D 'The Constitutional Protection of Property: A Comparison between the German and South African Approach' (1996) 11 *SAPL* 402-445 at 435, the function of this linking clause 'is to compel the legislature to decide beforehand whether the restrictive measures it proposes to take will amount to expropriation, and to notify the public accordingly'.

<sup>114</sup> Kleyn D 'The Constitutional Protection of Property: A Comparison between the German and South African Approach' (1996) 11 *SAPL* 402-445 at 435.

<sup>115</sup> The 'public good', sometimes also referred to as the public weal, is a narrow category that requires the expropriation to be strictly for a public need, and not merely in the public interest: Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 para 160; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148. Furthermore, the reference to public good in this regard must be distinguished from the reference to the public interest in terms of the determination of compensation, which is a broader concept than the public good that justifies the expropriation. The public good refers to the protection of the individual interest (the property) while the reference to the latter is aimed at protecting the public interest: Concurring judgment of Böhmer J in *BVerfGE* 56, 249 [1981] (*Dürkheimer Gondelbahn*). See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148 and the discussion in ch 4 at 4 4 4.



used. In a concurring judgment in the *Dürkheimer Gondelbahn*<sup>116</sup> decision, Böhmer J summarised the understanding of the public good requirement in terms of German expropriation law. Böhmer J interpreted the public good requirement as requiring that the expropriation 'must be strictly necessary'<sup>117</sup> for the fulfilment of the particular public good. Therefore, the legislation that authorises the expropriation must clearly state the purpose for which the property is expropriated and this purpose must be for the public good.<sup>118</sup>

Apart from the specific requirements of article 14.3, an expropriation also has to satisfy the general requirements that apply when limitations are placed on property.<sup>119</sup> This includes the proportionality requirement as well as constitutional principles such as equality and the protection of trust.<sup>120</sup> The principle of proportionality plays a central role in German constitutional law.<sup>121</sup> Although there is no explicit reference to the proportionality principle in the Basic Law, the Federal Constitutional Court often invokes this principle to test whether an act of government or legislation is in conflict with the Basic Law.<sup>122</sup>

Proportionality, as understood in German law, consists of three aspects.<sup>123</sup> Firstly, the means adopted must be appropriate or suitable to the fulfilment of the end result.<sup>124</sup> Secondly, the adopted means must have the least restrictive effect on the right protected in the Basic Law.<sup>125</sup> In terms of this consideration the standard that must be met is that of rationality.<sup>126</sup> Thirdly, the adopted means must be proportionate to the end result.<sup>127</sup> Therefore, the burden placed on the individual's right must not be excessive.<sup>128</sup>

<sup>116</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*). See also the discussion of this decision in ch 4 at 4 4 4 2.

<sup>117</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*) 278. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148.

<sup>118</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 284; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 588.

<sup>119</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147.

<sup>120</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147. See also Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 125-128.

<sup>121</sup> The principle of proportionality forms part of the *Rechtsstaat* principle, a basic structural principle of German law: Currie DP *The Constitution of the Federal Republic of Germany* (1994) 18-19; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 125-128.

<sup>122</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 309.

<sup>123</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 20, 309-310. See also Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 128; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 161.

<sup>124</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46.

<sup>125</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 20, 309-310.

<sup>126</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46.



In terms of this understanding of the public good, coupled with the proportionality principle described above, the German Federal Constitutional Court has indicated that an expropriation can only be valid if it is the only feasible manner (*ultima ratio*) to achieve the public good.<sup>129</sup> In this regard Mostert states that the expropriation must be requisite, which means that no 'other more lenient or less serious method would have been appropriate'.<sup>130</sup> For example, if the state could have acquired the land on the open market or if the state already has sufficient land at its disposal for realising that specific purpose, the expropriation will be invalid.<sup>131</sup> Furthermore, if the state expropriates an entire parcel of land, but only a section is strictly required for the purpose, the expropriation of the entire parcel will also be invalid.<sup>132</sup> Therefore, if the purpose of the expropriation could have been served by adopting less drastic means, the expropriation will be invalid.<sup>133</sup> This is in accordance with the view of the German courts that the public good that is served by the expropriated property has to be strictly necessary to ensure that the appropriate balance between the protection of the individual property right and the interests of the society is

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<sup>127</sup> Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed 1997) 46; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 309-310.

<sup>128</sup> Currie DP *The Constitution of the Federal Republic of Germany* (1994) 309-310; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 128; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 161.

<sup>129</sup> BVerfGE 24, 367 [1968] (*Deichordnung*); Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 309-310 para 589; Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hophauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513-514 para 67; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 164; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 303; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 587. Currie DP *The Constitution of the Federal Republic of Germany* (1994) 293 states that '[e]ven when the explicit requirement of statutory authority, public weal, and just compensation appear to be met, the Constitutional Court has made it clear that condemnation is an exceptional remedy that may be employed only as a last resort'.

<sup>130</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 303.

<sup>131</sup> Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 624. See also Kleyn D 'The Constitutional Protection of Property: A Comparison between the German and South African Approach' (1996) 11 *SAPL* 402-445 at 436.

<sup>132</sup> See Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 164; Kleyn D 'The Constitutional Protection of Property: A Comparison between the German and the South African Approach' (1996) 11 *SAPL* 402-445 at 436.

<sup>133</sup> BVerfGE 24, 367 [1968] (*Deichordnung*); Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 310-311 paras 589-590; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 164; Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hophauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513-514. See also Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 303; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 587.

maintained.<sup>134</sup> Therefore, in terms of German law the state's power of expropriation can only be implemented as a matter of last resort. If the expropriation can be served without expropriating the property, expropriation will be unlawful.

Given the similarities between the German property clause and section 25(1)-(3) of the 1996 Constitution<sup>135</sup> it is arguable that expropriation should also be regarded as a matter of last resort in South African expropriation law. In *Harvey v Umhlatuze Municipality*<sup>136</sup> the court confirmed that the expropriation is justified by the public purpose that is served and not by the payment of compensation. This indicates that the mere payment of compensation does not justify the state to expropriate property, but that the public purpose must justify the expropriation on its own, regardless of the fact of compensation.

It can be said that the strict German approach to the expropriation of property for public purposes means that the state should only be allowed to use its expropriating powers as a matter of last resort.<sup>137</sup> If the public purpose requirement is understood to mean that expropriation can only be utilised as a matter of last resort the question of alternative means (other than expropriation) surfaces, since the availability of a different, less invasive mean to fulfil the public good would invalidate the expropriation.

The German courts' approach to the evaluation of the public purpose is in contrast to the position of the courts in the United States. The German courts interpret the public purpose requirement strictly in terms of the authorising legislation. Therefore, the courts strictly evaluates both the justification of the expropriation in terms of the public purpose the expropriation is intended to serve and the authorising legislation, which must specifically authorise the expropriation for the fulfilment of the particular public purpose.<sup>138</sup> The courts in the United States, especially the US Supreme Court, are deferential to the decision of the legislature as to what constitutes a valid public purpose. Various decisions prove that the courts' power to review the decision as to what constitutes a valid public purpose is severely limited, effectively giving the legislature 'wide scope in determining

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<sup>134</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148. See also Schmidt-Aßmann B 'Expropriation in the Federal Republic of Germany' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 81-103 at 81.

<sup>135</sup> Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 274. See also De Waal J 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights' (1995) 11 SAJHR 1-29; Mostert H *The Constitutional Protection and regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 30-43; Mostert H 'Engaged Citizenship and the Enabling State as Factors determining the Interference Parameter of Property: A Comparison of German and South African Law (2010) 127 SALJ 238-273 at 244-246.

<sup>136</sup> 2011 (1) SA 601 (KZP) para 82.

<sup>137</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 500.

<sup>138</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 482.

what is or is not a public purpose for purposes of expropriation.’<sup>139</sup> As a result, when the courts are satisfied that there is a rational connection between the taking and the purpose, the taking is upheld and the question concerning less invasive means does not surface.

The courts in Ireland are also deferential towards the decision of the legislature as to what constitutes a public purpose.<sup>140</sup> However, as is argued below, although the Irish courts are usually fairly deferential towards the decision to expropriate, they do consider whether less invasive means were available and whether the expropriating authority considered the alternative means before it made the compulsory purchase order.<sup>141</sup>

## 5 5 Acceptance of the Less Invasive Means Argument: Irish Law

Case law from the Republic of Ireland shows that Irish courts are more receptive than the South African courts to the argument that the expropriator could have adopted a less invasive measure in fulfilment of a particular public good. Forde argues that if the purpose of the expropriation can be achieved without expropriating property, the compulsory acquisition of property can be invalidated since it is unnecessary and disproportionate.<sup>142</sup> Therefore, the Irish courts consider whether the expropriator took the availability of alternative means into account before it decided to expropriate property, since doing so could indicate whether the expropriation was in fact for the public good.

Similar to the position in German law, Hogan and Whyte state that ‘compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good’.<sup>143</sup> The authors’ argument was accepted by the Irish court in *Clinton v An Bord Pleanála and Others*<sup>144</sup> and *Egan v An Bord Pleanála*.<sup>145</sup> Therefore, it must be shown that the compulsory acquisition of property is in the public interest; the mere

<sup>139</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 483. See the discussion in ch 4 at 4 4 1 concerning the decisions of the US Supreme Court (*Berman v Parker* 348 US 26 (1954), *Midkiff v Hawaii Housing Authority* 267 US 229 (1984), *Kelo v City of New London* 545 US 469 (2005)) where this deferent approach is pertinent.

<sup>140</sup> See Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23. See the discussion of the Irish decisions in ch 4 at 4 4 3 where this deferent approach is described.

<sup>141</sup> See Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 245.

<sup>142</sup> Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 737. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 239.

<sup>143</sup> Hogan G & Whyte G (eds) *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) para 7 7 88. See also Walsh R “The Principles of Social Justice” and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland’ (2010) 32 *Dublin University Law Journal* 1-23 at 9; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 471.

<sup>144</sup> [2005] IEHC 84.

<sup>145</sup> [2011] IEHC 44.

payment of compensation cannot justify the expropriation.<sup>146</sup> Irish courts can therefore strike down an expropriation if it can be shown that the purpose of the expropriation can be achieved by less drastic measures. The decisions in which the plaintiffs have argued that the expropriator should have applied a less drastic measure than expropriation to fulfil the public purpose are discussed below.

In *O'Brien v Bord na Móna*,<sup>147</sup> the plaintiff argued that the permanent expropriation of his bogland for the extraction of turf in terms of the Turf Development Act of 1946 conflicted with articles 40 and 43 of the Irish Constitution of 1937. The Turf Development Act also allowed for the temporary expropriation of land for this purpose and the plaintiff argued that his property should have been expropriated temporarily rather than permanently. In this regard the plaintiff argued that the property should re-vest in him once all the turf had been extracted from his property. The high court held that the public interest justifies the permanent expropriation of the applicant's land, even until after the land had been stripped of all turf. The Supreme Court did not deal with this issue, but in relation to this decision Hogan and Whyte state that it is 'arguable that an interference with property rights, even when in essence warranted by the common good, must not exceed the measure of that exigency'.<sup>148</sup>

In *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland*<sup>149</sup> the Commissioner of Public Works served a compulsory purchase order on the applicants in terms of the An Blascaod Mór National Historic Park Act 11 of 1989. The Great Blasket or An Blascaod Mór is a small island where a small community lives. Despite its size, the community of the Great Blasket produced an 'extraordinary literary legacy'.<sup>150</sup> Writers of the island also attracted renowned scholars to the island. The aim of the Act was to establish and maintain, for the common good, a national historic park that includes the preservation of the dwellings used by the famous writers.

In relation to the right to property the plaintiffs argued that the expropriation was not for a public purpose and that the objective of the Act, which includes preserving the

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<sup>146</sup> In *Buckley v Attorney General* [1950] IR 67 the Supreme Court refuted the argument that the courts are not allowed to question whether the expropriation or delimitation of rights is in the public interest. In *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 157 the high court stated that although it should be hesitant to interfere with the decision of the national parliament of Ireland as to what is in the public interest, it does not exclude the court from reviewing that determination. See *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 165 for the court's consideration of whether the expropriation of property to establish a national park to safeguard the cultural heritage of the people is in the public interest.

<sup>147</sup> [1983] IR 255.

<sup>148</sup> Hogan G & Whyte G *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed 2003) 2007 fn 169. See also Forde M *Constitutional Law* (2<sup>nd</sup> ed 2004) 737.

<sup>149</sup> [1998] IEHC 38.

<sup>150</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 2.

amenity and allowing access to the general public, could be achieved by less intrusive means such as promulgating regulatory legislation that could prevent further development of the area.<sup>151</sup> Therefore, on the basis of article 43.2.2 the plaintiffs argued that the state should have adopted less drastic measures. Furthermore, the plaintiffs argued that the state should observe the principle of proportionality in reconciling the rights to property and the exigencies of the common good.<sup>152</sup>

The court held that the Act was discriminatory since it differentiated between people who have occupied property on the island before and after 17 November 1953. If a person occupied the property before 17 November 1953, his property could not be expropriated in terms of the Act. However, if a person acquired the property after 17 November 1953 his property could be expropriated. The plaintiffs all acquired their respective properties after 17 November 1953, which meant that their properties could be expropriated, while other owners' properties were exempt from expropriation in terms of this Act.

In the absence of any legitimate reasons to differentiate between these two groups, the court held that the discrimination in terms of the Act was not justified in terms of the common good. Therefore, the court concluded that the legislation and manner in which the state attempted to enforce the regime signalled a failure on the part of the state to protect the plaintiffs' property rights from unjust attack in contravention of article 40.3.2.<sup>153</sup> The court also held that the state's attempt to delimit the rights guaranteed in the Constitution 'in accordance with the exigencies of the common good'<sup>154</sup> was contrary to article 43.2.3 of the Constitution.<sup>155</sup>

Walsh points out that this decision provides an example of a proportionality test applied on the basis of the constitutional requirement in article 43.<sup>156</sup> In this decision the court stated that 'exigencies' does not mean useful or desirable, but necessary. In this regard the court held that the encroachment (the expropriation) must be proportionate to

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<sup>151</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 paras 22, 166.

<sup>152</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 168. In this respect the plaintiffs relied on decisions of the European Court of Human Rights: *Hauer v Land Rhineland-Pfalz* [1979] ECR 3727; *Sporrong and Lonroth v Sweden* [1982] 5 EHRR 35; *Pine Valley Developments Limited v Ireland* [1991] 14 EHRR 319.

<sup>153</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 197.

<sup>154</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 197.

<sup>155</sup> On appeal, in *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [2001] 1 IR 1 (SC), the decision of the high court was upheld, but only with reference to the right to equality. See further Walsh R 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 *Dublin University Law Journal* 1-34 at 14-15.

<sup>156</sup> Walsh R 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 *Dublin University Law Journal* 1-34 at 14-15.



the aim. Accordingly, the question to be asked is whether a 'pressing social need' is present so as to justify the infringement of the right to property.<sup>157</sup>

In the case of *Lord Ballyedmond v The Commission for Energy Regulation and Others*<sup>158</sup> the Bord Gáis Éireann (BGE) expropriated the applicant's land in terms of article 8(1) of the Gas Act of 1976. In terms of this Act the BGE is mandated to develop a gas supply network. To establish this network the BGE acquired the temporary right to enter the land while constructing the pipeline, as well as a permanent right to enter onto the land in order to maintain and operate the pipeline once completed.<sup>159</sup>

On 7 December 2005 the Commission for Energy Regulation issued an acquisition order for the construction of a pipeline which traversed the applicant's property. Before this order was issued, the applicant consulted with the Commission regarding the proposed route of the pipeline. The Commission preferred route A, which was the most direct route that the pipeline could follow. This route was also the least expensive, but it ran directly through the applicant's property. The applicant proposed a different route, route B. Route B was much longer than route A, but implementing route B would cause the pipeline to be further away from the applicant's house and would also run across the applicant's neighbours' property. The Commission proposed a third route, route C, but this route was not acceptable to the applicant.

The Commission compiled a report in which it assessed the feasibility of the three proposed routes. In terms of the report, route A was recommended because it was the optimum route taking in account factors such as safety, environmental impact and financial considerations. In terms of the report it was concluded that route A was the most economic route, while route B was the least economic. As a result, the Commission compulsorily acquired the applicant's property to construct the pipeline along route A.

According to the court, '[i]t is always open to a person in respect of whom a compulsory purchase order is sought to suggest that different land may meet the requirement of the acquiring authority'.<sup>160</sup> However, the decision that the Commission had to make was not whether an alternative route was preferable, but whether the acquisition should be made. According to the court there could be instances where a different route would have had less adverse effects and in which case there would come a point where

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<sup>157</sup> *An Blascaod Mór and Others v The Commissioners of Public Works in Ireland* [1998] IEHC 38 para 150. See Walsh R 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 *Dublin University Law Journal* 1-34 at 14-15.

<sup>158</sup> [2006] IEHC 206.

<sup>159</sup> *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206 at 1 2. See also Walsh R *Private Property Rights in the Irish Constitution* (PhD thesis Trinity College Dublin 2011) 245.

<sup>160</sup> *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206 at 6 5.



the Commission acted irrationally or disproportionately in not choosing the alternative route. Alternatively, there could be situations where a different route could have more advantages and in which case the Commission could cross a certain point where it acted irrationally or disproportionately in not opting for the alternative route. Therefore, the question before the Commission was not whether route B was better than route A or C but whether 'it was inappropriate [for the Commission] to make acquisition orders in respect of Route A because of any demonstrated superiority of an alternative'.<sup>161</sup>

This decision shows that the expropriated owner can argue that there are less intrusive means to achieve the public purpose, but there should be a substantive reason for choosing the alternative and not mere unhappiness over the proposed expropriation.<sup>162</sup> According to the court, the Commission's decision to select route A might have been disproportionate or irrational, and therefore invalid, if there had been an obvious, more suitable alternative route.<sup>163</sup> If there had been an obvious, more suitable route, the court would have found the decision of the Commission to choose route A to be disproportionate and irrational and therefore invalid. However, this would probably not be in terms of the public purpose requirement, but in terms of administrative law principles. The position would probably be similar in South African law. If the decision of the expropriating authority is unreasonable the decision to expropriate would be invalid in terms of administrative law principles and not on the basis of section 25(2).

However, the *Lord Ballyedmond v The Commission for Energy Regulation and Others*<sup>164</sup> decision shows that the owner of property can suggest alternatives when his property is to be expropriated. Furthermore, this decision suggests that Irish courts are open to consider alternative measures that would reduce the harsh effect of expropriation. This is different to the approach taken by the South African courts, where the availability of less invasive means is not considered when the expropriation is for a public purpose.<sup>165</sup>

## 5 6 Conclusion

It seems unlikely that the South African courts will pay much attention to the availability of less invasive means in terms of the public purpose requirement in section 25(2) of the 1996 Constitution. When the courts are satisfied that there is a rational connection

<sup>161</sup> *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206 at 6 7.

<sup>162</sup> See Walsh R *Private Property Rights in the Irish Constitution* (Phd thesis Trinity College Dublin 2011) 246.

<sup>163</sup> *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206 at 6 7.

<sup>164</sup> [2006] IEHC 206.

<sup>165</sup> See *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011 para 16.

between the expropriation and the purpose that is served, the decision to expropriate is apparently not open to attack, provided that the expropriation is for a valid public purpose.<sup>166</sup>

This approach might be justified in instances where the purpose of expropriation is uncontroversial, such as the building of roads, establishing conservation areas and improving the security of the State President.<sup>167</sup> It was already indicated above that even if a proportionality test was applied in the *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*<sup>168</sup> decisions, it would not have changed the outcome. Ensuring the safety and security of the President was for a public purpose, and if expropriation is the best means to realise the purpose, the decision to expropriate will not be set aside. Similarly, if a road needs to be built the court will not simply invalidate the expropriation because the owner proposes a different route that does not traverse his property but other property. In this regard the Irish decision of *Lord Ballyedmond v The Commission for Energy Regulation and Others*<sup>169</sup> is informative. In that decision the court stated that the expropriation of specific property could only be questioned if a substantive reason that should have moved the authority to rather select a different route was present.

However, in instances where the purpose of the expropriation is in itself controversial, such as expropriating property for economic development purposes or transferring expropriated property to third parties for economic development purposes, a mere rationality test may lead to unjust results. In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*<sup>170</sup> the court did not consider alternative means - expropriating only the property necessary for the building of the road - since the court was of the view that the applicant confused motive with purpose. It is arguable that the court ought to at least have tested whether the purpose of expropriation, namely economic development, was in the public interest. In terms of the rationality test the impact that the expropriation had on the property owner was not considered at all, nor was it considered whether there was an appropriate balance between the infringement of the property owner's right and the end result. This can in effect mean that the property owner

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<sup>166</sup> See especially *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011.

<sup>167</sup> As Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 789 states: 'If a government agency proposes to take a person's home to build a road, neither constitutional nor statutory law requires it to consider alternatives, nor does it require any substantial justification or meaningful judicial scrutiny of the government's choice.'

<sup>168</sup> [2010] ZAGPPHC 154, 12 October 2010; [2011] ZASCA 246, 1 December 2011.

<sup>169</sup> [2006] IEHC 206.

<sup>170</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

has to bear the burden of expropriation alone, not for the sake of the community or the public at large, but for the economic benefit of another private party.

In terms of a stricter proportionality enquiry, due consideration could be given to the appropriate balance between the impact on the property owner and the purpose of the expropriation. Therefore, courts should probably apply a proportionality test, possibly on the basis of administrative law, in expropriation cases, since an enquiry into the proportionality of the decision to expropriate arguably affords stronger protection of property rights by ensuring that expropriation must be strictly necessary to achieve the desired aim. In the event that alternative less intrusive measures are available it should at least cast doubt on whether the expropriation is strictly necessary and justified.

It was indicated above that in German law the application of the general constitutional principle of proportionality dictates that an expropriation must be the only way in which the public purpose can be realised. In the event that an alternative and less burdensome measure is available, the expropriation would be unlawful. This leads to the conclusion that the availability of less invasive measures plays a central role in the expropriation process, and is not irrelevant as is the case in present South African law.

The Irish case law referred to above is an example that indicates the courts' consideration of the less invasive means argument. The Irish courts do not simply dismiss the alternative measure when it has been decided that the expropriation is for a valid public purpose, but evaluates whether the expropriating authority considered and should have considered the alternatives. Although the availability of an alternative measure does not automatically invalidate an expropriation it can indicate that the decision to expropriate should be reviewed, and possibly be set aside, because the alternative measure was not considered in the expropriation process.

## CHAPTER 6: NON-REALISATION, COMPLETION, OR ABANDONMENT OF THE PUBLIC PURPOSE

### 6 1 Introduction

In the previous chapters, it is shown that the public purpose or public interest justifies an expropriation, while the payment of compensation is merely a result of an expropriation.<sup>1</sup> Therefore, difficulties arise when the original public purpose that justifies the expropriation is not implemented or if it comes to an end. This problem can arise in two different situations, but raise similar issues. The first situation is where the purpose for which the property was expropriated cannot be or is not realised. The second situation arises when the original public purpose was realised but later ends or is abandoned. Both situations can also involve a change in purpose, namely that the property is used for a different purpose for which it was expropriated.

The first situation, where the original public purpose is not or cannot be realised, can arise due to a number of reasons. It might be impossible for the expropriating authority to implement the original public purpose either as a result of unforeseen financial constraints or because it has become physically impossible to realise. The same problem can arise when a burdensome regulatory measure is implemented by a different and higher authority after the property has been expropriated, for instance when a new national physical planning measure renders the local planning scheme impossible to realise. The state may also simply decide to abandon the original purpose. The non-realisation of the original public purpose casts serious doubts on the legitimacy of the expropriation, since the property was expropriated for that particular purpose, which has now become unrealisable or is simply abandoned. A relevant consideration in this regard is whether the state acted in bad faith when it originally expropriated the property. If the property was expropriated in bad faith, in other words the expropriating authority knew that the purpose would not be realisable once it has expropriated the property, the expropriation would be invalid.<sup>2</sup>

The second situation, where the original public purpose was implemented but later comes to an end or is abandoned, can also arise due to a number of reasons. The original

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<sup>1</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82.

<sup>2</sup> Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235 at 226. See also Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 103-104.

public purpose can end upon the completion of a particular project or the state can decide to abandon the current use of the property, either because the original purpose has through time become impossible due to changing circumstances or because there is some other need not originally foreseen for which the property can be used more effectively.<sup>3</sup>

If it is accepted that the public purpose justifies the expropriation of property, non-realisation, completion or abandonment of the original public purpose should in principle mean that the justification for the expropriation falls away, unless a new legitimate public purpose is put forward.<sup>4</sup> When a new public purpose is not put forward the state is in principle no longer justified in taking or retaining ownership of the property, since the justification for so doing arguably falls away when the public purpose is not realised or ends, unless a new purpose is put forward. Therefore, in both situations it is possible that a change in purpose can justify the state to retain possession of the property and to use it for a different purpose. However, in this chapter it is argued that the changed purpose should also be a valid public purpose and the courts should be able to test the new purpose against the public purpose or public interest requirements of section 25(2) of the Constitution. In that way the state would not be able to use expropriated property for purposes other than for a public purpose or the public interest.

The possibilities raised above are important for this dissertation because a changed purpose can involve economic development purposes as well as third party transfers for economic development purposes. For instance, in *Harvey v Umhlatuze Municipality and Others*<sup>5</sup> (*Harvey*) the change in purpose involved the sale of the expropriated land to a third party for development purposes. In instances where the purpose of expropriation is vaguely linked to a public purpose, such as economic development, and where the courts apply a low level of scrutiny as to the legitimacy of the purpose, the non-realisation of the original purpose seems more likely. For instance, in *Poletown Neighborhood Council v City of Detroit*<sup>6</sup> it was projected that a certain number of jobs would be created while the jobs actually created was almost half the projected number.<sup>7</sup> Furthermore, in *Kelo v City of New*

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<sup>3</sup> See Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329-351 at 329.

<sup>4</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ 'Constitutional Property Law' 2010 *ASSAL* 251-294 at 292; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235 at 227.

<sup>5</sup> 2011 (1) SA 601 (KZP).

<sup>6</sup> 410 Mich 616 (Mich, 1981).

<sup>7</sup> Somin I 'Overcoming *Poletown: County of Wayne v Hathcock*, Economic Development Takings, and the Future of Public Use' 2004 *Mich State LR* 1005-1039 at 1014 states that of the projected 6150 employment

*London*<sup>8</sup> the development for which the properties were expropriated has to date not yet been implemented.

An important question that arises upon non-realisation of the public purpose (and one that can also be asked when the realised public purpose comes to an end or is abandoned) is whether the courts are able to order that the previously expropriated property be returned to the previous owner. This question was addressed in *Harvey* where the applicant argued that the expropriator should return the expropriated property to him when the original public purpose for which the property was expropriated could not be realised.

All the questions that are mentioned above are discussed in this chapter, namely whether the state is justified in continuing to possess and use expropriated property for a different purpose when the original purpose for which it was expropriated becomes impossible, ends or is abandoned; what level of scrutiny the courts should apply when adjudicating claims involving change, termination or abandonment of the purpose; and whether the original owner may have a claim for re-transfer of the property if the original purpose of the expropriation is not realised or abandoned. Each of these issues is considered in view of the implications for property that was either expropriated or is to be used for economic development, including instances where such use involves transfer of the property to a third party.

## 6 2 Harvey v Umhlatuze Municipality

In *Harvey v Umhlatuze Municipality and Others*<sup>9</sup> the court had to consider whether the public purpose requirement endures beyond the initial act of expropriation. The municipality expropriated the applicant's land for a valid public purpose - creating a public recreational open space and conservation area - but when the purpose could not be realised the municipality changed the intended use of the property. The new purpose involved sale of the land on tender to a private developer for the erection of residential houses. The applicant argued that the first respondent had an obligation to award him restitution of his former property - against payment of the market value - since the first respondent abandoned its plan to use the property for the original purpose.<sup>10</sup>

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opportunities that the development of the Poletown area would have created, only about 3600 actually materialised.

<sup>8</sup> 545 US 469 (2005).

<sup>9</sup> 2011 (1) SA 601 (KZP).

<sup>10</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 80.



Since there is no legislative authority for this proposition in South African law, the applicant relied on a particular interpretation of the public purpose requirement in section 25(2) of the 1996 Constitution, based on authority in German law. The applicant argued that when the public purpose falls away, becomes impossible, or is changed, the expropriation is no longer 'legally and constitutionally sustainable in the face of a claim to the property by the original owner'.<sup>11</sup>

Before investigating the applicant's argument in terms of German law, the court considered expropriation in South African law as well as in other foreign jurisdictions. In terms of the Expropriation Act 63 of 1975 there are only two prerequisites for a valid expropriation: it must be for a public purpose and compensation must be paid. In terms of section 25(2) of the Constitution, expropriation must be for a public purpose or in the public interest and just and equitable compensation must be paid. The court confirmed that the public purpose requirement serves as the justification for the expropriation, while the payment of compensation is merely the result of the expropriation.<sup>12</sup>

The court considered foreign law on the question whether re-transfer of expropriated property is possible if the original purpose falls away, becomes impossible or is abandoned.<sup>13</sup> In English law, administrative rules<sup>14</sup> recommend that the public authority should grant the expropriated owner or her descendants the first opportunity to purchase the land at the current market value in the event that the property is no longer needed for the purpose for which it was required.<sup>15</sup> In French law, the expropriating authority must use the property for the public purpose for which it was expropriated.<sup>16</sup> If the property is not used for the intended purpose or if the purpose ceases the expropriated owner may, within five years, demand the restitution of his property, provided that the expropriating authority has not requested use of the property for a new public purpose.<sup>17</sup> When the expropriating

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<sup>11</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 80.

<sup>12</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82.

<sup>13</sup> In this overview, the court relied extensively on Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990).

<sup>14</sup> These administrative rules are known as the Crichton Down Rules: Moore V 'Compulsory Purchase in the United Kingdom' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 1-31 at 4-5. Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329-351 provides an overview of the origin and development of the Crichton Down Rules in English law. See 6 4 4 below.

<sup>15</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) paras 89-90; Moore V 'Compulsory Purchase in the United Kingdom' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 1-31 at 4-5.

<sup>16</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 92.

<sup>17</sup> If the land in question is agricultural and the expropriating authority decides to lease the land, the previous owner has the first option to lease it: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 93.

authority sells the land, the previous owner has the first option to re-purchase the land.<sup>18</sup> Similarly, in Italian law, the previous owner can reclaim his previously expropriated property in the event that the property is not used for the intended purpose in the time-frame provided by the authorising legislation.<sup>19</sup> In Canada, the Canada Act of 1982 permits the Minister of Public Works to expropriate property if it would be for a public work or another public purpose. If the Minister abandons the purpose, he must file a notice of his intention to abandon. The expropriated owner can either accept or reject the abandonment. If he accepts the abandonment of the purpose the expropriation proceeds, but if he rejects it the property should be returned to him.<sup>20</sup> The court also undertook an overview of expropriation law in Australia,<sup>21</sup> Sweden<sup>22</sup> and the United States.<sup>23</sup> However, the court did not clearly state whether the abandonment of the initial public purpose in these jurisdictions necessitates or allows the re-transfer of the property to the original owner.

From the discussion of foreign law the court concluded that there is no unfettered power of expropriation. The power of expropriation must be justified by its serving some 'public purpose, use, interest, benefit or necessity'.<sup>24</sup> The state can only retain possession of the property as long as the property is used for the reason for which it was expropriated. However, in jurisdictions where the re-transfer of expropriated property occurs it is not through the inherent power of the courts, but in terms of legislation or administrative rules that specifically regulate this matter.

Nevertheless, the applicant argued that since the public purpose was abandoned, he had a right to reclaim the expropriated property. To substantiate this claim, the applicant relied on an argument made by Van der Walt.<sup>25</sup> Relying on German law,<sup>26</sup> Van

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<sup>18</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 93.

<sup>19</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 99.

<sup>20</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 114; Todd ECE 'Compensation for Expropriation in Canada' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 321-357.

<sup>21</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 108.

<sup>22</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) paras 100-103.

<sup>23</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) paras 104-107.

<sup>24</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 114.

<sup>25</sup> Van der Walt AJ *Constitutional Property Law* (2005) 256. In Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 493-499, this argument was retained and expanded with reference to *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) and the Malaysian decision of *United Development Company Sdn Bhd v The State Government of Sabah and Another* [2011] 7 MLJ 209, which is discussed below at 6 4 2. However, since the applicant's argument was based on Van der Walt AJ *Constitutional Property Law* (2005), references to both the 2005 and 2011 editions are included below.

<sup>26</sup> BVerfGE 38, 175 [1974], BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*); BVerfGE 97, 89 [1997]. In BVerfGE 38, 175 [1974], the Federal Constitutional Court held that the ownership guarantee in art 14 of the Basic Law serves as the basis for the repurchase of the property by the former owner if the public purpose is not realised. Furthermore, legislation such as the German Federal Building Code (*Bundesbaugesetz* 1960),

der Walt states that if property was ‘expropriated for a public purpose that was never realised (of for a purpose that ceased to exist),<sup>27</sup> the property should be returned to the previous owner, even if compensation was paid.<sup>28</sup> If the public purpose falls away, the state is no longer justified in retaining the property. Therefore, Van der Walt states that

[t]he public purpose that justifies expropriation has to endure beyond the initial act of expropriation and must have a lasting rather than fleeting or temporary quality to secure the interest of the public in fulfilment of that purpose.<sup>29</sup>

In German law, specific statutes provide for the re-transfer of previously expropriated property upon non-realisation of the public purpose.<sup>30</sup> Therefore, the public purpose requirement is bolstered by legislation to ensure that the expropriated property could be re-transferred to its original owner in the event that the public purpose becomes impossible.<sup>31</sup> Furthermore, these statutes often provide for the amount that the previous owner has to repay in such an event. In the absence of legislation, German courts have held that this principle of re-transfer is implied in the property guarantee in article 14 of the Basic Law of 1949.<sup>32</sup> However, since there is no equivalent doctrine or comparable legislation in South African law, the court in *Harvey* was not willing to order re-transfer.<sup>33</sup>

Instead, the court held that since the municipality initially expropriated the property in good faith, a change in circumstances that renders the original purpose impossible justifies the municipality’s decision to change the purpose for which the property is to be used. Therefore, the court held that the applicant was not entitled to the restitution of his

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amongst others, specifically provides for ‘re-expropriation’. See *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) paras 129-131; Du Plessis E ‘Restitution of Expropriated Property upon Non-realisation of the Public Purpose’ 2011 *TSAR* 579-592 at 588-589.

<sup>27</sup> Van der Walt AJ *Constitutional Property Law* (2005) 256; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 494.

<sup>28</sup> See Wendt R ‘Eigentum, Erbrecht und Enteignung’ in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 165 and the discussion of German law below.

<sup>29</sup> Van der Walt AJ *Constitutional Property Law* (2005) 256. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 493-494.

<sup>30</sup> See Sonnekus JC & Pleysier AJH ‘Eiendomsverwerping of –verlies onder ‘n Tydsbepaling of ‘n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)’ 2011 *TSAR* 601-625 at 613-619.

<sup>31</sup> *BVerfGE* 97 89 [1997]; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 149. See also Papier HJ ‘Art. 14’ in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 311 para 591; Van der Walt AJ & Slade BV ‘Public Purpose and Changing Circumstances: *Harvey V Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)’ (2012) 129 *SALJ* 219-235 at 224.

<sup>32</sup> *BVerfGE* 38, 175 [1974]; *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) para 97. See also Currie DP *The Constitution of the Federal Republic of Germany* (1994) 293-294; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 149; Du Plessis E ‘Restitution of Expropriated Property upon Non-realisation of the Public Purpose’ 2011 *TSAR* 579-592 at 589.

<sup>33</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497. The high court relied on the Constitutional Court’s decision in *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA t/a v Minister of Finance* 2002 (4) SA 768 (CC), where the Constitutional Court held that foreign law cannot by ‘simplistic transference’ determine the proper interpretation of the South African bill of rights. See also Du Plessis E ‘Restitution of Expropriated Property upon Non-realisation of the Public Purpose’ 2011 *TSAR* 579-592 at 582.

previously expropriated property, because the principle that expropriated property should be returned to the previous owner upon the non-realisation of the stated public purpose does not form part of South African law.<sup>34</sup>

## 6 3 Evaluation of Harvey v Umhlatuze Municipality

### 6 3 1 Introduction

*Harvey v Umhlatuze Municipality and Others*<sup>35</sup> illustrates an interesting aspect of expropriation law that has not surfaced in South African law before.<sup>36</sup> According to the construction relied on by the plaintiff in this case, non-realisation of the public purpose might allow the previous owner, in principle at least, to claim re-transfer of his expropriated property, provided he repays either the compensation initially received or the current market value. However, the court refused to grant such an order on the basis that there is no South African legislation or doctrine similar to that which exists in German law that would assist the court in making such an order.<sup>37</sup>

In Chapter 5 it is argued that the state should only use its expropriating power in exceptional instances or, in other words, as a matter of last resort.<sup>38</sup> Therefore, if the state requires property for a specific public purpose and cannot acquire the property on the open market, it is allowed to expropriate the property. But the public purpose must be evaluated strictly since the property is expropriated against the will of the owner. Although the expropriated owner receives compensation, the expropriation is justified by the public purpose that is served and not by the compensation. This means that, in principle at least, the state is not allowed to do with the property as it pleases, even after expropriation.<sup>39</sup>

<sup>34</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497.

<sup>35</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP).

<sup>36</sup> See Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 288.

<sup>37</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 291. In *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011 (Republic of the Philippines) the Supreme Court of Manila granted the re-transfer of the expropriated property upon the non-realisation of the public purpose without any legislative foundation.

<sup>38</sup> See also Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteiening (Deel 2)' 2011 TSAR 601-625 at 607.

<sup>39</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 498.

### 6 3 2 Absence of a Legislative Basis

The power of expropriation in South Africa is purely based on statutory law; there is no common law power of expropriation.<sup>40</sup> Since statute law does not provide for the re-transfer of expropriated property and given that there is no common law rule to that effect either, it is probably understandable that the high court was reluctant to grant the order for re-transfer in *Harvey*.<sup>41</sup> In this regard, Van der Walt argues as follows:

‘It is perhaps understandable that the High Court should be hesitant to effect a quite important development of the law, without any statutory foundation, purely on the basis of examples from foreign law that are based on jurisdiction-specific statutory foundations.’<sup>42</sup>

However, Sonnekus and Pleysier<sup>43</sup> argue that there is no reason why the South African Constitutional Court could not develop such a right of re-claim as the German Constitutional Court did in several decisions.<sup>44</sup> The authors base their argument on the similarities between section 25(1) of the 1996 Constitution, which protects property against arbitrary deprivation, and article 14 of the German Basic Law.<sup>45</sup> As a result, the authors suggest that the South African Constitutional Court could deduce a general right of re-transfer, based on section 25(1), similar to the right of re-transfer that was developed by the German Federal Constitutional Court.<sup>46</sup>

However, the ‘boundaries and contours’<sup>47</sup> of such a right to reclaim expropriated property upon non-realisation of the public purpose might be too technical for the courts to adjudicate, especially with regard to the calculation of the amount of money that the previous owner would have to repay.<sup>48</sup> Therefore, it is arguably best to have legislation in place that addresses this *lacuna* that exists in South African law. Legislation that enables

<sup>40</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) 601 (KZP) para 81; Jacobs M & Gildenhuis A ‘Expropriation in South Africa’ in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 373-399 at 373; Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 10; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 496. In *Joyce & McGregor v Cape Provincial Administration* 1946 AD 658 at 671, the court stated that ‘all rights of expropriation must rest upon a legislative foundation’.

<sup>41</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497.

<sup>42</sup> Van der Walt AJ ‘Constitutional Property Law’ 2010 *ASSAL* 251-294 at 291. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497.

<sup>43</sup> Sonnekus JC & Pleysier AJH ‘Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteiening (Deel 2)’ 2011 *TSAR* 601-625 at 614.

<sup>44</sup> *BVerfGE* 38, 157 [1974]; *BVerfGE* 97, 89 [1997].

<sup>45</sup> Sonnekus JC & Pleysier AJH ‘Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteiening (Deel 2)’ 2011 *TSAR* 601-625 at 614. See also Van der Walt AJ & Slade BV ‘Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)’ (2012) 129 *SALJ* 219-235 at 227.

<sup>46</sup> Sonnekus JC & Pleysier AJH ‘Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteiening (Deel 2)’ 2011 *TSAR* 601-625 at 614.

<sup>47</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 499.

<sup>48</sup> See Van der Walt AJ & Slade BV ‘Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)’ (2012) 129 *SALJ* 219-235 at 234-235.



the courts to order the re-transfer of expropriated property upon the non-realisation of the public purpose and that indicates how the amount of repayment should be structured will strengthen the justificatory public purpose requirement.<sup>49</sup>

### 6 3 3 State as 'Private Owner' of Expropriated Property

The court in *Harvey* was of the view that the municipality can use the property post-expropriation in the same manner that a private owner can, in other words that it could freely decide on the purpose for which it wants to use the land.<sup>50</sup> Although it was stated in *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)*<sup>51</sup> that there is no reason why the government should not have the same rights as any other owner, this statement should not be understood out of context.<sup>52</sup> In the context of expropriation and against the backdrop of the protective nature of section 25, the state is restricted to using the property for the specific purpose for which it expropriated the property.<sup>53</sup> Therefore, Van der Walt<sup>54</sup> argues that the state is bound to use the expropriated property for a public purpose or in the public interest, even once expropriation has taken place.<sup>55</sup> Although the inclusion of the public interest requirement in section 25(2) of the Constitution leads to a more generous approach instead of the traditional narrow

<sup>49</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 499; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 235.

<sup>50</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 59.

<sup>51</sup> 2001 (3) SA 1151 (CC).

<sup>52</sup> Sonnekus JC & Pleysier AJH 'Eiendomsverwerping of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 TSAR 601-625 at 609. See also Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 498-499; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 582-583.

<sup>53</sup> Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 590. See also the discussion below of the Philippine decision of *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011 where the court stated that 'the notion ... that the government, via expropriation proceedings, acquires unrestricted ownership over a fee simple title to the covered land, is no longer tenable.' This reported decision is neither paragraphed nor paginated. Furthermore, Quinot G 'Administrative Law' 2011 ASSAL 41-76 at 56 argues that the decision of the court in *Harvey* to allow the municipality to change the purpose has certain administrative law implications. He argues that the decision of the court leaves the impression that the 'authorized purpose of administrative power is to be assessed at a single moment in terms of lawfulness and then becomes irrelevant.' However, he argues that the purpose of authorization and lawfulness is to ensure that the administrators refrain from acting outside of their delegated powers. Therefore, Quinot argues that if administrators are allowed to change the purpose for which a certain power is granted they can extend their own authority. If the new changed purpose is also a valid public purpose it is arguable that the administrators would not extend their authority. Therefore, it is only in the event that the new changed purpose is not a valid public purpose or not in the public interest that there would be no authorization and would it also create administrative law difficulties in addition to being invalid from a constitutional property law perspective.

<sup>54</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 499.

<sup>55</sup> See also Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 584.



reading of the public purpose requirement, the state cannot use the expropriated property post-expropriation in any manner or for any purpose it chooses.<sup>56</sup> As a result, the state cannot simply use changing circumstances or needs as a justification to change the use of the property.<sup>57</sup>

#### 6 3 4 *The Role of Good Faith*

In *Harvey*, the court held that since the initial expropriation was done in good faith, the state is allowed to change the purpose for which the property is used. If the state expropriated the property in bad faith, in other words knowing that the declared purpose would not be realisable, the expropriation would have been invalid from the beginning. In that situation bad faith on the part of the state would invalidate the initial expropriation and since the initial expropriation was never justified, the change in purpose (whether a valid public purpose or not) is irrelevant. The rationale for this would be to prevent the state from using an apparently valid public purpose as a smokescreen to use the property eventually for a purpose that may not necessarily be a valid public purpose.

Furthermore, good faith on the part of the expropriating authority is not relevant at the initial expropriation; neither the Constitution nor the Expropriation Act makes mention of good faith as a requirement or justification for the expropriation. Therefore, the good faith of the expropriator should also be irrelevant afterwards. At most, good faith on the part of the expropriating authority can indicate that the initial public purpose was not a smokescreen to hide the real purpose for the expropriation, which might not be a valid public purpose.<sup>58</sup>

#### 6 3 5 *Change of Purpose and Re-transfer of Property*

The applicant in the *Harvey* decision argued that since the original purpose was abandoned he had a right of re-transfer since the justification for the expropriation fell away. With regard to the non-realisation of the original public purpose and the re-transfer argument there are two issues that should be distinguished. The first issue concerns the legal position when the purpose for which the property was expropriated is never realised. The second issue concerns the legal position when the state subsequently decides to

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<sup>56</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 499.

<sup>57</sup> Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 608.

<sup>58</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 498; Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 103-105.

change the purpose - a purpose that was duly implemented - to a different purpose. In both cases, the question concerning a change of purpose comes to light. Is the state allowed to use the property for a different purpose when the original purpose cannot be realised? Can the state change the use of the property when the original purpose is no longer the most viable purpose? It is submitted that in both cases the new, changed purpose must at the very least also be tested against the public purpose requirement in the 1975 Expropriation Act and the 1996 Constitution.

Therefore, in relation to both issues the courts should investigate whether a different purpose has been put forward and evaluate whether the new (or changed) purpose is also a valid public purpose in terms of the constitutional requirement.<sup>59</sup> It is arguable that when the new purpose is also a valid public purpose, the justification for the expropriation would revive.<sup>60</sup> Therefore, when the original public purpose ends or the original purpose cannot be implemented and the expropriator decides to change the use of the property, the court should at least test the changed purpose against the public purpose requirement. In that sense, the court in *Harvey* should have considered whether the new public purpose, which involved a third party transfer for development purposes, was also a valid public purpose in terms of the 1996 Constitution and the Expropriation Act of 1975. Instead, the court argued that since the original expropriation was undertaken in good faith, the municipality could do with the property as it pleases post-expropriation if changing circumstances rendered the original purpose impossible.

If the state is allowed to change the purpose of expropriation at whim it can easily abuse its expropriation powers. It may, for instance, expropriate property with the ostensible intention of building a road or a dam, and later change the purpose to a purpose that is arguably not a valid public purpose or sell it off to private parties that may use the property for what is not a public purpose either.<sup>61</sup> The abuse that will follow results from the fact that the original purpose is judged against the constitutional requirements - public purpose or public interest - but the changed purpose is not subjected to the same scrutiny.

Therefore, it should be considered whether South African law should make statutory provision for the previous owner to successfully reclaim the expropriated property when

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<sup>59</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ 'Constitutional Property Law' 2010 *ASSAL* 251-294 at 292; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235 at 227.

<sup>60</sup> See generally Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235 at 234.

<sup>61</sup> See Sonnekus JC & Pleyzier AJH 'Eiendomsverwering of -verlies onder 'n Tydsbepaling of 'n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 608.

the public purpose that originally justified the expropriation is not realised or is abandoned. From the overview of foreign law in the *Harvey* decision it is clear that provision is made in certain foreign jurisdictions for the previous owner to reclaim the expropriated property once the purpose of expropriation is not implemented or ends upon the completion of the particular purpose. This right of re-transfer is not always based on legislation, but on a particular interpretation of the public purpose requirement. Since the applicant in *Harvey* relied on German law, the German position relating to the re-transfer of expropriated property upon the non-realisation of the public purpose is analysed more fully below.

Furthermore, case law from the jurisdictions of Malaysia and the Philippines is discussed below. These jurisdictions, although 'not on all fours with South African law',<sup>62</sup> are discussed below because they shed interesting light on this issue. In these jurisdictions, the right of re-transfer is not contained in legislation, but made possible by the courts through a particular interpretation of the public purpose requirement. Finally, the Crichton Down Rules, which provides for the previous owner to reclaim his compulsorily acquired property in English Law, is discussed to indicate how the re-transfer of expropriated property is contained in a set of legal rules.

## 6 4 The Right of Re-transfer in Foreign Law

### 6 4 1 German Law

In *Harvey v Umhlatuze Municipality and Others*<sup>63</sup> the applicant specifically relied on the argument of Van der Walt,<sup>64</sup> based on German law, to substantiate the claim that he is entitled to re-transfer of the previously expropriated property on payment of the current market value.<sup>65</sup> Van der Walt relies on three German cases<sup>66</sup> to argue that when the purpose for the expropriation ends, the property should be returned to its original owner in terms of the public purpose requirement.<sup>67</sup>

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<sup>62</sup> Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey V Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 227.

<sup>63</sup> 2011 (1) SA 601 (KZP).

<sup>64</sup> Van der Walt AJ *Constitutional Property Law* (2005) 256; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 493-499.

<sup>65</sup> *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) paras 80, 125-132.

<sup>66</sup> BVerfGE 38, 175 [1974]; BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*); BVerfGE 97, 89 [1997].

<sup>67</sup> Van der Walt AJ *Constitutional Property Law* (2005) 256; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 494. See also Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey V Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 223-225.

In one German decision,<sup>68</sup> property was expropriated for the construction of a road. The owner argued that he had a right of re-transfer since the construction of the road never took place. The Federal Constitutional Court held that the expropriation of land is not aimed at the taking of the land but the actual use of the land for a specific and necessary public purpose. The expropriation is only lawful as long as the property is used for that purpose and once the purpose ends, the owner has the right to reclaim the property. Furthermore, the Federal Constitutional Court held that the basis for the right of repurchase is article 14 of the German Basic Law of 1949 and that it is not necessary to have a specific statutory basis for such a claim.<sup>69</sup> This claim, however, does not take the form of re-expropriation.<sup>70</sup> Only the state has the power to expropriate property, 'but the former owner can claim the land back if the expropriation was never carried through (and so legitimised)'.<sup>71</sup> Therefore, expropriation is only allowed for the specific public purpose and when that purpose is abandoned, or becomes impossible, the expropriated owner can reclaim the property. The fact that compensation was paid is not a defence to such a claim, since the expropriation is justified by the public purpose that is served and not by the payment of compensation,<sup>72</sup> which is similar to the position in South African law.

In *Dürkheimer Gondelbahn*,<sup>73</sup> the Federal Constitutional Court confirmed that the public purpose justifies the expropriation and that an expropriation will always be subject to the requirement that its use must be for the specific public purpose.<sup>74</sup> In this decision the Court held that a right of re-transfer in terms of article 14 of the Basic Law is only possible if the expropriation took place in terms of article 14.3. In this case, the expropriation was carried out in the German Democratic Republic, and the purpose of the expropriation fell away after the reunification of the Federal Republic of Germany.<sup>75</sup> Nevertheless, the Court

<sup>68</sup> BVerfGE 38, 175 [1974].

<sup>69</sup> See Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 510-511 para 591; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 293-294; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 149; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 588.

<sup>70</sup> Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 510-511 para 591; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 494; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 588.

<sup>71</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 494. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 149.

<sup>72</sup> BVerfGE 38, 175 [1974]; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 291; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 493; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 588; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 224.

<sup>73</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*).

<sup>74</sup> See BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*), discussed in ch 4 at 4 4 4 2. See also Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hophauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513 para 66.

<sup>75</sup> See *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) para 131.

confirmed that a right to re-transfer upon the non-realisation of the public purpose is possible in terms of article 14, even in the absence of specific legislation.<sup>76</sup>

In a different decision the German Federal Constitutional Court confirmed that the public purpose for which the expropriation was sought is both the purpose of the expropriation and the legitimisation.<sup>77</sup> Therefore, in terms of the guarantee of property in article 14 of the Basic Law the Court stated that the previous owner of the property acquires the right to repurchase the property when the purpose for which the property was expropriated is not fulfilled since the legitimisation fell away when the public purpose fell away.<sup>78</sup>

Therefore, even though there are various laws in German law that make provision for the re-transfer of previously expropriated property upon the non-realisation of the public purpose, the German Federal Constitutional Court has based such a claim of re-transfer on article 14 of the Basic Law.<sup>79</sup> However, according to the court in *Harvey*<sup>80</sup> the re-transfer of previously expropriated property to its former owner has routinely developed in legislation and therefore creates a 'statutory and regulatory framework'<sup>81</sup> used by the German courts to develop the right of re-transfer in terms of article 14 of the German Basic Law.

#### 6 4 2 Malaysian Law<sup>82</sup>

In Malaysian law property is protected against compulsory acquisition and use without compensation in terms of section 13 of the 1957 Federal Constitution of Malaysia. Section 13 of the Malaysian Constitution makes no reference to the public purpose requirement, but in terms of the Land Acquisition Act of 1960 the compulsory acquisition of property

<sup>76</sup> See Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 310 para 591; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 589.

<sup>77</sup> *BVerfGE* 97, 89 [1997]. See also Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 613-614, especially fn 164.

<sup>78</sup> *BVerfGE* 97, 89 [1997]. See also Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 613-614, especially fn 164.

<sup>79</sup> See Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 310 para 591. See also Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 589; Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 613.

<sup>80</sup> *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP).

<sup>81</sup> *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP) para 134.

<sup>82</sup> Research for this section has been published before in Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235.

must be for a public purpose.<sup>83</sup> In case law it is also evident that compulsory acquisition must serve the general public interest.<sup>84</sup>

In *United Development Company Sdn Bhd v The State Government of Sabah*<sup>85</sup> the plaintiff requested that his property be returned to him on the basis that the property was not used for the purpose for which it was acquired. In 1979 the government had compulsorily acquired the plaintiff's property for developing the Skim Penempatan Semulia project. However, it later emerged that the government planned to use the land for a different project, namely the Taman Kekal Pengeluaram project. In 2001, the plaintiff asked that the property be returned to him, on payment of RM1m, because the property was not used for the intended purpose.<sup>86</sup> The high court of Malaysia decided that the government acted in bad faith by not putting the land to use for the intended purpose for a period of 30 years. Therefore, the expropriation was void and of no effect and the plaintiff could take repossession of the property.

Although the decision was ultimately decided on the bad faith of the government, the court made some interesting remarks concerning the public purpose requirement. When the government declares that a compulsory acquisition is for a public purpose the courts adopt a deferential approach towards the decision of the government. However, if the acquiring authority has misconstrued its statutory powers or if bad faith is present, the decision of the acquiring authority can be reviewed.<sup>87</sup>

The court stated that the government cannot use the acquired property for a purpose other than that stated in the notice of acquisition that appeared in the Government Gazette. In terms of the Land Acquisition Ordinance the government must clearly state the intended use of the property, which means that the government does not have an unfettered discretion to deal with the property as it deems fit after acquisition. Therefore, even though the government can acquire property for a public purpose it does not have complete freedom to deal with the property in any way it wishes after expropriation.<sup>88</sup>

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<sup>83</sup> See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 272; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 228.

<sup>84</sup> *S Kulasingman & Another v Commissioner of Lands, Federal Territory and Others* [1982] 1 MLJ 204. See also Tan K, Min YT & Seng LK *Constitutional Law in Malaysia and Singapore* (1991) 674.

<sup>85</sup> [2011] 7 MLJ 209.

<sup>86</sup> The RM1m that the plaintiff was prepared to repay was the amount of compensation that he received when the property was originally expropriated.

<sup>87</sup> *United Development Company Sdn Bhd v The State Government of Sabah* [2011] 7 MLJ 209. See also Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 229.

<sup>88</sup> *United Development Company Sdn Bhd v The State Government of Sabah* [2011] 7 MLJ 209 para 29. The court uses the example of land that was acquired for the erection of a hospital, in which case the government cannot later decide to establish a refuse site instead.



The court left open the question whether the notice of acquisition that appeared in the Gazette can be revoked and under which circumstance this can be done. However, it stated that it is illegal and unjust to allow the government to use the property for a different purpose (even if the different purpose is a valid public purpose) than the one stated in the Gazette because the landowner negotiated compensation on the basis that the property would be used for a particular purpose. According to the court, '[I]and owners must be protected against compulsory deprivation of their properties for oblique motive disguised as "public purpose" ... [since] [t]he possibility cannot be discounted as the State Government in the present case in fact tried to alienate the said land to a third party in 1996'.<sup>89</sup>

In terms of this decision an argument can be made that compulsorily acquired property must only be used for the purpose for which it was acquired. In the event that the property is not used for the specific purpose, it could be an indication that the property was compulsorily acquired in bad faith, which would render the acquisition void. Although somewhat different to the issue in *Harvey* - since bad faith would also render the expropriation invalid in South African law<sup>90</sup> - the Malaysian decision shows that the specific purpose for which property is expropriated should endure beyond the initial act of expropriation.

The Malaysian court adopted a strict approach towards a change in purpose. It stated that the government is not allowed to change the purpose of the acquisition, even if the changed purpose is a public purpose. It has already been argued above that in South African law a changed purpose would not automatically invalidate the expropriation, since the public purpose requirement is still met on condition that the new purpose is also a valid public purpose.<sup>91</sup> In so far as the new purpose is not a valid public purpose and not subject to scrutiny by the courts, the expropriation may not be justified.

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<sup>89</sup> *United Development Company Sdn Bhd v The State Government of Sabah* [2011] 7 MLJ 209 para 31.

<sup>90</sup> Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 226. See also Gildenhuys A *Onteieningsreg* (2<sup>nd</sup> ed 2001) 103-104.

<sup>91</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 292; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 227.

### 6 4 3 *The Law of the Philippines*<sup>92</sup>

In the Republic of the Philippines, property may not be taken for public use without compensation.<sup>93</sup> Therefore, in case law it is accepted that two requirements apply when the state uses its power of eminent domain: it must be for a particular public purpose and just compensation must be paid.<sup>94</sup>

A dispute concerning the re-transfer of previously expropriated property upon non-realisation of the public purpose came before the Supreme Court of the Philippines in *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others*.<sup>95</sup> In 1961, the National Airport Corporation, now the Mactan-Cebu International Airport Authority (MCIAA), required several plots of land to expand the airport in Cebu City. The first group of owners, the Inocians, willingly sold their property to the MCIAA, but reserved the right to reclaim the property if the property was no longer needed for the stated purpose.<sup>96</sup> Due to a dispute concerning the amount of compensation the second group of owners, the Ouanos, refused to sell their properties. Therefore, the Ouanos' properties were expropriated and the expropriation was confirmed by the court of first instance.

It later emerged that the expansion of the airport did not take place. Subsequently, the airport was closed down and abandoned. The Inocians reclaimed their properties, but the MCIAA was of the opinion that they had no such right. In this decision both the Inocians and the Ouanos claimed that they had a right to take re-transfer of the property against payment of the condemnation price since the public purpose was not realised.

The MCIAA relied on *Fery v Municipality Cabanatuan*<sup>97</sup> (*Fery*) to deny the claimants' claim. In the *Fery* decision (heard before the 1978 Constitution of the Republic of the Philippines was promulgated), the court stated that if an undertaking is given that the expropriated owner can reclaim the property when the purpose of expropriation ceases, the owner would be entitled to take re-transfer of the property. However, if no undertaking to that effect is given the property is held by the state in fee simple. If the

<sup>92</sup> Research for this section has been published in Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235.

<sup>93</sup> S 9 of Art 3 of the 1978 Constitution of the Republic of the Philippines.

<sup>94</sup> *Mactan-Cebu International Airport Authority and Air Transport Authority v Bernardo L Lozada SR et al* GR No 176625, 25 February 2010.

<sup>95</sup> GR No 168770; GR No 168812, 9 February 2011.

<sup>96</sup> The Inocians argued that they would not have willingly sold their properties had they not been able to reserve this right.

<sup>97</sup> 42 Phil 28 (1921).

purpose of expropriation is later abandoned, the previous owner would have no claim over the property and therefore no right of re-transfer.

However, the *Fery* ruling has been overturned by the Supreme Court in *Mactan-Cebu International Airport Authority v Lozada SR*<sup>98</sup> (*Lozada*). In terms of the public purpose requirement, the Court in *Lozada* held that the expropriated property may only be used for the purpose indicated in the expropriation petition. If the expropriating authority wants to change the purpose, it can file a different petition with a different purpose. If it does not file for a new purpose the previous owner would have the right to reclaim the expropriated property. According to the court, this is possible even in the absence of an undertaking that the expropriated owner can reclaim the property upon the non-realisation of the public purpose. If the expropriated owner did not have this implied right, the expropriation process is flawed since the public use requirement is not met. This leads to a violation of the individual's right to justice, fairness and equity.<sup>99</sup>

In *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others*<sup>100</sup> the Supreme Court stood by its previous ruling in *Lozada*. Relying on *Lozada*, as well as *Heirs of Timoteo Moreno and Others v Mactan-Cebu International Airport Authority*<sup>101</sup> and *Mactan-Cebu International Airport Authority v Tudtud*,<sup>102</sup> the Supreme Court held that the expropriated owners were entitled to take possession of their previously expropriated property when the public purpose was abandoned. It stated that the 'government cannot plausibly keep the property in any manner it pleases and, in the process, dishonour the judgment of expropriation'.<sup>103</sup>

According to the Supreme Court the state no longer acquires unrestricted ownership of expropriated property. It differentiated between property willingly sold to the state and property expropriated by the state against the will of the owner. In the latter case, the transfer of the property is always conditional on it being used for the public

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<sup>98</sup> GR No 176625, 25 February 2010.

<sup>99</sup> See Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 232.

<sup>100</sup> GR No 168770; GR No 168812, 9 February 2011.

<sup>101</sup> GR No 156273, 15 October 2003. In this decision, the court of second instance also referred to the concept of constructive trust. The court was of the opinion that the state held the expropriated property in trust until the property is used for the purpose for which it was expropriated.

<sup>102</sup> GR No 174012, 14 November 2008.

<sup>103</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated. See also Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 232.

purpose for which it was expropriated.<sup>104</sup> Therefore, if the purpose of expropriation terminates or is abandoned the former owner may, if he so wishes, reclaim the property. If so, he will have to repay or return the compensation received. According to the Supreme Court in *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others*,<sup>105</sup> the possibility of expropriating property without an assurance to reclaim the property once the purpose of expropriation ends 'may be too much'.<sup>106</sup> The Court was further prompted to abandon the *Fery*<sup>107</sup> decision, since the absence of the right to reclaim expropriated property upon the abandonment of the public purpose could imply that the state's expropriation powers can be used 'deliberately ... as a subterfuge to benefit another with influence in the political process, including development firms'.<sup>108</sup>

Although the right to reclaim expropriated property upon the non-realisation of the public purpose developed on the basis of the assurance that was routinely given to expropriated owners in expropriation procedures, these decisions still convincingly show that the state must use the expropriated property for the public purpose for which the property was expropriated.<sup>109</sup> If a different public purpose is filed, then the expropriation can proceed because the expropriation would still be justified. Nevertheless, the decisions indicate a strict view of the power of the state to expropriate property for a public purpose.

#### 6 4 4 The Crichton Down Rules in English Law

In English law there are rules that regulate the position of compulsorily acquired property that becomes surplus, in other words no longer needed for the purpose for which it was acquired. In terms of the Crichton Down Rules<sup>110</sup> certain government departments are required to offer back compulsorily acquired property or property sold under the threat of compulsory acquisition to the former owners or their successors in title when the property

<sup>104</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated.

<sup>105</sup> GR No 168770; GR No 168812, 9 February 2011.

<sup>106</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated.

<sup>107</sup> *Fery v Municipality Cabanatuan* 42 Phil 28 (1921).

<sup>108</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR No 168770; GR No 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated.

<sup>109</sup> Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 232.

<sup>110</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules* Circular 06/2004 (31 October 2004).

is no longer needed for the purpose for which it was acquired.<sup>111</sup> The rules apply to all property in England and properties in Wales ‘acquired by and still owned by a UK government department’.<sup>112</sup>

The origin of the Rules is particular to the United Kingdom and is briefly stated here.<sup>113</sup> After the Second World War, Commander Marten sought to re-purchase land in the Crichel Estate that was compulsorily acquired for purposes of the war, but was rendered surplus after the war came to an end. However, the relevant state department denied his request and transferred the land to the Commissioners of Crown Lands. After a public outcry, based on allegations of corruption and maladministration, a public enquiry was launched. The report resulting from the enquiry led to the resignation of the responsible minister, Sir Thomas Dugdale. Before resigning, Dughale indicated how surplus land compulsorily acquired should be dealt with in future.<sup>114</sup> Dugdale indicated that where compulsorily acquired agricultural land becomes surplus and is not needed by a different state department, the land should be sold. Furthermore, he stated that the government recognises that previous owners, or their successors in title, should in certain instances be entitled to successfully reclaim the said land.<sup>115</sup> These indicators became known as the Crichel Down Rules.

The Crichel Down Rules have been amended numerous times<sup>116</sup> since being introduced in a 1954 Treasury Circular.<sup>117</sup> On the 31<sup>st</sup> of October 2004, the Office of the Deputy Prime Minister produced an updated Circular on *Compulsory Purchase and Crichel*

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<sup>111</sup> Moore V ‘Compulsory Purchase in the United Kingdom’ in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 1-31 at 4-5; Gibbard R ‘The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?’ in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329-351 at 329.

<sup>112</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* Circular 06/2004 (31 October 2004) 109 para 2. Wales, Scotland and Northern Ireland have similar rules, but these are not discussed here.

<sup>113</sup> For a more detailed account of the origin and development of the Crichel Down Rules, see Gibbard R ‘The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?’ in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329-351 at 330-333; Department of Communities and Local Government *The Operation of the Crichel Down Rules* (2000) at 3 1 - 3 5.

<sup>114</sup> See Department of Communities and Local Government *The Operation of the Crichel Down Rules* (2000) at 3 3.

<sup>115</sup> Department of Communities and Local Government *The Operation of the Crichel Down Rules* (2000) para 3 3.

<sup>116</sup> Department of Communities and Local Government *The Operation of the Crichel Down Rules* (2000) para 3 5. Most case law surrounding the Crichel Down Rules concerns the interpretation of various provisions of the Rules, which is one of the reasons why the Rules have been amended regularly. See also Gibbard R ‘The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?’ in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329- 351 at 332.

<sup>117</sup> The 1954 Crichel Down Rules (*Disposal of Agricultural Land acquired by Government Departments Compulsorily or under Threat of Compulsion*) Treasury Circular No 6/54, 27 October 1954. See Gibbard R ‘The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?’ in Cooke E (ed) *Modern Studies in Property Law* Vol II (2003) 329-351 at 332.



*Down Rules*.<sup>118</sup> In terms of this Circular these rules are non-statutory and therefore, not compulsory.<sup>119</sup> However, it is assumed that these rules should apply in a mandatory manner by certain departments.<sup>120</sup> It is for this reason that Gibbard states that '[t]he terms "rules" is itself something of a misnomer, as the guidance is in the form of advice rather than a set of statutory regulation, and is not universally applicable'.<sup>121</sup> However, the general rule is located in paragraph 10 of Part II of the Circular:

'Where a department wishes to dispose of land to which the Rules apply, former owners will, as a general rule, be given a first opportunity to repurchase the land previously in their ownership provided that its character has not materially changed since acquisition.'<sup>122</sup>

Therefore, former owners or their successors in title are given a first opportunity to purchase the land when the purpose of acquisition ends.<sup>123</sup> In terms of the Rules, the property is to be sold to the qualifying former owner at the current market value as established by a professional qualified valuation officer.<sup>124</sup>

In terms of the Annexure, the Rules apply to all government departments, non-departmental public bodies and other organisations subject to 'a power of direction by a Minister'.<sup>125</sup> It is recommended that local authorities as well as other statutory bodies that have compulsory acquisition power but that are not subject to Ministerial powers should follow the rules.<sup>126</sup>

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<sup>118</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004). On 5 May 2006, the Office of the Deputy Prime Minister became the Department of Communities and Local Government. However, the circular of 31 October 2004 is still applicable, but subject to certain amendments that have been issued by the Department of Communities and Local Government: [www.communities.gov.uk/publications/planningandbuilding/circularcompulsorypurchase2?view=Standard](http://www.communities.gov.uk/publications/planningandbuilding/circularcompulsorypurchase2?view=Standard) (accessed 12 April 2012).

<sup>119</sup> 'This Part of the Memorandum sets out the revised non-statutory arrangements ("Crichton Down Rules"); 'So far as local authorities and statutory bodies in England are concerned, it is recommended that they follow the Rules': Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 109 paras 1, 4.

<sup>120</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 109 paras 3, 4.

<sup>121</sup> Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 329.

<sup>122</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 110 para 10.

<sup>123</sup> See Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 334. A successor in title is a successor in terms of a will and 'includes those who would have succeeded by means of a second or subsequent will or intestacy': Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 119 para 10.

<sup>124</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 114 para 26.

<sup>125</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 118 para 3.

<sup>126</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 118 para 4.



In terms of the Rules there are also certain exceptions to the general rule to offer the property to the previous owner. If the land is needed by a different state department, the current department is not required to offer the property to the previous owner.<sup>127</sup> If the land is needed by a local authority or body with compulsory purchase power the current state department is not required to offer the property to the previous owner but on condition that the said body had the necessary authority at the time of acquisition to acquire the land.<sup>128</sup> There are also certain exceptions based on the lapse of time in paragraph 14 of the Rules.<sup>129</sup>

Furthermore, it is clear that the Rules will not apply where the character of the land has been changed materially. This includes instances where buildings have been erected on previously bare land or where additions to existing buildings were made that altered the character of the land.<sup>130</sup> Temporary buildings will not necessarily constitute a material change and evaluating whether development has materially changed the land, the relevant state department should consider the costs of restoring the land to its original state.<sup>131</sup> In the event that a portion of the land has been materially changed, the portion that was not materially changed can be offered to the previous owner.<sup>132</sup>

The practical application of the Crichton Down Rules is not beyond reproach. The Rules themselves had their origin in a hasty decision made by a minister before resigning, and have been amended numerous times as 'knee-jerk policy reactions to the rulings in hard cases, with the consequence that they have developed in a haphazard way'.<sup>133</sup> The procedure itself, for instance getting in touch with previous owners or their successors in title, can be a lengthy affair and often conflicts with other government obligations and targets.<sup>134</sup>

<sup>127</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 111 para 15 1.

<sup>128</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 111 para 15 2.

<sup>129</sup> For instance, agricultural land acquired before 1 January 1935; agricultural land acquired after 30 October 1992 that has become surplus and available for disposal more than 25 years after acquisition; and non-agricultural land that has become surplus and available for disposal more than 25 years after acquisition: Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 111 para 14.

<sup>130</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 110 para 10.

<sup>131</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 110 para 10.

<sup>132</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichton Down Rules Circular 06/2004* (31 October 2004) 110 para 11.

<sup>133</sup> Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 339.

<sup>134</sup> Gibbard R 'The Crichton Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 334. At 336-348, Gibbard also analyses the question whether the Rules themselves are fair and whether they are applied fairly in practice.

Furthermore, since the Rules are non-statutory they frequently conflict with state departments' own policies concerning the disposal of land. Therefore, 'there is much misunderstanding surrounding the issue of the offer-back procedures in practice, leading to inconsistent and often inappropriate application of the Rules'.<sup>135</sup> However, according to Gibbard the underlying philosophy of the Crichel Down Rules is still sound.<sup>136</sup> Gibbard indicates that there is a moral obligation to allow former owners the first option to re-acquire property that was taken from them and not used for the purpose it was initially acquired for. The operation of such a system that allows for such a right must be applied consistently and there must be proper guidance in place so that it can function 'fairly and predictably'.<sup>137</sup>

## 6 5 Evaluation of the Overview of Foreign Law

### 6 5 1 Use Restricted to the Purpose for which the Property was Expropriated

During the discussion of foreign law above it became clear that in some jurisdictions the expropriated property must be used for the purpose for which it was expropriated. In German law, expropriation will always be subject to the requirement that its use must be for a specific public purpose.<sup>138</sup> That specific public purpose is judged against the public purpose requirement in article 14.3 of the Basic Law of 1949 and the fulfilment of the public purpose must require the expropriation of the relevant property.

Similar to the German courts, Malaysian courts interpret the public purpose requirement strictly. In Malaysian law it is accepted that the state must use the property for the purpose set out in the notice of acquisition as it appeared in the Government Gazette. This was confirmed by the Malaysian high court in *United Development Company Sdn Bhd v The State Government of Sabah*.<sup>139</sup> The court stated that the government does not have unfettered power to deal with the property after expropriation in any way it deems fit. It therefore has an obligation to use the property for the specific public purpose, since the landowner negotiated compensation based on the assumption that the property would be used for a particular purpose. In *United Development Company Sdn Bhd v The State*

<sup>135</sup> Gibbard R 'The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 351.

<sup>136</sup> Gibbard R 'The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 351.

<sup>137</sup> Gibbard R 'The Crichel Down Rules: Conduct or Misconduct in the Disposal of Public Lands?' in Cooke E (ed) *Modern Studies in Property Law Vol II* (2003) 329-351 at 351.

<sup>138</sup> See *BVerfGE* 56, 249 [1981] (*Dürkheimer Gondelbahn*), discussed in ch 4 at 4 4 4 2. See also Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hophauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513 para 66.

<sup>139</sup> [2011] 7 MLJ 209.

*Government of Sabah*<sup>140</sup> the court did not indicate whether the public purpose can be changed and under which circumstances.

### *6 5 2 State Permitted to Change the Purpose for which the Property was Expropriated*

In contrast, it is accepted in other jurisdictions that the state may under certain circumstances and within limits change the purpose for which the expropriated property is used. The *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others*<sup>141</sup> decision from the Philippines shows that the state may change the use of the property after expropriation. In this regard the Supreme Court reasoned as follow:

‘A condemnor should commit to use the property pursuant to the purpose stated in the petition for expropriation, failing which it should file another petition for the new purpose. If not, it behoves the condemnor to return the said property to its private owner, if the latter so desires.’<sup>142</sup>

Although the Court stated that the state cannot use the expropriated property for any purpose and dishonour the judgment of expropriation, it indicated that the state can change the purpose if it files a new expropriation petition. This reason is arguably to ensure that the property is still used for a valid public purpose, since the Court was of the opinion that there is ‘no more cogent point for the government’s retention of the expropriated land’<sup>143</sup> if the condition (the public purpose) that allowed the state to expropriate the property in the first place falls away.

Similarly, the Cichel Down Rules exclude the obligation to offer the expropriated property to the previous owner if the acquired property is needed by a different state department. Therefore, it might be possible to use the property for a different purpose. However, since the obligation of re-transfer is not imposed when the property is needed by a different state department or body as stipulated in the Rules, and since the property is

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<sup>140</sup> [2011] 7 MLJ 209.

<sup>141</sup> GR No 168770; GR No 168812, 9 February 2011.

<sup>142</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR NO 168770; GR NO 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated.

<sup>143</sup> *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR NO 168770; GR NO 168812, 9 February 2011. This reported decision is neither paragraphed nor paginated.

regarded as not being 'surplus to Government requirements'<sup>144</sup> it is arguable that the property will in most instances continue to be used for a public purpose.

### 6 5 3 Re-transfer Guaranteed

In German law, where expropriation is only allowed for a specific public purpose, non-realisation or abandonment of that specific public purpose means that the owner can re-claim the property. Since the courts are only concerned with the specific public purpose for which the property is expropriated, a change in purpose is not even considered. It was established that provision is made in various pieces of legislation for the re-transfer of expropriated property once the purpose is not realised or abandoned. As was indicated in *Harvey v Umhlatuze Municipality and Others*,<sup>145</sup> similar legislation exists in several other jurisdictions as well, with the same effect. However, the German Federal Constitutional Court has held that even in the absence of specific legislation a right of re-claim is implicit in the guarantee of property in terms of article 14 of the Basic Law of 1949.<sup>146</sup>

In Philippine law, the Supreme Court in *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others*<sup>147</sup> has held that property owners has an implicit right to re-claim expropriated property once the purpose for which the property was expropriated is not realised, ends or is abandoned. The Supreme Court held that if the expropriated owner did not have this implied right, the expropriation process is flawed since the public use requirement would not be met.

In English law the Crichel Down Rules compel government departments to offer the acquired property to the original owner, or his successors in title, when the land becomes surplus. These rules contain detailed provisions concerning when and under which circumstances the relevant departments are obliged to offer the property to the previous owner, or his successors in title. Therefore, the Crichel Down Rules guarantee that compulsorily acquired property will be offered to the previous owner if it is no longer needed for a public purpose by the acquiring authority or by a different authority.

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<sup>144</sup> Office of the Deputy Prime Minister *Compulsory Purchase and the Crichel Down Rules* Circular 06/2004 (31 October 2004) 111 para 15 1.

<sup>145</sup> 2011 (1) SA 601 (KZP).

<sup>146</sup> *BVerfGE* 38, 175 [1974]. See further Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 510-511 para 591.

<sup>147</sup> GR No 168770; GR No 168812, 9 February 2011.

## 6 6 The Way Forward for South African Law

Since there is no legislation that can regulate the re-transfer of expropriated property upon the non-realisation of the public purpose in South African law it is submitted that the existing Expropriation Act 63 of 1975 should be amended to that effect. The Act should provide for mechanisms through which previous owners can re-claim their previously expropriated property in certain situations and to allow the courts the authority to oversee this process. The main objective of the amending provisions should be to indicate the nature of this right of re-transfer, the persons entitled to claim re-transfer, the time-frame within which the expropriated owner can reclaim the property upon the non-implementation of the purpose, setting up a framework for calculating the amount that has to be repaid, as well as the circumstances under which the state would not be required to re-transfer the property to the previous owner.

In view of the uncertainties and difficulties that arise due to the non-statutory nature of the Cichel Down Rules it is not advisable to adopt that approach. Rather, provision for such a right should place a statutory obligation on the expropriating authority to follow a particular process when the purpose for which the property was expropriated cannot be realised, ends, or if the purpose is subsequently abandoned. This process should also be activated when the expropriated owner re-claims the property upon the non-realisation or abandonment of the original purpose, or if the previous owner claims that the changed purpose is not a valid public purpose.

The issue of the lapse of time should be addressed clearly in this provision. To prevent uncertainty the law should attach a time-frame to the realisation of the public purpose. For instance, if the purpose for which the property was expropriated is not realised for a period of three years, the state should file a new purpose. Notice of the new purpose could be served on the previous owner, such as in Canadian law, or be placed in the Government Gazette and/or local newspapers. If a new purpose is not filed, the previous owner should be able to claim a right to repossession of the property. There are examples in foreign law of how such a time-frame could be construed. In French law an owner can reclaim the property if it has not been used for the public purpose for a period of five years.<sup>148</sup> In Dutch law, an owner can reclaim the property after three years has lapsed and it has not been used for the intended purpose.<sup>149</sup> The time-frame is something that has to be decided by the legislator, but it should be a relatively short period (3-5 years)

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<sup>148</sup> See *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 93.

<sup>149</sup> See Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 622.

rather than a longer period, since the whole purpose of expropriation is to expropriate property that is required, many times on an urgent basis, for the realisation of a particular public purpose.

If the purpose is abandoned or ends after the three year time period, the question as to what the state can do with the property arises. As a general rule, the expropriated property should always be used for a public purpose. Therefore, upon the completion or abandonment of the public purpose, the state should be forced to follow a specific process. If the state department that initially needed the property for the fulfilment of a public purpose can use it for a different public purpose the state can retain possession of the property, since it would still be justified in doing so. In that regard the state should file the new purpose, for instance by advertising it in the Government Gazette. If the previous owner contests the change in purpose, the courts should be able to decide whether the new purpose is a valid public purpose.

If the original state department cannot use the property for a different public purpose but it can be used for a valid public purpose by a different state department, the previous owner's right to reclaim the property should generally be excluded, provided that the proposed use by the different state department is also advertised in the Government Gazette. However, if the previous owner argues that the purpose to which the different state department will put the property is not a valid public purpose, she should be able to approach a court to determine whether the property is still to be used for a valid public purpose. If the state department that initially required the property for a public purpose or a different state department cannot use the property for a different public purpose or if the court determines that the new purpose is not a valid public purpose, the previous owner should be given the first opportunity to purchase the land in order to take repossession of the property. The offer to repurchase should be made within a specific time period (for instance a year) after the state or a court has concluded that the property cannot be used for a different public purpose.

Therefore, when a new public purpose cannot be established and the state wants to dispose of the land the legislation should force the expropriating authority to first offer the property to the previous owner or his successors in title. In that sense, the price that has to be repaid should either be the current market value of the property, as is the case in terms of the United Kingdom's Crichton Down Rules, or the compensation that was originally paid plus legal interest, as was the case in the Philippine decision of *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v*



*Inocian and Others*.<sup>150</sup> The decision between the two options of calculating the amount that has to be paid is probably one of policy and should be left up to the legislature, but given the argument below regarding the re-transfer of property that has materially changed since expropriation, a strong case for requiring the payment of the current market value can be made.

In terms of the Crichton Down Rules, the state is under no obligation to offer the property to the previous owner upon the abandonment of the public purpose when the property has been changed materially, for instance through development.<sup>151</sup> In terms of the Crichton Down Rules, the property is deemed to have materially changed when buildings have been erected on land that was vacant when it has been expropriated. Therefore, in the event that the state expropriates a vacant piece of land to build a hospital and in fact does so, but later the hospital falls into disuse because of a lack of funds, the state is under no obligation to offer the property to the previous owner.

However, it is arguable that the state could in that instance still offer the property to the previous owner, or his successors in title. If the price that has to be paid is market value, the owner will not be unduly favoured since he would have to pay for any improvements that might have been made to the property. There might be other instances where the state may be exempt from selling previously expropriated property, even to the previous owner. One example might include a nuclear electricity plant that was erected on expropriated land that fell into disuse. There may be a strong case not to sell the property since it may contain hazardous waste. If the property has been developed for or is usable for land reform purposes, the expropriating authority may also be exempt from offering the property to the previous owner.

The law as it stands states that the state is only allowed to use expropriated property for a public purpose.<sup>152</sup> What should happen when the state no longer has a need for the property and the previous owner rejects the offer to re-purchase the land? It is arguable that in that case, and in only that case, the state is able to deal with the property as if it held it in private ownership. In this instance, the public purpose has probably played its part and has rendered enough protection to the expropriated owner. It has ensured that the original expropriation was for a public purpose and it has given the expropriated owner the opportunity to reclaim the property when the property could no longer be used for a

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<sup>150</sup> GR No 168770; GR No 168812, 9 February 2011.

<sup>151</sup> See 6 4 4 above.

<sup>152</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 499; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 584.

public purpose. In that regard the state can freely dispose of the property in any matter it deems fit.

# CHAPTER 7: CONCLUSION

## 7 1 Introduction

The central question addressed in this dissertation is whether expropriation for economic development is justifiable in terms of section 25 of the 1996 Constitution of the Republic of South Africa, especially if the expropriation involves a third party transfer of the expropriated property. In terms of section 25(2) of the Constitution an expropriation must be for a public purpose or in the public interest and just compensation must be paid. It is generally accepted that the public purpose or public interest justifies an expropriation and that the payment of compensation is no more than a natural consequence of an expropriation rather than the source of its legitimacy.<sup>1</sup> This dissertation therefore considers the question whether the public purpose or public interest said to be served by it can justify both the expropriation of property for economic development purposes and the transfer of that property to a third party for the realisation of the intended economic development. In this regard it is argued in the chapters above that either the public purpose or the public interest can, at least in some instances, justify the expropriation of property for economic development purposes or the transfer of the expropriated property to third parties for the intended economic development, but that certain restrictions and qualifications of such a use of the state's power to expropriate are necessary.

To understand the meaning of the phrases 'public purpose' and 'public interest' in terms of the 1996 Constitution the dissertation starts off with an historical analysis of the understanding of the requirements in Chapter 2. In that chapter it is shown that the legislation that authorised expropriation before the constitutional era only referred to expropriation for 'public purposes.'<sup>2</sup> Public purpose was usually contrasted with private purpose and could be understood in either broad or narrow terms.<sup>3</sup> In terms of the narrow understanding, 'public purpose' was said to include goals directly related to government purposes, such as the building of government buildings, roads or other necessary infrastructure. In terms of the broad reading, the public purpose requirement was said to include a wider set of goals that would benefit the public at large or even the local public.<sup>4</sup> Examples of expropriation for a public purpose in the broader sense include the provision

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<sup>1</sup> See *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 82; *Minister of Minerals and Energy v Agri SA (CALS Amicus Curiae)* (458/11) [2012] ZASCA 93, 31 May 2012 para 18.

<sup>2</sup> See the Expropriation Act 55 of 1965; Expropriation Act 63 of 1975.

<sup>3</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271. See also Gildenhuys *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) 95.

<sup>4</sup> *Minister of Lands v Rudolph* 1940 SR 126; *Fourie v Minister van Lande en `n Ander* 1970 (4) SA 165 (O).

of housing for technicians responsible for important telecommunications networks<sup>5</sup> and the preservation and conservation of the country's water reserves.<sup>6</sup> The judicial choice between the broad and the narrow interpretation of the phrase 'public purpose' traditionally depended on the legislation involved and the facts of each case.<sup>7</sup>

This distinction between the broad and the narrow understanding of the public purpose requirement was applied in South African case law until the decision in *Administrator, Transvaal and Another v Van Streepen (Kempton Park) (Pty)*<sup>8</sup> (*Van Streepen*). In *Van Streepen* the Appellate Division of the Supreme Court did not make reference to the broad and narrow understanding of the public purpose requirement in earlier cases but held that although an expropriation that benefits a third party can never be for a public purpose, it can in certain circumstances be legitimate insofar as it is in the public interest. Therefore, it is argued in Chapter 2 that when the court in *Van Streepen* referred to 'public purpose' it referred only to the narrow understanding of the public purpose as established in earlier case law and when it referred to the 'public interest' it referred to the broad understanding of the public purpose requirement in earlier cases.<sup>9</sup> As a result, the position regarding the justificatory requirements for an expropriation before the Interim Constitution Act 200 of 1993 was promulgated was that the phrase 'public purpose' related to government purposes narrowly interpreted, while the phrase 'public interest' related to expropriation for purposes that benefit the public more broadly and that may also incidentally benefit third parties.

The property clause in the Interim Constitution of 1993 only referred to expropriation for public purposes. Given that the court in *Van Streepen* held that an expropriation that benefits a third party can never be for a public purpose there was concern that the expropriation of property in the area of land reform would be invalid in terms of this interpretation of the clause because land reform can also involve the transfer of expropriated property to third parties benefiting from land reform initiatives.<sup>10</sup> Therefore, in section 25(2) of the 1996 Constitution both the public purpose and the public interest were

<sup>5</sup> *Fourie v Minister van Lande en `n Ander* 1970 (4) SA 165 (O).

<sup>6</sup> *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N).

<sup>7</sup> See *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271; *Minister of Lands v Rudolph* 1940 SR 126; *Slabbert v Minister van Lande* 1963 (3) SA 620 (T).

<sup>8</sup> 1990 (4) SA 644 (A).

<sup>9</sup> See the discussion in ch 2 at 2 4 3 and ch 3 at 3 3 3.

<sup>10</sup> See Chaskalson M 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 136-138; Chaskalson M 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222-240 at 238; Budlender G 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender G, Latsky J, Roux T *Juta's New Land Law* (OS 1998) ch 1 at 48; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 340. See ch 3 at 3 2.

included, together with section 25(4),<sup>11</sup> to ensure that third party transfers of land expropriated for land reform purposes would not be invalidated simply because it involves a third party transfer of the land.<sup>12</sup> It is therefore concluded in Chapter 3 that the public purpose requirement in section 25(2) is limited to narrow public purposes (as it was understood in earlier case law), or government purposes, while the public interest requirement refers to broader public purposes, namely a purpose that benefits the public more broadly.

It is concluded in Chapter 3 that third party transfers for narrow public purposes are generally unproblematic. Legislation often specifically authorises the expropriation of property on behalf of a third party for the realisation of a project of public importance.<sup>13</sup> Furthermore, there is evidence that a third party transfer for broader public purposes may sometimes be in the public interest and therefore valid. In South African law an example of a third party transfer that is in the public interest is in the area of land reform, which is specifically legitimised in the Constitution and regulated in terms of legislation. At least as far as land reform is concerned, it is therefore clear that transfer of expropriated property to a third party beneficiary would not be in conflict with the section 25(2) requirement.

## **7 2 Expropriation for Economic Development and the Transfer of Property for Economic Development Purposes**

In this dissertation it is argued that the question whether a third party transfer of expropriated property is legitimate in terms of section 25(2) becomes problematic in situations where it already has become clear that the expropriation is for a valid public purpose or in the public interest in any event.<sup>14</sup> If the expropriation is neither for a lawful public purpose nor in the public interest, the expropriation would be invalid and the legitimacy of transfer of the property to a third party would be irrelevant.<sup>15</sup> Furthermore, if the expropriation is invalid for any other reason, such as it being arbitrary, not authorised by legislation, or corrupt, the expropriation would also be invalid and the question regarding the legitimacy of a third party transfer would not feature.<sup>16</sup>

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<sup>11</sup> S 25(4)(a) of the 1996 Constitution states that the 'public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.

<sup>12</sup> See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 591-592; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 462-463.

<sup>13</sup> See ch 3 at 3 3 3.

<sup>14</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 465.

<sup>15</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 465.

<sup>16</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 465.

With regard to the transfer of property to third parties a distinction is made between an expropriation that is for a public purpose and an expropriation that is in the public interest.<sup>17</sup> If the purpose of the expropriation is a public purpose, defined narrowly as state or government purposes, the question regarding the validity of a third party transfer of the property is usually less pertinent, since in such cases the identity of the party responsible for realising the public purpose is generally irrelevant.<sup>18</sup> In situations where expropriated property is transferred to a third party for public purposes as defined narrowly, the property is in fact required either for a public use (such as the building of roads) or for the primary benefit of the public (such as the construction of electricity plants to provide electricity to the public) in any event. Therefore, if property is expropriated for purposes directly related to narrow government purposes, such as the building of roads, schools or hospitals, the party responsible for constructing, managing and maintaining the infrastructure can be either the state or a private party and the legitimacy of transferring the expropriated property to a third party to that end would generally not be a big constitutional issue. This position also finds support in foreign law.<sup>19</sup> Foreign law indicates, however, that it is preferable to establish a framework of controls within which the legitimacy of third party transfers can be adjudicated, for example (as in German law) that the level of scrutiny can be lower if the third party to whom the expropriated property is to be transferred not only undertakes a particular public service for which the property is required on behalf of the state, but exists only and purely for the purpose of delivering the particular public service (such as providing public infrastructure).

If the expropriation is in the public interest (or for a public purpose defined broadly) the expropriated property may also be transferred to a third party for realisation of the public purpose, at least in certain situations. For purposes of slum clearance and land reform, for instance, property is occasionally expropriated and transferred to third parties. In that case both the expropriation and the transfer of the property are deemed to be in the public interest. In the area of slum clearance the public interest usually relates to the clearance of a blight that may be detrimental to the general welfare and health of society.<sup>20</sup> In the area of land reform the purpose of transferring the property to third parties is either to break up the unequal existing division of land or to provide for other restitutionary purposes, such as providing remedies to people previously affected by racially

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<sup>17</sup> See ch 4 at 4 2 - 4 3.

<sup>18</sup> See *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA) para 15 and the discussion in ch 4 at 4 2.

<sup>19</sup> For instance, in US and German law the transfer of property to third parties for narrow public purposes are generally allowed. See ch 4 at 4 2.

<sup>20</sup> See the US decision of *Berman v Parker* 348 US 26 (1954), discussed in ch 4 at 4 3 2.



discriminatory legislation and practices.<sup>21</sup> This argument could also justify expropriation and third party redistribution of property 'in such a way as to provide support to a vital process of reconciliation, reconstruction and development.'<sup>22</sup> In situations where property is expropriated and transferred to third parties because doing so is deemed to be in the public interest, the purpose of the expropriation is usually identified in the authorising legislation,<sup>23</sup> which is an important consideration for evaluating the legitimacy of expropriation for purposes such as slum clearance and land reform. However, in cases where property is expropriated for broader public purposes the courts would usually inquire whether there is some sort of legislative scheme that regulates or controls the realisation of the purpose by expropriating and transferring the property.

Against this backdrop this dissertation considers the question whether third party transfers for economic development purposes can be in the public interest. Economic development in general has not traditionally been regarded as a public purpose that could justify expropriation, and it is not immediately evident that it is in the public interest, especially in the absence of a regulatory legislative scheme. In Chapter 4 the question whether a particular third party transfer of expropriated property for economic development is legitimate in terms of the constitutional provisions is split up into two separate questions, namely firstly whether economic development is in the public interest and secondly whether the transfer of expropriated property to a third party for economic development purposes is in the public interest.

With regard to the first question, namely whether economic development generally is or can be in the public interest, the main issue is whether the expropriation of property for economic development purposes is specifically authorised in terms of legislation, or whether the expropriation of property for purposes of economic development takes place in terms of a statutory development scheme. In contradistinction to the trend in foreign law to authorise specifically the expropriation of property for redevelopment or development in dedicated legislation,<sup>24</sup> detailed authorising legislation does not exist in South African law.

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<sup>21</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 629.

<sup>22</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* (5<sup>th</sup> ed 2006) 629.

<sup>23</sup> See the District of Columbia Development Act of 1945, which was used to expropriate property to eliminate slum neighbourhoods in terms of a development plan. The expropriation of the properties in this case was challenged in *Berman v Parker* 348 US 26 (1954), which is discussed in ch 4 at 4 3 2. See also the Restitution of Land Rights Act 22 of 1994, which authorises the expropriation of property for purposes of restoring land to persons previously dispossessed of property through unfair legislation and practices. See the discussion in ch 4 at 4 3 3 1.

<sup>24</sup> The Regional Development Agencies Act 1998, which led to the dispute in *Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin) and *Sole v Secretary of State for Trade and Industry* [2007] EWHC 1527 (Admin) specifically authorise the compulsory acquisition of property to stimulate economic

The Expropriation Act 63 of 1975, which was used to expropriate the applicant's property for economic development in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*,<sup>25</sup> only refers very broadly and generally to the expropriation of property for public purposes. Similarly, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*<sup>26</sup> the courts accepted that the anticipated expropriation and transfer of property to third parties for economic development purposes would be in the public interest and would satisfy the requirements of the Expropriation Act and section 25(2) of the Constitution, even though both the Expropriation Act and Constitution only refer to the expropriation of property for a public purpose or in the public interest. Furthermore, neither the specific legislation that incorporated the Coega Development Corporation, the Manufacturing and Development Act 187 of 1993, nor the Eastern Cape Land Disposal Act 7 of 2000 granted explicit expropriation powers and therefore neither of these statutes specifically authorised the expropriation of property for economic development purposes.<sup>27</sup> It is therefore argued in Chapter 4 that the context within which foreign courts generally defer to the legislative decision to expropriate property for economic development, namely the existence of fairly specific and dedicated authorising legislation does not exist in South Africa and therefore such a deferential approach is not justified.

In cases where legislation does not specifically authorise the expropriation of property for economic development or redevelopment purposes, the expropriation of the property can still be valid if it complies with the constitutional requirements. However, in situations where legislation does not specifically authorise expropriation for economic development purposes, the judicial determination as to whether it in fact complies with the constitutional requirements should be stricter than in cases where legislation specifically authorises it.<sup>28</sup> In the foreign jurisdictions discussed in Chapter 4, namely US, English and Irish law, the courts easily allow an expropriation involving a third party transfer for economic development if the legislation specifically permits and authorises the expropriation for such purposes. Therefore, the foreign courts in these jurisdictions apply a relatively low level of scrutiny when considering the purposes for which property may be

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development. The Detroit Economic Development Corporation Act 1974 PA 338, which led to the dispute in *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981) was promulgated to stimulate the economies of distressed areas. In *Crosbie v Custom House Docks Development Authority* [1996] 2 IR 531 (HC), the Irish court relied on s 9 of the Urban Renewal Act of 1986, which authorises the relevant authority to 'acquire, hold and manage land in that Area for its development, redevelopment or renewal either by the Authority or by any other person' to validate the compulsory acquisition.

<sup>25</sup> [2010] ZAFSHC 11, 4 February 2010.

<sup>26</sup> 2009 (5) SA 661 (SE); 2010 (4) SA 242 (SCA).

<sup>27</sup> See ch 4 at 4 6 3.

<sup>28</sup> See ch 4 at 4 6 3.

expropriated, provided that the authorising legislation permits the expropriation of property for purposes such as redevelopment or economic regeneration. In other words, if the authorising legislation specifically allows for expropriation for the sake of economic development or redevelopment, the courts are deferent as to the means adopted to realise the purpose. The fact that the property is transferred to third parties is therefore not subjected to strict scrutiny.

The German courts, on the other hand, are stricter in evaluating the purposes for which property may be expropriated. In German law expropriation can only be effected in terms of legislation and the legislation must always clearly authorise the expropriation of the property for a specific public purpose.<sup>29</sup> Furthermore, the expropriation must be strictly necessary for the realisation of the purpose.<sup>30</sup> Therefore, the courts exercise strict control over the authority for an expropriation as it is specified in the authorising legislation. If the legislation does not authorise the expropriation for purposes of a specific economic development or regeneration, expropriation for that purpose would be invalid for lack of statutory authority, regardless of whether it includes third party transfer of the property.<sup>31</sup>

Since economic development has not traditionally been regarded as a valid public purpose or in the public interest in South African law, it is possible to argue that without any specific, dedicated legislative basis, the expropriation of property for economic development purposes should generally be invalid for lack of statutory authority, as in German law. Alternatively, it is argued in Chapter 4 that expropriations of this kind should at least be subjected to heightened judicial scrutiny, as was also suggested in a recent decision of the UK Supreme Court.<sup>32</sup>

As a general rule, a third party transfer of expropriated property is unproblematic if the purpose of the expropriation is for an apparently legitimate public purpose or in the

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<sup>29</sup> Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 279 para 522; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 paras 158-159; Schmidt-Aßmann B 'Expropriation in the Federal Republic of Germany' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 81-103 at 81; Currie DP *The Constitution of the Federal Republic of Germany* (1994) 291.

<sup>30</sup> Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 628 para 160; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147. See also the discussion in ch 5 at 5 4 2.

<sup>31</sup> BVerfGE 56, 249 [1981] (*Dürkheimer Gondelbahn*); BVerfGE 74, 264 [1986] (*Boxberg*) 286. See the discussion of these cases in ch 4 at 4 4 4.

<sup>32</sup> In *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* [2010] UKSC 20 Lord Walker, writing a separate concurring judgment, argued that private takings are particularly sensitive and as a result should be subjected to heightened scrutiny. See Waring EJM 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 15 and the discussion of this decision in ch 4 at 4 4 2 3 2.

public interest as set out above.<sup>33</sup> However, in a situation where the purpose of the expropriation is in itself difficult to justify, the determination as to whether the transfer of the property to a third party is lawful should be subjected to even stricter scrutiny. The expropriation of property for purposes of economic development or redevelopment is difficult to justify in general because it is so vague.<sup>34</sup> There is usually no hard evidence concerning the number of jobs or the amount of revenue that will be created by a development of this kind and in cases where it is promised that a certain number of jobs would be created, there is no assurance that it will indeed materialise, nor is there any accountability in the event that it does not materialise. As a result, both the expropriation and the transfer of property to third parties for economic development purposes should be subjected to rigorous judicial scrutiny, unless there is dedicated and more or less specific authorising legislation that sets out a scheme in terms of which the legitimacy of the expropriation and of any third party transfers that might be involved can be judged.

In Chapter 4 the arguments of various authors who are against allowing the transfer of expropriated property for economic development purposes are reviewed in addition to the discussion of case law. This literature focuses on a number of particularly problematic aspects of third party transfers of property expropriated for economic development. In the first place, third party transfers for economic development purposes have in various situations resulted in persons losing their homes.<sup>35</sup> The expropriation of homes has additional negative effects on the expropriated persons, such as the loss of a support system or informal arrangements concerning child-care and care for the elderly,<sup>36</sup> and these costs are not necessarily accounted for by the payment of market value compensation.<sup>37</sup> It may also be impossible to obtain a similar residence in a neighbourhood equal to the one from which the persons are displaced.<sup>38</sup> People may be more accepting of the expropriation of their homes for public purposes that serve narrow

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<sup>33</sup> See *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 (4) SA 242 (SCA); *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) and the discussion in ch 4 at 4 6 5.

<sup>34</sup> In this regard see Waring E.J.L. 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 20-21; Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 13-14.

<sup>35</sup> See *Kelo v City of New London* 545 US 469 (2005); *Poletown Neighborhood Council v City of Detroit* 410 Mich 616 (Mich, 1981).

<sup>36</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16.

<sup>37</sup> Michelman F.I. 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harv LR* 1165-1258 at 1214-1216; Michelman F.I. 'Property as a Constitutional Right' (1981) 38 *Wash & Lee LR* 1097-1114 at 1112.

<sup>38</sup> Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 16.

public purposes, such as when a new road or electricity plant need to be constructed, but they may feel extremely uneasy about sacrificing their homes for purposes not directly linked to a narrow public purpose, especially if the process is only justified because someone else may make better economic use of the property.<sup>39</sup> Furthermore, it has been argued that third party transfers for economic development purposes have disproportionate effects on the less affluent members of society.<sup>40</sup> As a result, it has been argued that the expropriation of homes should generally be subjected to stricter scrutiny.<sup>41</sup>

In addition to the disproportionately harsh effects that third party transfers for economic development may have on the less affluent members of society, it has also been argued that expropriation of this kind renders the public purpose requirement redundant. It replaces the security of property with a security of value.<sup>42</sup> In addition to the third party holding the expropriated property on exclusionary terms after expropriation, the expropriation of property to enable someone else to make a profit seems like an expropriation for a private purpose that should not be allowed.<sup>43</sup> As a result of the overview of academic criticisms, it is argued in Chapter 4 that the power of condemnation should only be available in situations where there is a real and direct benefit to the public, or if it involves subsequent public use of the property.<sup>44</sup> The power of condemnation should therefore not be used when the primary benefit of the expropriation goes to a private party and the secondary benefits such as increased employment opportunities accrue, if they do materialise at all, to the public.<sup>45</sup>

As a result of the negative externalities that come about when third party transfers for economic development are allowed, it is argued in this dissertation that the South African courts should not be as deferent as the US, English and Irish courts towards the purposes for which property may be expropriated. It is suggested that the German approach towards the purposes for which property may be expropriated, as authorised in

<sup>39</sup> The author wishes to thank Professor Lee Fennell for bringing this formulation under his attention.

<sup>40</sup> See Justice O'Connor's dissent in *Kelo v City of New London* 545 US 469 (2005); Underkuffler LS 'Kelo's Moral Failure' (2006) 15 *William & Mary Bill of Rights Journal* 377-387 at 386.

<sup>41</sup> Fee J 'Eminent Domain and the Sanctity of the Home' (2006) 81 *Notre Dame LR* 783-819 at 801. See also Van der Walt AJ 'Housing Rights and the Intersection between Expropriation and Eviction Law' in Fox-O'Mahony L & Sweeney JA (eds) *The Idea of Home in Law: Displacement and Dispossession* (2011) 55-100 at 99.

<sup>42</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 84, with reference to Calabresi G & Melamed AD 'Property Rules, Liability Rules and Alienability: One View of the Cathedral' (1972) 85 *Harv LR* 1089-1128. See also Waring EJJ 'The Prevalence of Private Takings' in Hopkins N (ed) *Modern Studies in Property Law* Vol VII (forthcoming 2013) (copy of paper on file with the author) 21; Walsh R "'The Principles of Social Justice" and the Compulsory Acquisition of Private Property for Redevelopment in the United States and Ireland' (2010) 32 *Dublin University Law Journal* 1-23 at 13-14.

<sup>43</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 83; Gray K 'Human Property Rights: The Politics of Expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>44</sup> See Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82-84.

<sup>45</sup> Gray K 'There is No Place like Home' (2007) 11 *Journal of South Pacific Law* 73-88 at 82-84.



legislation and judged against the public purpose requirement in article 14.3 of the 1949 Basic Law, should be adopted. In terms of German law the legislation must authorise the expropriation, the purpose for which it may be undertaken and the eventual transfer of the property to another private party for the realisation of that purpose. Accordingly, the courts strictly evaluate whether the expropriation is justified for that purpose, whether the expropriation and transfer of the property are strictly necessary for that purpose, and whether the whole process complies with article 14.3 of the Basic Law. More specifically, it is argued here that the contextual reasons for a more deferential judicial attitude in other jurisdictions, particularly the tendency to authorise and regulate specific expropriation and developments schemes in dedicated legislation, do not exist in South African law and that such a deferent approach is therefore not justified here.

Statutory or judicial control over expropriation schemes is desirable especially in cases where the purpose of the expropriation is vaguely formulated - such as 'regeneration' or 'development' - and in cases that involve third party transfers. In such a case the legislation can strictly control the situations under which property can be expropriated or impose restrictions when property is eventually expropriated. The courts should also control the purposes for which property may be expropriated, and such control must be stricter in cases where legislation does not impose any restrictions.

With regard to third party transfers for economic development it is therefore argued that both the purpose of the expropriation and the third party transfer should, each on its own, either be legitimised by legislation or be evaluated strictly by the courts. If legislation does not explicitly legitimise third party transfers for economic development purposes or if the legislation that exists does not impose restrictions, the courts' scrutiny of each aspect of the expropriation should accordingly be stricter.

### **7 3 The Less Invasive Means Argument in South African Expropriation Law**

Apart from the central question regarding the legitimacy of expropriation of property for economic development purposes and subsequent third party transfer of such property, Chapter 5 raises the related question whether the availability of an alternative, less invasive means - other than expropriation - to realise a valid public purpose is or should be an effective defence against a proposed expropriation. If the public purpose can be realised without expropriating property, it is arguably unnecessary to expropriate property for that purpose and then the expropriation might be open to attack on the basis of the



section 25 requirement. Acceptance of the less invasive means argument in South African expropriation law can strengthen the argument above concerning the strict level of scrutiny, since it would involve considering whether the expropriation is absolutely necessary for the achievement of the particular public purpose. However, recent case law confirms that as long as there is a rational connection between the purpose of the expropriation and the expropriation as a means to realise that purpose, and provided the purpose vaguely satisfies the public purpose or public interest requirement on that low level of scrutiny, the courts will not query or invalidate the decision of the expropriator to expropriate the property purely because there may be an alternative means to realise the same purpose.<sup>46</sup> The generally deferent attitude adopted by the courts implies that the availability of an alternative, less invasive means to realise the purpose is not currently a valid ground for an attack on the decision to expropriate.

In situations where the purpose of the expropriation is uncontroversial, this approach is unproblematic. For instance, ensuring the safety of the State President is a valid public purpose as understood narrowly and if the responsible authority decides that expropriation of private property is the best way to ensure the safety of the President, the expropriation should arguably not be set aside by the courts easily merely because alternative measures to reach the goal are available.<sup>47</sup> With reference to Irish law it is argued in Chapter 5 that even if there are alternative means available to realise a valid public purpose, the decision to expropriate property along a specific route or in a specific manner can only be set aside if there is a substantial reason as to why the expropriating authority should have elected a different route.<sup>48</sup> Mere unhappiness on the side of the expropriated owner is not a ground for setting aside the expropriation. To this extent, current reluctance to accept the less invasive means argument is justifiable. However, it is argued in Chapter 5 that in cases where the purpose of the expropriation is in itself controversial, such as vaguely defined economic development purposes or transferring expropriated property to third parties for economic development purposes, the availability of less invasive means to realise that purpose cannot be irrelevant. This is especially true in the absence of a dedicated legislative scheme that defines the proposed development and that includes some kind of control over or accountability regarding attainment of the purpose.

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<sup>46</sup> See *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246, 1 December 2011.

<sup>47</sup> See especially *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010; [2011] ZASCA 246, 1 December 2011 and the discussion at ch 5 at 5 4 1.

<sup>48</sup> See *Lord Ballyedmond v The Commission for Energy Regulation and Others* [2006] IEHC 206; Walsh R *Private Property Rights in the Irish Constitution* (Phd thesis Trinity College Dublin 2011) 246 and the discussion in ch 5 at 5 5.

In German law, legislation must be specific about the purposes for which property is expropriated. It therefore has to indicate that expropriation of property is absolutely necessary for the achievement of a particular, specified public purpose. As a result of the public purpose requirement, coupled with the proportionality principle applied by the courts when adjudicating expropriation cases, an expropriation is only valid if it is the only manner in which the public purpose can be realised; if an alternative, less invasive means is available to realise that specific public purpose, the expropriation can be set aside by the courts.<sup>49</sup> This ensures that the appropriate balance between the protection of individual property rights and the interests of society is maintained, without unduly interfering with the decision-making powers of the administration.<sup>50</sup> Therefore, it is suggested in Chapter 5 that a stricter proportionality enquiry, as is applied in German expropriation law, should also be applied in South African law in cases where the purpose of the expropriation is controversial or in cases where it is not immediately apparent that the purpose complies with the constitutional requirements.

Recent South African case law<sup>51</sup> suggests that courts will not apply a proportionality-type enquiry to expropriation decisions, even if the constitutional analytic logic of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>52</sup> (which allows for a proportionality-type analysis in suitable cases) is adopted.<sup>53</sup> Again, this level of judicial deference is acceptable where the purpose of the expropriation is unproblematic. However, it is argued in Chapter 5 that South African courts should apply a stricter proportionality-type test, possibly on the basis of administrative law, in expropriation cases where it is not immediately clear that the expropriation is for a valid public purpose or in the public interest, such as expropriation for vague economic development purposes not controlled in terms of a development scheme set out in

<sup>49</sup> BVerfGE 24, 367 [1968] (*Deichordnung*); Papier HJ 'Art. 14' in Maunz T, Dürig G et al (eds) *Grundgesetz Kommentar* Vol II (53<sup>rd</sup> update 2008) 310-311 paras 589-590; Wendt R 'Eigentum, Erbrecht und Enteignung' in Sachs M (ed) *Grundgesetz Kommentar* (4<sup>th</sup> ed 2007) 582-639 at 629 para 164; Hofmann H 'Art. 14' in Schmidt-Bleibtreu B, Hofmann H & Hophauf A (eds) *Kommentar zum Grundgesetz* (11<sup>th</sup> ed 2008) 513-514. See also Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 303; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 TSAR 579-592 at 587.

<sup>50</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148. See also Schmidt-Aßmann B 'Expropriation in the Federal Republic of Germany' in Erasmus GM (ed) *Compensation for Expropriation: A Comparative Study* Vol I (1990) 81-103 at 81.

<sup>51</sup> *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154, 12 October 2010; [2011] ZASCA 246, 1 December 2011; *eThekweni Municipality v Sotirios Spetsiotis* [2009] ZAKZDHC 51, 6 November 2009; *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>52</sup> 2002 (4) SA 768 (CC).

<sup>53</sup> See the discussion in ch 5 at 5 2 3.

dedicated authorising legislation. In such cases, a stricter enquiry into the proportionality of the decision to expropriate arguably affords stronger protection of property rights by ensuring that expropriation must be strictly necessary to achieve the desired aim. In the event that alternative less intrusive measures are available it should at least cast doubt on whether the expropriation is strictly necessary and justified. However, this will arguably only be the case when the purpose of the expropriation is not a narrow public purpose, but more broadly in the public interest.

#### **7 4 Non-realisation, Completion, or Abandonment of the Public Purpose**

Since it is generally accepted that the public purpose or public interest justifies an expropriation, questions inevitably arise when the purpose that justifies the expropriation is not realised; when the purpose is completed or if it is abandoned. This issue relates to the transfer of property for economic development purposes in the sense that when the purpose is not realised, is completed or abandoned and the state decides to change the use of the property, the changed purpose can involve economic development by a third party, as was the case in *Harvey v Umhlatuze Municipality and Others*<sup>54</sup> (*Harvey*). In Chapter 6 it is argued that the non-realisation, completion or abandonment of the public purpose can be a result of various reasons. If the public purpose is not realised, or if it is completed or abandoned, it means that the expropriation is in principle no longer justified. However, if the purpose is changed after non-realisation, completion or abandonment, expropriation would still be justified if the new purpose is also a valid public purpose as determined by a court.<sup>55</sup> The core argument in Chapter 6 is that situations like this at least require stricter judicial scrutiny of the purpose for which expropriated property is to be used once the original purpose becomes impossible, is completed or is abandoned.

One question that arises upon non-realisation of the public purpose (and one that can also be asked when the realised public purpose terminates or is abandoned) is whether the courts are able to order that the previously expropriated property be returned to the previous owner. In *Harvey*, the applicant argued that he should be able to take re-possession of the property since the purpose for which the property was expropriated was not realised and subsequently changed. In this decision the court refused to order re-transfer of the property because there was no legislative basis or applicable doctrine to

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<sup>55</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 *SALJ* 219-235 at 227.

justify such an order.<sup>56</sup> The court held that since the original expropriation was undertaken in good faith, the expropriating authority is allowed to change the intended use of the property if the original purpose becomes impossible to realise or is abandoned. In this regard the court did not inquire whether the changed purpose was also a valid public purpose.<sup>57</sup> If the court had found that the new purpose was also a valid public purpose, the state would have been justified in retaining ownership of the property.<sup>58</sup>

In certain foreign jurisdictions, such as German and Malaysian law, the expropriated property can only be used for the purpose for which it was expropriated.<sup>59</sup> In other foreign jurisdictions, such as English law and the law of the Philippines, the expropriating authority is allowed to change the use of the expropriated property, but only if certain conditions are met. Therefore, the expropriating authorities do not have the unfettered power post-expropriation to do with the property as it pleases. In German, English and Philippine law, the previous owners are able to claim re-transfer of their previously expropriated property upon non-realisation or abandonment of the original public purpose. In German and English law, legislation exists that compels the authorities to offer the property to its previous owners if it is no longer needed for the purpose for which it was expropriated.<sup>60</sup> In English law the obligation to offer the property to the previous owners can be excluded in certain circumstances. In the law of the Philippines, the obligation to offer the property to the previous owners developed out of the assurance that was routinely made to owners who lost their property through expropriation that they would be able to re-claim the property if it is no longer needed for the purpose for which it was expropriated.<sup>61</sup>

The court in *Harvey* refused to order re-transfer of expropriated property upon non-realisation of the public purpose since there is no legislation on which to base such an order for re-transfer. Therefore, it is argued in Chapter 6 that the Expropriation Act 63 of

<sup>56</sup> See generally Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 224.

<sup>57</sup> See Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498.

<sup>58</sup> Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 497-498; Van der Walt AJ 'Constitutional Property Law' 2010 ASSAL 251-294 at 291-292; Van der Walt AJ & Slade BV 'Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP)' (2012) 129 SALJ 219-235 at 225-226.

<sup>59</sup> See the discussion in ch 6 at 6 5 1.

<sup>60</sup> In *BVerfGE* 38, 175 [1974] the German Federal Constitutional Court has held that even in the absence of specific legislation that regulates the re-transfer of expropriated property upon the non-realisation, completion, or abandonment of the public purpose the right of re-transfer is still available since it flows from the protection afforded in art 14.3 of the German Basic Law of 1949. In English law, the Crichton Down Rules persuade certain public authorities to offer previously compulsorily acquired property back to the previous owner if it is no longer needed for the purpose for which it was acquired and cannot be used by a different state department. See further the discussion in ch 6 at 6 5 3.

<sup>61</sup> See *Ouano and Others v Mactan-Cebu International Airport Authority; Mactan-Cebu International Airport Authority v Inocian and Others* GR NO 168770; GR NO 168812, 9 February 2011 and the discussion in ch 6 at 6 4 3.

1975 should be amended to provide for the re-transfer of expropriated property upon non-realisation of the public purpose, at least in certain clearly circumscribed cases. It is suggested that this Act should provide for mechanisms through which previous owners can re-claim their expropriated property in certain situations and to allow the courts the authority to oversee this process. The main objective of the amending provisions should be to indicate the nature of this right of re-transfer; the persons entitled to claim re-transfer; the time-frame within which the expropriated owner can reclaim the property upon the non-implementation of the purpose; calculation of the amount that has to be paid for re-transfer; as well as the circumstances under which the state would not be required to re-transfer the property to the previous owner. In that regard the state would be prevented from changing the purpose for which expropriated property is used at its own discretion.<sup>62</sup> It would also prevent the state from using a valid public purpose as a smokescreen to use the property for a different purpose after the property has been expropriated.

## 7 5 Recommendations

This dissertation shows that there are a number of aspects of expropriation law, specifically with reference to the public purpose or public interest requirement, which have recently been the subject of case law for the first time. However, because there is no detailed framework in legislation or doctrine that can assist the courts in dealing with these problematic public purpose or public interest issues, the courts develop the law on a case to case basis. Since this position is not ideal, recommendations are made here concerning the possible ways of preventing the development of the law in piece-meal fashion, in favour of a more systematic development. Although amending legislation may be one way of solving the various issues it is probable that dedicated legislation would not be able to cover all aspects. Therefore, heightened judicial scrutiny may be better in certain cases.

The South African law of expropriation is based purely on statutory law; the state has no inherent power of expropriation. Therefore, legislation - particularly the Expropriation Act 63 of 1975 - could be amended to assist the courts in adjudicating certain public purpose or public interest issues discussed in this dissertation. It is suggested here that legislation would be able to clarify the issue of how long the public purpose should endure post-expropriation and the issues that revolve around it. The

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<sup>62</sup> In ch 6 at 6 3 3, the argument is made that the state cannot use expropriated property in the same manner as a private owner can. See Sonnekus JC & Pleysier AJH 'Eiendomsverwerwing of –verlies onder `n Tydsbepaling of `n Voorwaarde en die Privaatregtelike Implikasies vir Onteining (Deel 2)' 2011 *TSAR* 601-625 at 609; Van der Walt AJ *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 498-499; Du Plessis E 'Restitution of Expropriated Property upon Non-realisation of the Public Purpose' 2011 *TSAR* 579-592 at 582-583.

legislation can for example stipulate that expropriated property must be used for the public purpose for which it had been expropriated within a certain period of time, for instance three years. If the purpose cannot be realised within that three year time frame, or if the foreseen use was implemented but subsequently completed or abandoned, the legislation should require the relevant authorities to change the purpose. In that regard the courts should be allowed to test the new purpose against the constitutional requirements. If the state cannot use the property for an alternative public purpose, or if the courts find that the new purpose is not a legitimate public purpose, the legislation should provide for the possibility of re-transfer of the property to the previous owner. This provision should stipulate who is entitled to reclaim the property, namely the previous owner; stipulate the circumstances under which the state would not be required to re-transfer the property; and set out guidelines for the courts to determine the amount that the previous owner would have to repay if he wants to take transfer of the property. In Chapter 6 it was argued that the amount should be set at market value, but the courts should have the discretion to deviate from this amount in certain cases.

Since legislation, if amended, will not be effective in resolving all of the public purpose or public interest issues, the courts have the responsibility to scrutinise the purposes for which property is expropriated in a manner that provides optimal protection to property rights while simultaneously not frustrating necessary reforms. As a starting point, courts should acknowledge that the public purpose or public interest requirement justifies an expropriation, as was done in *Harvey v Umhlatuze Municipality and Others*.<sup>63</sup> From this point of view further principles can be deduced. The main principle should be that because the public purpose or public interest justifies an expropriation, a sufficient and absolutely necessary public purpose or public interest must be present to justify the expropriation. This will involve scrutinising the purpose of every expropriation carefully, especially since it is not common to authorise expropriation for a specific purpose in dedicated legislation, so that the decision to expropriate is largely left to the administration. In that context, stricter judicial control is necessary. If necessary, scrutiny of the purpose for which property is expropriated should take into account the legislative regulatory scheme, even if the legislation does not explicitly authorise the expropriation.

If the purpose can be achieved without expropriating property, courts should investigate why the alternative and less invasive method was not adopted, at least in cases where the purpose is not clearly and directly related to generally accepted, narrow public purposes. If the property is expropriated for broader purposes that are vaguely

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<sup>63</sup> 2011 (1) SA 601 (KZP).



beneficial to the public at large, the scrutiny should be stricter than in cases where the property is expropriated for narrower public purposes, such as the building of roads. If the expropriation is absolutely necessary this investigation will prove that; if not, it may point to an abuse of power such as expropriating property for an ulterior purpose.

Furthermore, the courts should be stricter in their determination as to whether a specific expropriation complies with the public purpose or public interest requirements in cases where it is not immediately apparent that the purpose is a legitimate public purpose. For instance, if the purpose of expropriation - such as economic development - is not clearly authorised in legislation and if it is not immediately clear that the purpose is a valid public purpose or in the public interest, stricter scrutiny should be applied as to the lawfulness of the expropriation.

The same would apply to the transfer of property to third parties for a particular purpose. When the property is expropriated for a narrow public purpose and transferred to third parties for the realisation of that purpose, a low level of scrutiny would not create any problems. If the third party was established particularly for the purpose of fulfilling the public purpose, a lower level of scrutiny is equally warranted. In cases where the expropriated property is transferred to third parties for broader purposes in the public interest but takes place in terms of a legislative scheme or is mandated by the Constitution, such as land reform, it is arguably less problematic if the courts apply a lower level of scrutiny.

However, in cases where it is not immediately apparent that the expropriation is for a public purpose and where the property is transferred to third parties for the realisation of the purpose, both the purpose of the expropriation and the transfer of the property for the realisation of this purpose should be subjected to heightened scrutiny. If the expropriation and transfer of property for purposes such as third party transfers for economic development purposes do not take place in terms of a regulatory legislative scheme or are not mandated by the Constitution, even stricter scrutiny should be applied.

Therefore, a third party transfer of property that is expropriated for broader public purposes should generally be subjected to stricter scrutiny. This will apply especially to cases where it is likely that the expropriation and third party transfer will not benefit the public directly but rather the third party; where there is no form of accountability to ensure that the benefits that were predicted to accrue to the public in fact materialise; where a person's home is expropriated; and where third party transfers have disproportionately negative effects on the less affluent members of society.

Generally, the power of expropriation should only be available in cases where it is absolutely necessary for the achievement of a particular public purpose or when it will clearly be in the public interest. If the purpose that is served by the expropriation is evaluated strictly in every specific case to ensure that it complies with the constitutional requirements, it is possible that some of the issues that have surfaced in this dissertation will not surface in future or will be resolved consistently and satisfactorily.

## ABBREVIATIONS

ASSAL	Annual Survey of South African Law
CLoSA	Constitutional Law of South Africa
Col LR	Columbia Law Review
Cornell LR	Cornell Law Review
Harv LR	Harvard Law Review
JQR	Juta's Quarterly Review of South African Law
Mich State LR	Michigan State Law Review
Minnesota LR	Minnesota Law Review
Notre Dame LR	Notre Dame Law Review
NYU LR	New York University Law Review
Oregon LR	Oregon Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stanford LR	Stanford Law Review
Stell LR	Stellenbosch Law Review
Sydney LR	Sydney Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
Wash & Lee LR	Washington and Lee Law Review
Yale LJ	Yale Law Journal

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