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NOTES

COMPLIANCE WITH SECTION 25(2)(b) OF THE CONSTITUTION: WHEN SHOULD COMPENSATION FOR EXPROPRIATION BE DETERMINED?

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INTRODUCTION

In the recent case of *Haffejee NO & others v eThekweni Municipality & others* 2011 (6) SA 134 (CC) (*Haffejee*), the Constitutional Court held that the determination of compensation need not precede an expropriation; compensation can in principle be determined after expropriation. The applicants (hereafter referred to as 'the Trust') in *Haffejee* were the trustees of the YGM Haffejee Family Trust, which owned property situated on the banks of the Umgeni River in Durban. This property was earmarked to be expropriated by the eThekweni Municipality for purposes of a canalisation programme to ensure that the effects of flooding of the river were minimised. In 2004, the Municipality resolved to expropriate the Trust's property and on 23 May 2005 a notice was sent to the Trust indicating the intention of the Municipality to expropriate the property. Another notice was sent on 30 June 2005, fixing the date of expropriation as 31 July 2005. Neither of these notices contained any offer of compensation. Therefore, it is clear that compensation had not been fixed at the time that the expropriation had taken place. In July 2006, the Municipality offered compensation at an amount of eighty per cent of the market value of the property. The applicants rejected the amount, because they questioned the validity of the expropriation in terms of s 25(2)(b) of the Constitution. Consequently, the Municipality instituted eviction proceedings and tendered payment of the full market value of the property as compensation, which was also rejected by the Trust.

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In the Kwazulu-Natal High Court the defences raised by the Trust were rejected and the court granted the eviction order (see *eThekweni Municipality & others v Haffejee NO & others* 2010 (6) BCLR 578 (KZD)). The Trust unsuccessfully sought leave to appeal to the Supreme Court of Appeal from the judge a quo (see *eThekweni Municipality & others v Haffejee NO & others* [2010] ZAKZDHC 80 (25 August 2010)). Similarly, leave was sought by petition to the Supreme Court of Appeal, but this was also refused, resulting in an appeal to the Constitutional Court.

In the Constitutional Court, the Trust argued that compensation for expropriation should be fixed prior to the expropriation in order for the requirement of s 25(2)(b) to be met (*Haffejee* para 20). In terms of s 25(2)(b), '[p]roperty may be expropriated only in terms of law of general application — subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court'.

The Trust stressed that an interpretation of s 25 that requires the fixing of compensation before expropriation would ensure that current South African property owners are not arbitrarily dispossessed of property in the same way as dispossessions had occurred when no constitutional protection of property existed. To this end, it was contended that subsecs 25(2) and (3) contain strict requirements that ensure that compensation for expropriation meets the standard of justice and equity and takes all relevant circumstances into consideration. Furthermore, the Trust argued that on a plain reading of s 25(2)(b) it is clear that, in principle, the payment of compensation can (and mostly *will*) occur after the expropriation; however, an agreement with regard to the amount of compensation and the time and manner of its payment must be reached *before* the expropriation (para 21). On the basis of these contentions, the Trust maintained that the expropriation process as provided for in the Expropriation Act 63 of 1975 was inconsistent with the Constitution (see *Haffejee* para 21. It is clear that the Trust initially asserted — but later abandoned — the contention that the provisions of the Expropriation Act that allow for compensation to be determined after the date of expropriation were in contravention of other provisions of the Constitution; namely s 34 (the right of access to courts), s 9 (the right to equality) and s 33 (the right to just administrative action)).

By contrast, the Municipality resisted an interpretation of s 25(2)(b) of the Constitution according to which the determination of compensation should always precede the expropriation (para 22). The Municipality submitted that such a reading of s 25(2)(b) would frustrate the Municipality's obligations to render basic services to residents, and would impede the transformative socio-economic purposes of the Constitution (para 22), primarily because it would cause unreasonable delays in the expropriation process, which would disrupt the duties that the Municipality has in terms of the Constitution. According to the Municipality, if this were tolerated, it would result in an inequitable imbalance between the interests of the public and the interests of the affected landowner. The Municipality also claimed that compensation

would still be just and equitable in terms of subsecs 25(2) and (3) if compensation were determined after the expropriation, as the owner of the expropriated property is always entitled to just and equitable compensation, regardless of whether that compensation is determined before or after the expropriation.

The Constitutional Court concluded that although payment of compensation is a constitutional requirement for the validity of an expropriation in terms of s 25(2)(b), the determination of that compensation is not a pre-condition for a valid expropriation (para 42). In this regard, the reason that the court gave for choosing this interpretation, as opposed to the one that requires pre-determination of compensation, was the undue burden that pre-determination would place on the state (see para 42).

With this decision in mind, this note examines the South African position regarding the appropriate time for the determination of compensation for expropriation, which has until recently not been discussed. As a point of departure it is necessary to distinguish between two aspects of compensation for expropriation, namely the determination of compensation and its payment, respectively. It will be shown that there are essential links between these aspects (and the connection may be crucial for constitutional scrutiny), but the two are fundamentally different matters of compensation that should be distinguished from the outset.

An analysis of the process of expropriation as outlined in the Expropriation Act follows after the outlining and identification of the issue. The aim is to question whether the provisions of the Act are constitutionally compliant in so far as they relate to the appropriate time for fixing compensation. In the absence of clarity in the constitutional provision itself, it is necessary to consider the interpretation expressed by the Constitutional Court in *Hafféjee*, specifically with regard to when compensation for expropriation should be determined. Is this interpretation really what is anticipated by s 25(2)(b) with regard to the requirement of compensation for expropriation? It is also crucial to question the court's interpretation of just and equitable compensation as described and required under s 25(3), as it relates to the proper time for determining compensation.

With regard to the interpretation of s 25(2)(b), it is important in the first instance to look at Froneman J's view of what constitutes 'just and equitable' compensation, and secondly to discuss briefly the comparative law analysis undertaken by the court. In the final part, some thoughts are offered in relation to whether this judgment necessarily changes the position regarding compensation for expropriation; and, ultimately, whether the outcome in *Hafféjee* is indeed correct.

OUTLINING AND IDENTIFYING THE ISSUE

To begin with, a distinction should be drawn between the determination of compensation for expropriation and the payment thereof. The *Hafféjee* case specifically dealt with the determination of the amount of compensation. In fact, the Trust conceded that payment of compensation may take place after

the expropriation, but insisted that the fixing of the amount of compensation should occur prior to the expropriation (para 21).

The Constitution provides reasonable clarity about the payment of compensation. Section 25(2)(b) makes it clear that there are three aspects that are important for purposes of compensation for expropriation, namely the amount of compensation, its time of payment and its manner of payment. In terms of s 25(2)(b), these aspects can either be agreed to by the parties involved, or approved or decided by a court. With regard to the amount of compensation, it is clear from subsecs 25(2) and (3) that the amount must be just and equitable: in other words it should reflect an equitable balance between the public interest and the interests of those affected by the expropriation; and the amount of compensation must be of such a nature that all relevant circumstances are taken into consideration, including (but not limited to) those factors listed in s 25(3).

In terms of the time and manner of payment of compensation, s 25(2)(b) states that this *too* should be just and equitable, and that all relevant circumstances should be considered in order to establish when and how compensation should be paid. It has been stated that in order for the time of payment of compensation to be just and equitable in terms of subsecs 25(2) and (3), prompt payment should follow after the expropriation has occurred (see A J van der Walt *Constitutional Property Law* 3 ed (2011) 509; Theunis Roux 'Property' in Stu Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* vol 3 2 ed (Original Service, 2003) 46–34–46–35). Regarding the manner of payment of compensation, it is generally accepted that money will form the mode of payment. However, it should in principle be possible that compensation is paid in another form (see Van der Walt *Constitutional Property Law* op cit at 509).

Therefore, it is evident that when dealing with issues concerning the payment of compensation, subsecs 25(2) and (3) are reasonably clear. However, these sub-sections are silent about when the decision concerning the three aspects of compensation for expropriation should be resolved. In this regard, the Expropriation Act is clearer. The next part of this note discusses the process of expropriation of property in terms of this Act, which provides for the possibility that compensation can be fixed after expropriation has taken place (see s 2(1)). It is therefore important to set out the process of expropriation in terms of the Act, in order to establish whether the provisions are constitutionally compliant in so far as they allow for compensation to be determined after an expropriation.

THE PROCESS OF EXPROPRIATION IN TERMS OF THE EXPROPRIATION ACT

In terms of the Expropriation Act, the process of expropriation occurs as follows (see *Haffejee* paras 15–16). If the Minister decides to expropriate, he must, in terms of s 7(1) of the Act, serve the notice of expropriation on the owner being expropriated. The notice should contain a description of the

property being expropriated (ss 10(1) and 7(2)(a)), the supposed date of expropriation, and also the date on which the state will take possession of the property (s 7(2)(b)). In the discretion of the Minister, the notice may also contain an offer of compensation (s 7(2)(d)). If it does, the notice should alert the owner to the fact that he has sixty days within which to respond to the offer by written statement indicating whether he accepts or rejects the offer (ss 7(2)(c) and 9(1)). If the owner does not respond to the offer of compensation contained in the notice, or the written statement does not contain the information as required in terms of s 7(2) of the Act, the Minister can apply to an appropriate court to determine a suitable amount of compensation in the particular case. However, if the owner does respond, but rejects the offer of compensation made by the Minister, the owner should react by indicating the amount claimed by him as compensation and also how the amount is calculated (s 9(1)(a)). If the Minister is not prepared to pay this amount, he is obliged to make another offer within a reasonable time in terms of s 10(4) of the Act. However, if the owner does not accept this final offer, the Minister can apply to an appropriate court to determine a suitable amount of compensation in the particular instance.

On the other hand, a different course of action follows if no offer of compensation is made in the notice (ss 9(1)(b) and 10(2)). If this occurs, the owner has sixty days after the notice was received to respond to the notification. In his written response, the owner must indicate the amount he claims as compensation (s 9(1)). If the Minister is not prepared to pay the amount sought, he must make another offer within a reasonable time, after which the owner has thirty days to respond to this offer indicating its acceptance or rejection (s 10(4)). If no settlement is reached, the Minister can apply to an appropriate court to decide on a suitable amount of compensation.

In this process, it is important to note that the expropriation is deemed to take place on the date mentioned in the notice (s 8). When the expropriation occurs, ownership of the expropriated property vests in the state by way of original acquisition of ownership, irrespective of whether the owner consents or disagrees. From the process, it is clear that compensation can be fixed after the date of expropriation, especially in instances where the parties cannot agree on the amount of compensation and the court is left to decide an appropriate amount in the particular case. The question that arises in these instances is whether the provisions of the Expropriation Act are consistent with s 25(2)(b), especially in light of the fact that s 25(2)(b) does not explicitly mention when compensation should be determined. In order to answer questions in this regard, it may be appropriate at this stage to provide a brief discussion of the South African literature (or lack thereof) on this point.

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The writings of South African authors are for the most part mute about the time when compensation for expropriation should be agreed upon. Gilden-

huys & Grobler do not directly state that compensation can be determined after the expropriation in terms of the Expropriation Act (see Antonie Gildenhuis & Gerrit Grobler 'Expropriation' in W A Joubert (ed) *The Law of South Africa* vol 10 (1980)). However, the authors do provide an enquiry into the procedure of expropriation in terms of the Act (see Gildenhuis & Grobler in *LAWSA* op cit paras 28–36). From this enquiry, it is clear that the Act provides for the Minister to pay the amount of compensation that was offered to the owner, even if at that stage the owner has not yet accepted the offer (Gildenhuis & Grobler in *LAWSA* op cit para 36). This will ordinarily occur after the date of expropriation but prior to the determination of the amount of compensation, which means that it is possible that compensation may only be determined subsequent to the expropriation (ibid).

Jacobs & Gildenhuis discuss the significant aspects concerning the measure and method for determining compensation for expropriation in South African law (see Marcus Jacobs & Antonie Gildenhuis 'Expropriation' in South Africa' in G M Erasmus (ed) *Compensation for Expropriation: A Comparative Study Volume I* (1990) 373 at 377–88). Again, the authors do not unequivocally confirm that it is possible in terms of the Act to allow compensation to be determined after the expropriation. However, the possibility is not entirely eliminated in terms of their breakdown of the process of expropriation in terms of the Act either. This is because the actual payment of compensation will generally take place at a much later date, especially if the parties cannot agree on compensation and the dispute is taken to court and resolved by litigation, which (according to the authors) usually occurs after the date of expropriation (Jacobs & Gildenhuis op cit at 379). Therefore, it may be that the expropriation can occur first, and the calculation of the compensation amount at a later stage.

More recently, Gildenhuis has noted that compensation serves to replace the expropriated property (see Antonie Gildenhuis *Onteieningsreg* 2 ed (2001) 151). For that reason, he emphasises the replacement role of compensation, as opposed to the justificatory role that the public purpose/public interest requirement plays in expropriation law (Gildenhuis op cit at 151). He confirms that payment of compensation is not a pre-requisite for the vesting of ownership, and distinguishes between the validity of the expropriation and the acquisition or vesting of ownership (ibid). In this regard, it is clear that the expropriation (in other words, the date on which ownership of the expropriated property vests in the state) can take place before compensation is paid, the latter being an issue concerning the validity of the expropriation rather than the vesting of ownership. Regrettably, Gildenhuis does not comment on whether the determination of compensation should occur prior to the date of expropriation, or whether it may be settled thereafter.

In *Constitutional Law of South Africa*, Roux does not identify when in the process of expropriation compensation should be specified either (Roux op cit at 46–34–46–36). By the same token, Van der Walt, in the recently revised *Constitutional Property Law*, does not mention whether s 25(2)(b) actually requires that the determination of compensation should occur ahead of the

expropriation. However, Van der Walt does indicate that the *Haffejee* case confirms that s 25 does not require that compensation should always be calculated before the expropriation (see Van der Walt *Constitutional Property Law* op cit at 509). Interestingly, both Van der Walt and Roux point out that *payment* of compensation should occur as soon as possible after the expropriation, because a long delay in paying compensation will not be just and equitable in terms of the requirements in subsecs 25(2) and (3) (see Van der Walt *Constitutional Property Law* *ibid*; Roux op cit at 46–34). However, this still does not resolve the challenge in expropriation law regarding when compensation should be determined. In the absence of clarity in this regard, Froneman J in *Haffejee* was required to determine whether the provisions of the Expropriation Act were constitutionally valid in so far as they allowed for compensation to be determined after the expropriation. To this end, he set out to determine the most likely interpretation of s 25(2)(b) in the specific case. The interpretation of s 25(2)(b) as applied in *Haffejee* forms the core of the discussion below.

INTERPRETATION OF SECTION 25(2)(b)

FNB as authority for analysing section 25

The Constitutional Court in *Haffejee* started the interpretation of s 25 by emphasising that *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) (*FNB*) should be used as the point of departure when undertaking an analysis of s 25 (para 25). In this respect, *FNB* provides a structural analysis that makes interpretation of s 25 more manageable (see *FNB* (supra) para 46). In terms of *FNB* there are certain crucial questions that need to be asked in the context of s 25. In the first place, it needs to be established whether the interest in the particular case constitutes property that requires protection in terms of s 25. Thereafter, it should be determined whether the infringement of the property or property rights caused deprivation in terms of its s 25(1) meaning. If deprivation results, it must be in terms of law of general application and it may not be arbitrary. With regard to the arbitrariness requirement in s 25(1), the Constitutional Court held in *FNB* that deprivation of property is arbitrary when there is insufficient reason for it, or if it is procedurally unfair (*FNB* (supra) para 100). Only if it is established that the deprivation was not arbitrary, or the deprivation was arbitrary but could be justified under s 36, can scrutiny in terms of subsecs 25(2) and (3) be undertaken (*ibid*).

A very important result of the *FNB* decision for future cases dealing with potential infringements of s 25 is that all limitations on property rights that may result in constitutional infringement in terms of s 25 must first comply with the requirements of s 25(1) before it can be established whether the alleged contravention affects subsecs 25(2) and (3) (*FNB* (supra) paras 60 and 100. See also Van der Walt *Constitutional Property Law* op cit at 219–20; Roux op cit at 46–23–46–25). Therefore, in terms of the methodology provided in

FNB, even if the question in any given case relates specifically to the possibility of an invalid expropriation in terms of subsecs 25(2) and (3), it must first comply with the test for deprivation of property in terms of s 25(1) (*FNB* (supra) para 60; Van der Walt *Constitutional Property Law* op cit at 219–20. See also A J van der Walt 2011 (3) *JQR Constitutional Property Law* 2.2.1, where Van der Walt indicates that the court failed to recognise the academic argument of Roux that an expropriation that has passed the non-arbitrariness test of s 25(1) cannot seriously be questioned for non-compliance with subsecs 25(2) or (3)). It may have been significant in this regard to have seen whether the expropriation would have passed the scrutiny of s 25(1) in terms of the non-arbitrariness test if the court had been more thorough in its s 25(1) analysis. Perhaps it would not have made a difference, but even then the fact that it would not have made a difference substantially influences the argument related to Roux's contention. Therefore, the fact that the court did not give any recognition to the arbitrariness vortex argument when interpreting s 25 (and purportedly following the *FNB* methodology) casts doubt on the court's interpretation of s 25(1). The result is that if the deprivation is arbitrary and it cannot be justified, the enquiry stops there and the law that causes the deprivation would be invalid. The question concerning expropriation of property, and whether the expropriation complies with the requirements of subsecs 25(2) and (3), would not arise in the above-mentioned cases. However, if the deprivation is not arbitrary, or it is arbitrary but justified, the question concerning expropriation must be considered. With the *FNB* case in mind, the *Haffejee* court set out to interpret s 25(2)(b) (see *Haffejee* para 27).

Froneman J began by assuming that the interest in question qualified as property for purposes of s 25 and by accepting that there was deprivation of property. The court also acknowledged that the deprivation was in terms of law of general application as required under s 25(1) (*ibid*), and accepted that the deprivation was not arbitrary in terms of s 25(1). Hence, it qualified as expropriation that complied with the public purpose/public interest requirement in terms of s 25(2)(a). Accordingly, the court held that the only question that still required attention was whether the expropriation complied with s 25(2)(b). To this end, the court set out general principles of interpretation of s 25 in order to establish the best possible interpretation of s 25(2)(b) about the time at which compensation for expropriation should be determined. This was necessary because the provision itself does not provide clarity in this regard.

Purposive interpretation of s 25 in line with FNB

In line with *FNB*, the *Haffejee* court mentioned some important general aspects of the interpretation of s 25. Using what is commonly referred to as purposive interpretation, the court stated in the first place that any challenge to s 25 should always begin with s 25(1) (*Haffejee* para 29). Secondly, it emphasised that when interpreting s 25, the section should be seen in the context of the values that are enshrined in the Constitution as a whole (see

paras 29–31 and also Van der Walt *Constitutional Property Law* op cit ch 2). In other words, interpretation of s 25 should aim at enhancing the ‘values that underlie an open and democratic society based on human dignity, equality and freedom’ (*Haffejee* para 29), and should give due consideration to international and foreign law as required in terms of s 39(1) of the Constitution. In this regard, international law must be considered and foreign law may be considered. Furthermore, when pre-constitutional law is applicable during interpretation (as in *Haffejee*) that law should be approached with circumspection. With regard to interpretation of s 25, it is also important that due recognition should be given to the apparent tension that exists between the protection of existing property rights (as guaranteed in terms of subsecs 25(1)–(3)) and the need for redress and transformation to address the unequal distribution of property (as mandated in terms of subsecs 25(4)–(9)) (*Haffejee* para 31). This requires particular sensitivity towards the historical context of the constitutional provision as well as the Constitution as a whole. This also calls for a context-sensitive approach that will ensure that a proportionate balance is struck between protecting private property rights and serving the public interest. Ultimately, this necessitates the conviction that property rights are not absolute and can be limited depending on societal considerations (*Haffejee* para 30). With these general principles in mind, the court set out to interpret s 25(2)(b).

In doing so, it emphasised that an interpretation of the subsection could not preclude the possibility that the decision concerning compensation should precede the expropriation, or a flexible interpretation that allows for the determination of compensation to follow the expropriation (*Haffejee* para 35). Froneman J opined that both these interpretations are plausible. In this regard, the decision about whether compensation should be determined beforehand is context-sensitive and must be made according to the circumstances of the particular case. The court acknowledged that there may be strong arguments for and against an interpretation that requires compensation to be determined before the expropriation. However, according to Froneman J, when an interpretation of ‘just and equitable’ compensation is considered, it may not be too difficult to see that an inflexible requirement of compensation before expropriation would be unsustainable in certain instances; for example where the expropriation is urgent, as in the case of natural disasters (paras 39–40). Therefore, the public interest may in some instances necessitate compensation not having been determined beforehand. However, there are also instances where it may be clear that it would be unjust not to determine compensation beforehand, such as instances where people may upon eviction lose their homes or livelihoods without compensation having been resolved before the eviction (*Haffejee* para 40).

The court concluded that it was faced with a decision in the particular case regarding which of the two possible interpretations was more compatible with the Constitution as a whole. It was eventually persuaded by the fact that making the determination of compensation a pre-condition for expropriation would burden the state unduly in the sense that the issue of compensa-

tion would always have to be settled before expropriation has taken place (para 42). Therefore it held that s 25(2)(b) of the Constitution does not require that the determination of the amount of compensation and the time and manner of payment thereof should precede the expropriation (para 27). The court highlighted that compensation that is determined beforehand will generally be just and equitable, as is required in terms of s 25(3), but compensation determined after expropriation will not per se be invalid. However, if the compensation is determined subsequent to the expropriation, it should be determined reasonably quickly thereafter. And, very importantly, the court made it clear that should eviction follow upon the expropriation, it must either be agreed to by the parties or decided (and ordered) by court (para 43). Besides the purposive interpretation of s 25 applied in the case, it is also interesting to consider the court's reliance on comparative law. In this regard, the judgment is actually quite problematic.

COMPARATIVE ANALYSIS

Use of comparative analysis in Haffeejee

Subsections 39(1)(b) and (c) of the Constitution require that a court, tribunal or forum must consider international law and may consider foreign law when interpreting the Bill of Rights (*Haffeejee* para 34.). Van der Walt (*Constitutional Property Law* op cit at 27–8) writes:

‘The purpose of reference to foreign law should be, firstly, to note the problems of interpretation and application that have already been uncovered there, and secondly to observe and analyse different approaches, arguments, tendencies and trends in the solution of those problems, while remaining careful to ensure that the interpretation and application of section 25 is suited to current, local needs and demands, within the historical, social and political context of South African legal development.’

He adds that ‘comparative analysis for the sake of comparison is senseless: comparative analysis should bring some benefit in the form of new solutions and alternatives or greater clarity (even when it is of no more assistance than avoiding errors made in other jurisdictions or understanding when and why foreign law is not useful on a specific point)’ (ibid). Keeping in mind this basic premise as to why comparative law is important for constitutional interpretation, it is interesting to consider the use of comparative law in the *Haffeejee* case with the aim of determining whether it added any real value to the investigation.

In *Haffeejee* the court stated that comparative law was inconclusive with regard to the question of the determination of compensation for expropriation (para 34). The court mentioned that it obtained its research for the comparative analysis from the Venice Commission, of which the court is a member (para 34n37)). Based on this research, it recognised that some jurisdictions require that the determination of compensation should precede the expropriation, whereas other jurisdictions do not (ibid). The court then proceeded to list numerous jurisdictions with property clauses where no

mention is made about when compensation for expropriation should be determined, eventually coming to the conclusion that the approaches in these jurisdictions were unhelpful (para 34).

The difficulty with this type of comparative analysis is that it does not effectively take the issue any further than showing that there is a problem, and that the problem also exists in other jurisdictions. What would perhaps have been of greater assistance in this case is an analysis of how the clauses of the relevant jurisdictions are interpreted (and applied) in the respective countries with regard to the question of the determination of compensation for expropriation. Therefore, the type of comparative analysis that may have been useful would have been a comparison with jurisdictions that also have constitutional expropriation provisions that do not explicitly provide that compensation should always be determined before the expropriation, and an assessment of how the courts in those jurisdictions deal with those clauses. An example of a jurisdiction that may be worthwhile to consider in this regard would be Malaysia. For reasons discussed below, it seems as though Malaysia may provide some useful insight into how the South African property clause should be interpreted, specifically with reference to when compensation for expropriation should be determined.

Interesting comparative exploration: The Malaysian position

The Malaysian property clause is found in art 13 of the Federal Constitution of Malaysia, 1957. Article 13 provides:

‘(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.’

It is clear that the property clause in the Malaysian Constitution is similar to its South African counterpart. Generally, this makes comparative analysis with Malaysia very fruitful. A distinction is drawn in Malaysian law between two situations: state interferences where the limitation results in possible deprivation of property which should be in accordance with law in terms of the so-called police power of the state; and state interferences that cause compulsory acquisition or use of property according to the power of eminent domain, which has the additional requirement of adequate compensation (A J van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 266–7).

The power of compulsory acquisition enshrined in clause 2 of art 13 is similar to the expropriatory power in South African law. Clause 2 of art 13 is less descriptive than its South African equivalent in terms of compensation for compulsory acquisition: all that is provided is that adequate compensation should accompany compulsory acquisitions. The ambit of the requirement of adequate compensation is not defined or explained in the clause. Therefore, the provision itself does not stipulate when compensation should be determined (or paid) in order for the standard of *adequate compensation* to be met.

However, Malaysia has legislation regulating acquisitions which is similar to the South African Expropriation Act. The Malaysian Land Acquisition Act

of 1960 regulates the acquisition of land, the assessment of compensation to be made in account of such acquisition, and all other matters incidental thereto. The Act also provides a procedure that has to be followed in the case of acquisition of land by the state and requires that a Land Administrator should hold an inquiry to determine the compensation award (s 10). However, the Act does not specify exactly when this inquiry should be held in order for the acquisition to be valid. The case of *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35 is interesting in this regard. This case dealt with the appropriate time for holding an inquiry to determine the amount of compensation for compulsory acquisitions.

The Federal Court in *Pemungut Hasil Tanah* had to determine whether a delay of seven years, measured from the declaration of acquisition to the holding of the inquiry to determine the compensation award, was in conflict with the provisions of the Land Acquisition Act (*Pemungut Hasil Tanah* (supra) para 12). The court found that the long delay prejudiced the landowner, which in turn caused the acquisition to be in conflict with the Act, although the Act did not specify the time-frame within which the inquiry should be held (ibid para 18). The court also acknowledged that the longer the delay in making the inquiry, the greater the injustice to the landowner, creating the likelihood that the acquisition would be in conflict with the Act because the compensation was not determined timeously (ibid). Interestingly, the Judicial Commissioner in the High Court commented on the fact that a delay in holding an inquiry to determine the compensation award would no doubt result in inadequate compensation that would be in violation of clause 2 of art 13, which requires adequate compensation for compulsory acquisitions. However, this was not seriously considered in the Federal Court because the court merely interpreted the Land Acquisition Act in order to establish when compensation should be determined in order for the acquisition to be in line with the Act. Consequently, the Federal Court interpreted adequate compensation as requiring that compensation should be determined reasonably quickly *after* the expropriation notice, even if the Act does not specify a time within which the inquiry should be held.

What is interesting in terms of the comparative value of the Malaysian position is the court's interpretation of s 10 of the Land Acquisition Act. As mentioned earlier, neither clause 2 of art 13 nor s 10 of the Act is clear about when the inquiry into the compensation award should be held. In the absence of clarity, the court was faced with the question whether the delay was acceptable in the particular case. The court used s 38 of the Interpretation of General Clauses Ordinance of 1948 to interpret s 10 of the Land Acquisition Act. In this regard, the court emphasised that if an Act does not specifically stipulate a time by which something should be done, it can be assumed that it should be 'done with all convenient speed, equating "all convenient speed" with "as soon as possible" and "within a reasonable time"' (*Pemungut Hasil Tanah* ibid para 17). Furthermore, it was stressed that 'all convenient speed' will depend on the particular case. It is clear that the Land

Administrator is unable to prolong or delay the fixing of the compensation award unreasonably. The court stated that '[b]y providing no time limit within which the Collector should hold an inquiry the legislator leaves the discretion in the matter to the Collector, but it is certainly not its intention that the Collector shall be free to use it at any time he chooses to inquire at the expense of the land owner or regardless of his right' (ibid para 18).

In my view, the court in *Haffejee* would have reached the same conclusion it did had it considered the interpretation of the provisions in the Malaysian Land Acquisition Act to establish whether s 25(2)(b) was contravened. However, the Malaysian position regarding the determination of compensation would have been of much greater assistance than the actual comparative analysis undertaken by the court.

It should be noted, though, that the possible reason why the comparative law analysis done in *Haffejee* was inconclusive was because the court considered the jurisdictions it referred to in light of the question of when compensation should be *paid* and not when the compensation should be *determined*, an all-important distinction that was illustrated towards the beginning of this note. The failure to distinguish these two aspects makes it difficult to establish when compensation should be determined so that the expropriation is still in line with s 25(2)(b). As was mentioned earlier, it is imperative to separate the aspects in order to question whether it would be in line with s 25(2)(b) to determine compensation after the expropriation. This argument is reinforced in the next part of this note.

DOES HAFFEJEE NECESSARILY CHANGE THE POSITION CONCERNING COMPENSATION FOR EXPROPRIATION?

It seems unlikely that this judgment fundamentally changes the position concerning compensation for expropriation. Practically and legally, it appears to make no difference whether compensation is determined prior to the expropriation, or thereafter. The support for this contention is based on the fact that the requirement of s 25(2)(b) is only fulfilled upon payment of compensation, and not the determination thereof. It should be kept in mind that payment of compensation may occur after expropriation, as long as the time of payment of compensation is still just and equitable in the particular case. Therefore, to the extent that s 25(2)(b) is unclear about when compensation should be determined, the guideline for payment of compensation in every individual case should inform the decision about whether the time of determining the compensation is constitutional. This may be demonstrated by using a hypothetical example of what would ordinarily occur in the case of the expropriation of property.

If one considers a time line (or continuum), plotting the events that typically take place during the process of expropriation, there are three very important points that should be highlighted on this time line. In the first place (most likely at a point illustrated on the far left of the time line) would be the notice of expropriation, which we assume to be point A. At point A,

knowledge of the expropriation will most likely be communicated for the first time to the owner of the property being expropriated. The second point (point B) on the imaginary time line would be the date of expropriation, which will most likely be plotted to the right of (ie later than) the notice of expropriation. This is the date on which ownership of the expropriated property vests in the state. From what generally occurs in the case of expropriation, there is a point on the time line to the right of (ie later than) the date of expropriation (point B) where compensation for expropriation is *paid* to the owner that was expropriated (point C). On the time line there are now three points namely, point A (the notification date), point B (the date of expropriation) and point C (the date of payment of compensation).

In addition, there are important caveats that should be mentioned about the time line. First, C can (and mostly will) occur after B. In other words, payment of compensation in most instances occurs after the expropriation (see Van der Walt *Constitutional Property Law* op cit at 509; Roux op cit at 46–34). Secondly, it should be possible in principle in some instances to require that C should occur prior to B. This would depend on the circumstances of the case and a proportionate balance being struck between the interest of the landowner affected by the expropriation and the public interest. Therefore, if needs be, compensation should be paid before the expropriation. In the third place, if C occurs after B, the period between B and C should be reasonably short. This will ensure that the time of payment of compensation will be just and equitable, as s 25(2)(b) requires. Finally, the requirement of s 25(2)(b) is only fulfilled once C has taken place. Therefore, if compensation is paid before the date of expropriation, the requirement of s 25(2)(b) will be fulfilled before ownership of the expropriated property vests in the state whereas, if compensation is paid after the date of expropriation, the requirement of s 25(2)(b) is only satisfied after ownership vests in the state.

This being said, the question that now becomes important for consideration is where on the time line the determination of compensation (point D) should be plotted. More importantly, it needs to be established whether point D should always be to the left of (earlier than) point B, where compensation is at all times determined before expropriation, or whether point D may occur after (later than) point B, which allows for the possibility that compensation is determined after the expropriation. My argument is that the answer in every specific case lies with point C; the point at which compensation for the expropriated property is paid to the affected landowner.

If in the particular case it is in the public interest to pay compensation before the expropriation, naturally the determination of compensation should also occur before the expropriation (requiring points C and D to be plotted before point B). However, if compensation may be paid after the expropriation in the particular case, nothing precludes the possibility that the determination of compensation may also occur after the expropriation (allowing points C and D to be plotted after point B). It should be kept in

mind, as is mentioned as one of the caveats above, that the requirement of s 25(2)(b) is only fulfilled upon payment of compensation (point C). Therefore, if we concede that payment of compensation for expropriation may occur after the expropriation, then we should in principle be willing to accept that the determination of compensation can also in certain instances take place after the date of expropriation. As long as the determination of compensation occurs before the payment of compensation (which it obviously will) it still complies with the requirement in s 25(2)(b).

In essence, the fact that compensation must be paid reasonably quickly after the expropriation forms a safety net to prevent instances where the state unreasonably prolongs the determination of compensation and the subsequent payment thereof. Therefore, the property right of the person whose property is being expropriated is protected against long delays in the fixing of compensation, because this will also prolong the payment thereof, which may result in the time of payment of compensation not being just and equitable in terms of s 25(2)(b).

Although this argument was not raised in *Haffejee*, it may be a way of explaining why the court went the route that it did by stating that s 25(2)(b) should be interpreted in a flexible manner that does not require that compensation should always be determined before expropriation. However, there is a very important qualification to be made if the rationale and approach to the interpretation of s 25(2)(b), as emphasised in *Haffejee*, are to be followed. It should be noted that what would be deemed just and equitable would depend on the relevant circumstances in the particular instance. In other words, in order to determine what would amount to just and equitable time of payment of compensation — and the concomitant determination thereof — will depend on the circumstances of the particular case. When considering the circumstances of the particular case, due recognition should be given to instances where eviction of the former owner will take place before compensation for expropriation has been determined.

This concern has been raised as a point of criticism against the decision (see L Kotzé 'Expropriation: The Constitutional Court decides' available at <http://www.timeslive.co.za/ilive/2011/10/13/expropriation-the-constitutional-court-decides-ilive>, accessed on 18 January 2012). In this regard, Kotzé writes that 'land owners could find themselves in a situation where they [have] been evicted from their land and are without a place of residence or an income generating asset until such time as agreement is reached in respect of the compensation to be paid to them' (ibid). However, Froneman J made it clear in *Haffejee* that eviction following expropriation may not take place unless it is agreed upon between the parties to the expropriation; or, in the absence of agreement, it may only take place under court supervision (*Haffejee* para 43). Therefore, the eviction of an expropriatee who is unwilling to vacate the expropriated property after the date of expropriation may only occur if there is judicial oversight.

This judicial oversight will ensure a separation between two distinct situations. The first is where the person whose property is being expropriated

may have a legitimate reason for refusing to vacate — for example in cases where he risks losing his primary residence or livelihood — and the need to determine compensation beforehand is more demanding. The other extreme may occur where the person whose property is being expropriated is trying unjustifiably (and in conflict with what would be in the best interest of the public) to prolong the process of expropriation by ensuring that the expropriation cannot proceed until compensation is determined. Judicial oversight will guarantee that just and equitable outcomes are reached that are in accordance with ss 25(3) and 26(3) of the Constitution, and will ensure that the rights of the affected landowner are not unjustifiably prejudiced during the expropriation process.

CONCLUSION

This note provides some insights into the issue concerning when compensation for expropriation should be determined in order for an expropriation to comply with s 25(2)(b) of the Constitution. The question that was investigated was whether the *Haffejee* judgment fundamentally changed the law regulating compensation for expropriation. More specifically, it was necessary to investigate whether s 25(2)(b) implicitly requires that compensation for expropriation be determined before the expropriation, or whether (as *Haffejee* ultimately confirmed) a flexible approach should be followed that will allow for the possibility that compensation is fixed subsequent to the expropriation.

It is argued here that the outcome of the case cannot be faulted. To the extent that s 25(2)(b) does not provide clarity about when compensation for expropriation should be determined, it would have to be deduced that the time of payment of compensation should inform the constitutionality of the time of the determination thereof. The assumption is that if the time of payment of compensation is just and equitable, any time of determination of compensation that occurs before that, will also be just and equitable. This is because the requirement of s 25(2)(b) is only fulfilled upon payment of compensation and not the determination thereof. This should be said with the qualification that if eviction is a serious option in the particular instance, it should either be agreed to by the parties, or decided or approved by a court. In this regard, the court in *Haffejee* made the position concerning eviction clear and eliminated some of the resistance against the outcome. Therefore, in my view, the outcome in *Haffejee* cannot be criticised, and any doubts expressed about the judgment are perhaps instinctive, rather than being well-reasoned.