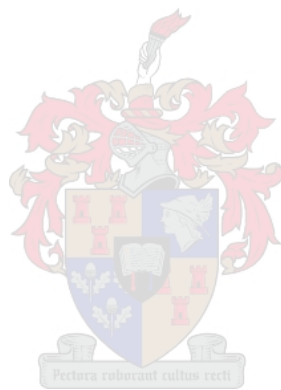


Underutilisation of expropriation in the land redistribution context: Current and potential obstacles

Charissa Barden



*Thesis presented in fulfilment of the requirements for the degree of Master of Laws at Stellenbosch
University*

Supervisor: Professor ZT Boggenpoel

Faculty of Law

Department of Public Law

December 2020

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.

Charissa Barden

December 2020

Summary

Expropriation in the context of land reform generally, and redistribution more specifically, is a highly contentious topic in South Africa today. The effects of colonisation and apartheid have left an impact on current land distribution, social identity and economic goals, particularly to the detriment of the poor. These lasting effects signify the need for an effective land redistribution policy in the constitutional era and is a multidimensional issue. A notable mechanism of achieving the redistribution of land is through the utilisation of land expropriation. However, since the Constitution of the Republic of South Africa, 1996, has come into effect, the land redistribution policy has been slow in reaching its goals, with limited results. Furthermore, the mechanism of expropriation has not been greatly utilised as a means of reaching redistribution goals.

The gap between expropriation and land redistribution is fraught with uncertainty in how to use expropriation as a mechanism to achieve land redistribution, which is impacted by a multitude of factors. This uncertainty is aggravated by the changing policies and unclear goals of the redistribution programme, which has potentially resulted in the underutilisation of expropriation. In light of this gap and the limited number of expropriations which have taken place for redistribution purposes, this thesis investigates potential hurdles and hindrances contributing to the underutilisation of expropriation. The thesis examines potential obstacles arising from the contextual understanding of expropriation in the redistribution framework, the administrative law considerations applicable to expropriation in redistribution, and the compensation requirement as it applies to expropriations currently. This investigation makes use of an integrated timeline of expropriation and redistribution developments, the legitimate justification of expropriation and a comparison between market-led land acquisition and compensation for expropriation. Thus, this thesis concludes by highlighting many, though not all, of the potential issues that hinder the utilisation of expropriation in redistribution.

Opsomming

Onteiening in die konteks van grondhervorming is tans 'n omstrede onderwerp in Suid Afrika veral waar herverdeling ter sprake is. Die gevolge van kolonialisering en apartheid het 'n blywende impak op sosiale identiteit en ekonomiese doelwitte, ten koste van die armer bevolking. Bogenoemde dui op 'n behoefte vir 'n effektiewe grondhervormingsbeleid in 'n grondwetlike era en is 'n multidimensionele kwessie. 'n Opvallende meganisme om die herverdeling van grond te bewerkstellig, geskied deur die onteiening van grond. Sedert die Grondwet van die Republiek van Suid-Afrika, 1996, in werking getree het, is die grondherverdelingsbeleid se doelstellings egter vertraag, met beperkte resultate. Verder is die beskikbare onteieningsmeganisme nie effektief benut om die herverdelingsdoelwitte te bereik nie.

Die gaping tussen onteiening en grondherverdeling word gekenmerk deur onsekerheid rakende die gebruik van onteiening as 'n meganisme om grondherverdeling te bewerkstellig. Die onsekerheid word deur menigte faktore beïnvloed en word vererger deur veranderende beleide en onduidelike herverdelingsdoelwitte wat gevolglik lei tot die oneffektiewe gebruik van onteiening in hierdie konteks. Met inagnome van hierdie leemte en die beperkte hoeveelheid onteiening wat plaasvind vir grondherverdeling, ondersoek hierdie tesis die potensiële struikelblokke en hindernisse wat verhoed dat onteiening benut word. Verder word die moontlike probleme, wat kan spruit uit 'n kontekstuele benadering tot onteiening in die herverdelingsraamwerk, ondersoek. Die administratiewe en vergoedingsraamwerk se toepassing word ook oorweeg. Die ondersoek maak gebruik van 'n geïntegreerde tydlyn van onteiening en hervormingsontwikkelinge; oorweeg die regverdigings vir onteiening; en vergelyk markgebaseerde grondverkryging met onteiening teen vergoeding. Dus bevestig hierdie tesis van die potensiële kwessies wat die effektiewe benutting van onteiening in grondhervorming verhoed.

Acknowledgements

It is an incredible privilege to have a document which evidences one's growth both as a professional and a person. The contents of this thesis have a large amount of passion, pride, struggle and unanswered questions, which I humbly submit are the beginning of my works as a practitioner (errors and limitations included).

I would firstly like to give my sincerest gratitude to Professor Boggenpoel, who has been the best supervisor for which one could ask. Before undertaking this thesis, I often told my family that Prof would get me to the end of this degree, even if she had to drag me kicking and screaming; and I did my fair share of kicking and screaming. With great leadership, new heights are explored. Prof Boggenpoel is a great leader.

I would also like to thank the National Research Foundation for their generous funding which allowed me to complete this thesis to the best of my abilities.

I have to give the biggest "shout-out" to the wonderful people of the South African Research Chair in Property Law, including the current members, alumni and fellows. Every conversation, every "but maybe consider it like this", every "don't overthink it", every "do you need me to get you anything from the shops?", made this degree not just an achievement, but an amazing experience. Thank you. A special word of thanks to Dr Elsabe van der Sijde, who was my research buddy right to the end, and (soon to be) Dr Sameera Mahomed, for making sure I came back from Italy in one piece.

My friends from the faculty, especially my "day ones" Gerda and Cathy, Mrs King and the hardworking admin assistants: I appreciate every bit of encouragement, from the days I was still looking for a topic all the way to when I was finishing it.

I could never contain in one document the amount of support my dearest Avuyile Gasela gave me, in short I will simply say "Many thanks, with love". I must also send special thanks to my closest friends, Lerato Melato, Matthew Davidse and Naledi Pooe: you helped me through my first degree and maintained that same energy for my second. Thank you.

Lastly, and most importantly, I dedicate this achievement to my greatest supporters without whom my career would not be possible - the women of my family: Ann Sanderson (my grandmother), Veronica Taschl (my mother), Andrea Moos (my sister), and Mary Sanderson (my aunt). They taught me that when one has strength to do good work, one should go do it.

My work begins here.

Table of Contents

Declaration.....	i
Summary	ii
Opsomming	iii
Acknowledgements.....	iv
Table of Contents	v
Chapter 1: Introduction	1
1 1 Introduction to the research problem	1
1 2 Research aims and hypotheses.....	5
1 3 Methodology	6
1 4 Overview of chapters	7
Chapter 2: Utilisation of expropriation in the land redistribution context	9
2 1 Introduction	9
2 2 The meaning of land redistribution.....	9
2 2 1 Introduction.....	9
2 2 2 Redistribution as a land reform sub-programme	10
2 2 2 1 Conceptualising land redistribution	10
2 2 2 2 Redistribution focusing on urban land.....	14
2 2 2 3 Identified issues in land redistribution	18
2 2 3 Models of land redistribution.....	20
2 2 4 Conclusion.....	23

2 3	Legislation and policy.....	24
2 3 1	Introduction.....	24
2 3 2	Redistribution of land: Legislative framework	27
2 3 3	Redistribution of land: Policy framework.....	30
2 3 3 1	Introduction	30
2 3 3 2	Settlement/land acquisition grant 1994	31
2 3 3 3	Policy and procedure for expropriation of land in terms of Act 126 and ESTA 1999	34
2 3 3 4	Land redistribution and agricultural development 2001.....	36
2 3 3 5	Proactive land acquisition strategy 2006.....	39
2 3 3 6	Green paper on land reform 2011	41
2 3 3 7	State land lease disposal policy 2013.....	43
2 3 4	Conclusion.....	43
2 4	Expropriation as a mechanism to ensure redistribution	45
2 4 1	Introduction.....	45
2 4 2	Definition and requirements for expropriation	46
2 4 2 1	Introduction	46
2 4 2 2	Law of general application	47
2 4 2 3	Subject to compensation.....	47
2 4 2 4	Public purpose/public interest	49
2 4 4	Legislative framework for expropriation	51
2 4 4 1	Introduction	51

2 4 4 2	Expropriation legislation 1975 - 2013.....	52
2 4 4 3	Expropriation legislation 2015 - 2019.....	57
2 4 4 4	Conclusion	59
2 5	Conclusion	60
	Chapter 3: Administrative law as a vehicle to ensure land redistribution	63
3 1	Introduction	63
3 2	Considerations attached to expropriation as an administrative action	64
3 2 1	Introduction.....	64
3 2 2	Administrative regulation of expropriation.....	65
3 2 3	Reasonableness, rationality and proportionality	70
3 2 4	Arbitrariness	73
3 2 5	Less invasive means and alternative project arguments	80
3 2 6	Conclusion.....	87
3 3	Legitimate justification of South African expropriation in redistribution	89
3 3 1	Introduction.....	89
3 3 2	Legitimate purpose	91
3 3 3	Suitability of the project and expropriation.....	92
3 3 4	Balance between project's public benefits and adversely affected interests	94
3 3 6	Conclusion.....	97
3 4	Legislative incorporation of the legitimate justification in redistribution expropriation	97
3 4 1	Introduction.....	97

3 4 2	General expropriation legislation	98
3 4 3	Specific redistribution expropriation provisions.....	100
3 4 4	The expropriation vehicle	104
3 5	Conclusion	106
Chapter 4: Compensation as a potential obstacle to land redistribution expropriations...		108
4 1	Introduction	108
4 2	Compensation for expropriation	109
4 2 1	Introduction.....	109
4 2 2	Conceptualising compensation for expropriation	109
4 2 3	Requirements for the payment of compensation	115
4 2 3 1	Time and manner for payment of compensation.....	115
4 2 3 2	Amount of just and equitable compensation	117
4 2 4	Conclusion.....	127
4 3	The burden of land acquisition for redistribution	128
4 3 1	Introduction.....	128
4 3 2	Redistribution through market-led land acquisition	131
4 3 3	Willing buyer/willing seller (WB/WS).....	134
4 3 4	Redistribution through land expropriation	137
4 3 5	Property valuation and land administration in redistribution	140
4 3 6	Conclusion.....	147
4 4	Conclusion	148
Chapter 5: Conclusion		151

5 1	Introduction	151
5 2	Conclusions	152
5 2 1	Contextualisation of expropriation in redistribution	152
5 2 2	Administrative law as a vehicle for expropriation	156
5 2 3	Compensation as a potential hindrance for redistribution expropriations	158
5 3	Way forward and concluding remarks	161
	Bibliography	163
	Index of Legislation and Constitution	185
	Table of Cases	187
	Annexure.....	190

Chapter 1: Introduction

1 1 Introduction to the research problem

Expropriation of land, particularly expropriation for land reform purposes, is presently a contentious topic in South Africa. South Africa's transition to democracy, as similarly seen in jurisdictions such as Zimbabwe, lay most notably in the rejection of the previously reigning regime, with a desire to start anew.¹ Land (and land law) in modern South Africa has a long history of conflict, systemic violence and colonial legacy attached to it.² Thus, due to the importance of land, a transition from vastly unequal land distribution towards more equitable land access and more equal land ownership patterns, will need to be facilitated by the state in the laws that it enacts. Therefore, it is important that a clear contextualisation exists in the constitutional dispensation about the law that permits limitations on the protection of property.

Section 25 of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides the authority and constitutional justification for all state interferences with property. The provision sets out, in the first place, the prohibition against the arbitrary deprivation of property, and the requirement that such deprivation must be in terms of law of general application.³ Secondly, section 25 provides the authority and consequences of expropriation of property.⁴ It is therefore only in light of the authority of section 25 that the decision to expropriate can take place.

In February 2017, Mr JS Malema, as the leader of the Economic Freedom Fighters ("EFF"), presented an argument before the National Assembly ("NA") proposing the

¹ F Schauer "Legal development and the problem of systemic transition" (2003) 13 *Journal of Contemporary Legal Issues* 268.

² S Terreblance *A history of inequality in South Africa 1652 – 2002* (2002) 7.

³ Section 25(1) of the Constitution.

⁴ Section 25(2) of the Constitution.

amendment of section 25 of the South African Constitution. He stated that “this Constitution must be changed to make it possible for [black] people to own the land”.⁵ Furthermore, in February 2018, the NA debate on expropriation without compensation revealed the EFF opinion that section 25 purportedly stands in the way of land reform (expropriations).⁶ These parliamentary discussions have brought to light new debates about the conflict between the protection of property rights and the opening up of rights to those denied such rights in the past through mechanisms such as expropriation.

A multitude of studies exist on the topic of expropriation, particularly regarding the requirements and effects of this state power.⁷ In establishing a thorough analysis of the power to expropriate, these studies improve on the current understanding of the exact provisions that underlie the purposes, as well as the requirements of this particular type of state interference with the right to property. However, the 2012 *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* identified the underutilisation of expropriation as an existing problem in the land reform process.⁸ This is supported by the 2011 *Green paper on land reform*,⁹ in which one of the strategic means that the Department of Rural Development and Land Reform planned to improve land reform was through the improved use of land

⁵ Minutes of Proceedings of the National Assembly on Tuesday 28 February 2017 [Unrevised Hansard available at <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 23-07-2018)] 43.

⁶ Minutes of Proceedings of the National Assembly on Tuesday 27 February 2018 [Unrevised Hansard available at <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 25-07-2018)] 30.

⁷ For a general exposition on the definition and requirements of expropriation, see BV Slade “The ‘law of general application’ requirement in expropriation law and the impact of the Expropriation Bill of 2015” (2017) 50 *De Jure* 346; AJ van der Walt *Constitutional property law* 3 ed (2011) 336 – 354; H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 122; A Gildenhuys *Onteieningsreg* 2 ed (2001). See also 2 4 2.

⁸ *A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) Pretoria: Department of Rural Development and Land Reform available at <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368-a-policy-framework-for-land-acquisition-and-land-valuation-in-a-land-reform-context-and-for-the-establishment-of-the-office-of-the-valuer-general>> (accessed 18-04-2018) 7.

⁹ *Green paper on land reform* (2011) Pretoria: Department of Rural Development and Land Reform available at <https://www.gov.za/sites/www.gov.za/files/land_reform_green_paper.pdf> (accessed 18-04-2018).

expropriation.¹⁰ Furthermore, Kepe and Hall have pointed out that expropriation has been underutilised in the context of land redistribution.¹¹ It has been widely acknowledged that the land reform process thus far has been frustratingly slow in reaching the desired aim of addressing the vast racial inequality that exists in land ownership and land access in South Africa today.¹² However, it is not entirely clear where exactly in the overall land reform programme the issues fall, shrouding the programme and utilisation of expropriation with many aspects of uncertainty.¹³

Therefore, to create an informed cause and effect relationship between the decision to expropriate in redistribution and the underutilisation of this state power, some of the more important factors that play a role in the decision to expropriate must be considered. Expropriation of land, and the endeavour to ensure that land redistribution takes place, are multi-dimensional and complex legal and social issues. Thus, it may be difficult to pinpoint the exact causes of the underutilisation of the expropriation power of the state. Nonetheless, it is important to interrogate questions of underutilisation, especially at a time when there are calls for the reconsideration of expropriation law.

The aim of this thesis is therefore to determine whether it is possible to detect factors that point to the underutilisation of expropriation as a mechanism to ensure that the necessary

¹⁰ *Green paper on land reform* (2011) 4-5.

¹¹ T Kepe & R Hall *Land redistribution in South Africa: Commissioned report for high level panel on the assessment of key legislation and the acceleration of fundamental change* (2016) Parliament of South Africa <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 11-03-2019) 4; 12.

¹² S Pityana "The 'land question': The South African Constitution and the emergence of a conservative agenda" in B Cousins & C Walker (eds) *Land divided land restored* (2015) 161 161; M Aliber "Unravelling the 'willing buyer, willing seller' question" in B Cousins & C Walker (eds) *Land divided land restored* (2015) 145 145; JM Pienaar *Land reform* (2014) 373; F Hendricks, L Ntsebeza & K Helliker "Land questions in South Africa" in F Hendricks, L Ntsebeza & K Helliker (eds) *The promise of land* (2013) 1; L Ntsebeza "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 107 107.

¹³ D James *Gaining ground? 'Rights' and 'property' in South African land reform* (2007) 2; B Cousins "How do rights become real? Formal and informal institutions in South Africa's land reform?" (1997) 28 *IDS Bulletin* 59 60. A multitude of studies exist that aim to answer the overarching question of what hinders land reform through analyses of different parts that influence the programme; thus any study that looks at land reform in South African law potentially provides an element of an answer to the question of what hinders land reform. See J Zimmerman "Property on the line: Is an expropriation-centered land reform constitutionally permissible?" (2005) 122 *South African Law Journal* 278 382.

redistribution of land occurs. In this way, one can begin to get a sense of the extent to which amendment of section 25 is needed, if at all, to ensure that radical transformation or redistribution of land holdings in South Africa takes place.

It is important to note that if a conservative legal culture prevails, which resists constitutional transformation regarding land and land ownership, the mechanisms in place to try and achieve the desired transformation will be inhibited, despite the fact that the transformative aims of the Constitution are clear.¹⁴ This potentially plays a role in the extent and scope of the state's power to (re)distribute land to those waiting for access to property rights. Therefore, theoretical perspectives on ownership have a role to play in how and why expropriations take place. It also plays a role in the way in which expropriation matters are adjudicated.¹⁵ Furthermore, one cannot underestimate or ignore pure political will, or the lack thereof, to expropriate land and this will have to manifest in any study engaging with the potential obstacles that contribute to the underutilisation of the state's power to expropriate for land redistribution.

When considering the obstacles that potentially stand in the way of the utilisation of expropriation in redistribution, legal and extra-legal matters play a role in the analysis. This is because the power to expropriate is a legal question, but the decision to expropriate is arguably a political issue.¹⁶ Furthermore, a variety of legal fields interact in the decision to expropriate land, potentially requiring different levels of scrutiny in the validity of expropriation.¹⁷ Due to expropriation being effected through state action, the factors that influence the decision to expropriate will depend on the authorisation and justification of the

¹⁴ K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 168.

¹⁵ H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) 11.

¹⁶ Pienaar *Land reform* (2014) 227; SK Amoo *Property law in Namibia* (2014) 22. The decision to expropriate is also influenced by a number of other factors that may be political, but could even be broader including economic considerations and administrative constraints.

¹⁷ These fields include constitutional property law, administrative law and planning law. See J van Wyk *Planning law* 2 ed (2012) 225; EJ Marais "A common-law presumption, statutory interpretation and section 25(2) of the Constitution — a tale of three fallacies. A critical analysis of the Constitutional Court's *Arun* judgment" (2016) 133 *South African Law Journal* 629 644.

expropriation itself. It is the factors (and potential obstacles) derived from the justification and authorisation of expropriation that bear importance for this thesis.

The above-mentioned factors and obstacles will be derived from three overarching themes, namely the broader redistribution framework (chapter 2), administrative law principles applicable to expropriation (chapter 3), and the compensation requirement (chapter 4). These themes have been derived from areas in which the utilisation of expropriation in redistribution has many questions and aspects of uncertainty. While each theme, namely the redistribution framework, administrative law and compensation, have been well researched individually, there seems to be a gap in the holistic research of these themes in the context of expropriation. It is in this gap that this thesis seeks to make a contribution and investigates indicators to the underutilisation of expropriation in land redistribution.

1 2 Research aims and hypotheses

This thesis aims to establish some of the potential obstacles that hinder the utilisation of expropriation in the context of land redistribution in South Africa. Furthermore, the thesis aims to determine if, and to what extent, these factors provide sufficient justification for the utilisation (or underutilisation) of expropriation in the specific context of land redistribution. Therefore, research on expropriation in the broader land reform programme falls beyond the scope of this study.

Expropriation is one way in which the purposes of redistribution can be met.¹⁸ Many potential obstacles that hinder the expropriation powers of the state in the context of land redistribution are likely to be rooted in areas that are possibly problematic in expropriation

¹⁸ T Kepe & R Hall *Land redistribution in South Africa: Commissioned report for high level panel on the assessment of key legislation and the acceleration of fundamental change* (2016) Parliament of South Africa <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 11-03-2019) 11; Pienaar *Land reform* (2014) 313.

law. These may include the goal of ensuring land redistribution takes place, the requirement of compensation for expropriation and the application of administrative law principles to land redistribution expropriations.

The hypothesis underlying this thesis is that the current utilisation of land redistribution expropriations is not likely to be sufficient to meet its required aims in the land reform programme. This is possibly due to the uncertainty surrounding how best to utilise expropriation to reach the aims of land redistribution, the slow pace in the enactment (and implementation) of legislation and policies to address land redistribution issues as they arise, and a lack of political will to ensure the necessary expropriations take place. In this regard, it may not necessarily be section 25 of the Constitution, the requirement of compensation for expropriation or the application administrative regulation to expropriation that stand in the way of land redistribution expropriations.

1 3 Methodology

This study identifies potential hurdles influencing the decision to expropriate land for land redistribution purposes in South African law through a doctrinal and conceptual analysis of expropriation law. These possible obstacles will be identified through policy, legislation, case law and literature in the fields of expropriation and redistribution. This analysis will also indicate what the more uncertain elements in the application of expropriation in redistribution are. The structure of the redistribution framework as it stands, and the contextualisation of expropriation in the redistribution framework, will be used as a point of departure. This will further highlight the requirements for a valid expropriation in South African law, and areas of uncertainty in the specific context of redistribution. Furthermore, legislation that grants the state the power to expropriate property will be contextualised in instances of land redistribution.

Policies in the context of land redistribution will form a large part of the analysis, with particular attention directed towards whether the policies provide clarity on the current use of expropriation in redistribution. Thereafter, potential hurdles, which the state's utilisation of expropriation must overcome, including the administrative law principles applied to expropriation and the compensation requirement in redistribution, will be discussed. The general expropriation framework broader than redistribution and the overarching administrative law framework fall outside of the ambit of this study. Furthermore, the complex extra-legal factors that also contribute to the underutilisation of expropriation in land redistribution will not be the focus of this study. The purpose of this thesis will be to determine where the biggest instances of legal contestation and uncertainty are, and whether it is possible to identify key factors that determine the (under)utilisation of the state's power of expropriation for land redistribution.

1 4 Overview of chapters

This thesis consists of five chapters of which this chapter serves as the introductory one. Chapter 2 contextualises the expropriation power in land redistribution. The chapter examines the broader redistribution framework to identify the role expropriation plays in redistribution. Thereafter, the expropriation framework is explored in light of legislative changes affecting the use of expropriation going forward.

Chapter 3 investigates the relationship between administrative law and expropriation in redistribution. The administrative law principles that apply to expropriation as an administrative act are discussed as potential obstacles to the expropriation power in redistribution. Thereafter, the legitimate justification of expropriation is introduced, defined and applied to expropriation in the context of redistribution. The main purpose of the chapter is to determine whether the administrative considerations applicable are potential obstacles to the utilisation of the expropriation power in redistribution.

In chapter 4 the compensation requirement in expropriation law is set out. The concept of compensation in expropriation is defined and explored in the context of redistribution. Thereafter, the considerations that apply to compensation are compared to the cost of market-led land acquisition. This is done in order to establish whether compensation for expropriation is legally more burdensome than market-led land acquisition, thus contributing to the underutilisation of expropriation.

The final chapter will conclude this research and summarise the main findings of the thesis.

Chapter 2: Utilisation of expropriation in the land redistribution context

2 1 Introduction

The Constitution of the Republic of South Africa, 1996 (“Constitution”) creates the mandate for land redistribution, and the authority for expropriation of property.¹ This chapter aims to find some indications of what potentially hinders the use of expropriation, specifically in the context of land redistribution. In order to pinpoint these hindrances, this chapter aims to define and explore the meaning of land redistribution in South Africa. The goals of the redistribution framework will be analysed, particularly in relation to the overarching land reform programme. The legislation and policies that make up the programme will also be set out in order to gauge the problems and successes of redistribution thus far.

Redistribution of land is achieved through different mechanisms to reach its constitutionally mandated aims; one of these mechanisms is expropriation of property. The definition and requirements for the use of expropriation will be set out in order to better contextualise how expropriation is meant to work generally, but also more specifically in the context of land redistribution. Expropriation has been noted to be a power that can be used as a means to affect change in access to land and landownership patterns.² However, how this mechanism fits into the redistribution framework needs to be investigated, in order to critically analyse the use of expropriation in the sphere of redistribution.

2 2 The meaning of land redistribution

2 2 1 Introduction

In order to contextualise redistribution as a sub-programme of land reform, its role in relation to the overarching land reform programme in South Africa must be understood. This

¹ Section 25(2) and (5) of the Constitution.

² See sections 25(4) – (9) of the Constitution. See also specifically H Mostert “Revising the procedure for expropriations in South Africa: 2015 Bill and 1975 Act compared” 2016 *European Property Law Journal* 170 172; JM Pienaar *Land reform* (2014) 177; I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 547.

section therefore discusses the meaning of land redistribution in light of land reform. Thereafter, the models that were used to frame South African land redistribution are discussed. In this way, the expectations placed on redistribution, and the shortcomings that exist in the sub-programme thus far, can be better understood.³ Expropriation in this context is considered in so far as expropriation can be used as a vehicle to achieve land redistribution in South Africa.

2 2 2 Redistribution as a land reform sub-programme

2 2 2 1 *Conceptualising land redistribution*

The South African land reform programme can be divided into three sub-programmes. The Department of Land Affairs (“DLA”), which became the Department of Rural Development and Land Reform (“DRDLR”) after 2009, demarcated the sub-programmes in the *White paper on South Africa land policy* (1997) (“*White paper*”).⁴ Land reform consists of restitution, redistribution and tenure security.⁵ Though the sub-programmes are set out in the *White paper*, the mandate for restitution, redistribution and tenure reform is also found in section 25(5) – (9) of the Constitution.⁶ The *White paper* was published with the aim of redressing a long colonial history that barred the majority of black people in South Africa from owning land.⁷ This aim complements the Constitution’s transformative goal of restoring land to people and communities who lost those resources in the past.⁸

³ In the context of this chapter, the word “redistribution” is used in reference to the redistribution of land, a sub-programme of South African land reform.

⁴ *White paper on South Africa land policy* (1997) Pretoria: Department of Land Affairs <<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>> (accessed 14-09-2018) 9.

⁵ Land reform broadly relates to the redistribution of land to the landless, although specific definitions are context specific. See D Iyer “The role of government in expediting land expropriation: Reshaping the future of land reform” (2017) 52 *Journal of Public Administration* 508 509; Pienaar *Land reform* (2014) 12, 19; L Changuion & B Steenkamp *Disputed land* (2012) 275; E Lahiff “Land redistribution in South Africa” in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural land redistribution: Toward greater consensus* (2009) 169 171.

⁶ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 559.

⁷ Changuion & Steenkamp *Disputed land* (2012) 275; *White paper on South Africa land policy* (1997) 9.

⁸ Currie & de Waal *The bill of rights handbook* 6 ed (2013) 559.

The land reform sub-programmes can further be placed into either the category of being aimed at historically-based redress or redistributive justice.⁹ Historically-based redress directly focuses on correcting the injustices of apartheid land policy,¹⁰ and mass dispossession on the basis of racial discrimination.¹¹ Redistributive justice, in turn, is a broader category of land reform, and is aimed at allowing each individual the opportunity to receive what is fair, with a view to equality.¹² The sub-programme of restitution mainly falls under the category of historically-based redress.¹³ Redistribution and tenure security fall mainly under the category of redistributive justice; however, it should be noted that these sub-programmes can also fall under the category of historical redress.¹⁴ Redistribution is therefore related to concepts of redress and justice, rather than simply shifting land from one person to another.¹⁵

Land reform, of which land redistribution forms part, is a context specific concept that not only differs by jurisdiction, but also depends on the overall aims of the programme.¹⁶ The

⁹ Pienaar *Land reform* (2014) 272.

¹⁰ M Aliber & R Mokoena "The land question in contemporary South Africa" in J Daniel, A Habib & R Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 330 340-341.

¹¹ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 559.

¹² Pienaar *Land reform* (2014) 277; JL Gibson "Group identities and theories of justice: An experimental investigation into the justice and injustice of land squatting in South Africa" (2008) 70 *The Journal of Politics* 700 701. Gibson points out that fairness is a difficult concept to quantify, particularly in light of multiple types of justice. These include social justice, redistributive justice and retributive justice. Although he notes that fair distribution can be balanced by weighing one claim against another, there is no set criteria for justice, or fairness.

¹³ Pienaar *Land reform* (2014) 272. Historically-based redress in South African land reform is linked to resolving the political, economic and social development issues that prevail as a result of centuries of colonial dispossession. See WD Thwala "Land and agrarian reform in South Africa" in P Rosset, R Patel & M Courville (eds) *Promised land: Competing visions of agrarian reform* 57 57; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 330.

¹⁴ Pienaar *Land reform* (2014) 272 – 273.

¹⁵ Lahiff "Land redistribution in South Africa" in Binswanger-Mkhize, Bourguignon & Van den Brink (eds) *Agricultural land redistribution: Toward greater consensus* (2009) 175. Redistribution of resources can be similarly conceptualised in broader human rights research, particularly regarding socio-economic equality. See S Fredman "Redistribution and recognition: Reconciling inequalities" (2007) 23 *South African Journal on Human Rights* 214 216. Fredman indicates that socio-economic equality aims at "redistribution, [in order] to correct economic injustices in terms of access of individuals to resources", which is broader than access to land. See also N Fraser "Social justice in the age of identity politics: Redistribution, recognition and participation" in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 7 9-11.

¹⁶ Pienaar *Land reform* (2014) 13. In South Africa, those aims are informed by section 25 of the Constitution and the *White paper on South Africa land policy* (1997), in which the mandate for the land reform programme is set out.

need for an overall land reform programme is often sparked by political development and, when oversimplified, land reform comprises of a body of laws aimed at poverty reduction.¹⁷ Land reform programmes in most jurisdictions have redistribution of land as an important aspect of the programme, and redistribution is often considered as one of the main aims of a land reform programme.¹⁸ This is because, conceptually, redistribution should benefit the poor in granting better access to land.¹⁹ Thus, the aim of redistribution in the land reform programme is to provide access to land for those who require it.²⁰

Land has significance in the realm of poverty reduction due to the fact that for a poor person, land would arguably be their main means for potential wealth creation.²¹ This is particularly prevalent for the poor in rural areas, where the owners of large landholdings are the most influential role players in the land market.²² It should be noted that there are mechanisms in place other than expropriation in order to implement the land transfer aims of redistribution.²³ Such mechanisms include the regulation of the landholding market and tax measures supporting land reform.²⁴ Thus, a successful redistribution programme must ensure that in addition to reforming land ownership patterns, the market that favours large landowners is sustainably reformed as well.²⁵

¹⁷ T Kepe & R Hall *Land redistribution in South Africa: Commissioned report for high level panel on the assessment of key legislation and the acceleration of fundamental change* (2016) Parliament of South Africa <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 11-03-2019) 5; Pienaar *Land reform* (2014) 16, 274; M Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 2.

¹⁸ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 328. Lipton chooses a redistribution focus in the preferred definition of land reform, though Pienaar notes that this definition is too narrow for the South African context. Lipton's definition has a focus on farmland, whereas the South African aims of redistribution targets both rural and urban land. See Pienaar *Land reform* (2014) 273.

¹⁹ Section 25(5) of the Constitution; Pienaar *Land reform* (2014) 283; Currie & De Waal *The bill of rights handbook* 6 ed (2013) 560; Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 328.

²⁰ Changuion & Steenkamp *Disputed land* (2012) 275.

²¹ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 2, 257.

²² Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 255; HP Binswanger & K Deininger "South African land policy: The legacy of history and current options" (1993) 21 *World Development* 1451 1454. Although redistribution in South Africa is an agrarian focused sub-programme of land reform, it is not limited to rural land.

²³ Pienaar *Land reform* (2014) 216 – 220.

²⁴ Pienaar *Land reform* (2014) 368 – 372.

²⁵ Binswanger & Deininger (1993) 21 *World Development* 1454.

In the *White paper*, some of the immediate issues that required attention in land redistribution were set out. These included the means of addressing mass landlessness and homelessness, a practical way to respond to the different desires and needs for land both in the rural and urban sphere, and achieving this all while bearing national economic growth in mind.²⁶ The goal of better land access for the poor is broad, and rather than granting a right to benefit from the sub-programme, redistribution broadly grants the ability/possibility to benefit from land access.²⁷ It is due to the broad aims of redistribution that this sub-programme of land reform is envisaged to support the other two sub-programmes of restitution and tenure reform.²⁸ The sub-programmes of restitution and tenure reform also have the goal of sustainable resource distribution, and thus contain elements of redistribution.²⁹ Although this does not necessarily merge the successes of the different sub-programmes, how well each sub-programme fares does have an element of promoting land redistribution. Redistribution focuses greatly on settlement and the transfer of land so that the state may grant better land access to the poor.³⁰

The mass landlessness and differing needs regarding urban and rural land can be linked to South Africa's history. The legacy of the Native Land Act of 1913, which reserved very little land for the black population, left a struggle for space in the wake of urbanisation and proletarianism.³¹ Large populations from the African reserved lands were forced to move to the cities for work, thus leading to the emergence of squatter camps and slums near the

²⁶ *White paper on South Africa land policy* (1997) 10-11; Pienaar *Land reform* (2014) 216.

²⁷ Pienaar *Land reform* (2014) 283. Section 25(5) only mandates measures by the state to be taken to ensure that better access to land and resources take place. If this is contrasted to the restitution sub-programme, section 25(6) and (7) grants an actual right to redress in instances that meet the restitution requirements.

²⁸ R Hall "Transforming rural South Africa? Taking stock of land reform" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 87 89. In tallying the total land redistributed, successful claims in the restitution sub-programme are included, see Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 331.

²⁹ C Walker "Redistributive land reform" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 132 135.

³⁰ Pienaar *Land reform* (2014) 289; Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 91.

³¹ F Hendricks, L Ntsebeza & K Helliker "Land questions in South Africa" in F Hendricks, L Ntsebeza & K Helliker (eds) *The promise of land* (2013) 1 4; Currie & De Waal *The bill of rights handbook* 6 ed (2013) 559.

cities.³² The struggle for space for those individuals, some of whom do not have access to a wage or a means of subsistence living, must be addressed in land policy.³³ Thus, a factor that redistribution policy is required to take into account is whether the land is urban or rural.³⁴

2 2 2 2 *Redistribution focusing on urban land*

The initial redistribution model put its focus on agrarian reform. However, South Africa is not primarily an agrarian society.³⁵ Walker notes that it is the failing of the urban economy to address the unemployment in the urban sector that emphasises the need for land among both the urban and rural poor.³⁶ The poor in urban areas often consist of rural newcomers seeking work, and often include those most marginalised in society.³⁷ The rural poor are often driven to seeking urban employment because, as in most developing nations, the poor in the farmlands are in control of the minority of the land available.³⁸ The potential beneficiaries of land redistribution are therefore the poor and the landless, in both urban and rural contexts. Therefore, a limitation on the redistribution programme thus far is that it targets mostly agrarian land for redistribution.

The ability to be a beneficiary of redistribution has always been technically available to the poor in urban areas.³⁹ However, one should question the effectiveness of redistribution in redistributing primarily rural land. The potential beneficiaries of redistribution are scattered between urban and rural areas. The poor in urban areas, both landless and sometimes

³² Hendricks, Ntsebeza & Helliker "Land questions in South Africa" in Hendricks, Ntsebeza & Helliker (eds) *The promise of land* (2013) 4.

³³ Hendricks, Ntsebeza & Helliker "Land questions in South Africa" in Hendricks, Ntsebeza & Helliker (eds) *The promise of land* (2013) 4-5.

³⁴ Hendricks, Ntsebeza & Helliker "Land questions in South Africa" in Hendricks, Ntsebeza & Helliker (eds) *The promise of land* (2013) 3.

³⁵ Walker "Redistributive land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 134.

³⁶ Walker "Redistributive land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 134.

³⁷ Walker "Redistributive land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 134.

³⁸ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 2.

³⁹ See 2 3 3 2 below. The initial redistribution policies were essentially aimed at aiding the poor more generally, and not only the rural poor.

homeless, are seemingly disadvantaged to the potential benefits of redistribution compared to the rural poor. These issues of homelessness and landlessness exist, in many cases, as a result of the segregation that apartheid enforced. Under the apartheid regime, amongst specific designated racial groups, some people were excluded from housing depending on their race and/or their political leanings.⁴⁰ It was in the 1970s that the movement into the desirable white spaces began with shack settlements developing through land occupations.⁴¹ Though many of these occupations were families trying to reunite after apartheid separations, these occupations were essentially political in nature.⁴² Redistribution therefore has a role to play in undoing this legacy of inequality left by apartheid.

As democratic and constitutional South Africa crosses its second decade of existence, effective solutions to the problems of landlessness left by apartheid are urgently required. Social movements by the poor, particularly squatters, have particularly highlighted the need for an effective strategy to rectify the engineered segregation that apartheid designed.⁴³ The Advisory Panel on Land Reform and Agriculture (“Advisory Panel”) point out that an urban focus when considering land demand is necessary in future land policy.⁴⁴ Broader categories of land need may also prove beneficial in land policy going forward; categories ranging from land for purposes of settlement to land for small business owners and emerging black entrepreneurs.⁴⁵

⁴⁰ R Pithouse “Abahlali baseMjondolo and the struggle for the city in Durban, South Africa” (2009) 6 *Cidades* 241 243.

⁴¹ Pithouse (2009) 6 *Cidades* 243.

⁴² Pithouse (2009) 6 *Cidades* 244. The settlements that began as a result of these occupations were often named after ANC leaders. One example is the township of Msholozhi in Mbombela, Mpumalanga; named after the clan name of former president Jacob Zuma.

⁴³ After the unbanning of the ANC in 1990, popular organisations from black townships became affiliated with the South African National Civics Organisation, and later became different Non-Governmental Organisations (“NGOS”). The dialogue created by these organisations became the basis for what later became *Abahlali baseMjondolo*. See Pithouse (2009) 6 *Cidades* 242, 247.

⁴⁴ *Final report of the presidential advisory panel on land reform and agriculture* (2019) Pretoria: Advisory Panel on Land Reform and Agriculture <<https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>> (accessed 29-07-2019) 55.

⁴⁵ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 55. See 2 3 3 4 below.

Land redistribution was envisioned to provide access to land rights for the poor.⁴⁶

However, S'bu Zikode, the 2007 president of *Abahlali baseMjondolo* in South Africa, states that:

“Many things have been said. Many things have been seen. Many policies have been passed. Many people have voted. But what has been done has not been done for the poor. [...] The poor are outside”.⁴⁷

The organised movement of impoverished and landless people is a global concept. From South Africa's *Abahlali baseMjondolo* to Brazil's *Movimento dos Trabalhadores Rurais sem Terra*, the landless people's movement show the critical status of landlessness and spatial inequality in the respective jurisdictions.⁴⁸ Landless people's movements are often supported by politicians, especially when party support and credibility is swayed by the effectiveness of the land reform programme.⁴⁹ Thus, access to land and redistribution is greatly influenced by the political agenda in a country, in addition to the legal parameters that shape the land redistribution programme.

After the 1993 negotiations that pre-empted the South African Constitution's property clause, the matter of housing for the masses who were landless required focus. What followed was an intricate phasing of legal developments that took place in response to the land issue.⁵⁰ The World Bank played an important role in the development of a policy on land through a market based model of land acquisition, based on the housing policy

⁴⁶ Pienaar *Land reform* (2014) 283; Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 328.

⁴⁷ S Zikode “Our country is the greatest strength of the *Abahlali baseMjondolo* movement (SA) (shackdwellers)” (2008) 43 *Journal of Asian and African Studies* 113 113.

⁴⁸ This is true both socially and politically, see T Madlingozi “Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution” (2017) 1 *Stellenbosch Law Review* 123 125. Madlingozi states that the members of *Abahlali* are “the forgotten”, indicating an existence of “neo-apartheid”, suggesting a continuing political oppression on the poor. See also Pithouse (2009) 6 *Cidades* 255; D James *Gaining ground? ‘Rights’ and ‘property’ in South African land reform* (2007) 3. For more reading on the aims and meetings of the *Abahlali baseMjondolo* movement, see R Patel “A short course in politics at the university of *Abahlali baseMjondolo*” (2008) 43 *Journal of Asian and African Studies* 95 98.

⁴⁹ James *Gaining ground? ‘Rights’ and ‘property’ in South African land reform* (2007) 3.

⁵⁰ R Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in B Cousins & C Walker (eds) *Land divided land restored* (2015) 127 134. See also Table 2 in 2 3 1 below for a timeline of these developments.

developed for Chile under the Pinochet era.⁵¹ The result was that the poor were given cheaper land and were often banished to the peripheries of urban areas.⁵² The plight of the landless is therefore an issue that transcends the urban/rural divide.⁵³

Although redistribution is an agrarian focused land sub-programme, urban planning law should also have a redistributive agenda that promotes land reform. In urban areas, planning law is meant to address many of the urban land issues.⁵⁴ The relationship between land reform and planning law is not well defined, and requires further analysis if land reform is utilised in addressing urban land questions going forward.⁵⁵ The Development Facilitation Act 67 of 1995 (“DFA”) was legislation specifically aimed at land-use management, but was essentially a tool for redistribution.⁵⁶ The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”), as the successor to the DFA, replaced the unconstitutional parts of the DFA and consolidated urban planning law that was left fragmented after the end of the apartheid regime.⁵⁷ The principle that underpins the planning law framework under SPLUMA is that sustainable development and land-use management must be integrated into different disciplines and legal fields.⁵⁸ Land redistribution going forward should therefore take these planning law frameworks into account, to ensure that the frameworks benefit all potential beneficiaries of the sub-programme.⁵⁹

⁵¹ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 134; Pithouse (2009) 6 *Cidades* 244. This model is discussed in 2.2.2.3 below.

⁵² Pithouse (2009) 6 *Cidades* 244.

⁵³ The location of *Abahlali baseMjondolo* is uniquely between the urban area of the city of Durban and the surrounding rural areas. See Pithouse (2009) 6 *Cidades* 255; R Pithouse “Urban land question is also urgent” (09-03-2018) *Abahlali baseMjondolo* <<http://abahlali.org/node/16422/>> (accessed 11-03-2019).

⁵⁴ Pienaar *Land reform* (2014) 319.

⁵⁵ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 88.

⁵⁶ Pienaar *Land reform* (2014) 292.

⁵⁷ Pienaar *Land reform* (2014) 297.

⁵⁸ Pienaar *Land reform* (2014) 298; J van Wyk *Planning law* 2 ed (2012) 10.

⁵⁹ Section 2 of *National Land Reform Framework Bill* (2017) Cape Town: Parliament <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf> (accessed 11-03-2019).

2 2 2 3 *Identified issues in land redistribution*

There are seemingly two prevailing views on how land redistribution has fared since the launch of land reform.⁶⁰ On one hand, the DLA supported the findings that said that over 200 000 hectares of land have been distributed to over 30 000 families, and that major progress had thus been made.⁶¹ On the other hand, civil society groups suggest that the overwhelming majority of land is still controlled by white farmers, implying that redistribution has had limited success, and has been slow.⁶² In this regard, it is difficult to ignore the massive landlessness and poverty that is prevalent in black communities today.⁶³ The continued existence and momentum of *Abahlali baseMjondolo* and the landless people's movement is indicative that landlessness cannot be ignored.⁶⁴

Mbokazi makes the argument that redistribution is hindered by the fact that certain democratic practices are not effectively included in the sub-programme.⁶⁵ These practices include public participation and meaningful engagement, particularly with farmers and initiatives that include civil society organisations.⁶⁶ Hall, in turn, questions the focus of the land debates, which puts emphasis on the method of land acquisition, of which expropriation is only one such method.⁶⁷ There is an ongoing tension between the state and the market in the matter of land acquisitions and the means through which the state acquires land.⁶⁸ However, Hall further points out that it is the cause of the land reform land acquisitions that also needs scrutiny. She questions the use of outdated statutes that prohibit the subdivision

⁶⁰ J Zimmerman "Property on the line: Is an expropriation-centered land reform constitutionally permissible?" (2005) 122 *South African Law Journal* 378-381.

⁶¹ In addition to the black farmers who had been settled in terms of the Land Redistribution and Agricultural Development Policy, see Zimmerman (2005) 122 *South African Law Journal* 381; see also 2 3 3 4 below.

⁶² Zimmerman (2005) 122 *South African Law Journal* 380.

⁶³ Zimmerman (2005) 122 *South African Law Journal* 380-381.

⁶⁴ Pithouse (2009) 6 *Cidades* 250.

⁶⁵ Mbokazi 2018 *New Agenda: South African Journal of Social and Economic Policy* 24.

⁶⁶ Mbokazi 2018 *New Agenda: South African Journal of Social and Economic Policy* 23-24.

⁶⁷ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 141.

⁶⁸ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 141.

of rural land, and regulate the use of expropriation.⁶⁹ This suggests that before one can question whether expropriation should be utilised or not, the expropriation power must be supplemented by adequate legislation in the constitutional era.

There are some factors beyond agrarian policy that have an impact on the success of redistribution, although Hall puts the emphasis on agrarian policy as a means of change in land reform. The first is the fact that the amount of working commercial farms are rapidly decreasing as arable land becomes less abundant.⁷⁰ Secondly, the amount of families who make their livelihoods in commercial agriculture is diminishing, resulting in the loss of many jobs.⁷¹ These factors are supported by arguments suggesting that rural development will not be found in a land reform programme, but rather in improved economic policy and mass access to education and healthcare.⁷²

Despite these arguments, land inequality is still a major impediment to mechanisms of poverty reduction. Lipton states that:

“Land inequality continues to be mainly built, not on transfers of land from the less active or skilful to those better adapted to run farms, but on inheritance from ancestors who worked or saved (or often stole or bribed) to get the land.”⁷³

However, Lipton then counters his argument stating that the market will always rectify itself in favour of the rich, thus economic change is where effective reform will be found rather

⁶⁹ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 141. She specifically argues that the Subdivision of Agricultural Land Act 18 of 1977, which prohibits certain subdivisions of land, and the Expropriation Act of 1975 should no longer be applicable. The Subdivision of Agricultural Land Act was instituted in the apartheid regime to prevent farms from being made smaller, thus preventing black potential owners from affording farmland, see Lahiff “Land redistribution in South Africa” in Binswanger-Mkhize, Bourguignon & Van den Brink (eds) *Agricultural land redistribution: Toward greater consensus* (2009) 183. Easy subdivision of agricultural land has been identified as key for land reform going forward in the *Final report of the presidential advisory panel on land reform and agriculture* (2019) 58.

⁷⁰ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 142; Pienaar *Land reform* (2014) 832.

⁷¹ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 142; Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 297-298.

⁷² Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 297.

⁷³ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 307.

than simply land reform.⁷⁴ Despite this view, land ownership patterns may only be changed by a successful land reform programme, which will include redistribution.⁷⁵

2.2.3 Models of land redistribution

In 1993, the World Bank provided suggestions and research on land reform to provide guidance on structuring the South African land reform programme, specifically redistribution.⁷⁶ In these suggestions, redistribution is noted as having two essential stages, acquisition of land and (re)distribution of land.⁷⁷ The four models of land redistribution were set out depending on whether the state, or the market, played a driving role in the acquisition or distribution of land.⁷⁸ Below is an illustration of these models, which distinguishes between market assisted and state-driven (administrative)⁷⁹ acquisition and distribution of land.

Table 1 presents a number of options for structuring the redistribution programme. The model changes depending on whether the land acquisition or land distribution stage is driven by the state or the market. For ease of reference, each model in Table 1 has been given a letter from (A) to (D). These models below in relation to the use of expropriation are discussed in the context of redistribution.

⁷⁴ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 307.

⁷⁵ Lipton *Land reform in developing countries: Property rights and property wrongs* (2009) 306-307.

⁷⁶ *Options for land reform and rural restructuring in South Africa* (1993) Washington DC: World Bank <<http://documents.worldbank.org/curated/en/707271468302672976/pdf/779910WP0land00n0Box377320B000UO090.pdf>> (accessed 14-08-2019).

⁷⁷ Lahiff (2007) 28 *Third World Quarterly* 1585; *Options for land reform and rural restructuring in South Africa* (1993) 32.

⁷⁸ *Options for land reform and rural restructuring in South Africa* (1993) 32-33.

⁷⁹ In this context, state driven acquisition of land includes instances of land acquisition initiated by the state, either through purchase or expropriation. This acquisition is administrative in nature if driven by the state, see G Quinot & P Maree "Administrative action" in G Quinot (ed) *Administrative justice in South Africa* (2015) 66. Therefore, acquisition that is administrative or state driven is used interchangeably.

Table 1: World Bank models of land redistribution

	Market-assisted acquisition	Administrative acquisition
Market-assisted distribution	(A) With both stages handled by market mechanisms, such as the willing-buyer, willing-seller model. The role of the state is limited to monitoring and facilitating the process.	(C) Here the state acquires the land (through expropriation or direct purchase) and relies on a market device for distribution, such as a bidding process.
Administrative distribution	(B) In this case, the state acquires land in the market and then administers the settlement program. Examples include homeland consolidation and betterment schemes	(D) An example of an administratively handled land redistribution is the process of directed resettlement on state owned or expropriated land.

Source: World Bank “Models of land redistribution” in *Options for land reform and rural restructuring in South Africa* (1993) 33. Edited by author.

Model A is a structure of redistribution in which the market drives both land acquisition and distribution. Model A is closely linked to the initial structure of redistribution to which the government committed itself in the 1997 *White paper*.¹ The success of land redistribution in model A is reliant on the ability of beneficiaries of land reform to participate in the free market to acquire land. Thus, land can only be acquired if a willing seller makes land available for beneficiaries to willingly acquire, hence the willing buyer/willing seller (“WB/WS”) model.² This approach had many problems when utilised in South Africa, rooted mainly in the poverty of land redistribution beneficiaries.³ A redistribution structure similar to model A was used in South Africa in the initial stages of redistribution.⁴ Expropriation did not feature in model A,

¹ *White paper on South Africa land policy* (1997) 9,12; Lahiff (2007) 28 *Third World Quarterly* 1585.

² See 4 3 3 where this principle is elaborated upon.

³ See 2 3 3 2 below.

⁴ This was after the *Proactive land acquisition strategy* fully replaced the *Land redistribution and agricultural policy*. See the policy framework in 2 3 3 below.

due to the state maintaining only a monitoring role and land acquisition being facilitated predominantly by the market.

Model B is a structure of land redistribution in which the state makes use of the market in the process of land acquisition. Therefore, the state once more plays a minor role in land acquisition. However, the state plays a more dominant role in administering the acquired land. Thus, the state would buy the land from a willing seller, and administer the land in accordance with its policies and legislation. Sufficient administrative authority is required in the administration of the acquired land. This highlights the importance of effective land administration in land reform.⁵ Model B also does not make use of expropriation, due to land acquisition essentially being facilitated by the market.

It is in model C and D that expropriation as a means of land acquisition is utilised. The state uses its authority to expropriate in order to acquire land, which it then distributes either through market means (such as bidding, as shown in model C), or directly allows resettlement on state-owned land (as shown in model D).⁶ South Africa's land redistribution programme seems to be shifting from a model A type redistribution to a model D type redistribution. This shift is evidenced by the redistribution policies since 1994, ranging from the *Settlement/land acquisition grant* in 1994 (model A) to the *State land lease disposal policy* in 2013 (model D).⁷ However, this shift has thus far not been very clear.

The above models indicate that South Africa may need to re-strategise more clearly the model of redistribution planned for the future. Current political discussions suggest that the use of expropriation is meant to take a more prominent role as a means for the state to acquire land for redistribution purposes.⁸ The state's expropriation powers are therefore an important tool to redistribution, and land reform generally.⁹ It should be noted that the

⁵ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 90.

⁶ See Table 1 above.

⁷ See 2.3.3 below for a discussion of the redistribution policy framework.

⁸ Changuion & Steenkamp *Disputed land* (2012) 274.

⁹ *Land Redistribution and Agricultural Development* (2001) Pretoria: Departments of Agriculture and Land Affairs < <https://www.nda.agric.za/docs/Policy/redistribution.htm> > (accessed on 08-10-2018) 4.

possible factors that affect expropriation are extensive, which may include fields broader than law.¹⁰ Nonetheless, an analysis of the redistribution framework may be useful in considering how expropriation is meant to feature as a mechanism to ensure that redistribution is successfully undertaken in South Africa going forward.

2 2 4 Conclusion

The above analysis of the meaning of land redistribution brings to light two important conclusions, which potentially affect the utilisation of expropriation in redistribution. The first is that redistribution is a broad field that needs to be better structured in order to adequately meet the demands of potential beneficiaries. Redistribution is required to address many problems left in the legacy of apartheid, including mass landlessness and homelessness in both the urban and rural contexts. The programme as it stands is faced with many unanswered questions. These include: a means to access accurate information on the success of redistribution thus far, an adequate programme of granting improved access to land to both the urban and rural poor, and certainty regarding the model of land acquisition and distribution that underpins the framework of redistribution. Expropriation is a part of the model of land acquisition, but must be followed by a workable framework for redistribution. If clear and concise direction is set out in the policy framework regarding the above-mentioned questions, it may be easier to understand how expropriation is meant to be utilised in the sub-programme.

The second is that redistribution is a multi-faceted land reform sub-programme in which expropriation has a specific role as a means of land acquisition. Therefore, redistribution must also be understood in view of fields broader than land reform law. These fields include economic growth, which the *White paper* points out as a factor in land reform; planning law,

¹⁰ Pienaar *Land reform* (2014) 33; RL Posterman & T Hanstad "Land reform in the twenty-first century: New challenges, new responses" (2006) 4 *Seattle Journal for Social Justice* 763 764.

which addresses many urban land issues through statutes such as SPLUMA; and constitutional law, which sets out many of the democratic practices used in achieving human rights, such as meaningful engagement and public participation. These fields are notably important when considering redistribution of land. It is in the policy framework that governs redistribution that these fields must be taken into account. This is because if this does not occur at policy level, the task of taking into account these broader factors may only occur when utilising expropriation as a mechanism for acquiring land for redistribution. The expropriation procedure is laden with requirements and procedures that test the validity and purpose for which the expropriation is undertaken.¹¹ If redistribution of land is one such purpose, the policies that frame redistribution should adequately encompass as many of the applicable disciplines and fields as possible. This ensures that the expropriation process is not burdened with more considerations than is necessary. In light of all the issues highlighted above regarding the meaning of land redistribution, the focus of redistribution being urban and rural land, and the fact that there are different models that redistribution can take, it is necessary to consider the legislative and policy frameworks for redistribution in South Africa.

2 3 Legislation and policy

2 3 1 Introduction

In order to better understand redistribution and how expropriation is meant to be used in the redistribution context, the structure of redistribution as it initially began, and as it currently stands, should be discussed. The structure of land redistribution is contained in the policies and legislation that make up the sub-programme.¹² These policies and statutes are located in different fields of law, which function in conjunction with redistribution. The policy and legislative framework governing land, expropriation and land redistribution in South Africa

¹¹ See 2 4 2 4 below.

¹² Pienaar *Land reform* (2014) 285.

has had many changes over the past decades. This section will therefore put its focus on policies and statutes that indicate the potential authority for expropriation as a redistribution mechanism.

In order to better contextualise the use of expropriation in redistribution, the legislation and policies that empower expropriation in redistribution will be identified. Furthermore, the changing trends in the policy framework of redistribution will also be highlighted. This section aims to better understand how expropriation is meant to fit into the redistribution context. The table below provides a logical timeline of some of the policies and legislation in expropriation law and land redistribution in South Africa.¹³ The statutes, policies, Amendment Acts and Bills that speak directly to expropriation have been indicated in bold.

Table 2: Timeline of policy, legislation and political events in redistribution and expropriation

1975	Expropriation Act 63 of 1975
1977	Expropriation Amendment Act 19 of 1977
1978	Expropriation Amendment Act 3 of 1978
1982	Expropriation Amendment Act 21 of 1982
1992	Expropriation Amendment Act 45 of 1992
1993	Interim Constitution of the Republic of South Africa Act 200 of 1993 Provision of Certain Land Settlement Act 126 of 1993 World Bank makes proposals for rural restructuring in <i>Options for land reform and rural restructuring in South Africa</i> (1993)
1994	Community land conference on the land charter Restitution of Land Rights Act 22 of 1994 Settlement/Land Acquisition Grant, 1994, by the Department of Land Affairs
1996	Constitution of the Republic of South Africa, 1996 Land Reform (Labour Tenants) Act 3 of 1996

¹³ Case law which had an effect on land redistribution and expropriation were omitted from this table. Instances of case law that has an impact on either the redistribution or expropriation framework will be discussed when specifically relevant in the sections that follow.

1997	White Paper on Land Reform, 1997 by the Department of Land Affairs
1998	Provision of Certain Land Settlement Act 126 of 1993 is renamed to become Provision of Land and Assistance Act 126 of 1993
1999	Policy and procedures for expropriation of land in terms of Act 126 And ESTA (1999)
2001	Land Redistribution and Agricultural Development, 2001, by the Department of Land Affairs Landless People's Movement is formed
2003	<i>Comprehensive Agricultural Support Programme</i> (2003), by the Department of Agriculture
2005	National Land Summit, 2005, by the Departments of Agriculture and Land Affairs The movement of <i>Abahlali baseMjondolo</i> mobilises
2006	Proactive Land Acquisition Strategy, 2006, is launched by the Department of Land Affairs
2007	Draft Policy on the Expropriation Bill 2007 <i>Settlement and Implementation Support Programme</i> (2007), by the Commission on the Restitution of Land Rights and Department of Agriculture
2008	Expropriation Bill B16-2008
2009	The Department of Land Affairs becomes the Department of Rural Development and Land Reform
2011	Green Paper on Land Reform, 2011, by the Department of Rural Development and Land Reform
2012	Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general, 2012, by Department of Rural Development and Land Reform
2013	Expropriation Bill (draft) in GN 234 of 2013 GG 36269 of 20-03-2013 State Land Lease and Disposal Policy, 2013, by the Department of Rural Development and Land Reform
2014	Property Valuation Act 17 of 2014
2015	Expropriation Bill B4D-2015
2017	Property Valuation Census Parliamentary call for amendment to section 25 of the Constitution
2018	Parliamentary call for expropriation without compensation

	Expropriation Bill (draft) in GN 116 of 2018 GG 42127 of 21-12-2018
2019	<i>Final report of the presidential advisory panel on land reform and agriculture, 2019</i>

Source: Author's own design.

The purpose of Table 2 is to provide an overview of the policy, legislation and events that have affected land redistribution in South Africa, with a particular focus on the potential use of expropriation in the redistribution context. Table 2 is fairly long, indicating the multitudes of documents, legislation and policies that make up the redistribution framework. This section will therefore highlight some of the policies, documents and legislation indicated in the table. As a point of departure, the statutes that give effect to redistribution and expropriation will be identified. Thereafter, the policy framework for redistribution will be discussed. Thus, the manner in which expropriation forms part of the redistribution framework can be better understood, and a conclusion about the use (or non-use) of expropriation in the redistribution context can be derived.

2.3.2 Redistribution of land: Legislative framework

Land redistribution differs from the other two sub-programmes of land reform because the directives of redistribution are located in the relevant policies, rather than the governing legislation.¹⁴ However, it is legislation that enables certain policies to be instituted. A few of the more important pieces of legislation in this regard include the Provision of Land and Assistance Act 126 of 1993 ("Act 126") and the State Land Disposal Act 48 of 1961 ("State Land Act"). The aims of Act 126 provided the authority for certain policies that came later, such as the Proactive Land Acquisition Strategy (2013) ("PLAS").¹⁵ The State Land Act is a

¹⁴ Pienaar *Land reform* (2014) 274. E Lahiff "Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform" (2007) 28 *Third World Quarterly* 1577 1580.

¹⁵ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) Pretoria: Department of Agriculture

pre-constitutional statute, but finds relevance today because it provides the authority for the disposal of state land which can be used for redistribution.¹⁶ As a result of this Act, the State Land Lease and Disposal Policy (2013) is in force.¹⁷

The legislative paradigm for redistribution has much to do with transforming the ownership patterns of private land, which was white dominated at the end of apartheid.¹⁸ The transition to the land reform framework proposed a programme of redistribution and restitution for a limited amount of time.¹⁹ This was in accordance with the Provision of Certain Land for Settlement Act 126 of 1993, which became Act 126 in 1998. Act 126 was enacted in order to empower the state to meet its redistribution obligations in terms of section 25(5) of the Constitution.²⁰ The preamble of Act 126 indicates that the Act is aimed at identifying, regulating and sub-dividing land for settlement purposes, and providing financial assistance for the acquisition of that land. Act 126 also empowers the use of expropriation in order to achieve redistribution of property.²¹ However, as a safeguard against land mismanagement, the provisions of Act 126 provides that the state would be able to intervene if redistributed land was not being utilised productively.²²

<http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/manual%20for%20the%20implementation%20of%20the%20proactive%20land%20acquisition%20strategy.pdf> (accessed 11-03-2019) 7.

¹⁶ Pienaar *Land reform* (2014) 324.

¹⁷ Pienaar *Land reform* (2014) 324; *State Land Lease and Disposal Policy* (2013) Pretoria: Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/phocadownload/Policies/state_land_lease_and_disposal_policy_25july2013.pdf> (accessed 11-03-2019) 9.

¹⁸ Pienaar *Land reform* (2014) 322; Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 87 89; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 330.

¹⁹ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 133.

²⁰ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 26.

²¹ Section 2, 10 and 12 of Act 126. Section 12 of Act 126 states: Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act 63 of 1975), the Minister may for the purposes of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

²² Section 8 of Act 126.

As noted earlier, the ultimate successes of the restitution and tenure reform sub-programmes of land reform impact on the success of redistribution.²³ These sub-programmes once more broaden land access, and promote the ideals contained in PLAS.²⁴ Consequently, statutes that grant expropriation powers more broadly in land reform, such as the Land Reform (Labour Tenants) Act 3 of 1996 (“Labour Tenants Act”), the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and the Restitution of Land Rights Act 22 of 1994 (“Restitution Act”) are applicable to the redistribution framework as well.²⁵ Thus, the statutes that specifically provide for expropriation and redistribution potentially include the Act 126, ESTA, the Labour Tenants Act, and the Restitution Act, despite the fact that the Expropriation Act 63 of 1975 (“1975 Expropriation Act”) is the overarching statute that authorises all expropriations more generally.²⁶ Therefore, it seems that there are few statutes that empower the Minister to expropriate specifically in the context of redistribution, which is potentially problematic considering the broad ambit of redistribution.

It should be noted that although the successes of restitution and tenure reform do promote the goals of redistribution, the mandate for the use of expropriation in restitution matters seems more straightforward than in the redistribution context.²⁷ This is because of the more stringent rules and requirements that must be proven for a land claim to be successful in

²³ See 2 2 1 above.

²⁴ See the *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 25; Pienaar *Land reform* (2014) 6-7. See also Section 4 of the *National Land Reform Framework Bill* (2017).

²⁵ Pienaar *Land reform* (2014) 301-305.

²⁶ BV Slade “The ‘law of general application’ requirement in expropriation law and the impact of the Expropriation Bill of 2015” (2017) 50 *De Jure* 346 352; EJ Marais “Providing better protection for expropriatees? Preliminary thoughts on the interpretation of ‘arbitrarily’ in clause 2(1) of the Expropriation Bill B4D-2015” (2017) 33 *South African Journal on Human Rights* 97 101. The general expropriation legislative framework is discussed in 2 4 4 below. Hoops argues that the use of more specific statutes that authorise expropriation for a specific public purpose such as redistribution possibly strengthens the legitimacy of that purpose. See B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 389; H Mostert “Revising the procedure for expropriations in South Africa: 2015 Bill and 1975 Act compared” 2016 *European Property Law Journal* 170 182. See 3 3 for a discussion of the legitimate justification of expropriation.

²⁷ This is because restitution is made up of claims made by people and communities, which are either successful or not. Upon a successful claim, the state expropriates and transfers the property to the beneficiaries of the claim. This however has particular issues attached to it, see T Roux “Land restitution and reconciliation in South Africa” in F du Bois & A du Bois-Pedain (eds) *Justice and reconciliation in post-apartheid South Africa* (2006) 144 162; R Hall “Land restitution in South Africa: Rights, development and the restrained state” (2004) 38 *Canadian Journal of African Studies* 654 658.

terms of the Restitution Act.²⁸ Restitution results in land being returned in many instances to large communities in various regions of the country, without the need for court intervention.²⁹ Due to the specific nature of a land claim, possible defences for an owner to resist a land claim can even be listed.³⁰ It is therefore a well-documented procedure, which is not necessarily the case for the different projects that fall under redistribution.

Land acquisition for redistribution has many different purposes.³¹ Hall goes as far as noting that redistribution is meant to cater for the many landless members of the population who do not qualify for the restitution programme.³² This not only puts into perspective how large the beneficiary group for redistribution is, but also suggests that there are many different purposes in redistribution for which expropriated land should be utilised.³³ In addition to resettlement, redistribution projects include agricultural development and non-agricultural enterprises.³⁴ It is policy that determines the projects on which redistribution puts focus, and who the intended beneficiaries are. These policies are discussed below.

2 3 3 Redistribution of land: Policy framework

2 3 3 1 Introduction

The policy framework for land redistribution is extensive, and there are various different mechanisms in place at national level and local governance level to regulate the

²⁸ See *Salem Party Club and Others v Salem Community and Others* 2018 3 SA 1 (CC), See also Roux "Land restitution and reconciliation in South Africa" in du Bois & du Bois-Pedain (eds) *Justice and reconciliation in post-apartheid South Africa* (2006) 165; WL Venter "The statutory remedies available to landowners that are faced with unfounded restitution claims in terms of the Land Rights Act 22 of 1994" (2003) 2 *Stellenbosch Law Review* 235 236.

²⁹ W Du Plessis, N Olivier N & JM Pienaar "Expropriation, restitution and land redistribution: An answer to land problems in South Africa?" (2003) 18 *SA Public Law* 491 492.

³⁰ Venter (2003) 2 *Stellenbosch Law Review* 253-254.

³¹ Pienaar *Land reform* (2014) 301.

³² Hall (2004) 38 *Canadian Journal of African Studies* 655.

³³ Section 25(7) of the Constitution sets the parameters in terms of which restitution should be used. Section 25(5), which mandates redistribution, is not as clear as section 25(7), in only requiring the promotion of broader access to land rights. The scope of redistribution is therefore dependent on its policy and legislative framework in order to give the sub-programme meaning.

³⁴ This is in accordance with the *Land Redistribution and Agricultural Development* (2001) Pretoria: Departments of Agriculture and Land Affairs < <https://www.nda.agric.za/docs/Policy/redistribution.htm>> (accessed on 08-10-2018). See 2 3 3 4 below.

redistribution of land.³⁵ Although there are many land redistribution policies and grants; this section highlights the more pivotal documents in redistribution at national level, particularly in relation to expropriation. In this way, the different obstacles that the utilisation of expropriation faces in redistribution can potentially be identified.

2 3 3 2 *Settlement/land acquisition grant 1994*

In 1994, the DLA launched the pilot programme for land redistribution.³⁶ The pilot programmes in redistribution were instituted in the form of different grants, but found great difficulty initially due to the large amount of beneficiaries to be supported.³⁷ The DLA instituted a subsidy scheme to enable black people to enter the land market, with the aim of a diversified agricultural sector that transcended racial lines in future.³⁸ Redistribution thus put its initial focus on agricultural land.³⁹

The *Settlement/land acquisition grant* (“SLAG”),⁴⁰ and the *Settlement and production land acquisition grant* (“SPLAG”),⁴¹ were both grants meant to enable beneficiaries to acquire land to settle on. These mechanisms are supported by programmes that assist beneficiaries post settlement. These include the 2003 *Comprehensive agricultural support programme*,⁴²

³⁵ Municipalities made use of the Municipal Commonage Policy, which provided common use land for the poor in local areas. See *Municipal Commonage Policy and Procedures* (1997) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/161-municipal-commonage-policy-and-procedures>> (accessed 11-03-2019). See Kepe & Hall *Land redistribution in South Africa* (2016) 19; Pienaar *Land reform* (2014) 332-334 for a discussion on these policies.

³⁶ See also Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 331.

³⁷ Pienaar *Land reform* (2014) 207; Hall “Transforming rural South Africa? Taking stock of land reform” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 89; Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 331.

³⁸ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Lahiff (2007) 28 *Third World Quarterly* 1580.

³⁹ WG Moseley “Neoliberal agricultural policy versus agrarian justice: Farm workers and land redistribution in South Africa’s Western Cape Province” (2007) 89 *South African Geographical Journal* 4 4-5.

⁴⁰ As established by the *White paper on South Africa land policy* (1997) 7.

⁴¹ *Settlement and Production Land Acquisition Grant* Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/settlement-production-land-acquisition-grant-policy-framework.pdf> (accessed 11-03-2019); Pienaar *Land reform* (2014) 219.

⁴² *Comprehensive Agricultural Support Programme* (2003) Pretoria: Department of Agriculture <<https://www.nda.agric.za/docs/casp/casp.htm>> (accessed 13-12-2018).

and the 2007 *Settlement and implementation support programme*.⁴³ However, there is little information on the success of these support programmes.⁴⁴

The SLAG was enabled by Act 126, and confirmed in the *White paper*.⁴⁵ It was based on the market-led approach of the World Bank, and was aimed at being a key feature of the redistribution sub-programme.⁴⁶ This approach envisaged the removal of past discriminatory laws,⁴⁷ therefore allowing the previously disadvantaged to participate with white landowners in the purchasing of land in a free market.⁴⁸ The obstacle that had to be surmounted was the fact that the previously disadvantaged populations lived in poverty, and could not afford land at market prices.⁴⁹ Thus, the World Bank suggested that a grant system be implemented as a point of departure for redistribution in South Africa.⁵⁰

The SLAG was a monetary grant given to landless families earning below a certain amount in order for them to buy land.⁵¹ SLAG was therefore geared towards assisting the

⁴³ *Settlement and Implementation Support Programme* (2007) Pretoria: Department of Agriculture and Commission on the Restitution of Land Rights <https://www.gov.za/sites/default/files/gcis_document/201411/dlasynthesisreportsept2007.pdf> (accessed 13-12-2018).

⁴⁴ For research on post-settlement support in redistribution, see Lahiff "Land redistribution in South Africa" in Binswanger-Mkhize, Bourguignon & Van den Brink (eds) *Agricultural land redistribution: Toward greater consensus* (2009) 185. Lahiff notes that a possible shortcoming in post-settlement support programmes is the fact that its use beyond the land transfer stage of redistribution is not adequately conceptualised.

⁴⁵ *White paper on South Africa land reform* (1997) 7; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 332.

⁴⁶ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 134; *Options for land reform and rural restructuring in South Africa* (1993) 31.

⁴⁷ These include the Natives Land Act 27 of 1913, and the Group Areas Act 41 of 1950.

⁴⁸ It is from this approach that willing buyer/willing seller became a part of the South African redistribution model. E Kgwadi & M Nefale "The negative impacts of World Bank market based land reform: A South African case study" in F Barros, S Sauer & S Schwartzman (eds) *The negative impacts of World Bank market based land reform* (2003) 297 300; *Options for land reform and rural restructuring in South Africa* (1993) 32-33. See 2 2 3 above.

⁴⁹ Kgwadi & Nefale "The negative impacts of World Bank market-based land reform: A South African case study" in Barros, Sauer & Schwartzman (eds) *The negative impacts of World Bank market based land reform* (2003) 301; Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 87 98.

⁵⁰ *Options for land reform and rural restructuring in South Africa* (1993) 31. The recommendations made by the World Bank suggested that the public sector should support the often unskilled beneficiaries of the grants, but the market of land should essentially be left open.

⁵¹ *White paper on South Africa land policy* (1997) 17; Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 134-135; Pienaar *Land reform* (2014) 217 218; N Mbokazi "Understanding land redistribution policy-making and policy implementation: Case studies from the Eastern Cape – land reform" 2018 *New Agenda: South African Journal of Social and Economic Policy* 22 23. See also *Options for land reform and rural restructuring in South Africa* (1993) 34, for the World Bank suggestions on a grant system.

landless poor. The amount that SLAG offered was akin to an urban housing grant at the time, and was complemented by a grant for the planning fees involved in starting a business.⁵² Hall points out that despite the negotiations for the 1996 Constitution's property clause, and the African National Congress ("ANC") effort for expropriation to be demarcated in section 25, the DLA did not use expropriation in the initial structuring of redistribution.⁵³ Instead, the ANC opted for the market-based approach as suggested by the World Bank.⁵⁴

The use of the SLAG had many problems.⁵⁵ Hall argues that a redistribution mechanism such as SLAG alienated many stakeholders, including rural communities, white farmers, the black commercial farming class, and NGOs opposed to the market-led approach to land reform.⁵⁶ The issue of the large beneficiary groups also went unresolved, and the amount of funding provided was not sufficient for more complex agricultural enterprises.⁵⁷ High expectations from beneficiaries were soon dashed when expense greater than the grant limited the possibility of land subdivision, and the cost of farming forced beneficiaries to continue the farming practice of previous owners.⁵⁸ Although SLAG did not make use of expropriation specifically, redistribution legislation such as Act 126 and ESTA did provide

⁵² Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 331. SLAG was meant to assist beneficiaries in covering the cost of land purchase for housing or business projects. These costs included the fees for facilitators/consultants, preparing business plans, conducting feasibility studies, and covering certain transfer costs.

⁵³ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 332.

⁵⁴ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135. See *Options for land reform and rural restructuring in South Africa* (1993) 31, for the crux of the World Bank suggestions.

⁵⁵ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 332-333.

⁵⁶ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Pithouse (2009) 6 *Cidades* 245.

⁵⁷ For a more detailed discussion on the SLAG-based redistribution projects, see Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 332-333.

⁵⁸ Aliber & Mokoena "The land question in contemporary South Africa" in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 335.

for the use of expropriation early on in the framework of redistribution. Despite the concurrence of SLAG and Act 126, the investment in SLAG as the pilot project for redistribution indicates that initial use of expropriation in redistribution was understandably low.

2.3.3.3 *Policy and procedure for expropriation of land in terms of Act 126 and ESTA 1999*

In 1999, the DLA published the *Policy and procedure for expropriation of land in terms of Act 126 and ESTA* (“Expropriation procedures”) to provide guidelines on expropriation in terms of these two Acts.⁵⁹ The document was designed to provide for instances of land acquisition for redistribution, in which the owner would not willingly sell the property, or negotiate for a fair price.⁶⁰ This was in line with the 1997 *White paper* which committed land reform to the WB/WS approach to land acquisition.⁶¹ The expropriation procedures were designed to fill the gap of policy guidelines for instances in which expropriation for redistribution was utilised.⁶² However, it is clear that this policy (and expropriation) was intended to be utilised only in instances where WB/WS negotiations were unsuccessful, and where no suitable alternative was available.⁶³ Thus, the utilisation of expropriation was not as such promoted by this policy, but rather promoted as a secondary plan for land acquisition when negotiation, as a point of departure, failed.

⁵⁹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) Pretoria: Land Reform Policy Committee <https://www.gov.za/sites/default/files/gcis_document/201409/landexpro0.pdf> (accessed 19-08-2019) 1; R Hall *Submission to the portfolio committee on public works on Expropriation Bill of 2015* (2015) Institute for Poverty, Land and Agrarian Studies (PLAAS) <http://repository.uwc.ac.za/bitstream/handle/10566/4588/expropriation_bill_plaas_submission_2015.pdf?sequence=1&isAllowed=y> (accessed 27-08-2019) 4.

⁶⁰ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.1 Background) 2.

⁶¹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.1 Background) 2; Moseley (2007) 89 *South African Geographical Journal* 4.

⁶² *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.1 Background) 2.

⁶³ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.3 The relationship between the Expropriation Act, Act126/ESTA and the Constitution) 4.

The policy was extensive in giving practical guidelines to the expropriation powers granted by Act 126 and ESTA. Guidelines were provided on the delegation of expropriation powers, the relationship between Act 126 and the Expropriation Act, and expropriation on behalf of unidentified beneficiaries.⁶⁴ The policy also gave a detailed outline of the expropriation procedure, in terms of the Expropriation Act.⁶⁵ Provision was made for the owner to dispute the intended expropriation, particularly on grounds relating to the public interest, thus halting the expropriation until a court has adjudicated the matter.⁶⁶ Moreover, draft documents justifying expropriations in terms of Act 126 or ESTA were provided at the end of the document.⁶⁷ The document was designed in such a way that if expropriation was needed in terms of Act 126 or ESTA, there should have been very little confusion on what was required in the procedure.

Although the policy addresses many of the procedural aspects surrounding expropriation, this policy has seemingly had little effect on expropriation in subsequent redistribution policy and legislation. The policy is often briefly cited in later policy documents such as PLAS,⁶⁸ but is not prominently mentioned in research on redistribution. This is possibly due to a lack of a sufficient central policy database for redistribution documents, which adequately provides access to all redistribution documents that make up the sub-programme and how they should potentially function together. Furthermore, an unanswered question in terms of the guidelines is how acquired land is meant to be distributed once acquired, particularly if such land is acquired on behalf of unidentified beneficiaries.⁶⁹ The identification of beneficiaries is important, because it suggests which groups of people are a priority in

⁶⁴ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999)(1.4 Identified and unidentified beneficiaries) 2-4.

⁶⁵ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 4-6.

⁶⁶ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 23.

⁶⁷ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 43-53.

⁶⁸ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 257.

⁶⁹ PLAS indicates that in the instances of land being acquired on behalf of unidentified beneficiaries, the procedures listed in the *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) will have to be amended accordingly, see *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 257.

redistribution. Despite expropriation being a means of land acquisition in the context of redistribution, it would be useful to have an indication of which document or guideline commences after acquisition in order to distribute the acquired land appropriately.

2.3.3.4 *Land redistribution and agricultural development 2001*

The SLAG projects struggled along until 2000, when the DLA eventually introduced a new initiative for redistribution. In 2001, the *Land Redistribution and Agricultural Development* (“LRAD”) was established as a policy that provided grants on a sliding scale depending on the contribution of a potential beneficiary.⁷⁰ The LRAD replaced SLAG, and also set out the different potential projects that the redistribution sub-programme supported and promoted.⁷¹ These projects included agricultural development, settlement and non-agricultural enterprises.⁷² The aim was to make land available for people to use for each project, and to be funded accordingly. The policy promoted economic efficiency and productivity above all else,⁷³ and had a shifted focus from simply providing land to the landless poor, to agricultural development.⁷⁴ The LRAD was designed as a more interventionist approach by the state to support the black farming class, but was still based on the World Bank design.⁷⁵

The concept of creating an agricultural class of black farmers can be traced to the Glen Grey Act of 1894, in which Cecil John Rhodes, the then Prime Minister, sought to establish

⁷⁰ *Land redistribution and agricultural development* (2001) Pretoria: Departments of Agriculture and Land Affairs < <https://www.nda.agric.za/docs/Policy/redistribution.htm> > (accessed on 08-10-2018); Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 136; Lahiff (2007) 28 *Third World Quarterly* 1580; Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 335.

⁷¹ *Land Redistribution and Agricultural Development* (2001) 2; Pienaar *Land reform* (2014) 218; Mbokazi 2018 *New Agenda: South African Journal of Social and Economic Policy* 23.

⁷² *Land Redistribution and Agricultural Development* (2001) 1.

⁷³ Mbokazi 2018 *New Agenda: South African Journal of Social and Economic Policy* 28; Hall “Who, what, where, how, why?” in Cousins & Walker (eds) *Land divided land restored* (2015) 136.

⁷⁴ Pienaar *Land reform* (2014) 218.

⁷⁵ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 135 – 136; Pienaar *Land reform* (2014) 218; Mbokazi 2018 *New Agenda: South African Journal of Social and Economic Policy* 23.

a farming class of Africans, with a view towards eventually creating native reserves.⁷⁶ This idea was developed after the creation of the Bantustans when the Tomlinson commission of enquiry into the socio-economic development of Bantustans proposed newer measures that would more clearly establish a farming class in the Bantu areas.⁷⁷ The commission used ideas that still resonate in some policy frameworks today, especially in so far as it aimed to improve productive land use by granting certain allotments of arable land to families that were *bona fide* in their use of the land.⁷⁸ The Freedom Charter seemed to echo such an ideology by emphatically stating that “the land shall belong to those who work it”.⁷⁹ The ANC government had the objective of providing agricultural support for those whose demands for land were high, a concept dating back to the Tomlinson commission.⁸⁰

The 2001 institution of the LRAD is an example of the remnants of the Tomlinson commission because it moved away from focusing solely on the landless poor and geared its focus towards a black commercial farming class through the incorporation of grants for sustainable commercial farming.⁸¹ The successes of the policy were not primarily due to its improvements on SLAG, but rather due to the fact that stakeholder buy-in was vastly improved.⁸² Although the DLA warned against white farmers impeding the redistribution

⁷⁶ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 129.

⁷⁷ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 129 – 130; R Davies, D O’Meara & S Dlamini *The struggle for South Africa: A reference guide to movements, organizations and institutions new edition vol 1* (1988) 203. For a detailed discussion on the Tomlinson Commission in the timeline of apartheid land laws that immediately followed, see Changuion & Steenkamp *Disputed land* (2012) 201- 204.

⁷⁸ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 130.

⁷⁹ *The Freedom Charter* (1955) Johannesburg: Congress Alliance of the People <http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AD1137/AD1137-Ea6-1-001-jpeg.pdf> (accessed on 03-12-2018) 3; Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 131.

⁸⁰ Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in Cousins & Walker (eds) *Land divided land restored* (2015) 131.

⁸¹ Pienaar *Land reform* (2014) 218. For a more detailed discussion of the LRAD and the process of making the policy, see R Hall “Two cycles of land policy in South Africa: Tracing the contours” in W Anseeuw & C Alden (eds) *The struggle over land in Africa: Conflicts, politics and change* (2010) 175 180-182.

⁸² Hall “Two cycles of land policy in South Africa: Tracing the contours” in Anseeuw & Alden (eds) *The struggle over land in Africa: Conflicts, politics and change* (2010) 181.

process, the LRAD fully embraced the WB/WS model.⁸³ Thus, the market-led approach as suggested by the World Bank prevailed, which favoured the economically more powerful white landowners.

The LRAD provided a grant of between R20 000 – R100 000, depending on the amount contributed by a beneficiary, the lowest being a R5 000 contribution.⁸⁴ The project delivery seemingly improved compared to SLAG, due to a larger grant amount being available.⁸⁵ However, this larger grant amount resulted in fewer than 2500 families being assisted per year with the budget allocation from the DLA.⁸⁶ Aliber and Mokoena call the LRAD an “arithmetic failure” by the DLA. This is because the LRAD could hardly be considered adequate for the needs of the poor, if the few thousands of landless families assisted by the LRAD were compared to the remaining millions unemployed in the rural areas.⁸⁷

In 2005, the provincial departments of agriculture and the DLA held a National Land Summit, to reconsider how land reform policies worked, and to fast track the effectiveness of these policies in South Africa.⁸⁸ The summit seemed to induce a shift in political dynamics, notably in the state trying to meet the demand of the landless people and NGOs.⁸⁹ Consensus was reached regarding: the fact that the state should be more proactive in its

⁸³ The essence of the WB/WS model is that land could only be bought/sold on the agreement of sale between the willing seller (white land owner) and the willing buyer (the state/ redistribution beneficiary). Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 335. See also 4 3 3.

⁸⁴ Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 335.

⁸⁵ Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 336. The grant could be awarded to five beneficiaries per household.

⁸⁶ Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 336.

⁸⁷ Aliber & Mokoena “The land question in contemporary South Africa” in Daniel, Habib & Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 336. See also S Tsawu *An historical overview and evaluation of the sustainability of the land redistribution for agricultural development (LRAD) programme in South Africa* MPhil Stellenbosch University (2006) 56.

⁸⁸ *National Land Summit 27 – 31 July 2005* (2005) Johannesburg: Departments of Agriculture and Land Affairs <https://www.nda.agric.za/docs/landsummit/land_summit.htm> (accessed on 11-03-2019). The participants were national and provincial government departments, organised agriculture, civic organisations, academics and the general public. See also R Hall & L Ntsebeza “Introduction” in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 1 15.

⁸⁹ Hall & Ntsebeza “Introduction” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 16.

acquisition land; that the WB/WS model should be rejected; and that expropriation should be promoted.⁹⁰ It was from these proposals that PLAS, as discussed below, was developed.

2.3.3.5 *Proactive land acquisition strategy 2006*

After the 2005 National Land Summit, there were many concerns raised about the slow market-led approach towards land reform.⁹¹ The slow rate in the redistribution process was notably clear from the LRAD already, and PLAS was designed to speed up the redistribution process in 2006. PLAS was therefore adopted in 2006, but only fully replaced the LRAD in 2011.⁹² PLAS aimed at increasing black ownership, and was geared directly towards commercial farming.⁹³ Thus, the policy was not primarily geared towards the poor, as it required a certain amount of commercial farming knowledge and resources to be successful.⁹⁴

The main objectives of PLAS were: to redistribute 5 million hectares of white owned-land; to provide support to new farmers; to increase agricultural production; and to increase black-owned agri-businesses.⁹⁵ PLAS specifically aimed at using expropriation to target land, which the state could acquire if beneficiaries with grants could not afford it.⁹⁶ Instead of relying on a needs-based approach to land redistribution, PLAS consolidated one approach

⁹⁰ Kepe & Hall *Land redistribution in South Africa* (2016) 22; Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135; Hall & Ntsebeza "Introduction" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 15. See also M Aliber "Unravelling the 'willing buyer, willing seller' question" in B Cousins & C Walker (eds) *Land divided land restored* (2015) 145 145.

⁹¹ F Hendricks "Rhetoric and reality in restitution and redistribution" in F Hendricks, L Ntsebeza & H Helliker (eds) *The promise of land* (2013) 27 28.

⁹² Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 135 – 138; Pienaar *Land reform* (2014) 219.

⁹³ *Implementation plan for the Proactive Land Acquisition Strategy* (2006) Pretoria: Department of Agriculture <<https://www.gov.za/documents/implementation-plan-proactive-land-acquisition-strategy>> (accessed 11-03-2019) 8; Pienaar *Land reform* (2014) 219.

⁹⁴ Pienaar *Land reform* (2014) 219.

⁹⁵ Pienaar *Land reform* (2014) 219.

⁹⁶ *Implementation plan for the proactive land acquisition strategy* (2006) 13.

for redistribution, namely state-driven proactive land acquisition.⁹⁷ This essentially meant that PLAS aimed at using direct intervention by the state in acquiring land, rather than waiting for the application of beneficiaries for assistance to determine where/when the state would intervene. PLAS thus identified that expropriation should be used as a primary means through which land redistribution can be achieved, due to market based land acquisition being too slow.⁹⁸ Promoting land redistribution is an obligation on the state,⁹⁹ and the mechanisms, such as expropriation, are meant to be utilised in order to ensure it takes place.

Through the aims of PLAS, the DRDLR would purchase land directly and either transfer or lease the land to emerging black farmers, rather than simply issuing out grants.¹⁰⁰ Thus, PLAS envisaged a “double transfer” of land, from the owner to the state, and the state to the beneficiary.¹⁰¹ If land was leased to a beneficiary, and such beneficiary defaulted on their lease fees, or did not break even in their business, that beneficiary was struck off the list, removed from the operation, and a new beneficiary took their place.¹⁰²

PLAS initially seemed successful, at least in comparison to the LRAD and SLAG.¹⁰³ Mpumalanga, the Western Cape and KwaZulu-Natal were shown to have the greater number of beneficiaries in comparison to other provinces in 2008/2009.¹⁰⁴ Despite the initial success of PLAS, the pace of land acquired through PLAS diminished by the end of the 2009 financial year.¹⁰⁵ Possible reasons for the dwindling success of PLAS in 2009 were linked to the DLA/DRDLR needing to manage the role of the administration of beneficiaries’

⁹⁷ See *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 6. For a more detailed discussion, see EN Ranwedzi *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013) 27.

⁹⁸ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 13. It should be noted that market based land acquisition is not excluded as a means to achieve land redistribution.

⁹⁹ Section 25(5) of the Constitution. See also D Iyer “The role of government in expediting land expropriation: Reshaping the future of land reform” (2017) 52 *Journal of Public Administration* 508 509.

¹⁰⁰ Kepe & Hall *Land redistribution in South Africa* (2016) 24.

¹⁰¹ Kepe & Hall *Land redistribution in South Africa* (2016) 25.

¹⁰² Kepe & Hall *Land redistribution in South Africa* (2016) 25.

¹⁰³ Ranwedzi *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013) 35-36.

¹⁰⁴ Ranwedzi *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013) 38.

¹⁰⁵ Ranwedzi *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013) 50.

contracts, as well as being project officers for the land leased out.¹⁰⁶ This approach is confirmed in the State Land Lease and Disposal Policy (2013), in the sense that the state is the party that leases land out to the beneficiaries of redistribution.¹⁰⁷ Unlike the LRAD, PLAS adopted a pro-poor approach, addressing aspects of housing and landlessness, in addition to emergent commercial farmers.¹⁰⁸ In 2019, the Advisory Panel pointed out that land acquisition through PLAS has proven to be fairly slow, and has resulted in land being bought at prices higher than market value.¹⁰⁹ Although the issues around beneficiary selection and high land prices were not answered in PLAS, the policy has proven to be an important step towards the state playing a more prominent role in land acquisition for the purposes of redistribution. This will likely be an important factor in improving the utilisation of expropriation in redistribution going forward.

2 3 3 6 *Green paper on land reform 2011*

In 2007, the ANC held its 52nd national conference to address agrarian change, land reform and rural development.¹¹⁰ In response to land issues raised at the conference, the DRDLR enacted the *Green paper on land reform* in 2011 ("*Green paper*"), addressing secure forms of long-term land tenure, and strategies to provide land access to the marginalised and impoverished.¹¹¹ One of the strategic means through which the DRDLR planned to improve land reform was through the institution of certain offices.¹¹² These included the Land Management Commission, the Land Rights Management Board and

¹⁰⁶ Ranwedzi *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013) 50.

¹⁰⁷ *State land lease and disposal policy* (2013) Pretoria: Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/phocadownload/Policies/state_land_lease_and_disposal_policy_25july2013.pdf> (accessed 11-03-2019). See 2 3 3 7 below.

¹⁰⁸ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 6.

¹⁰⁹ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 121.

¹¹⁰ *Green paper on land reform* (2011) Pretoria: Department of Rural Development and Land Reform <https://www.gov.za/sites/www.gov.za/files/land_reform_green_paper.pdf> (accessed 18-04-2018) 1.

¹¹¹ *Green paper on land reform* (2011) 4.

¹¹² *Green paper on land reform* (2011) 4 -5.

Committee, and the Office of the Land Valuer-General, the latter of which was specifically meant to address potential problems that face expropriation of property, for instance the issue of compensation for expropriation.¹¹³

The *Green paper* identified issues that needed to be addressed, including the lack of a national database of property values and legislation, which could potentially create a framework for ascertaining when market value is one of a number of factors to determine compensation for expropriation.¹¹⁴ To date, the use of expropriation is not clearly set out in the redistribution policy framework arguably due to a lack of certainty regarding the state's role in achieving redistribution. Initially the approach to redistribution was to issue certain grants such as SLAG and SPLAG, and to let the beneficiaries apply for state assistance in a need-based approach. Thus, the limited utilisation of expropriation in the initial years of redistribution is arguably due to the World Bank's model A redistribution programme that did not make use of this mechanism.¹¹⁵ PLAS seemingly shifted that approach to a state driven one. Moreover, expropriation legislation, more generally, had a long period of not being changed between the last amendments in 1992, until the Expropriation Bill of 2008.¹¹⁶ It was only after the Land Summit of 2005 and the launch of PLAS in 2006 that a renewed effort into expropriation in the context of redistribution is seen.¹¹⁷ Thus, a shift towards a model D redistribution system is indicated by PLAS, and further evidenced by the *State land lease and disposal policy* (2013).¹¹⁸ This policy is discussed briefly below.

¹¹³ *Green paper on land reform* (2011) 7. The use of this office and compensation is discussed in 4 3 5.

¹¹⁴ *Green paper on land reform* (2011) 7. For further discussion of the matter of compensation and the *Green paper*, see E du Plessis "Silence is golden: Lack of direction on compensation for expropriation in the 2011 Green paper on land reform" (2014) 7 *Potchefstroom Electronic Law Journal* 798 807; W Erlank "Green paper on land reform: Overview and challenges" (2014) 17 *Potchefstroom Electronic Law Journal* 0614 0615.

¹¹⁵ See Table 1 in 2 2 3 above.

¹¹⁶ See Table 2 in 2 3 1 above; see 2 4 4 for the discussion of expropriation law.

¹¹⁷ See Table 2 in 2 3 1.

¹¹⁸ *State Land Lease and Disposal Policy* (2013) 7-8.

2 3 3 7 *State land lease disposal policy 2013*

The 2013 State Land Lease and Disposal Policy (“SLLDP”) confirmed a marked shift in the manner in which the state approached redistribution, particularly regarding the distribution of land. The policy confirmed an approach that was designed to provide *secure land tenure* to beneficiaries, rather than specifically transferring of land.¹¹⁹ The policy provided leasehold for different categories of beneficiaries for 30 years, with the option to renew for another 20 years.¹²⁰ Only after 50 years could the beneficiaries possibly become owners of the land.¹²¹ The empowering legislation for this policy is the State Land Act.¹²² However, the success of this policy is dependent on the state having enough land to lease out. In this regard, PLAS and the SLLDP have a similar goal in ensuring there is enough land in the state’s possession to redistribute.

The SLLDP has been useful in distinguishing between the types of beneficiaries of rural land reform.¹²³ The SLLDP has furthermore indicated a framework on the distribution of land after it has been acquired. The SLLDP is thus an important part of the redistribution framework, because it provides a potential answer to what has to be done with land once it has been acquired through expropriation, namely the subsequent redistribution of that land to those who are in need of it.

2 3 4 Conclusion

Two overarching points seem to emerge from the analysis of the legislative and policy frameworks of redistribution. Firstly, the many statutes and policies that the DRDLR have

¹¹⁹ *State Land Lease and Disposal Policy* (2013) 7-8; Kepe & Hall *Land redistribution in South Africa* (2016) 26.

¹²⁰ *State Land Lease and Disposal Policy* (2013) 20-21; Kepe & Hall *Land redistribution in South Africa* (2016) 26.

¹²¹ *State Land Lease and Disposal Policy* (2013) 25.

¹²² *State Land Lease and Disposal Policy* (2013) 9.

¹²³ *State Land Lease and Disposal Policy* (2013) 15; *Final report of the presidential advisory panel on land reform and agriculture* (2019) 58.

instituted for redistribution have lacked an overarching direction for the sub-programme.¹²⁴ Although restitution and redistribution have successfully redistributed small percentages of the land available,¹²⁵ a consistent policy direction since the initial grants in 1994 has not been clear in the legislative or policy framework for redistribution.¹²⁶

A possible contributor to the lack of clear direction is the fact that the shift from the initial World Bank model of land redistribution, being model A, to the state-driven model D, was never expressly carried out. Instead, PLAS and later the SLLDP were instituted, indicating that the initial idea of model A by the World Bank had finally been done away with. If this shift in approach was more expressly decided, the possible benefits and issues attached to a model D land redistribution could be more simply be identified.¹²⁷ One potential benefit is an improved redistribution programme, achieved by swifter land acquisition through means such as expropriation.

Secondly, expropriation cannot be seen as a stand-alone catalyst for redistribution and land reform in South Africa.¹²⁸ It is only a part of process of redistribution. The speed of acquisition is nullified by the delay of (re)distribution. Thus, a means of overcoming the burdens attached to expropriation only become meaningful when the policy on redistribution is equally efficient. Information around land and landholdings is required to become more accessible, such as through the National Land Restitution Register,¹²⁹ the Land Commission in terms of the Regulation of Agricultural Land Holdings Bill,¹³⁰ and the 2017 Land Audit Report by the DRDLR.¹³¹ The introduction of the Property Valuation Act 17 of 2014, which

¹²⁴ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 26.

¹²⁵ Du Plessis, Olivier & Pienaar (2003) 18 *SA Public Law* 491.

¹²⁶ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 26.

¹²⁷ In the initial World Bank report, some of the issues attached to a model A redistribution were set out in the report, see *Options for land reform and rural restructuring in South Africa* (1993) 33-34. The failures of SLAG were evidence of some of the issues as pointed out by the World Bank, see 2 3 3 2 above.

¹²⁸ Mostert (2016) 5 *European Property Law Journal* 172-173.

¹²⁹ Established in section 2 of the Restitution of Land Rights Amendment Act 15 of 2014.

¹³⁰ GN 229 of 2017 GG 40697 of 17-03-2017.

¹³¹ *Land Audit Report* (2017) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126>> (accessed 13-12-2018).

also establishes the Office of the land valuer-general,¹³² will also serve as a registry of land if effectively implemented.¹³³

The initial projects of redistribution used less invasive methods of attempting to provide land access,¹³⁴ and did not bring about the results that the marginalised and beneficiaries of redistribution required. However, to date expropriation – specifically for the purposes redistribution – has not been used.¹³⁵ It is not clear why this is the case, since legislation for expropriation in redistribution is available through Act 126. In addition, PLAS seems to be an indication of the state taking a more direct stance towards land acquisition. In this way, the use of expropriation for redistribution purposes could be better integrated into the redistribution strategies in future. An updated expropriation policy, which takes into account the above-mentioned factors, would potentially aid the uncertainties around how expropriation is meant to be used in the sub-programme. Furthermore, if a new expropriation bill is drafted, a policy by the DRDLR, specifically on expectations of expropriation in the context of redistribution, may prove beneficial for both redistribution and expropriation. It is with this background in mind that the expropriation framework is discussed below.

2 4 Expropriation as a mechanism to ensure redistribution

2 4 1 Introduction

The expropriation power is a useful mechanism in land reform, although redistribution policy has not yet clearly contextualised and effectively implemented the use of this mechanism. This is potentially because the state is in the position to directly redistribute land by taking it from one person and making it available to redistribution beneficiaries. However,

¹³² As introduced by the *Policy framework for land acquisition* (2012) 7; and established by section 4 of the Property Valuation Act 17 of 2014. One of the functions of this statute is to aid the compensation process in expropriations by providing the values of land identified for land reform purposes. See 4 3 5.

¹³³ Section 2 of the Property Valuation Act 17 of 2014.

¹³⁴ SLAG and the LRAD did not include direct land acquisition by the state, see 2 3 3 2 and 2 3 3 4.

¹³⁵ Kepe & Hall *Land redistribution in South Africa* (2016) 28.

in order to understand why expropriation has been underutilised in redistribution thus far, the requirements in order for the expropriation power to be used must be set out. This section therefore discusses the definition and requirements for a valid expropriation and some of the issues that arise from these requirements. This is done as a platform to establish some of the potential hindrances rooted in the expropriation legislation framework itself.

2 4 2 Definition and requirements for expropriation

2 4 2 1 *Introduction*

Section 25 of the Constitution provides the authority and constitutional justification for all state interference with private property.¹³⁶ The provision firstly sets out the prohibition against the arbitrary deprivation of property, and the requirement that such deprivation must be in terms of law of general application.¹³⁷ Section 25 furthermore provides the authority and consequences of expropriation of property.¹³⁸ This bears importance because some of the uncertainties around the requirements of expropriation can arguably affect the validity of an expropriation. The requirements for a valid expropriation are that property be expropriated in terms of a law of general application, subject to the payment of compensation, for a reason that is either in the public interest or for a public purpose.¹³⁹ Each requirement is elaborated below.

¹³⁶ Van der Sijde argues that not all limitations on property are necessarily synonymous with the specific "technically, constitutional" limitations posed by section 25 of the Constitution, such as deprivations, see E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 24. She argues that limitations can result from broad regulatory measures imposed on property, which is not necessarily the same as deprivations, since only unauthorised or arbitrary deprivations are limitations of property in terms of section 25(1). For the purposes of this thesis, state interference connotes the "technical, constitutional" circumstances in which the state may limit property rights, in particular expropriation.

¹³⁷ Section 25(1) of the Constitution.

¹³⁸ Section 25(2) and (3) of the Constitution; B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 376.

¹³⁹ T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014) 46-28.

2 4 2 2 *Law of general application*

A valid expropriation must take place in terms of a law of general application. A law of general application is a properly promulgated and constitutionally valid piece of law that is generally and equally applicable.¹⁴⁰ Slade notes that this requirement rarely gives rise to difficulties.¹⁴¹ Due to this, even case law gives less attention to this requirement, compared to the compensation and public purpose/public interest requirements.¹⁴² This requirement is often considered in light of sections 33 and 36(1) of the Constitution.¹⁴³ There is no common law authority for expropriation in South African law, thus authorisation has always been through legislation.¹⁴⁴ In the context of redistribution, which is essentially a policy driven field, there is possibly a need to enact more legislation that grants the power to expropriate for redistribution purposes.¹⁴⁵

2 4 2 3 *Subject to compensation*

The compensation requirement is a greatly contested requirement for a valid expropriation.¹⁴⁶ Although this requirement is discussed extensively in chapter 4, it remains important to introduce compensation as a requirement for expropriation. Section 25(2)(b) of the Constitution requires compensation be paid by the state, the amount of which be agreed upon between the parties or approved by the court. Although the compensation requirement

¹⁴⁰ AJ van der Walt *Constitutional property law* 3 ed (2011) 232.

¹⁴¹ Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 45.

¹⁴² Slade (2017) 50 *De Jure* 347.

¹⁴³ These sections also require a law of general application. In *President of Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) para 104, Mokgoro J found that law of general application for the purposes of section 33 of the Constitution includes legislation, common law and executive rule-making in terms of the Constitution. See also Slade (2017) 50 *De Jure* 350; Currie & De Waal *The bill of rights handbook* 6 ed (2013) 159.

¹⁴⁴ Slade (2017) 50 *De Jure* 350; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 114.

¹⁴⁵ See 2 3 2 above.

¹⁴⁶ Parliamentary News "National Assembly debates motion on land expropriation" (28-02-2018) *Parliament of the Republic of South Africa* < <https://www.parliament.gov.za/news/national-assembly-debates-motion-land-expropriation> > (accessed 11-03-2019); Minutes of Proceedings of the National Assembly on Tuesday 28 February 2017 [Unrevised Hansard] <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 23-07-2018) 43.

should be set out in the empowering legislation, the court may create the obligation to pay compensation.¹⁴⁷ In instances where the court does this, however, the intention of the legislator and the interpretation of the empowering legislation itself is often the method the court uses in determining compensation.¹⁴⁸

Section 25(3) gives further provision around the requirement of compensation, and states that the amount of compensation and the time and manner of payment should be just and equitable.¹⁴⁹ Although debates around compensation have inspired renewed calls for constitutional amendment for removal of this requirement,¹⁵⁰ compensation is viewed by some academics as a central feature to the definition of expropriation.¹⁵¹ In the case of *Mhlanganisweni community v the Minister of Rural Development and Land Reform and Others* ("Mhlanganisweni"),¹⁵² the purpose of compensation was found to be to give to the expropriated owner the full equivalent of the expropriated property.¹⁵³ The Land Claims Court held that land reform matters have no superior standing compared to the other legitimate public purposes that give rise to expropriation, and therefore should not impact the amount of compensation paid.¹⁵⁴ Some academics argue, however, that the purpose of land reform should play a significant role in the determination of compensation.¹⁵⁵ The

¹⁴⁷ Section 25(2)(b) of the Constitution; BV Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 46; Van der Walt *Constitutional property law* 3 ed (2011) 458.

¹⁴⁸ WJ du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 43. The approach of seeking the intention of the legislature is a longstanding one, see G Devenish "Restrictive interpretation: An analysis of the relevance of context, ambiguity and the maxims employed in the process of restrictive interpretation of statutory provisions of legislation" (1992) 1 *Tydskrif vir Regswetenskap* 1 2. This approach is supported by the separation of powers doctrine, see P de Vos & W Freedman *South African constitutional law in context* (2014) 61; I Currie & J de Waal *The bill of rights handbook* 6 ed (2013). Therefore, the court, in interpreting legislation, should seemingly measure the intention of the lawmaker against the spirit and purport of the Constitution.

¹⁴⁹ The Expropriation Bill (draft) in GN 116 of 2018 GG 42127 of 21-12-2018 deviates from this principle. In section 12(3) of the Bill provides instances in which nil compensation is allowed.

¹⁵⁰ Minutes of Proceedings of the National Assembly on Tuesday 27 February 2018 [Unrevised Hansard] <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 25-07-2018) 30.

¹⁵¹ Van der Walt *Constitutional property law* 3 ed (2011) 343; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 42.

¹⁵² *Mhlanganisweni community v the Minister of Rural Development and Land Reform and Others* [2012] ZALCC 7.

¹⁵³ *Mhlanganisweni community v the Minister of Rural Development and Land Reform and Others* [2012] ZALCC 7 para 51.

¹⁵⁴ *Mhlanganisweni community v the Minister of Rural Development and Land Reform and Others* [2012] ZALCC 7 para 73.

¹⁵⁵ See 4 2 3 2.

purpose for which an expropriation takes place is therefore an important aspect of the compensation requirement.

2 4 2 4 *Public purpose/public interest*

Section 25(2)(a) of the Constitution requires an expropriation to take place for a valid public purpose or in the public interest.¹⁵⁶ This requirement is not only aimed at preventing fraudulent expropriations, but also prevents frivolous use of the state's power.¹⁵⁷ The purpose behind expropriation plays an important role in the legitimacy of the state action, since the justification must be for the public benefit and in line with the Constitution.¹⁵⁸ Thus, the public purpose/public interest must pass constitutional muster in terms of other constitutional rights as well.¹⁵⁹

In the case of *Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd*,¹⁶⁰ which is a pre-constitutional judgment that concerned an expropriation of land for the purposes of a road, the court made the distinction between public purpose and public interest.¹⁶¹ A public purpose expropriation is when the expropriated land is meant for state use or public use, such as a road.¹⁶² However, a strict interpretation of public purposes would seemingly suggest that an expropriation for the transfer and benefit of another party falls outside this ambit.¹⁶³

In this regard, expropriations for a public interest would therefore include valid expropriations for reasons other than state use.¹⁶⁴ Section 25(4)(a) of the Constitution states

¹⁵⁶ Section 25(2)(a) of the Constitution.

¹⁵⁷ Mostert 2016 *European Property Law Journal* 172 – 173; Pienaar *Land reform* (2014) 366; Van der Walt *Constitutional property law* 3 ed (2011) 458.

¹⁵⁸ Hoops *The legitimate justification of expropriation* (2017) 4; Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 48.

¹⁵⁹ These include section 36(1) of the Constitution. See 3 3.

¹⁶⁰ *Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A).

¹⁶¹ *Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A) para 661C.

¹⁶² *Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A) para 661C.

¹⁶³ *Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd* 1990 4 SA 644 (A) para 661C; Van der Walt *Constitutional property law* 3 ed (2011) 461.

¹⁶⁴ Van der Walt *Constitutional property law* 3 ed (2011) 460 – 462; Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 49.

that expropriations for land reform fall under the category of public interest. Land reform expropriations would directly contradict the principle that a lawful expropriation should not be for the benefit of an individual or third party, without the distinction between public purpose and public interest.¹⁶⁵ Van der Walt notes that the public purpose/public interest distinction gives rise to a dual role to the public purpose requirement, namely to prevent abuse of expropriation and, importantly, to not hinder land reform.¹⁶⁶

The redistribution statutes that provide for expropriation are useful in establishing land reform as a legitimate cause for expropriation, specifically falling under the category of “public interest” in the Constitution.¹⁶⁷ It is in this regard that the lawfulness of third party beneficiaries of expropriation is affirmed, particularly if there is supporting legislation.¹⁶⁸ In the case of *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation ((Pty) Ltd and Others* (“*Offit*”),¹⁶⁹ Wallis AJA pointed out 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, using the same contractors.”¹⁷⁰

Although *Offit* was not a land reform case, this understanding of third party transfers to satisfy the public purpose requirement can be applied to land reform.¹⁷¹ Slade notes that the constitutionality of third party transfers has not been challenged in South Africa to

¹⁶⁵ H Mostert “The poverty of precedent on public/public interest: An analysis of pre-constitutional and post-apartheid jurisprudence in South Africa” in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 59 69; Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 48.

¹⁶⁶ Van der Walt *Constitutional property law* 3 ed (2011) 460. See also Slade *The justification of expropriation for economic development* LLD Stellenbosch University (2012) 48.

¹⁶⁷ Section 25(4)(a) of the Constitution. For an analysis on precedent defining public purpose/public interest, see H Mostert “The poverty of precedent on public purpose/interest: An analysis of pre-constitutional and post-apartheid jurisprudence in South Africa” in B Hoops, EJ Marais, H Mostert, JAMA Sluysman and LCA Verstappen (eds) *Rethinking expropriation law I: Public interest in Expropriation* (2015) 59 66.

¹⁶⁸ BV Slade ““Public purpose or public interest” and third party transfers” (2014) 17 *Potchefstroom Electronic Law Journal* 167 186.

¹⁶⁹ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation ((Pty) Ltd and Others* 2010 4 SA 242 (SCA).

¹⁷⁰ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation ((Pty) Ltd and Others* 2010 4 SA 242 (SCA) para 15.

¹⁷¹ Slade (2014) 17 *Potchefstroom Electronic Law Journal* 190-191.

date.¹⁷² This is supported by the Constitution's commitment to land reform and the regulation provided in the form of land reform statutes, such as the Restitution Act.¹⁷³ The constitutionality of third party transfers therefore does not pose an obstacle to redistribution expropriation, until such time as it is challenged.

2 4 4 Legislative framework for expropriation

2 4 4 1 Introduction

The purpose of this section is to elaborate on the statute and subsequent Bills that generally authorise expropriation. It should be remembered that redistribution legislation or policies do not provide the impetus to expropriate. The state always has the power to expropriate generally in terms of expropriation laws. The current statute that governs expropriation of property is the 1975 Expropriation Act. Since the enactment of the 1975 Expropriation Act, the Constitution has come into force and is the yardstick against which all laws are measured.¹⁷⁴ Thus, the 1975 Expropriation Act is meant to function within the ambit of the Constitution, overall promoting the Bill of Rights.¹⁷⁵

A central feature in each of the newer general Expropriation Bills was, and is, to replace the 1975 Expropriation Act.¹⁷⁶ Though the 1975 Expropriation Act is still in force at this time, there has been some speculation about what the newest Expropriation Bill will entail and mean, particularly for land reform.¹⁷⁷ Thus, the provisions of the 1975 Expropriation Act and newer Expropriation Bills are discussed below.

¹⁷² Slade (2014) 17 *Potchefstroom Electronic Law Journal* 191. This position has not yet changed.

¹⁷³ Slade (2014) 17 *Potchefstroom Electronic Law Journal* 191, see also Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 655.

¹⁷⁴ Any law that is not in harmony with the Constitution is invalid. See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) para 62; Currie & De Waal *The bill of rights handbook* 6 ed (2013) 9.

¹⁷⁵ Section 2, 7 and 8 of the Constitution.

¹⁷⁶ Section 32 of the 2008 Expropriation Bill, section 29 of the 2013 Expropriation (draft) Bill, clauses 29-30 of the 2015 Expropriation Bill and section 29-30 of the 2019 Expropriation (draft) Bill.

¹⁷⁷ See JM Pienaar "Land reform" (2018) 4 *Juta Quarterly Review* 1.2; P Dube "Cutting through the noise of land expropriation without compensation" (11-01-2019) *Business Live* available at

2 4 4 2 *Expropriation legislation 1975 - 2013*

As mentioned above, the 1975 Expropriation Act is still the current statute that governs expropriations generally. Due to the fact that the statute is pre-constitutional, the Act does not make reference to the Constitution or its land reform mandate as per section 25 of the Constitution.¹⁷⁸ If the 1975 Expropriation Act were to be divided into three overarching parts, the following subdivisions emerge: those that empower the Minister to expropriate, the sections relating to compensation, and the internal remedies available for expropriatees.¹⁷⁹ Sections 2-5 of the Act set out which authorities may exercise the power to expropriate. The notification of expropriation must be served subject to section 7 of the Act, in terms of which formal notice is provided and the process of expropriation begins. Sections 8-9 provide for the duties and formalities in respect of the passing of ownership from the expropriated owner to the state. Sections 10-21 of the Act, in turn, require the provision and payment of compensation.

Marais argues that it is possibly this legislation being of “pre-constitutional vintage” that is responsible for the limited use of the expropriation power for the past two decades.¹⁸⁰ In order to better align the expropriation procedure with the Constitution, and emphasise the public interest of land reform, an updated general expropriation statute is necessary.¹⁸¹ Another justification for an updated procedure is that section 25(4) of the Constitution makes provision for land reform within the meaning of public interest to justify expropriation.

<<https://www.businesslive.co.za/fm/features/2019-01-11-cutting-through-the-noise-of-land-expropriation-without-compensation/>> (accessed 30-05-2019).

¹⁷⁸ Although the Expropriation Act lists its multiple legislative amendments since coming into force, these legislative amendments are notably pre-constitutional, and the Act has not been amended after the Constitution came into effect.

¹⁷⁹ However, it should be noted that the act covers other aspects of the expropriation process.

¹⁸⁰ Marais (2017) 33 *South African Journal on Human Rights* 98. The court also makes this remark about the 1975 Expropriation Act in *Haffajee NO and Others v eThekweni Municipality and Others* 2011 6 SA 134 (CC) para 14.

¹⁸¹ Marais (2017) 33 *South African Journal on Human Rights* 98; XH Nginase *The meaning of ‘public purpose’ and ‘public interest’ in section 25 of the Constitution* LLM Stellenbosch University (2009) 53.

However, the Expropriation Act only identifies public purpose as a justification for expropriation, the ambit of which does not clearly include land reform.¹⁸²

It is not clear when a new Expropriation Act (of which there have been a number of bills and drafts) is going to be enacted. Mostert reasons that even under the Expropriation Act, there is great potential for transformation through the use of the expropriation mechanism.¹⁸³ Hall also points out that select use of expropriation could make the right pieces of land needed for reform available.¹⁸⁴ Although the Expropriation Act has seemingly survived both the Interim and Final Constitution,¹⁸⁵ Mostert notes that the continued existence of the Act is because it has been amended many times, and can be utilised in a constitutional reading of its provisions.¹⁸⁶ Constitutional remedies also allow for interpretation to bring the legislation in line with the Constitution.¹⁸⁷ However, these mechanisms have not been called into use, since the Expropriation Act has not to date been constitutionally challenged.¹⁸⁸

It seems that the challenge in maintaining the 1975 Act lies in what the legislation does not thoroughly address, a main component being how to determine the compensation requirement in expropriation.¹⁸⁹ However, the Expropriation Bill of 2015 was meant to signify a change and improvement in the land reform framework.¹⁹⁰ Many of the changes instituted in the Expropriation Bill of 2015 were meant to empower the state to expropriate for land

¹⁸² Marais (2017) 33 *South African Journal on Human Rights* 98, who further identifies the substantive justification and market-led compensation requirements in terms of the Expropriation Act as problematic in the legislation as it stands.

¹⁸³ Mostert 2016 *European Property Law Journal* 172.

¹⁸⁴ Hall "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in Cousins & Walker (eds) *Land divided land restored* (2015) 141. Hall notes that the view that expropriation is not needed for redistribution exists; however, this argument is supported in the discussion of the willing buyer/willing seller principle.

¹⁸⁵ Although amended multiple times, the Expropriation Act has not yet been repealed. The Expropriation Bill (draft) of 2019 aims to do this. See Table 2 in 2 3 1.

¹⁸⁶ Mostert 2016 *European Property Law Journal* 173; Du Plessis, Olivier & Pienaar (2003) 18 *SA Public Law* 492. See also Table 2.

¹⁸⁷ Mostert 2016 *European Property Law Journal* 173. See also Currie & De Waal *The bill of rights handbook* 6 ed (2013) 183 – 190 on constitutional remedies. This is important because the Constitution makes no distinction in subsuming pre- or post-constitutional legislation, but rather requires that all laws be compliant with its constitutional mandate regardless of date.

¹⁸⁸ Mostert 2016 *European Property Law Journal* 174.

¹⁸⁹ ZT Boggempoel *Property remedies* (2017) 222.

¹⁹⁰ Pienaar *Land reform* (2014) 365; Mostert 2016 *European Property Law Journal* 176; Kepe & Hall *Land redistribution in South Africa* (2016) 28.

reform purposes.¹⁹¹ Mostert contends that this may become difficult because of the differing pieces of legislation that also grant the power to expropriate. However, Mostert does concede that the Expropriation Bill of 2015 did grant the expropriation procedure an aspect of uniformity.¹⁹² This does not indicate how the expropriation procedure is meant to fit into the land redistribution framework. The development of a piece of legislation to replace the Expropriation Act is being done with the aim of speeding up the land reform process,¹⁹³ but how that will play a role in redistribution is not clear. One possibility is that in replacing the 1975 Expropriation Act, an updated and uniform procedure for expropriation that is in line with the Constitution would be provided.¹⁹⁴ Such a procedure would therefore echo the values of the Constitution, namely accountability, social justice and human rights.¹⁹⁵ It is these values that support the redistribution mandate in South Africa, and ensure that the redistribution of land is undertaken in a constitutional manner.

The Expropriation Bill B16-2008 ("2008 Expropriation Bill") was the first attempt at repealing the 1975 Expropriation Act in its entirety.¹⁹⁶ One of the goals of the Bill, as set out in its preamble, was to provide for expropriation subject to compensation for land in the public interest.¹⁹⁷ Although not directly quoted, section 25(2) of the Constitution is listed, as well as the state obligation towards land reform in the preamble of the 2008 Expropriation Bill. A concept introduced by the 2008 Expropriation Bill was a National Advisory Board, meant to advise the Minister on all aspects of expropriation, including the determination of

¹⁹¹ Kepe & Hall *Land redistribution in South Africa* (2016) 28; Mostert 2016 *European Property Law Journal* 181.

¹⁹² Mostert 2016 *European Property Law Journal* 182.

¹⁹³ Du Plessis (2011) 22 *Stellenbosch Law Review* 355.

¹⁹⁴ NL Braude "A 'uniform procedure' for all expropriations? Customary property rights and the 2015 Expropriation Bill" (2017) 1 *Stellenbosch Law Review* 68 68; Mostert 2016 *European Property Law Journal* 182; Marais (2017) 33 *South African Journal on Human Rights* 105.

¹⁹⁵ See preamble of the Constitution.

¹⁹⁶ Section 34 of Expropriation Bill B16-2008; WJ du Plessis "The (shelved) Expropriation Bill B16-2008: An unconstitutional souvenir or an alarmist memento?" (2011) 22 *Stellenbosch Law Review* 352 355.

¹⁹⁷ Preamble of Expropriation Bill B16-2008.

compensation.¹⁹⁸ The powers of this Board were set out in the Bill, and the overall role of the Board was to promote efficiency in the expropriation procedure and expedite expropriations by all organs of state.¹⁹⁹ The concept of such a board seems beneficial to improving the expropriation process, and relieving the workload on the Department of Public Works.²⁰⁰ However, it was also pointed out that the administrative nature of the advisory role of the Board would have required scrutiny of its decisions through section 33 of the Constitution.²⁰¹

With the introduction of the 2008 Expropriation Bill, much media attention and many political opinions became prominent.²⁰² The old tension between the National Party and the African National Congress flared up again, as different stakeholders grappled with protecting land rights compared to the promotion of land reform.²⁰³ One of the arguments levelled against renewed efforts towards land reform through the 2008 Expropriation Bill was the possible deterrent to investment, and the risk of the exodus of skilled white land owners.²⁰⁴ In one regard, stakeholders, such as Agri South Africa, made submissions to parliament during the drafting of the Bill regarding the uncertainty in the agricultural sector in the wake of large scale land expropriations.²⁰⁵ In contrast, lawyers and land activists seemed to

¹⁹⁸ Section 6 of 2008 Expropriation Bill; Du Plessis (2011) 22 *Stellenbosch Law Review* 367; G Pienaar “Die grondwetlikheid van die voorgestelde onteieningsraamwerk vir Suid-Afrika” 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 344 347.

¹⁹⁹ Clauses 6-9 of 2008 Expropriation Bill; Du Plessis (2011) 22 *Stellenbosch Law Review* 367-368.

²⁰⁰ Du Plessis (2011) 22 *Stellenbosch Law Review* 368.

²⁰¹ Du Plessis (2011) 22 *Stellenbosch Law Review* 368; Pienaar 2009 *Tydskrif vir die Suid-Afrikaanse Reg* 348.

²⁰² See Du Plessis (2011) 22 *Stellenbosch Law Review* 355; Nginase *The meaning of ‘public purpose’ and ‘public interest’ in section 25 of the Constitution* LLM Stellenbosch University (2009) 54, for a discussion on these responses.

²⁰³ In the debates for a property clause, there was tension between the African National Congress, who sought to remedy the vast inequality of wealth between white and black South Africans, and the National Party, who sought to protect the existing rights of property owners. See M Chaskalson “The property clause: Section 28 of the Constitution” (1994) 10 *South African Journal on Human Rights* 131 132. See also Du Plessis (2011) 22 *Stellenbosch Law Review* 355. These tensions also indicate the importance of a constitutionally supported land reform programme, since the importance of land branches into a multitude of political, social and economic issues. In this regard, see JM Pienaar “Land reform embedded in the Constitution: Legal contextualization” (2015) 114 *Scriptura* 1 5.

²⁰⁴ Du Plessis (2011) 22 *Stellenbosch Law Review* 355.

²⁰⁵ The argument Agri SA relied upon on was the fact that the agricultural sector deals with food production and is dependent on investment. Any threat to agricultural productivity could potentially have caused a food crisis. See Agri South Africa “Submission on the Expropriation Bill [B16-2008]” (17-06-2008) *Parliamentary*

support the idea that the Bill was necessary for expediting land reform, particularly with the restlessness of the landless and increasing land occupations.²⁰⁶ The Bill was subsequently shelved, though these tensions still exist in expropriation debates.²⁰⁷

The Expropriation Bill (draft) of 2013 (“2013 Expropriation (draft) Bill”)²⁰⁸ was the next attempt to institute an updated and more constitutionally sound general expropriation statute.²⁰⁹ The aim of the 2013 Expropriation (draft) Bill was once more to replace the 1975 Expropriation Act, to bring it in line with sections 25 and 33 of the Constitution, and to take better account of expropriations for the public interest.²¹⁰ Some of the notable changes in that Bill are clauses 22-26 of the 2013 Expropriation (draft) Bill, which provide for access to courts, urgent expropriations, withdrawal of expropriations and the setting up of an expropriation register.²¹¹

For the purposes of accountability, the 2013 Expropriation (draft) Bill established an expropriation register aimed at the establishment and maintenance of all expropriations, both pending and already completed.²¹² The 2013 Bill did not include a National Expropriation Advisory Board as provided for in the 2008 Expropriation Bill, nor was this Board carried forward in the 2015 Expropriation Bill or the 2019 Expropriation (draft) Bill.²¹³ However, the expropriation register has been brought forward to the 2019 Expropriation

Monitoring Group <<http://www.pmg.org.za/report/20080617-expropriation-bil-public-hearings>>; Du Plessis (2011) 22 *Stellenbosch Law Review* 356.

²⁰⁶ Du Plessis (2011) 22 *Stellenbosch Law Review* 356.

²⁰⁷ Du Plessis (2011) 22 *Stellenbosch Law Review* 353.

²⁰⁸ GN 234 of 2013 GG 36269 of 20-03-2013.

²⁰⁹ This was after the 2008 Bill was shelved. See Du Plessis (2011) 22 *Stellenbosch Law Review* 375; E du Plessis “Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on land reform” (2014) 17 *Potchefstroom Electronic Law Journal* 798 799; Pienaar *Land reform* (2014) 367; AJ van der Walt “Constitutional property law” 2013 *Annual Survey of South Africa* 216 216. The draft was published along with an explanatory memorandum, see *Explanatory memorandum on the draft Expropriation Bill*, 2013 (2013) <[http://www.publicworks.gov.za/PDFs/Explanatory%20memorandum%20on%20the%20draft%20Expropriation%20Bill%20\(2013-03-15\).pdf](http://www.publicworks.gov.za/PDFs/Explanatory%20memorandum%20on%20the%20draft%20Expropriation%20Bill%20(2013-03-15).pdf)> (accessed 11-04-2019).

²¹⁰ Pienaar *Land reform* (2014) 367; Van der Walt 2013 *Annual Survey of South Africa* 216.

²¹¹ See also Pienaar *Land reform* (2014) 367; *Explanatory memorandum on the draft Expropriation Bill*, 2013 (2013) 1–2.

²¹² See also Pienaar *Land reform* (2014) 367; *Explanatory memorandum on the draft Expropriation Bill* (2013) 2.

²¹³ Clause 6 of 2008 Expropriation Bill; Van der Walt 2013 *Annual Survey of South Africa* 218.

(draft) Bill and indicates that it is these accountability mechanisms which will be an important part of the expropriation procedure going forward.

Furthermore, a notable addition in the 2013 Expropriation (draft) Bill was in section 23, which provided for urgent expropriations, meant for instances when expropriation is temporarily needed for disaster management.²¹⁴ This would provide for expropriation in emergency instances, for which the state has yet to legislate. Such a circumstance arose in the matter of the *Minister of Public Works v Kyalami Ridge Environmental Association* (“*Kyalami Ridge*”).²¹⁵ The matter concerned housing that the state provided for residents of Alexandra after heavy flooding damaged a large portion of the area.²¹⁶ The issue was the lawfulness of the relocation as granted by the government due to the fact that no provisions in legislation granted the state this relocation power.²¹⁷ *Kyalami Ridge* displayed a critical balance that must be struck between upholding constitutional rights, and the lawful actions of the government.²¹⁸ The availability of expropriation in such instances is useful in equipping the state to uphold that balance. This serves to prove how dynamic and versatile the expropriation power can be when utilised to meet the needs of the population. The expropriation power should therefore be as versatile in the endeavour of the redistribution of land.

2 4 4 3 *Expropriation legislation 2015 - 2019*

The Expropriation Bill B4D-2015 (“2015 Expropriation Bill”) was the next attempt at replacing the 1975 Expropriation Act, and seemingly paid much more attention to the

²¹⁴ Clause 23 of the 2013 Expropriation (draft) Bill; Pienaar *Land reform* (2014) 367.

²¹⁵ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC).

²¹⁶ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) para 6.

²¹⁷ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) para 92; C Hoexter *Administrative law in South Africa* 2 ed (2012) 35.

²¹⁸ See *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) paras 113 – 114, where the court pointed out that although the victims of the flooding have constitutional rights, the government is obligated to act lawfully in upholding those rights.

multitude of constitutional rights affected by expropriation.²¹⁹ Significant provisions include Clause 2(1), because it requires that the power to expropriate be exercised in a manner that is not arbitrary.²²⁰ The Expropriation Bill (draft) of 2018 (“2019 Expropriation (draft) Bill”)²²¹ makes similar reference to the term “arbitrarily” in the context of expropriation.²²² The word “arbitrary” is mentioned in section 25(1) of the Constitution, which pertains to interference with property rights in the form of deprivation.²²³ The meaning of arbitrarily, being an adverb of the same root as the adjective “arbitrary”, should seemingly be understood in terms of the meaning of arbitrary in section 25(1) in terms of the 2015 Expropriation Bill as it relates to deprivation.²²⁴

Although the Expropriation Advisory Board was not contained in the 2015 Expropriation Bill, the Bill does still make reference to an expropriation register, meant to ensure that all information pertaining to intended and executed expropriations is available to the public.²²⁵ The Expropriation Bill B4D-2015 followed, and was debated for 3 years before being regarded as unconstitutional in 2018.²²⁶

Currently, the 2019 Expropriation (draft) Bill is available for public comment.²²⁷ This Bill has also maintained the idea of an expropriation register, and has made few material changes to the 2015 Expropriation Bill. The main difference between the Bills is related to compensation. Clause 12(3) of the 2019 Expropriation (draft) Bill demarcates certain instances in which “nil compensation” would be just and equitable.²²⁸ Nil compensation is a

²¹⁹ The preamble of the Bill cites sections 25, 33 and 34 of the Constitution. See further Marais (2017) 33 *South African Journal on Human Rights* 99; Mostert 2016 *European Property Law Journal* 179.

²²⁰ Section 2(1) of 2015 Expropriation Bill; Marais (2017) 33 *South African Journal on Human Rights* 100. See 3 2 4.

²²¹ GG 42127 of 21-12-2018.

²²² Section 2(1) of 2019 Expropriation (draft) Bill.

²²³ Marais (2017) 33 *South African Journal on Human Rights* 101.

²²⁴ Marais (2017) 33 *South African Journal on Human Rights* 102; For the meaning of arbitrary in terms of section 25(1), see Van der Walt *Constitutional property law* 3 ed (2011) 265.

²²⁵ Section 26 of 2015 Expropriation Bill.

²²⁶ Parliamentary press release “Public works committee resolves to reject Expropriation Bill” (28-08-2018) *Parliament of the Republic of South Africa* <<https://www.parliament.gov.za/press-releases/public-works-committee-resolves-reject-expropriation-bill>> (accessed on 18-09-2018).

²²⁷ Expropriation Bill (draft) in GN 116 of 2018 GG 42127 of 21-12-2019.

²²⁸ The full implications of this is discussed in 4 3 5.

concept that neither the 1975 Expropriation Act, nor the 2008, 2013 or 2015 Expropriation Bills, specifically included. This may have an impact on the cost of expropriations, but does not rectify the other uncertainties and challenges which face redistribution and the use of expropriation in that context. The cost of expropriation is therefore one of many issues in expropriation for redistribution purposes, and this is discussed in more detail in chapter 4.²²⁹

If one reflects on the statutes in the context of redistribution and expropriation, it is interesting to note that the 1975 Expropriation Act states that the application of the Act does not derogate from expropriation authorised by other statutes.²³⁰ The 2019 Expropriation (draft) Bill goes a step further and requires that other statutes that authorise expropriation be interpreted in a manner that complements the Bill.²³¹ Therefore, even if redistribution expropriation is used in terms of specific legislation, it will have to be in line with the general expropriation statute, should the 2019 Expropriation (draft) Bill be enacted. These uncertainties are some of the challenges that potentially face the utilisation of expropriation in the redistribution context.

2 4 4 4 Conclusion

There are two important points to be noted about the general expropriation legislative framework highlighted in this section. Firstly, a statute to replace the 1975 Expropriation Act is necessary to ensure the expropriation power can be used effectively going forward. There have been a number of attempts to update the 1975 Expropriation Act to bring it in line with the Constitution. Since the 1975 Expropriation Act is pre-constitutional, the different draft

²²⁹ This is particularly in light of the Constitution Eighteenth Amendment (draft) Bill (2019) Cape Town: Parliament <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191203Draft_advertised.pdf> (accessed 31-01-2020), which would entrench expropriation without compensation into the Constitution.

²³⁰ Section 26 of the 1975 Expropriation Act. However, the section only requires that the Act always be applied in expropriations authorised by other statutes in the calculation of compensation. Other statutes for the purposes of this chapter refer to land reform statutes that give effect to expropriation for land redistribution. See 2 3 2.

²³¹ Clause 2(4) and 29 of the 2019 Expropriation (draft) Bill. See also AJ van der Walt *Property and constitution* (2012) 49.

Bills aimed at replacing the Act have introduced concepts that bring expropriation law more in line with section 25 of the Constitution. The most notable features from the different Expropriations Bills tabled since 2008 are the expropriation register, the Expropriation Advisory Board, and the provision for nil compensation. Although the Expropriation Advisory Board has not been brought forward into the 2015 and 2019 Expropriation Bills, the expropriation register may prove highly beneficial for research on expropriation. It is difficult to account for underutilisation with no current centralised means of listing the number of expropriations taking place. The proposed expropriation register may be useful in this regard. Interrogating the underutilisation of expropriation, particularly in the redistribution context, will be made easier with a record of current and past expropriations becoming available to the public.

Secondly, much of the uncertainty around redistribution and the mechanism of expropriation is seemingly because of the gap that exists in redistribution policies setting directives for the use of expropriation. Legislation does not contain the redistribution directives. It is policy that determines the goals of redistribution. Thus, a changed expropriation framework will not necessarily make the mechanism more useful in redistribution until a policy sets up a means to implement it. It is this gap that exists between the redistribution policies and the mechanism of expropriation that leaves the role of expropriation in redistribution elusive.

2 5 Conclusion

This chapter has raised some of the questions and uncertainties that exist in land reform, specifically in the context of redistribution and expropriation law in South Africa. It is clear that land redistribution is meant to provide better land access to the poor, which has been the aim of redistribution since it was set out in the Constitution and the *White paper*. Though it is only one part of the overall land reform programme, the other sub-programmes of land

reform are somewhat interlinked with redistributive aims. This is seen by the fact that the successes of the other sub-programmes essentially also promote the success of the redistribution sub-programme.

Multiple statutes exist that promote redistribution, some of which grant expropriation powers to the state. However, expropriation as a mechanism was not often used in the redistribution context. In the initial stages of redistribution, state acquisition was not the focus of the sub-programme. This is possibly due to the fact that the thrust of the sub-programme is found in its policies. Initial redistribution policy instituted a grant system, which was later found to be insufficient to meet the aims of redistribution. However, since SLAG, LRAD and PLAS, the redistribution framework has progressively moved toward a state land acquisition model, in which expropriation is a promoted mechanism of land acquisition. Thus, since the 2005 National Land Summit, it appears expropriation is meant to play a much bigger role in land redistribution.

The focus of redistribution and the intended beneficiaries is an aspect that will need clarity going forward. Redistribution is meant to benefit the poor, yet some redistribution policies are focused on commercial interests, which further marginalise the poor. There are arguments that the interests of the poor would be better protected through economic change rather than land redistribution. Despite this, land ownership patterns in South Africa are particularly skewed due to its historical context, and a national framework specifically focused on land reform should be the means to redress this historical injustice.

There are furthermore some uncertainties that still exist in the expropriation framework. The compensation requirement, and pending Bill to replace the 1975 Expropriation Act, are still matters which cause considerable debate. Despite this, the real limit in the use of expropriation in redistribution is the fact that redistribution policy does not set out directives for the use of expropriation directly. Despite the shift towards a land acquisition, there exists a gap in how expropriation is meant to be mandated in redistribution and how this connects

to the subsequent redistribution of land meant to take place afterwards. This may be a matter of accountability, which administrative regulation could possibly improve and is thus discussed in chapter 3. The improvement for the gap in the mandate for expropriation in redistribution may be found in newer expropriation legislation, or improved redistribution policies. However, it is this gap that makes expropriation difficult to contextualise in the sub-programme of redistribution and possibly hinders the utilisation of expropriation in redistribution. Thus, there is merit in considering whether obstacles can be found in some of the administrative considerations applicable when expropriation takes place in terms of either the general or specific redistribution pieces of legislation.

Chapter 3: Administrative law as a vehicle to ensure land redistribution

3 1 Introduction

In chapter two, it was established that the redistribution framework and expropriation need to be better integrated, possibly by means of legislation or policy.¹ Therefore, to better understand how such an integration should take place, this chapter analyses the current legislative tools available to state officials to expropriate property for land redistribution. This chapter aims to grapple with extra requirements and considerations attached to expropriation as an administrative action, subject to administrative law. The ultimate aim is to determine whether these extra requirements and considerations prove to be a vehicle or an obstacle in the quest for ensuring expropriation in the context of land redistribution.

Due to the fact that expropriation is authorised in terms of legislation, the decision to expropriate in land redistribution is anchored in three different areas of law, namely administrative law, expropriation law, and the laws regulating land redistribution. Although each area is potentially applicable when expropriation takes place for redistribution purposes, the focus of this chapter is the administrative considerations which apply to expropriation statutes in redistribution. As a point of departure, some of the important considerations for expropriation as an administrative act will be unpacked. The key to improved utilisation of expropriation in redistribution may thus lie in clearer incorporation of important administrative considerations in the current statutes which authorise expropriation for redistribution.

Thereafter, the manner in which the expropriation statutes in the redistribution context make room for the administrative considerations will be considered. In this regard, this chapter will potentially establish if the current enabling statutes for redistribution

¹ See 2 5.

expropriations sufficiently take into account the administrative considerations for expropriation.

3 2 Considerations attached to expropriation as an administrative action

3 2 1 Introduction

In South Africa, an expropriation is an administrative act, and is therefore subject to administrative law.² Expropriation as an administrative action invokes certain administrative considerations. Due to the application of administrative law and the statutory authorisation of expropriation, certain administrative considerations are applicable to the expropriation procedure. The recent case of *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* (“*Kohler*”),³ is an example of some of the administrative obstacles attached to an expropriation. The matter concerned an expropriation by the City of Cape Town of land belonging to Kohler Bricks (Pty) Ltd.⁴ The challenge in *Kohler* was notably in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), and not in terms of section 25(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Although *Kohler* was not an expropriation for redistribution, the principle that an expropriation can be challenged through administrative law applies to all expropriations. This means that there

² *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 1; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2010 4 SA 242 (SCA) para 43; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) para 12. See also EJ Marais “Providing better protection for expropriatees? Preliminary thoughts on the interpretation of ‘arbitrarily’ in clause 2(1) of the Expropriation bill B4D-2015” (2017) 33 *South African Journal on Human Rights* 97 101; M Kidd “Reasonableness” in G Quinot (ed) *Administrative justice in South Africa* (2015) 169 175,183; E van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 6; AJ van der Walt *Constitutional property law* 3 ed (2011) 501; A Gildenhuys *Onteieningsreg* 2 ed (2001) 77. In South Africa, administrative expropriation is officially recognised, requiring the discretion of an administrator for an expropriation to be instituted. However, statutory and judicial expropriation do exist, though its acceptance in South African law is not clear. Statutory expropriation is often discussed in the context of constructive expropriation, see Van der Walt *Constitutional property law* 3 ed (2011) 457, H Mostert “The distinction between deprivations and expropriations and the future of the ‘doctrine’ of constructive expropriation in South Africa” (2003) 4 *South African Journal on Human Rights* 567 572. For a discussion on judicial expropriation, see Gildenhuys *Onteieningsreg* 2 ed (2001) 14-15.

³ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019).

⁴ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019) para 1.

are considerations outside section 25 of the Constitution that must be taken into account when undertaking an expropriation.

In the case of expropriation, many of these considerations stem from either issues in interpreting the relevant statute, a field closely linked with administrative law,⁵ or implementing the expropriation. This section examines some of these extra considerations, and asks to what extent they can be attributed to the underutilisation of expropriation in redistribution.

3 2 2 Administrative regulation of expropriation⁶

Administrative law is a broad legal field that regulates any exercises of public power.⁷ Administrative law principles therefore act as a means of regulating state action and is closely linked with concepts such as administrative justice.⁸ Farina broadly states that administrative law is “the [systemic] regulation of regulation”, due to the fact that administrative law applies to all legal frameworks that empower state action.⁹ Administrative law therefore extends its regulatory reach over expropriation law.

⁵ E Mureinik “Administrative Law in South Africa” (1986) 103 *South African Law Journal* 615 619.

⁶ It should be noted that this study does not purport to provide an extensive overview of administrative law. It only seeks to outline the extent to which this area of the law applies to expropriation for redistribution purposes.

⁷ There are different definitions of administrative law. See H Corder “The development of administrative law in South Africa” in G Quinot (ed) *Administrative justice in South Africa* (2015) 1 3; C Hoexter *Administrative law in South Africa* 2 ed (2012) 2-3, 10; Y Burns *Administrative law under the 1996 Constitution* 4 ed (2012) 14-15. For older pre-constitutional definitions, see GE Devenish, K Govender & D Hulme *Administrative law and justice in South Africa* (2001) 6-7. See also *Pharmaceutical Manufacturers Association of South Africa and Another: In re Eex parte application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 45.

⁸ This is because section 33 of the Constitution entrenches the right to administrative justice. See *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 135; Hoexter *Administrative law in South Africa* 2 ed (2012) 17.

⁹ CR Farina “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *SA Public Law* 489 490. Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 7, define administrative law as “...a part of the domain of public law, [which] regulates the organisation, capacities and actions of the state in its interactions with individuals and juristic persons”. For a thorough discussion of the different definitions of administrative law, see Hoexter *Administrative law in South Africa* 2 ed (2012) 8.

The source of administrative “regulation” is the Constitution of the Republic of South Africa, 1996 (“Constitution”), administrative legislation and the common law.¹⁰ This includes section 33 of the Constitution and PAJA. The purpose of PAJA is to give effect to section 33 of the Constitution, and to provide guidelines on lawful, reasonable and procedurally fair administrative actions.¹¹ The definition of administrative action has been noted to be somewhat complicated.¹² The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others*¹³ identified seven essential elements to the PAJA definition of an administrative act, namely: “(a) a decision of an administrative nature, (b) by an organ of state or natural or juristic person, (c) exercising a public power or performing a public function, (d) in terms of any legislation or empowering provision, (e) that adversely affects rights, (f) that has a direct, external legal effect and, (g) that does not fall under any of the listed exclusions”.¹⁴ The decision to expropriate, as an administrative action, is therefore subject PAJA.¹⁵ Thus, in addition to the section 25(2) requirements, an expropriation must satisfy the lawful, reasonable and procedurally fair requirements in terms of PAJA.¹⁶

¹⁰ Before the Constitution, the common law development of administrative law was largely dependent on the courts. *Pharmaceutical Manufacturers Association of South Africa in re: the ex parte application of the President of the Republic of South Africa* 2000 2 SA 674 (CC) para 45; Hoexter *Administrative law in South Africa* 2 ed (2012) 17; Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 8.

¹¹ I Currie “What difference does the Promotion of Administrative Justice Act make to administrative law?” 2006 *Acta Juridica* 325 332-333.

¹² Defined in section 1 of PAJA, administrative actions is defined as:

[...] any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.

The section goes on to list specific instances in which this definition does not apply, of which expropriation is not one. For research on this definition, see G Quinot & P Maree “Administrative action” in G Quinot (ed) *Administrative justice in South Africa* (2015) 66 76.

¹³ *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC) para 33.

¹⁴ *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC) para 33, see also Quinot & Maree “Administrative action” in Quinot (ed) *Administrative justice in South Africa* (2015) 76.

¹⁵ *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11 (4 February 2010) para 1.

¹⁶ See Currie 2006 *Acta Juridica* 329-330 on the relationship between PAJA and the Constitution.

As an administrative act, expropriation can only take place once the decision to expropriate by an authorised expropriator is made. The authorisation for expropriation of property can therefore come from the general 1975 Expropriation Act, or more specific statutes authorising expropriation.¹⁷ In this regard, some questions are raised around firstly the governance of expropriations, and secondly whether the imperatives on state bodies to put into effect the expropriation procedure in land redistribution are clear enough. Governance is a broad, but context specific, concept, which may differ depending on the field in which it applies.¹⁸ This means that good governance to an economist will differ from what good governance might mean to a politician.¹⁹ The concept is often used as a measure for the actual performance of government activity.²⁰ Good governance embodies principles, such as accountability and transparency, the absence of which can severely hinder the effectiveness of a ruling government.²¹ Poor governance is therefore associated with the misappropriation of funds, reckless expenditure by the state and a government unable to provide for the needs of its people.²² The matter of governance in the context of expropriation relates to the application of the legal boundaries that legislation and the Constitution set for an expropriation project.²³ The slow and disappointing pace of redistribution, coupled with the underutilisation of expropriation, therefore points towards poor governance as a possible cause.

The Constitutional Court in *Koyabe v Minister for Home Affairs and Others* (“*Koyabe*”)²⁴ touched upon the expectation on the government to serve the public in considering the

¹⁷ In the context of redistribution, this will include the Provision of Land and Assistance Act 126 of 1993. See 2 3 2.

¹⁸ S De La Harpe, C Rijken & R Roos “Good governance” (2008) 2 *Potchefstroom Electronic Law Journal* 1 3.

¹⁹ De La Harpe, Rijken & Roos (2008) 2 *Potchefstroom Electronic Law Journal* 3.

²⁰ T Coetzee “Governance practices in Africa” (2017) 4 *Journal of African Studies* 155 157.

²¹ Coetzee (2017) 4 *Journal of African Studies* 159.

²² Coetzee (2017) 4 *Journal of African Studies* 161.

²³ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 55.

²⁴ *Koyabe v Minister for Home Affairs and others* 2010 4 SA 327 (CC).

principle of *batho pele*.²⁵ Though the matter concerned an administrative action relating to the withdrawal of residence permits,²⁶ the court noted that the principle of *batho pele* requires that the public interest should be served throughout public administration.²⁷ Public administration should therefore always be carried out with principles of fairness, accountability, and public administration with a high standard of responsiveness to the needs of the people.²⁸ This principle is also pointed out as a guiding principle for expropriation valuations by the Office of the Land-Valuer General.²⁹ In land redistribution, the administration must take particular heed of the democratic principles that the court in *Koyabe* pointed out and not be hindered by the converse of *batho pele*, namely poor governance. This is important because of the delay that poor governance can pose to meeting the redistribution needs of the masses of landless people that the administration serves.

The question of whether the imperatives on the state to expropriate are clear enough, particularly in redistribution, is difficult to answer. The root of the question is whether the legislation that authorises expropriation sufficiently compels the state to make use of the expropriation power. In the case of *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* (“*Offit*”),³⁰ the Supreme Court of Appeal (“SCA”) dealt with the question of whether it is possible to compel the state to expropriate.³¹ The matter

²⁵ *Koyabe v Minister for Home Affairs and others* 2010 4 SA 327 (CC) para 62; *batho pele* means 'people first' in Sesotho.

²⁶ *Koyabe v Minister for Home Affairs and others* 2010 4 SA 327 (CC) para 1.

²⁷ *Koyabe v Minister for Home Affairs and others* 2010 4 SA 327 (CC) para 62; this principle is also entrenched in policy on public service and applies to administration in all spheres of government. See G Quinot “Regulating administrative action” in G Quinot (ed) *Administrative justice in South Africa* (2015) 95 96; Hoexter *Administrative law in South Africa* 2 ed (2012) 19.

²⁸ *Koyabe v Minister for Home Affairs and others* 2010 4 SA 327 (CC) para 62.

²⁹ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368-a-policy-framework-for-land-acquisition-and-land-valuation-in-a-land-reform-context-and-for-the-establishment-of-the-office-of-the-valuer-general>> (accessed 18-04-2018) 29. This office and its role in property valuation is discussed in 4 3 2 2.

³⁰ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA).

³¹ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 43.

considered the lawfulness of an expropriation of land belonging to Offit Enterprises (Pty) Ltd, the appellant.³² The issue was that the piece of land was situated in an industrial zone under the control of Coega Development Corporation (“Coega”), the first respondent, to run a government initiated deep-water port project.³³ The Eastern Cape provincial department and the Department of Trade and Industry, the second and third respondents, both held a stake in Coega.³⁴ The appellants in the matter held land in the region that Coega required in order to operate its project.³⁵ Coega entered into unsuccessful negotiations with the appellants for the transfer for the land, after which Coega threatened to have the appellants’ properties expropriated.³⁶ The expropriation never happened, and the appellants argued that the failure to expropriate was reducing their property values.³⁷ Wallis AJA held that the (lack of an) expropriation in *Offit* was not a failure to take an administrative decision in terms of section 6(2)(g) of PAJA, because there had to be an obligation on the state to take the decision for this provision in PAJA to be activated.³⁸ The failure to expropriate is therefore not an administrative action, and not actionable under PAJA.³⁹ This proves problematic if the state underutilises the expropriation power. A means to compel the state to expropriate, in a manner that does not overstep the separation of powers,⁴⁰ may be needed to improve the utilisation of expropriation in redistribution.

³² *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) paras 2-3; see also AJ van der Walt “Constitutional property law” (2008) 4 *Juta Quarterly Review* 2.1

³³ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 2.

³⁴ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 2.

³⁵ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 3.

³⁶ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) paras 3-4.

³⁷ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 6.

³⁸ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 43.

³⁹ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 4 SA 242 (SCA) para 43.

⁴⁰ For the doctrine of separation of powers, see Kidd “Reasonableness” in Quinot (ed) *Administrative justice in South Africa* (2015) 170; De Vos & Freedman *South African constitutional law in context* (2014) 60; Currie & De Waal *The bill of rights handbook* 6 ed (2013) 18; Hoexter *Administrative law in South Africa* 2 ed (2012) 351; Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 176.

3 2 3 Reasonableness, rationality and proportionality

An important aspect in scrutinising an expropriation as an administrative action is reasonableness. Reasonableness is one of the three main components of just administrative action, and does not have a singular definition in administrative or general public law.⁴¹ It is therefore a difficult standard to define because in investigating reasonableness in expropriation, possibly through statutory interpretation in judicial review, a court would risk overstepping the doctrine of separation of powers.⁴² State accountability must therefore be carefully navigated when courts hold state implementation of expropriation statutes against a reasonableness standard.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (“*Bato Star*”),⁴³ O’Regan J made a list of considerations for what should be taken into account in determining whether a “reasonable equilibrium” has been met in an administrative decision.⁴⁴ Although the matter was not an expropriation case, these *Bato Star*-factors are still useful in expropriation law. This is because they determine, on a spectrum that ranges from rationality to proportionality, which level of reasonableness to apply to an administrative decision.⁴⁵

⁴¹ Section 33 of the Constitution; S Viljoen “Substantive adjudication of the decision to expropriate property” (2017) 28 *Stellenbosch Law Review* 444 451; Kidd “Reasonableness” in Quinot (ed) *Administrative justice in South Africa* (2015) 171; Hoexter *Administrative law in South Africa* 2 ed (2012) 341, 346; G Quinot & S Liebenberg “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” in S Liebenberg & G Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 197 198; Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 175.

⁴² Kidd “Reasonableness” in Quinot (ed) *Administrative justice in South Africa* (2015) 170; Hoexter *Administrative law in South Africa* 2 ed (2012) 351; Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 176.

⁴³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

⁴⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 45. These include: the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected.

⁴⁵ Quinot & Liebenberg “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 204; Hoexter *Administrative law in South Africa* 2 ed (2012) 343; C Plasket “Disproportionality – the hidden ground of review: *Medirite (Pty) Ltd v South African Pharmacy Council & Another*” (2019) 1 *South African Law Journal* 15 20. In PAJA, section 6(2)(f)(ii) and section 6(2)(h).

The test for rationality is the threshold standard of reasonableness in an administrative decision.⁴⁶ This standard is used to determine whether there was a rational objective basis between the administrator's decision, and the information used to make the decision.⁴⁷ On the other side of the spectrum is proportionality, which is more stringent than rationality, and involves the consideration of the substantive impact of the administrative decision.⁴⁸

There is no demarcated test for proportionality, however it has been noted that in instances in which the *Bato Star* considerations point towards the competing interests of the parties, a standard of proportionality should be used.⁴⁹ Hoexter likens proportionality to the notion that "one ought not to use a sledgehammer to crack a nut".⁵⁰ In the context of land acquisition in redistribution, expropriation is one such sledgehammer, particularly if not considered in light of other potential means of land acquisition, such as land auctions. If stated differently, expropriation should only be utilised as a necessary alternative when other means to acquire land through negotiation are no longer possible. This principle is echoed in redistribution policy.⁵¹ However, this principle should not hinder the utilisation of expropriation at the expense of effective land redistribution.

Proportionality considers whether less drastic measures could be used to achieve the end goal of the decision.⁵² According to Hoexter, the three main elements that this includes,

⁴⁶ *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 3 SA 265 (CC) para 164, the court held that all administrative decisions must have a rational basis as a minimum. Hoexter *Administrative law in South Africa* 2 ed (2012) 340; Marais (2017) 33 *South African Journal on Human Rights* 109; Viljoen (2017) 28 *Stellenbosch Law Review* 451.

⁴⁷ Kidd "Reasonableness" in Quinot (ed) *Administrative justice in South Africa* (2015) 175; Hoexter *Administrative law in South Africa* 2 ed (2012) 341; *Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa* 2004 3 SA 346 (SCA) para 21.

⁴⁸ Quinot & Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 204; Kidd "Reasonableness" in Quinot (ed) *Administrative justice in South Africa* (2015) 180.

⁴⁹ Quinot & Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 204.

⁵⁰ Hoexter *Administrative law in South Africa* 2 ed (2012) 344.

⁵¹ See 2 3 3 3.

⁵² Hoexter *Administrative law in South Africa* 2 ed (2012) 344; Kidd "Reasonableness" in Quinot (ed) *Administrative justice in South Africa* (2015) 180; Quinot & Liebenberg "Narrowing the band: Reasonableness

are necessity, balance and suitability of the decision.⁵³ In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*,⁵⁴ the court found that proportionality was the appropriate standard applicable to a matter using the *Bato Star* consideration. In this regard, the court considered the suitability and the necessity of the decision.⁵⁵ Thus, in scrutinising the reasonableness standard in an administrative action such as expropriation, one can validly look at factors such as the suitability and necessity of the expropriation in accordance with the *Bato Star* considerations. This may play a useful role in justifying the use of expropriation through administrative principles such as proportionality.

It is reasonableness, comprising of a spectrum between rationality and proportionality, which potentially determines the need and suitability of an expropriation.⁵⁶ If an expropriation decision comes under scrutiny, either through section 25 of the Constitution or PAJA, it is not clear if proportionality and rationality are informed by the same considerations in administrative law as in expropriation law. For the purposes of legal certainty in the context of expropriations, it should be clear which indicators inform reasonableness.⁵⁷ There is no indication that it would be problematic to always apply an administrative standard of reasonableness to expropriations when conceptualising proportionality. Currently in South Africa, an expropriation is always an administrative action and is thus subject to administrative law.⁵⁸ Administrative law provides recourse in terms of PAJA, specifically on

review in administrative justice and socio-economic rights jurisprudence in South Africa" in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 204.

⁵³ Hoexter *Administrative law in South Africa* 2 ed (2012) 345; Kidd "Reasonableness" in Quinot (ed) *Administrative justice in South Africa* (2015) 183.

⁵⁴ *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 3 SA 265 (CC).

⁵⁵ *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 3 SA 265 (CC) paras 165-166, the court also considered certain questions similar to the *Bato Star* guidelines, such as the nature of the decision, the nature of the power involved and the impact of the decision.

⁵⁶ See 3 3 3 below.

⁵⁷ See Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 200; Quinot & Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 199.

⁵⁸ See 3 2 1 above.

the grounds of reasonableness.⁵⁹ In the context of expropriation law, it is not entirely clear on what grounds one can challenge the proportionality of the decision. If not pursued in terms of administrative law, one possible way to challenge rationality or proportionality in expropriation law is through the arbitrariness requirement in terms of section 25(1) of the Constitution. This requirement is discussed below.

3 2 4 Arbitrariness

Another element that may need to be taken into account when scrutinising statutory implementation of expropriation provisions is the non-arbitrariness requirement in section 25(1) of the Constitution.⁶⁰ In this regard, it is important to briefly address two aspects of the relationship between section 25(1) and 25(2) of the Constitution. In this way, some of the issues that surround applying arbitrariness specifically in the expropriation context can be better understood.

The first aspect of the relationship between section 25(1) and (2) of the Constitution to be briefly mentioned is the ongoing debate of constructive expropriation in South African law. A constructive expropriation is the term applied to an excessive regulation, in terms of section 25(1) of the Constitution, materially amounting to a form of expropriation, in terms of section 25(2) of the Constitution.⁶¹ This discussion is important because concepts such

⁵⁹ Section 6(2)(h) of PAJA states that a court may review an administrative decision 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 so exercised the power or performed the function.

⁶⁰ Van der Walt *Constitutional property law* 3 ed (2011) 287; H Mostert, A Pope, P Badenhorst, W Freedman, J Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 120-121; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 622.

⁶¹ These are instances of deprivations in terms of section 25(1) of the Constitution being excessive to the point of materially amounting to an expropriation. See BV Slade "Compensation for what? An analysis of the outcome in *Arun Property Development (PTY) LTD v Cape Town City*" (2016) 19 *Potchefstroom Electronic Law Journal* 1 21. For a more detailed discussion of constructive expropriation see IM Rautenbach "Expropriation and compensation for limitations of the right to property that do not amount to expropriation" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 585; K Bezuidenhout *Compensation for excessive but otherwise lawful regulatory state action* LLD Stellenbosch University (2015) 54; EJ Marais "When does state interference with property (now) amount to expropriation? An analysis of the *AgriSA* Court's state acquisition requirement (Part I)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983 3031; Van der Walt *Constitutional property law*

constructive expropriation possibly broaden the scope of what constitutes an expropriation in South Africa, which further blurs whether non-arbitrariness applies in expropriation cases. The impact that *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* (“FNB”)⁶² had on constructive expropriation was related to the distinguishing factor between expropriation and deprivation. Where it was thought that the distinguishing factor between expropriation and deprivation was that compensation is paid for expropriation and not deprivation, FNB puts the distinguishing focus on the effect that the expropriation, as opposed to deprivation, has on ownership.⁶³ The 2013 case of *Agri South Africa v Minister for Minerals and Energy and Others* (“Agri SA”) is a recent example of an instance where the court deviated from the FNB-methodology in its application of expropriation law.⁶⁴ However, the decision has been criticised to have been a matter that should not have been considered in terms of expropriation law at all.⁶⁵ The matter concerned the Mineral Resources and Development Act 22 of 2002 (“MPRDA”), the operation of which Agri SA challenged, since it converted old order mineral rights into new order prospecting mining rights.⁶⁶ It was argued that this conversion amounted to an expropriation.⁶⁷ Although this

3 ed (2011) 376 – 377; Mostert (2003) 4 *South African Journal on Human Rights* 589; AJ van der Walt “Moving towards recognition of constructive expropriation” (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459 475.

⁶² *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

⁶³ Van der Walt *Constitutional property law* 3 ed (2011) 343. This was a marked difference to the approach in *Harksen v Lane* 1998 1 SA 300 (CC) paras 31 – 37. Although the court also recognised expropriation as a form of deprivation, the distinguishing feature in terms of section 28 of the Interim Constitution was that expropriation granted the relevant authority acquisition of the property.

⁶⁴ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC); EJ Marais “When does state interference with property (now) amount to expropriation? An analysis of the AgriSA Court’s state acquisition requirement (Part I)” (2015) 18 *Potchefstroom Electronic Law Journal* 2983 2985.

⁶⁵ J Dugard & N Seme “Property rights in court: An examination of judicial attempts to settle section 25’s balancing act re restitution and expropriation” (2018) 34 *South African Journal on Human Rights* 33 46.

⁶⁶ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC) para 2. See also Dugard & Seme (2018) 34 *South African Journal on Human Rights* 46; Marais (2015) 18 *Potchefstroom Electronic Law Journal* 2985.

⁶⁷ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC) para 16. The judgment of Froneman J considered whether the conversion of rights, which the court calls compensation in kind, under the MPRDA amounted to just and equitable compensation as per section 25 of the Constitution. This was the central feature of the deliberation. See paras 88- 90.

case was not a land reform matter, the court used an interpretation of section 25 emphasising that the MPRDA is part of the constitutional framework that is aiming to close the gap between the rich and the poor due to the previous mineral dispensation.⁶⁸ The court ultimately found that it did not amount to an expropriation, though a deprivation was present.⁶⁹ The majority judgment notably deviated from *FNB* to rely on the *Harksen* approach with emphasis on state acquisition of the property.⁷⁰ Constructive expropriation therefore seems relegated to instances where an excessive deprivation is awarded compensation rather than invalidated.⁷¹ It is these instances of excessive deprivation being compensated which suggest that there is a conditional acceptance of constructive expropriation. It is these uncertainties that result in continued uncertainties in expropriation, which extends to redistribution expropriations.

The second aspect is derived from the methodology set out by the Constitutional Court in *FNB*.⁷² The court authoritatively pointed out that expropriations are subset of deprivations.⁷³ Thus, all expropriations should be compliant with section 25(1) of the Constitution, in addition to the requirements of section 25(2) and (3). The result is that, in

⁶⁸ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC) paras 2, 87.

⁶⁹ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC) para 67.

⁷⁰ *Agri South Africa v Minister for Minerals and Energy and Others* 2013 4 SA 1 (CC) para 67; Dugard & Seme (2018) 34 *South African Journal on Human Rights* 47.

⁷¹ Slade (2016) *Potchefstroom Electronic Law Journal* 21. Rautenbach 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 585; Marais (2015) 18 *Potchefstroom Electronic Law Journal* 3031, Van der Walt (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 475.

⁷² *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank* 2002 4 SA 768 (CC). *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100, the court gave guidelines on determining arbitrariness, which if not established, amounts to an arbitrary deprivation. See also Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 236; Van der Walt *Constitutional property law* 3 ed (2011) 237; Mostert, Pope, Badenhorst, Freedman, Pienaar & Van Wyk *The principles of the law of property in South Africa* (2010) 120-121; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 622.

⁷³ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 58 - 60. In this regard, the court in *FNB* mentioned that expropriations are a subset of deprivations, thereby distinguishing expropriations as a specific type of deprivation. For a more detailed discussion of this methodology see Hoops *The legitimate justification of expropriation* (2017) 380; Mostert, Pope, Badenhorst, Freedman, Pienaar & van Wyk *The principles of the law of property in South Africa* (2010) 122; AJ van der Walt "Striving for better interpretation – a critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854 878.

principle, expropriation in terms of section 25(2) of the Constitution must be applied with due cognisance of the provisions of section 25 as a whole. *FNB* is still authoritative and is binding on all courts,⁷⁴ but it should be noted that the *FNB* approach has not always been followed consistently by courts.⁷⁵ Therefore, in theory, arbitrariness in terms of section 25(1) of the Constitution should be applied to all expropriations.

In the application of the *FNB* methodology, whether the state action in question was arbitrary bears importance.⁷⁶ Section 25(1) clearly states that a requirement for a valid deprivation is that it should not be arbitrary. Although section 25(2) of the Constitution does not require non-arbitrariness explicitly, the Expropriation Bill B4D-2015 (“2015 Expropriation Bill”) and the Expropriation Bill (draft) in GN 116 GG 42127 of 21-12-2018 (“2019 Expropriation (draft) Bill”) make mention of arbitrariness in the context expropriation.⁷⁷ Therefore, non-arbitrariness will potentially be a more direct requirement for expropriations in future, even if the *FNB* methodology is not applied. Arbitrariness in the specific context of expropriation should therefore be framed with the relationship between section 25(1) and section 25(2) of the Constitution in mind.

The assumption in expropriation law is that any decision to expropriate that is not duly authorised, or is found to be arbitrary, is invalid.⁷⁸ The *FNB* case was useful in

⁷⁴ In *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 37, the court noted that “[Expropriation] remains a deprivation of property and any such deprivation must not be arbitrary”.

⁷⁵ BV Slade “The effect of avoiding the *FNB* methodology in section 25 disputes” (2019) 40 *Obiter* 36 36; B Slade “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 331 343; Van der Walt *Constitutional property law* 3 ed (2011) 451.

Section 2(1) of the 2019 Expropriation (draft) Bill states:

“Despite the provisions of any law to the contrary an expropriating authority may not expropriate property arbitrarily or for a purpose other than public purpose or in the public interest”.

⁷⁶ The full ambit of the *FNB* test falls beyond the scope of this study, see Van der Walt *Constitutional property law* 3 ed (2011) 224, 283; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) 613; AJ van der Walt “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng (CC)*” (2005) 122 *South African Law Journal* 75 76, 89, for more extensive writing on the application and criticism of the methodology.

⁷⁷ Section 2(1) of both the Expropriation Bill B4D-2015 and Expropriation (draft) Bill GG 42127 of 21-12-2018.

⁷⁸ Viljoen (2017) 28 *Stellenbosch Law Review* 455.

conceptualising arbitrariness in the context of section 25 of the Constitution. In *FNB*, the Constitutional Court conceptualised a deprivation in terms of section 25(1) as being arbitrary when the law of general application does not provide “sufficient reason” for the deprivation, or the deprivation is procedurally unfair.⁷⁹ The court went on to provide factors useful to establishing sufficient reason, including the relationship between (if applied to the expropriation context): the expropriation and the purpose; the purpose for the expropriation and the owner of the affected property; and the purpose of the expropriation and the nature of the property.⁸⁰ These factors are notably similar to the ones listed in section 36(1) of the Constitution.⁸¹

The court further qualified these factors by stating that a deprivation of land that takes over all the “incidents of ownership” would require more compelling reasons than a less extensive deprivation of a right, which only takes over partial ownership.⁸² Arbitrariness in the context of expropriation seems to broadly mean that the state action was carried out without sufficient reason for the action, and the test is located on a spectrum between rationality and proportionality.⁸³ In this regard, similarly to reasonableness in the context of administrative law, arbitrariness is determined by either a rational connection between the expropriation and the purpose, or a proportionality evaluation.⁸⁴ Overall, the arbitrariness test in terms of *FNB* seems to suggest a proportionality evaluation should be used,

⁷⁹ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

⁸⁰ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

⁸¹ See 3 3 4 below.

⁸² *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

⁸³ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100; Van der Walt *Constitutional property law* 3 ed (2011) 237; Van der Walt (2005) 122 *South African Law Journal* 77.

⁸⁴ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100, the court noted that the proportionality evaluation is determined similarly to the limitation requirements in section 36(1) of the Constitution. See further Marais (2017) 33 *South African Journal on Human Rights* 110; Van der Walt *Constitutional property law* 3 ed (2011) 237-238; Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 237.

particularly if the state action amounts to expropriation of property. Arbitrariness in the context of section 25 of the Constitution is therefore similar to reasonableness in the context of administrative law, since both arbitrariness and reasonableness require evaluation of the action on a spectrum between rationality and proportionality.⁸⁵ However, if an expropriation is challenged in terms of the section 25(1) arbitrariness requirement, the crux of the challenge would be based on the merits of the decision; which is not taken into account in the judicial review through PAJA.⁸⁶ Different sources of law therefore inform whether the action should be evaluated in terms of a test that is nearer to rationality or proportionality depending on whether the action is challenged on the grounds of arbitrariness in terms of section 25, or reasonableness in terms of administrative law.⁸⁷

If reasonableness is informed by different considerations in administrative law than in expropriation law, proportionality could arguably be taken into account differently depending on whether an expropriation is challenged on the grounds of section 25 or through PAJA.⁸⁸ As noted earlier, the reasonableness spectrum in administrative law is informed by the relevant factors as put forth in *Bato Star*.⁸⁹ These factors have elements of similarity to the

⁸⁵ Kidd "Reasonableness" in Quinot (ed) *Administrative justice in South Africa* (2015) 170; Hoexter *Administrative law in South Africa* 2 ed (2012) 351; Devenish, Govender & Hulme *Administrative law and justice in South Africa* (2001) 176.

⁸⁶ Viljoen (2017) 28 *Stellenbosch Law Review* 451-452.

⁸⁷ Marais (2017) 33 *South African Journal on Human Rights* 110; Van der Walt *Constitutional property law* 3 ed (2011) 241; Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 238. In this regard, the single-system-of law and subsidiarity principles should be noted, see *Pharmaceuticals Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) para 44; Viljoen (2017) 28 *Stellenbosch Law Review* 461; Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015) 16; Van der Walt *Constitutional property law* 3 ed (2011) 66. In essence, the principles guide the choice litigants have when selecting a cause of action in instances when a constitutional right has potentially been infringed. The idea is to maintain the principle that the law is singular under the Constitution, while ensuring that legislation and the common law are developed and interpreted in a manner consistent with the Bill of Rights, see Van der Walt *Constitutional property law* 3 ed (2011) 68. It should be noted that the subsidiarity principles are not always applied correctly in the context of expropriation, and the relationship between section 25 of the Constitution and administrative law is not always straightforward, especially because not all deprivations are administrative actions, see Viljoen (2017) 28 *Stellenbosch Law Review* 458; AJ van der Walt "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88 91.

⁸⁸ See Viljoen (2017) 28 *Stellenbosch Law Review* 445.

⁸⁹ See 3 2 3 above, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 44-45, in which O'Regan J draws on English law for guidance on the applicable factors. See also Quinot & Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights

ones contained in section 36(1) of the Constitution, and also bear an element of similarity to the factors that the court in *FNB* provided to determine arbitrariness.⁹⁰ For an expropriation to be validly instituted, there need only be an enabling statute that grants an administrator the power to expropriate.⁹¹ This is on the basis that the applicable statute passes constitutional muster, and satisfies the requirements in accordance with sections 25(1), 25(2), 33 and 36 of the Constitution.⁹²

Thus, by virtue of the *FNB* methodology, guidance on the rationality or proportionality of an expropriation can be found in the factors *FNB* set out regarding arbitrariness, and the listed factors in section 36(1) of the Constitution; or as an alternative step, in terms of reasonableness through PAJA and administrative law.⁹³ Proportionality is easier to apply to an expropriation in the context of PAJA; even if the merits of the case are not looked at in review.⁹⁴ This is because an administrative act, including an expropriation, is always required to be reasonable. However, the *FNB* approach of applying expropriation as a subset of deprivations is one not consistently applied by the courts. Thus, the application of the non-arbitrariness requirement to expropriations may need thorough justification. It is in this regard that an updated expropriation statute may prove useful. In the specific instances

jurisprudence in South Africa" in Liebenberg & Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 204.

⁹⁰ Viljoen (2017) 28 *Stellenbosch Law Review* 452, 462; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

⁹¹ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 379; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 28; Van der Walt *Constitutional property law* 3 ed (2011) 452. For a simplification of the procedure under the 1975 Expropriation Act, see AJ van der Walt & GJ Pienaar *Introduction to the law of property* 7 ed (2016) 127.

⁹² Gildenhuys & Grobler "Expropriation" in Joubert & Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 23. The former Expropriation Bills have been struck down on the basis of not passing constitutional muster. See Parliamentary press release "Public works committee resolves to reject Expropriation Bill" (28-08-2018) *Parliament of the Republic of South Africa* <<https://www.parliament.gov.za/press-releases/public-works-committee-resolves-reject-expropriation-bill>> (accessed on 18-09-2018).

⁹³ Viljoen (2017) 28 *Stellenbosch Law Review* 463-464; Slade "Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996" in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 336.

⁹⁴ *Kohler Bricks (Pty) Ltd v The City of Cape Town* [2019] ZAWCHC 6 (15 February 2019), is a good demonstration of this because the applicant challenged an expropriation on grounds of the procedural fairness. See also Viljoen (2017) 28 *Stellenbosch Law Review* 463.

of expropriation, a court interpretation of arbitrariness in expropriation may clarify some of the difficulty in establishing whether non-arbitrariness applies to section 25(2) of the Constitution, even if expropriation is not considered to be a subset of deprivations.

3 2 5 Less invasive means and alternative project arguments

A further obstacle attached to the statutory interpretation and implementation of expropriation statutes is the potential acceptance of the less invasive means and the alternative project arguments in South Africa. These arguments are both concerned with whether an expropriator reached the correct conclusion in deciding to expropriate, or not.⁹⁵ Thus, the expropriator's implementation of the expropriation statute is examined against a court's interpretation of the expropriation statute. The less invasive means and alternative project argument both hinge on the overarching dissatisfaction by an expropriated owner or interested party with a particular expropriation. It is the challenging party who is of the opinion that an expropriation of a particular property was the incorrect decision made by the administrator.⁹⁶

These arguments become important in redistribution due to the 1999 *Policy and procedure for expropriation of land in terms of Act 126 and ESTA* ("Expropriation procedures").⁹⁷ The policy notes that expropriation should be used when a project in terms of the Provision of Land and Assistance Act 126 of 1993 ("Act 126") or the Extension of Security of Tenure Act 62 of 1997 ("ESTA") has begun, but the owner of the land needed refuses to sell, and "no suitable alternative land is available".⁹⁸ However, a criteria to define

⁹⁵ B Slade "The less invasive means argument in expropriation law" 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 199 200; B Hoops "The alternative project argument in the context of expropriation law (part 1)" 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 680 681.

⁹⁶ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 684.

⁹⁷ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) Pretoria: Land Reform Policy Committee <https://www.gov.za/sites/default/files/gcis_document/201409/landexpro0.pdf> (accessed 19-08-2019).

⁹⁸ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.4 Identified and unidentified beneficiaries) 4. Confirmed in the *Manual for the Implementation of the Proactive Land Acquisition*

“suitable alternative land” is not provided in the *Expropriation procedures* or the Proactive Land Acquisition Strategy. In this regard, some insight can be derived from the less invasive means and alternative project arguments to inform how the “suitable alternative” aspect of requirement in the *Expropriation procedures*.

The two arguments are similar in that they attack the legality of the expropriation that has taken place.⁹⁹ However, the grounds put forth as to why the expropriation was incorrectly decided is where the less invasive means and alternative project argument differ. Slade distinguishes two kinds of less invasive means arguments, namely the argument that the expropriation took more property than was necessary, or that the expropriation itself was unnecessary.¹⁰⁰ The case of *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* (“*Bartsch*”),¹⁰¹ is an example of the first category of the less invasive means argument.¹⁰² The matter concerned an expropriation of land for the primary purpose of a road, and the secondary purpose of making land available for a developer to build a shopping centre.¹⁰³ The argument made in the alternative in *Bartsch* was that the amount of property taken by the municipality was more than what was necessary for the intended road.¹⁰⁴ The court, however, did not take into account the merits of such an argument in its decision, and therefore made no indication of the validity or invalidity of such an argument

Strategy (2007) Pretoria: Department of Agriculture
<http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/manual%20for%20the%20implementation%20of%20the%20proactive%20land%20acquisition%20strategy.pdf> 257.

⁹⁹ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 681; Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 201.

¹⁰⁰ Slade “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 331; Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 200-202.

¹⁰¹ *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11 (4 February 2010).

¹⁰² Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 201.

¹⁰³ *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11 (4 February 2010) para 1.

¹⁰⁴ *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* [2010] ZAFSHC 11 (4 February 2010) para 1. See further Slade “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 333.

in South African law.¹⁰⁵ It is therefore seemingly still possible for an aggrieved expropriatee to challenge an expropriation through this argument in terms of section 25 of the Constitution.

The second type of less invasive means argument seems to fit the definition of the “alternative project argument” as set out by Hoops.¹⁰⁶ The case of *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (“*Erf 16 Bryntirion I*”)¹⁰⁷ is an example that has been analysed in both the alternative project argument and the less invasive means context.¹⁰⁸ The matter concerned an expropriation by the City of Tshwane Metropolitan Municipality of the plaintiff’s property, in order to consolidate the surrounding erven that formed the Bryntirion Presidential Estate.¹⁰⁹ The public purpose of the expropriation was to improve the security of the presidential estate by cordoning off the area, in which the plaintiff’s property was the only erf privately owned.¹¹⁰ The crux of the plaintiff’s argument was that expropriation of the property was not necessary for the intended public purpose, and that simply fencing off the property could have served the intended purpose.¹¹¹ Slade interprets this as an example of a type of less invasive means argument,¹¹² whereas Hoops points out that this argument falls closer to the alternative project argument.¹¹³

Hoops argues that it is important to differentiate between the alternative project argument and the less invasive means argument, particularly relating to necessity.¹¹⁴ The reason for this lies in the crux of what is being argued in the review proceedings, namely an attack on

¹⁰⁵ Slade “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) 333-334.

¹⁰⁶ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 681-682.

¹⁰⁷ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011).

¹⁰⁸ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) paras 1, 5; Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 425; Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 681; Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 202.

¹⁰⁹ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) paras 1-3.

¹¹⁰ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) para 4.

¹¹¹ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) para 15.

¹¹² Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 202.

¹¹³ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 681.

¹¹⁴ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 685.

the project for which the expropriation is intended, or an attack on the expropriation itself.¹¹⁵ The distinction is one that current South African expropriation law does not make, which Hoops postulates is the reason why courts struggle to identify the difference in argument.¹¹⁶ This distinction is important when considering the *Expropriation procedures*, because there is clear distinction between the project and the decision to expropriate for redistribution purposes. Expropriation is meant to be utilised only when the redistribution project is halted by the refusal to sell by the owner of the identified land, in addition to there being no suitable alternative land to use to realise that project.¹¹⁷ Thus, the less invasive means argument could be linked to the consideration of alternative land. However, the alternative project argument could be used to challenge the suitability of the land identified for the project. In this way, both arguments are potentially applicable in redistribution expropriations, even if not applicable to expropriations generally.

An obstacle to the acceptance of these arguments in South African law is the general deference by the courts to leave the executive to make its decisions autonomously. In *Erf 16 Bryntirion I*, the rational connection established by the expropriator between the public purpose and the expropriation was deemed to be sufficient to justify the expropriation.¹¹⁸ The court dismissed the application, noting that “[t]he fact that there are other ways to achieve the purposes of the expropriation is irrelevant provided that the expropriation is for a public purpose”.¹¹⁹ Thus, courts emphasise that it is the authority of the expropriator to decide how best to achieve the public purpose of the expropriation.¹²⁰ However, in the context of redistribution, the expropriator should take into account suitable alternative land

¹¹⁵ Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 691.

¹¹⁶ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 427; Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 691.

¹¹⁷ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.4 Identified and unidentified beneficiaries) 4.

¹¹⁸ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) para 10.

¹¹⁹ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2011] ZASCA 246 (1 December 2011) para 16; Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 202; Van der Walt *Constitutional property law* 3 ed (2011) 501.

¹²⁰ Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 202; Van der Walt *Constitutional property law* 3 ed (2011) 501.

before the expropriation, particularly in accordance with the *Expropriation procedures*. Furthermore, in the context of accountability and good governance,¹²¹ it may be necessary for the courts to consider more critically the nexus between the expropriation and the purpose, particularly if the expropriation is challenged through administrative law. This is notable as a potential obstacle to the utilisation of expropriation in the redistribution context.

In *Kohler*,¹²² the applicant raised the argument that less invasive means were available to the expropriator. The overall challenge of the matter was that the decision to expropriate was procedurally unfair, in accordance with administrative law.¹²³ The matter concerned an expropriation of land for the purposes of waste removal for the City of Cape Town.¹²⁴ The applicant submitted that the city had not facilitated the requisite participation by the applicant before the expropriation took place. The municipality had other means available to ensure the continuation of the waste disposal system without expropriation, such as leasing the property.¹²⁵ Furthermore, the applicant argued that had the respondent facilitated the requisite representations, the applicant would have raised the fact that the intended public purpose could have been achieved through means other than expropriation.¹²⁶ This argument seems to fall under the second type of less invasive means argument suggested by Slade. The expropriation was ultimately set aside because of the procedural unfairness of the decision, due to the lack of representations facilitated by respondent.¹²⁷ However, the court made no clear pronouncement on the acceptance, or weight of, the less invasive means argument in South African law. This is despite the fact that the municipality had other

¹²¹ See 3.2.2.

¹²² *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019).

¹²³ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019).

¹²⁴ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019) para 2.

¹²⁵ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019) para 19.

¹²⁶ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019) para 19.

¹²⁷ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Others* [2019] ZAWCHC 6 (15 February 2019) [2019] ZAWCHC 6 (15 February 2019) para 24.

means available to ensure the continuation of the waste disposal system without expropriation, such as leasing the property. Had the court considered this, it may have meant that another avenue of remedial options would be available to the expropriatee by way of the less invasive means argument in the context of administrative law.

The case of *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* (“*Staufen*”),¹²⁸ was a more recent matter that required the court to critically consider the nexus between the public purpose of the expropriation and the implemented expropriation. The case concerned the review of an expropriation of land on which Eskom, the state-owned energy producing company, operated a power plant.¹²⁹ Eskom operated a power station and occupied a portion of the applicant’s farm by means of a servitude established before the applicant took ownership of the farm.¹³⁰ Eskom’s occupation was later found to be unlawful, after which the applicant instituted eviction proceedings to remove Eskom and the power station from the farm.¹³¹ In response, the Minister of Public Works issued a notice of expropriation for the portion upon which Eskom operated the power station.¹³² The authorisation for the expropriation was under section 26(1) of the Electricity Regulations Act 4 of 2006.¹³³

The court pointed out the procedure in terms of the regulations imposed by the Electricity Regulations Act, in which certain requirements must be addressed in an application for an expropriation.¹³⁴ These include:

¹²⁸ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP).

¹²⁹ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 1.

¹³⁰ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 2.

¹³¹ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 2.

¹³² *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 2.

¹³³ Section 26(1) of the Electricity Regulation Act 4 of 2006 states that:

(1) The State may, in order to facilitate the achievement of the objectives of this Act, expropriate land, or any right in, over or in respect of land, on behalf of a licensee in accordance with section 25 of the Constitution and section 2 of the Expropriation Act, 1975 (Act No. 63 of 1975).

¹³⁴ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 52; section 2(2) of Electricity Regulation Act.

- “1. [T]he reasons and motivation why the licensee reasonably requires the land [...] to expropriate with a full description of the facilities in connection with which the land or right is required;
2. [F]ull reasons why the said facilities will “enhance the electricity infrastructure in the national interest”;
3. [A] full motivation why the requested expropriation “will be in the public interest as contemplated by section 25(2) of the Constitution”;
4. [T]he history of negotiations between the licensee and the owner for the acquisition of the land or the right and reasons why the licensee is unable to acquire such land or right by agreement;
5. [T]he practical alternatives which are open to the licensee if such land or right is not expropriated.”¹³⁵

Section 2(2)(h) of the Electricity Regulations Act holds that practical alternatives should be considered in the event of expropriation not taking place. If this section was applied on the facts of *Staufen*, practical alternatives would have had to be provided to Eskom if the Minister of Public Works decided to not expropriate, and eviction occurred. In *Staufen*, however, the detrimental implications of moving the power plant away from the applicant’s land seemed to outweigh the applicant’s arguments of alternative land being available to achieving the purpose.¹³⁶ The court in *Staufen* ultimately dismissed the application for review.¹³⁷ Although the Electricity Regulations Act seems to consider arguments that echo the less invasive means argument, there is no mandate in legislation that the practical alternatives ought to be taken once they are considered. However, in the context of redistribution, that mandate exists in the policy guidelines of the *Expropriation procedures*. Thus, the less invasive means argument could potentially hold more weight in a case dealing with a redistribution

¹³⁵ As quoted by the court in *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 52; and contained in section 2(2) of the Electricity Regulations Act.

¹³⁶ This was because the effect of not expropriating in favour of Eskom would have had a widespread impact on all the surrounding areas to which Eskom provided power. Eskom required the land in order to keep operating the power station. See *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 41.

¹³⁷ *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others* 2019 2 SA 295 (ECP) para 93.

expropriation in terms of Act 126 of ESTA, than in cases about expropriation generally as highlighted above.

3 2 6 Conclusion

The above discussion brings to light three conclusions regarding the considerations that apply to expropriation as an administrative act.

The first is that an expropriation is subject to considerations in administrative law over and above the ones contained in section 25(2) of the Constitution. Administrative law is useful because it provides the regulation for the lawful and constitutional exercise of public power. Administrative principles such as good governance and *batho pele*, ensure that the administration utilises its power in a manner consistent with the Constitution. Expropriation, as an exercise of public power, should therefore be exercised in a manner that is lawful, procedurally fair and reasonable. Although not attached to administrative law, the less invasive means and alternative project arguments furthermore support the lawful and reasonable requirements in administrative law. Challenging an expropriation on the grounds of the less invasive means or alternative project arguments requires an evaluation similar to reasonableness in terms of administrative law. These arguments are particularly relevant in the context of redistribution expropriations due to the *Expropriation procedures*. Thus, administrative considerations provide a higher standard to be overcome in redistribution expropriations, than the requirements in terms of section 25(2) of the Constitution. However, these considerations are useful in ensuring that expropriations are lawful, reasonable and consistent with the Constitution. This means that these considerations are not an obstacle to the utilisation of expropriation in redistribution, but rather a vehicle to the lawful use of expropriation.

Secondly, the application of the spectrum between rationality and proportionality is easier to conceptualise in terms of administrative law than in terms of section 25 of the Constitution.

Administrative law provides a useful way to determine the reasonableness of an expropriation, through section 6(2)(h) of PAJA and the *Bato Star* considerations. Thus, the spectrum between rationality and proportionality can be conceptualised in terms of reasonableness. However, the arbitrariness standard in the specific context of expropriation needs further clarification, particularly if the 2019 Expropriation (draft) Bill is enacted. It is not clear if courts will consistently apply the *FNB* methodology going forward, and section 25(2) of the Constitution does not explicitly make reference to arbitrariness. An expropriatee may choose to challenge an expropriation either through section 25(2) of the Constitution or through PAJA, as indicated by *Kohler*.¹³⁸ An expropriation is always required to be reasonable in terms of administrative law; however, applying the non-arbitrariness requirement to expropriation needs significant substantiation. Thus, administrative law potentially simplifies the task of challenging the rationality or proportionality of an expropriation.

Lastly, the difficulties that do exist in applying administrative considerations to expropriations do not seem to be the reasons for underutilisation of expropriation in redistribution. Although the difficulty in conceptualising and justifying some of the administrative concepts could potentially deter expropriators from embarking on an expropriation, it is not equally clear whether these issues necessarily form part of the initial considerations taken by the expropriator to such an extent that they impact on the decision to expropriate. Thus, these considerations cannot be directly imputed as a reason for the limited utilisation of expropriation in redistribution. The administrative considerations instead seem to strengthen the lawful use of expropriation in South Africa and should be closer integrated into the expropriation discourse. Thus, although the administrative considerations applicable to expropriation apply over and above the section 25(2) requirements of the

¹³⁸ Albeit tempered by the subsidiarity principle, see Van der Walt *Constitutional property law* 3 ed (2011) 68.

Constitution, these considerations allow for improved utilisation of expropriation to be consistently applied with the Constitution and should not be seen as a hindrance.

3 3 Legitimate justification of South African expropriation in redistribution

3 3 1 Introduction

It has been established that expropriation as an administrative action invokes certain considerations that must be considered over and above the section 25 requirements in the Constitution. This suggests that these considerations place a higher hurdle for expropriation in administrative law than in expropriation law. Surmounting obstacles in both expropriation and administrative law should impute a sense of overall legal validity to an expropriation. In this regard, one can theoretically apply a standard of legitimate justification to an expropriation. This may be useful clarifying the manner in which administrative considerations should be taken into account in expropriation for land redistribution. The “legitimate justification” for the purposes of this chapter is meant to refer to an expropriation that has satisfied both expropriation law and administrative law requirements. It is therefore more stringent a measure than required for a valid expropriation, as held in section 25(3) of the Constitution and the 1975 Expropriation Act and is important for this chapter because it gives an idea of which administrative considerations apply to expropriations, particularly in redistribution.

The meaning of a legitimate justification is therefore meant to be an amalgamation of considerations already applicable to expropriations as administrative acts in South Africa. If the expropriation can withstand constitutional muster and the scrutiny of administrative review, the decision can be considered an overall legitimate one.¹³⁹ Thus, without such a

¹³⁹ This is not to say that a decision yet to be placed under review is illegitimate. However, if a legitimate expropriation were to be reviewed, it would still be valid. See *Harvey v Umhlathuze Municipality and Others* 2011 1 SA 601 (KZP) para 84.

legitimate justification, the potential for challenging and reviewing an expropriation remain high. The legitimate justification for expropriation has much to do with the cause that gives rise to the expropriation, which for the purpose of this section is land redistribution in South Africa.¹⁴⁰ The usefulness of using these considerations in conceptualising the expropriation procedure is that it allows for an encompassing view of all the required justifications of a valid expropriation. In this regard, Table 3 below illustrates some of the more important considerations for a legitimate expropriation.

Table 3: Considerations for a legitimate redistribution expropriation in South Africa

State question	Consideration
Legitimate purpose	Public purpose/public interest Suitability test
Suitability and need for the (redistribution) project and expropriation	Rationality
Balance between project's public benefits and adversely affected interests	Proportionality in terms of reasonableness Section 36(1) of the Constitution

Source: Adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

The column on the right-hand side of Table 3 gives an indication of some the considerations that the administrator could use in testing and determining the relevant state question as contained in the column on the left-hand side. The state questions are some of

¹⁴⁰ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 29.

the factors that supplement the legitimate justification of expropriation. Although the 1975 Expropriation Act and PAJA are applicable as a means of review after an expropriation has taken place, the Table 3 state questions and considerations should presumably be taken into account by the expropriator *before* an expropriation takes place. Thus, much like two sides of the same coin, these considerations that guide an expropriator to expropriate may be interpreted by the expropriatee conversely when seeking recourse for the expropriation. These considerations are elaborated upon below.

3 3 2 Legitimate purpose

The legitimate purpose of the expropriation seemingly relates to the lawfulness of the authorisation of the expropriation. Thus, the public purpose/public interest requirement in terms of section 25(2) of the Constitution would inform the legitimate purpose of the expropriation.¹⁴¹ This position has been criticised as a very limited conception of what should inform the legitimate purpose for expropriation.¹⁴² The 1975 Expropriation Act also gives very little guidance as to what constitutes a legitimate public purpose. The only guidance offered is that the expropriation should reasonably be required for the purpose.¹⁴³

Hoops suggests a suitability test to determine the legitimacy of the purpose on the basis of the first appeal in the matter of *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (“*Erf 16 Bryntirion II*”).¹⁴⁴ The court in *Erf 16 Bryntirion II* used *Bato Star* to inform its interpretation of public purpose, and found that if the expropriation (the administrative act) cannot reasonably result in the realisation of the intended purpose, and is not supported by facts to

¹⁴¹ *Harvey v Umhlathuze Municipality and Others* 2011 1 SA 601 (KZP) para 82.

¹⁴² Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 30; AJ van der Walt & BV Slade “Public purpose and changing circumstances: *Harvey v Umhlathuze Municipality & Others*” (2012) 129 *South African Law Journal* 219 220.

¹⁴³ It should be noted that this guideline only applies in instances where expropriation occurs on behalf of a juristic person. See Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 421; section 3(1) of the 1975 Expropriation Act.

¹⁴⁴ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154 (12 October 2010).

suggest that it will, the court should review the decision.¹⁴⁵ This forms a suitability test according to Hoops because it is suggested that if the project (and therefore the expropriation) is suitable to reasonably realise the purpose, it would then be a legitimate one.¹⁴⁶ If not, an illegitimate purpose is served by the expropriation. Therefore, the consideration of the legitimacy of the purpose closely hinges with the suitability of the project and expropriation, which is discussed accordingly.

3 3 3 Suitability of the project and expropriation

The suitability and need for the project and expropriation are seemingly informed by the rationality of the decision to expropriate. The rationality of the expropriator's decision is determined by assessing whether the decisions rationally connected to the project (which in the context of this thesis is redistribution of land), which is served by using expropriation. In this regard, the suitability and the need for the (redistribution) project compared to the suitability for expropriation are potentially different. The suitability for a project, such as a resettlement scheme or small-scale commercial farm for the beneficiaries of land redistribution,¹⁴⁷ may not equate to the suitability of expropriation to achieve such a project. The suitability of the project and expropriation are important in redistribution because of the *Expropriation procedures*.

Expropriation in terms of the *Expropriation procedures* should only take place when the intended (redistribution) project cannot proceed because "the owner won't sell at [an] appropriate price or there is no suitable alternative land and the only alternative option is to recommend that the land be expropriated".¹⁴⁸ Thus, the suitability of using expropriation for

¹⁴⁵ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* [2010] ZAGPPHC 154 (12 October 2010) para 54; Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 422.

¹⁴⁶ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 422.

¹⁴⁷ Policy determines the intended projects that the redistribution of land is meant to aid. See 2 3 3 5; 2 3 3 7.

¹⁴⁸ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.4 Identified and unidentified beneficiaries) 4.

a redistribution project is limited by whether the owner refuses to sell the identified property, whether suitable alternative land is available, and if the only appropriate option is for expropriation to be utilised.

The need for expropriation according to the *Expropriation procedures* is therefore determined by whether or not the owner has refused to sell the property. This is supported by section 2(3) of the 2019 Expropriation (draft) Bill.¹⁴⁹ However, the definition of “suitable” alternative land is not included in the *Expropriation procedures*. It is in this regard that the administrative use of rationality may prove beneficial. Expropriation as an administrative action requires a sufficient rational or proportional link between the expropriation and the purpose thereof.¹⁵⁰ It is this link that informs considerations such as reasonableness, arbitrariness, and can be used to determine whether the suitability of the project and expropriation are justified.¹⁵¹

Hoops identifies certain instances where expropriation would clearly not be suitable.¹⁵² These include instances in which the land is not suitable to implement the intended project, or if the project was not intended to be implemented on that land.¹⁵³ Furthermore, an expropriation is not suitable when the expropriated land is not large enough for the intended project.¹⁵⁴ The instances identified by Hoops’ seem to adequately add guidelines regarding suitability based on rationality. These examples are supported by Slade’s argument that an expropriation must be deemed necessary when other options to achieve the public purpose/interest have been exhausted.¹⁵⁵ A rational decision to expropriate is one that is

¹⁴⁹ Section 2(3) of the 2019 Expropriation (draft) Bill states that:

[...] a power to expropriate property may not be exercised unless the expropriating authority has without success attempted to reach an agreement with the owner or the holder of an unregistered right in property for the acquisition thereof on reasonable terms.

¹⁵⁰ Marais (2017) 33 *South African Journal on Human Rights* 101; Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 423; Kidd “Reasonableness” in Quinot (ed) *Administrative justice in South Africa* (2015) 175, 183.

¹⁵¹ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 423, see also Table 3.

¹⁵² Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 437.

¹⁵³ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 437

¹⁵⁴ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 437.

¹⁵⁵ Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 207.

“objectively capable of furthering the purpose [...] for which the decision was purportedly taken”.¹⁵⁶ If the project cannot be implemented on the identified land or the project is to be implemented on a different parcel of land, the decision to expropriate for that project cannot be a rational one. Thus, in accordance with the *Expropriation procedures*, the suitability of the expropriation in redistribution is determined by rationality, and whether the intended parcel of land is required for the implementation of the intended project. Moreover, if the suitability of the project is not established, the rationality of the decision to expropriate can be brought under review in terms of section 62(2)(f)(ii) of PAJA.¹⁵⁷ Thus, the suitability of the project and the expropriation is therefore a consideration in administrative law that must be overcome in addition to the expropriation law requirements.

3 3 4 Balance between project’s public benefits and adversely affected interests

The balance between the project’s public benefits and adversely affected interests is also an important aspect in the legitimate justification of expropriation. This bears importance due to the potential for expropriation to infringe on certain rights in the Bill of Rights. This balance is rooted in reasonableness according to administrative law, and the wording from sections 25(3) and 36(1) of the Constitution. In terms of expropriation law, the interests of the expropriatee are taken into account to a very limited extent.¹⁵⁸ The only context in which the interests of the expropriatee are considered is the determination of compensation in

¹⁵⁶ Hoexter *Administrative law in South Africa* 2 ed (2012) 340. See also Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 423-424.

¹⁵⁷ Section 6(2)(f)(ii) of PAJA states that a decision can be brought under review if:

- (f) the action itself-
- (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision.

¹⁵⁸ These interests are accounted for in considerations such as reasonableness. The courts are not compelled to take into account the individual expropriatees’ interest since no provision in terms of general expropriation law requires this, see Hoops *The legitimate justification of expropriation* (2017) 446.

terms of section 25(3) of the Constitution.¹⁵⁹ In terms of administrative law, the standard of reasonableness is useful to balance the public interest served by the expropriation and the interests of the expropriatee. This is supported by the fact that in administrative law, every person whose rights are adversely affected by an administrative decision has the right to be given reasons for the decision.¹⁶⁰ When dealing with an expropriation of land, the adversely affected interests as a result of an expropriation include the interests of the expropriatee, and the interests of the environment.¹⁶¹ Thus, there are a number of potential interests to take into account when expropriating land.

Section 36(1) of the Constitution provides the criteria to establish whether a limitation of a constitutional right, such as the right to property, can be justified.¹⁶² This supports the legitimate justification for expropriation because the purpose served by the expropriation can be weighed against the adversely affected rights of the expropriatee by compelling the state to justify the limitation on a right.¹⁶³ The purpose of the expropriation is important in this regard because the decision to expropriate presumes that the public purpose/interest served by the expropriation weighs more than the adversely affected rights of the expropriatee.¹⁶⁴ Thus, an equitable balance is presumably struck between the public benefit of the project/expropriation and the protection (or detraction) of individual property rights.¹⁶⁵

¹⁵⁹ Section 25(3) of the Constitution states that the determination of compensation should “reflect an equitable balance between the public interest and the interest of those affected”. See Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 448. See also chapter 4 below.

¹⁶⁰ Section 33(2) of the Constitution; Kidd “Reasons” in Quinot (ed) *Administrative justice in South Africa* (2015) 198; Hoexter *Administrative law in South Africa* 2 ed (2012) 470.

¹⁶¹ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 445.

¹⁶² In terms of section 36(1) of the Constitution this criteria includes:

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

See also Currie & De Waal *The bill of rights handbook* 6 ed (2013) 151.

¹⁶³ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 446.

¹⁶⁴ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 447.

¹⁶⁵ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 447; Van der Walt *Constitutional property law* 3 ed (2011) 41.

Section 36(1) and reasonableness in terms of administrative law provide the means to test this equitable balance in the context of expropriation.¹⁶⁶

The application of section 36(1) of the Constitution is generally accepted to be a two stage process.¹⁶⁷ The first step is to determine the scope of the applicable right,¹⁶⁸ in this context it is the right to property in terms of section 25 of the Constitution. The second step is to determine whether the limitation of the right is justified, which is a factual determination.¹⁶⁹ The justification that section 36(1) provides is on the basis that the limitation posed to the applicable right is a reasonable one.¹⁷⁰ Reasonableness in the context of section 36(1) of the Constitution occurs when the infringement of the right is deemed proportional to the benefits achieved from the limitation.¹⁷¹

It has been argued that sufficient justification for the limitation should be made when an expropriation takes place.¹⁷² This is due to the extensive nature of the limitation posed by expropriation on an individual's right to property for the benefit of the community.¹⁷³ If the balance between project's public benefits and adversely affected interests is not established the decision to expropriate can be challenged in review through section 6(2)(h) of PAJA,¹⁷⁴

¹⁶⁶ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 449. Although section 25(1) of the Constitution is considered to have an internal limitation clause, it does not seem to preclude the application of section 36(1) of the Constitution. This position was assumed in the case of *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 110. See also T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014) 46-26 – 46-28; K Iles "Limiting socio-economic rights: Beyond the internal limitations clauses" (2004) 20 *South African Journal on Human Rights* 448 452.

¹⁶⁷ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 154; Iles (2004) 20 *South African Journal on Human Rights* 453.

¹⁶⁸ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 154; Iles (2004) 20 *South African Journal on Human Rights* 453.

¹⁶⁹ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 154; Iles (2004) 20 *South African Journal on Human Rights* 453.

¹⁷⁰ *Nhlabathi and Others v Fick* [2003] ZALCC 9 paras 32-33. See also Currie & De Waal *The bill of rights handbook* 6 ed (2013) 162.

¹⁷¹ Currie & De Waal *The bill of rights handbook* 6 ed (2013) 163. The definition was sourced from *S v Makwanyane* 1995 3 SA 391 (CC) para 104. Currie & De Waal state that the definition of reasonableness from *S v Makwanyane* 1995 3 SA 391 (CC) has become a standard reference by the Constitutional Court when considering the legitimacy of a limitation placed on a constitutional right.

¹⁷² Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 207; Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 680.

¹⁷³ Slade 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 207; Hoops 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 680.

¹⁷⁴ Section 6(2)(h) of PAJA.

3 3 6 Conclusion

The legitimate justification for expropriation is an important legal aspect to expropriation. The legitimate justification refers to considerations both in expropriation law and in administrative law that contribute to limiting potential reasons to challenge the decision to expropriate. An expropriation can potentially be challenged through administrative law even if the expropriation is valid in terms of section 25(2) of the Constitution. It is in this regard that the consideration such as the legitimate purpose, the suitability and need for the project and expropriation and the balance between the project's purpose and the public interest become important. If these considerations are not adequately addressed, an expropriation can be challenged through judicial review in terms of PAJA. In this way, these extra administrative hurdles must be overcome in addition to the expropriation requirements in section 25 of the Constitution. However, these hurdles do not seem to pose an obstacle to the framework that makes provision for expropriation in redistribution, but does potentially affect the state actually making use of the expropriation power. Ensuring these considerations are addressed adequately reduces possible points of review after an expropriation has taken place, and should therefore encourage a lawful use of expropriation in redistribution. However, it sets the bar of legal considerations to overcome much higher, and may be a contributor to the limited use of expropriation in redistribution thus far.

3 4 Legislative incorporation of the legitimate justification in redistribution expropriation

3 4 1 Introduction

The administrative considerations discussed above are, in certain respects, incorporated into the current legislative framework for expropriation for redistribution purposes. In order to give a clearer indication of how thorough the expropriation framework takes these

administrative hurdles into account, the relevant state questions and administrative considerations will be analysed with reference to expropriation statutes. The aim of this analysis is to better understand what the provisions in the expropriation legislative framework in redistribution provide, and indicate which administrative hurdles are overcome by the framework as it stands.

3 4 2 General expropriation legislation

The Bills aimed at replacing the 1975 Expropriation Act have resulted in a slow progression towards framing the expropriation power to better suit the needs of the present time. The 2019 Expropriation (draft) Bill is the only potential replacement of the 1975 Expropriation Act at this point. However, there is use in the academic exercise of reflecting on the nuances of the changed Bills since 2008. This is because certain trends are suggested in terms of some of the provisions, and it is useful to keep track of the beneficial legislative changes over time. For purposes of this section, general expropriation legislation refers to the 1975 Expropriation Act, and the draft Bills aimed at replacing the Act.

In the context of the general expropriation legislation, the first few provisions of the various statutes are the only guidance offered on the legitimate purpose. These sections generally set the parameters of the expropriation power to be exercised. Hoops points out that the 1975 Expropriation Act does not suggest the relationship that is meant to exist between the expropriation project and the purpose.¹⁷⁵ Section 3(1) of the 1975 Expropriation Act does require that the property must be “reasonably” required for the intended purpose.¹⁷⁶ This section is similarly maintained in section 4 of the Expropriation Bill B16-2008 (“2008

¹⁷⁵ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 421.

¹⁷⁶ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 421. See also section 4(1) of the 2008 Expropriation Bill and the 2013 Expropriation (draft) Bill, and section 3(2) of the 2015 Expropriation Bill and 2019 Expropriation (draft) Bill, which limits this delegation to other organs of state and not juristic persons.

Expropriation Bill”) and section 4(2) of the Expropriation Bill (draft) in GN 234 of 2013 GG 36269 of 20-03-2013 (“2013 Expropriation (draft) Bill”), but both Bills require that the Minister must be satisfied that it is required for a public purpose/public interest. Thus, if the public purpose/interest is established in terms of legislative authorisation, which reasonably requires expropriation, the purpose is assumed as legitimate.¹⁷⁷ Further guidance on the project will therefore be informed by authorisation from a specific expropriation statute, such as a redistribution statute or from the project itself.¹⁷⁸

Section 6(1) of the 1975 Expropriation Act empowers the Minister to inspect and verify the property intended for expropriation.¹⁷⁹ The 2008 Expropriation Bill mentions an Expropriation Advisory Board established in section 6, the function of which was to advise the Minister on “all aspects of expropriation, including compensation”.¹⁸⁰ Section 10 of the 2008 Expropriation Bill emphasised the requirement that the Minister must consider land reform to redress past discrimination in the investigation and valuation of the property.¹⁸¹ This commitment is echoed in clauses 5 and 6 of the Memorandum on the objects of the Expropriation Bill, 2015, but interestingly not carried forward to the 2019 Expropriation (draft) Bill. Although not brought forward into the 2019 (draft) Bill, the requirement that redress of past discrimination should be taken into account in the early stages of an expropriation supports the legitimate purpose of redistribution expropriation in the context where property is expropriated for redistribution purposes.

Section 6(1)(a) and section 5(1)(a) of the 2015 Expropriation Bill and the 2019 Expropriation (draft) Bill make specific reference to the suitability and the purpose of the expropriation.¹⁸² The peremptory use of the word “must” in the section suggests that the

¹⁷⁷ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 421.

¹⁷⁸ See 2 3 2 for examples of redistribution statutes. Other examples include specific statutes that authorise expropriation such as the National Roads Act 54 of 1971 or the Electricity Regulations Act.

¹⁷⁹ Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 437.

¹⁸⁰ Section 8(1) of 2008 Expropriation Bill.

¹⁸¹ Section 10(1)(b) of the 2008 Expropriation Bill.

¹⁸² Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 437.

suitability, and the investigation necessary to determine suitability, are an imperative part of the expropriation process.¹⁸³ In the general expropriation legislation, the legitimacy, suitability and need for a project are broadly accounted for in a range of sections in the general expropriation legislation. Table 4 below illustrates the above analysis of the general expropriation legislation. The analysis of specific expropriation statutes (authorising redistribution) in light of the administrative considerations and state questions takes place thereafter.

Table 4: Expropriation Bills and Acts

	1975 Expropriation Act	2008 Expropriation Bill	2013 Expropriation (draft) Bill	2015 Expropriation Bill	2019 Expropriation (draft) Bill
Legitimate purpose	Section 2,3, 5	Section 2 - 5	Section 2-5	Section 2-4	Section 2-4
Suitability of project and Suitability of expropriation	Section 6-9	Section 10-14	Section 6-12	Section 5-11	Section 5-11
Balance between project's public benefits and adversely affected interests	Section 6	Section 8(6)	Section 6-7	Section 5-6	Section 5-6

Source: Author's own design, y-axis adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

3 4 3 Specific redistribution expropriation provisions

The more specific expropriation statutes in the context of redistribution are also important in the legitimate justification of expropriation. It is important to note that these statutes work

¹⁸³ Section 5(1)(a) – (2) of the 2015 Expropriation Bill and 2019 Expropriation (draft) Bill. The general principle is that the word "must" is peremptory, unless otherwise suggested. See *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 1 SA 308 (SCA) para 32 and Hoexter *Administrative law in South Africa* 2 ed (2012) 49.

in conjunction with the general expropriation legislation, which at this time is the 1975 Expropriation Act but may in the near future be subject to amendment or repeal.¹⁸⁴ Thus, to a certain extent, the general expropriation statutes reduce the amount of considerations that need to be addressed by the more specific redistribution statutes. This is because if certain considerations, such as suitability, is adequately addressed in the general legislation; suitability need not be addressed in the same way in the specific redistribution provisions.

However, these statutes have an important role to play in authorising expropriation for land redistribution. Therefore, the expropriations that these statutes authorise can support the legitimate justification of expropriation if some of the administrative hurdles are addressed in the specific provisions. The legitimate purpose in these more specific statutes is dependent on the aim of the statute as a whole, and can be found in the preamble of the statute. Act 126 is, for instance, aimed at designating, providing and subdividing land for settlement purposes. Act 126 is broad in its purpose, and any limitations put on land by laws regarding the subdivision of agricultural land or establishing townships are not applicable to land acquired for the Act's purposes.¹⁸⁵ Thus, there are a wide array of projects that can be instituted in order to make land available for settlement. Sections 4-8 of Act 126 generally provide for the development of land designated by the Minister for settlement, and the manner in which developers (if used) should go about planning a development. This, read in conjunction with section 12 of Act 126, sets out the possible development of a project and the power of the Minister to expropriate for such an instance.

The broadness of this statute regarding a specific project is likely not to limit the type of projects that could be developed for land redistribution.¹⁸⁶ Expropriation in terms of the Act

¹⁸⁴ These changes include the tabled amendment to section 25(2) of the Constitution, making provision for expropriation without compensation. See Constitution Eighteenth Amendment (draft) Bill (2019) Cape Town: Parliament <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191203Draft_advertised.pdf> (accessed 31-01-2020) Furthermore, the 1975 Expropriation Act will potentially be replaced by the 2019 Expropriation (draft) Bill.

¹⁸⁵ Section 2(4) of the Provision of Land Assistance Act.

¹⁸⁶ Redistribution projects can include settlement and business enterprises. See 2 3 3 4.

126 will be predominantly for settlement purposes.¹⁸⁷ The legitimacy of this purpose is informed by the mass landlessness that prevails in South Africa today as a result of apartheid.¹⁸⁸ It is therefore in the interests of promoting land access that providing land for settlement is legitimately in the public interest.¹⁸⁹ Section 12 of Act 126 empowers the Minister to expropriate for the purposes of the Act. Thus, it is clear that Act 126 empowers the use of expropriation for a valid purpose.

The purpose of ESTA is to strengthen the tenure rights of South Africans whose insecure tenure leaves them vulnerable to eviction.¹⁹⁰ This statute promotes redistribution through redistributing farmland to workers and rural dwellers in instances where the inhabitants qualify as occupiers.¹⁹¹ The Minister is granted expropriating powers in terms of section 26(1) of ESTA. This power is granted for the reform developments envisaged by the Act.¹⁹² ESTA similarly sets out land to which the Act applies,¹⁹³ and the measures that the Minister may use to facilitate the long-term tenure security for occupiers.¹⁹⁴ The suitability of the project and expropriation in the context of ESTA and Act 126 are not found in the legislation. However, the *Expropriation procedures* was specifically drafted to guide expropriations which take place in terms of Act 126 and ESTA. Thus, the suitability of the project in the redistribution context will come from the *Expropriation procedures*, and will be dependent on whether the owner refused to sell the property, the existence of suitable alternative land, and whether expropriation was the only appropriate tool to achieve the purpose.¹⁹⁵

The Land Reform (Labour Tenants) Act 3 of 1996 ("Labour Tenants Act") is also a statute aimed at improving the tenure security of occupiers, but it applies specifically in the context

¹⁸⁷ Section 2 of Provision of Land Assistance Act 126 of 1993; see 2 3 2.

¹⁸⁸ See 2 2 2 1.

¹⁸⁹ Section 25(7) of the Constitution.

¹⁹⁰ Preamble of ESTA; Pienaar *Land reform* (2014) 303.

¹⁹¹ Pienaar *Land reform* (2014) 303.

¹⁹² See "Off-site developments" in section 1 of ESTA; Pienaar *Land reform* (2014) 303.

¹⁹³ Section 2 of ESTA.

¹⁹⁴ Section 4(1) of ESTA, which includes planning on and off site developments and acquiring land for such developments.

¹⁹⁵ See 3 3 3 above.

of dwellers that fit the definition of labour tenants.¹⁹⁶ Provision for expropriation can be found in sections 2(2) and 12 of the Labour Tenants Act. The importance of the redistributive ends served by this statute is due to the amount of racial regulation that applied to rural land during apartheid, the effects of which need to be rectified in the constitutional dispensation.¹⁹⁷ The legitimate purpose served by the Labour Tenants Act is therefore rooted in the secure tenure granted to labour tenants, through the redistribution of land. The *Expropriation procedures* do not apply to expropriations in terms of the Labour Tenants Act,¹⁹⁸ and there is no similar policy that refers to the expropriation procedures for the Labour Tenants Act. Thus, guidelines regarding the suitability of the project and expropriation should be found in the rationality standard in terms of administrative law.

The Restitution Act is similarly aimed at redressing past laws, and has the aim of returning land rights to communities dispossessed under racial laws.¹⁹⁹ In accordance with section 42E of the Restitution Act, the Minister may acquire land for land claims through purchase or expropriation. The Land Claims Court is furthermore empowered to order the state to expropriate land in order to restore land in a claim, and determine the compensation thereof.²⁰⁰ Similarly to the Labour Tenants Act, the *Expropriation procedures* do not apply to expropriations in terms of the Restitution Act. However, the suitability of the expropriation is guided by section 42E of the Restitution Act, which provides for negotiation for land acquisition before expropriation is used. The rationality standard in terms of administrative law can also be applied in expropriations in terms of the Restitution Act, in order to determine the suitability and need for the expropriation.

¹⁹⁶ Preamble of the Labour Tenants Act; Pienaar *Land reform* (2014) 305. See also H Mostert, JM Pienaar & J van Wyk "Land" in WA Joubert, JA Faris and LTC Harms (eds) *Law of South Africa* Vol 14 part 1 (2010) para 115.

¹⁹⁷ These include the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936. See Pienaar *Land reform* (2014) 305.

¹⁹⁸ The *Expropriation procedures* specifically apply to expropriations in terms of ESTA and Act 126.

¹⁹⁹ Preamble of the Restitution Act. See also section 25(5) of the Constitution and Pienaar *Land reform* (2014) 533.

²⁰⁰ Section 22(1)(b) and section 35(1)(a) of the Restitution Act.

Table 5 below illustrates the incorporation of the above mentioned considerations in the specific redistribution legislation.

Table 5: Expropriation provisions in land redistribution legislation

	Provision of Land and Assistance Act 126 of 1993	Extension of Security of Tenure Act 62 of 1997	Restitution of Land Rights Act 22 of 1994	Land Reform (Labour Tenants) Act 3 of 1996
Expropriation power	Section 12	Section 26	Section 42E(2)-(3)	Section 2(1), (2)
Legitimate purpose	Section 2 Section 12	Section 1 Section 26	Section 22(1)(b)	Section 2
Suitability of project and Suitability of expropriation	Section 12(2) Section 4-8	Section 4(1)	Sections 2-3 Sections 4-6 Section 42E(1)	Section 3(1) Section 16(1)
Balance between project's public benefits and adversely affected interests	Section 5-6	-	Section 42E(1)	Section 4(8)

Source: Author's own design, y-axis adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

3 4 4 The expropriation vehicle

The legislative framework for expropriation in redistribution should satisfy both expropriation law requirements in addition to administrative law requirements to ensure that there are few reasons to challenge or hinder the use of expropriation. This legislative framework includes the general expropriation legislation, specific redistribution statutes that authorise expropriation. It is through the smooth running of this framework that expropriation as a mechanism to land redistribution can be effectively utilised. Tables 3, 4 and 5 illustrate

what these considerations are, and where they can be taken into account in the general and specific expropriation legislative framework. However, to better conceptualise the importance of this framework working together, one can use the analogy of a car trying to reach a destination as a metaphor for expropriation.

If one could conceptualise a project that results in the redistribution of land as a destination, expropriation would be, possibly the fastest, vehicle that the Minister of Public Works could utilise to get there.²⁰¹ Like any motor vehicle, the expropriation vehicle is one that must be roadworthy and usable, equipped and fortified by the empowering legislation, supporting policy frameworks, the requirements of section 25 of the Constitution, and the checks and balances of administrative law as the chassis, wheels and engine of the car.²⁰² For every speed hump that the expropriation vehicle faces, the legislative framework should rightly equip the vehicle to overcome with ease.

It is when the legislative framework has not sufficiently equipped the expropriation vehicle that administrative considerations and relevant state questions become speed humps that the vehicle cannot overcome. The added element of judicial review being a potential roadblock on the road to redistribution should furthermore be a small delay on an otherwise straightforward journey to the destination. Therefore, essentially not posing great obstacles in the way initially thought, these added considerations are necessary for the utilisation of the expropriation power.

Thus, like any functioning machine, it is in the smooth running of all the related parts of the expropriation action that allow for proper use of the mechanism. However, even if every aspect of the expropriation vehicle is prepared to weather any terrain, the destination will never be reached if the vehicle has no driver. Similarly, even if the extra administrative

²⁰¹ This is in comparison to other land acquisition methods such as land audits and purchase through the market.

²⁰² The applicable legislation and policies include the 1975 Expropriation Act, the Provision of Land Assistance Act, PLAS and PAJA.

considerations noted in this chapter are clarified and overcome through legislation or policy, political will has a large role to play in establishing whether the state will step up and drive the vehicle to its constitutional target.

3 5 Conclusion

Expropriation of property is a state power that is governed by requirements in both expropriation law and administrative law. Although these additional requirements in administrative law seem to further burden the utilisation of expropriation, administrative law ensures that constitutional checks and balances apply to the use of all state powers, including expropriation. These checks and balances include holding each expropriation to a reasonableness standard, and ensuring that each expropriation is subject to the principles of good governance and *batho pele*. This bears particular importance in redistribution, because expropriation is a means to redress the mass landlessness in South Africa.

Furthermore, administrative law provides a useful way to determine the reasonableness of an expropriation, through section 6(2)(h) of PAJA and the *Bato Star* considerations. Thus, the spectrum between rationality and proportionality can be conceptualised in terms of reasonableness. This means that the application of the spectrum between rationality and proportionality is easier to conceptualise in terms of administrative law than in terms of section 25 of the Constitution. Moreover, the arbitrariness standard in the specific context of expropriation needs further clarification, particularly if the 2019 Expropriation (draft) Bill is enacted. It is not clear if courts will consistently apply the *FNB* methodology going forward, and section 25(2) of the Constitution does not explicitly make reference to arbitrariness. In this way, extra administrative hurdles do not seem to stand in the way of expropriation.

If one applies a legitimate justification to expropriation, each consideration ensures that there are fewer reasons to question or review an expropriation decision in redistribution.

These considerations include: the suitability of the project and expropriation, suitable alternative land or less invasive means than expropriation, the legitimacy of the purpose served by the expropriation, and the balance maintained between the public interest and interests of the expropriatee. These considerations can be informed by different sources of law, either through administrative considerations, such as reasonableness; arbitrariness in terms of section 25 of the Constitution, or the proportionality test in section 36(1) of the Constitution.

It seems that the key to improving the use and understanding of redistribution expropriations lies in a clearer incorporation of the important administrative considerations in the current redistribution statutes and policies. Although this chapter does not single out any hurdle in particular, it is suggested that the administrative hurdles posed to expropriation ensure that there are fewer reasons to challenge or hinder an expropriation. Thus, administrative law does not seem to be the reason that the expropriation vehicle in redistribution is underutilised. Another important part of the expropriation decision is the determination of compensation. Thus, compensation as a potential obstacle to land redistribution expropriations is discussed in chapter 4.

Chapter 4: Compensation as a potential obstacle to land redistribution expropriations

4 1 Introduction

It has been established in chapter 3 that some elements of administrative regulation should promote land redistribution expropriations taking place, if exercised correctly. In this chapter, arguably the most contentious expropriation requirement is discussed.¹ The compensation requirement is established in Constitution of the Republic of South Africa, 1996 (“the Constitution”) and the Expropriation Act 63 of 1975 (“1975 Expropriation Act”).² The question this chapter therefore aims to grapple with is whether the compensation payable for expropriation is a potential obstacle to the use of redistribution expropriations.

Du Plessis surmises that there are three essential requirements for a valid expropriation, namely “a law, a purpose, and compensation”.³ In chapter 2, redistribution as a purpose for expropriation is contextualised, and in chapter 3, the advantages that allow administrative law to be a vehicle for expropriation are discussed. In this chapter, the nature of the duty to pay compensation is discussed.

As a point of departure, the requirements of compensation for expropriation, particularly in light of the latest Expropriation Bill (draft) GN116 of 2018 (“2019 Expropriation (draft) Bill”), are discussed.⁴ Thereafter, the question of whether the acquisition of land for redistribution is legally more burdensome in expropriation than in market-based land acquisition is unpacked. In this regard, issues attached to property valuation and the willing buyer/willing

¹ C Ng’ong’ola “Property guarantees in old and new Southern African constitutions” in B Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 154 158. This area of law is notably under development, with a potential replacement to the Expropriation Act 63 of 1975 and possible amendment of section 25 of the Constitution of the Republic of South Africa, 1996.

² Section 25(3) of the Constitution and section 12 of the 1975 Expropriation Act.

³ E du Plessis “The public purpose requirement in the calculation of just and equitable compensation” in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I* (2015) 369 376; E du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in B Hoops, EJ Marais, L van Schalkwyk & NK Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 191 191.

⁴ Expropriation Bill (draft) in GN116 of 2018 GG 42127 of 21-12-2018.

seller (“WB/WS”) principle will be analysed. It is from these discussions that it can be determined if the requirement of compensation for land redistribution expropriations is a hindrance to the utilisation of expropriation in redistribution.

4 2 Compensation for expropriation

4 2 1 Introduction

This section explores the meaning of compensation for expropriation in South African law. The concept of compensation in the context of expropriation is set out as a point of departure. This is a particularly vexing issue in light of the parliamentary debates that have called for expropriation to take place without compensation.⁵ Thereafter, the requirements around the time, manner and amount for compensation will be set out. This section concludes with a discussion of how the compensation amount is meant to be determined, and the implications that the compensation requirement potentially has on the utilisation of expropriation in redistribution

4 2 2 Conceptualising compensation for expropriation

It has been noted that potentially the largest hindrance to land reform (expropriations), and transformation of property holdings in South Africa, is the uncertainty around compensation and the tensions between the application of the Constitution and the Expropriation Act.⁶ The difficulty in the task of balancing the competing interests in calculating just and equitable compensation has arguably played a role in leading political

⁵ Minutes of Proceedings of the National Assembly on Tuesday 27 February 2018 [Unrevised Hansard available at <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 25-07-2018)], 30–31.

⁶ WJ du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 4; D Iyer “The role of government in expediting land expropriation: Reshaping the future of land reform” (2017) 52 *Journal of Public Administration* 508 513; J van Wyk “Compensation for land reform expropriation” 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 21 25; E du Plessis “Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on land reform” (2014) 17 *Potchefstroom Electronic Law Journal* 799 801.

parties to call for the amendment of section 25 of the Constitution to allow for expropriation without compensation.⁷ Land reform was subject to competing political visions, and much rhetorical debate on how the process should be sped up.⁸ Notably the decision to expropriate should make economic sense, in addition to legal sense.⁹

The duty to compensate in the context of expropriation in South Africa is sourced from the common law and section 25(2) of the Constitution.¹⁰ The rationale behind compensation is the assumption that the legislators (and therefore authorities) do not intend to take rights away indiscriminately, or without compensation.¹¹ In expropriation, compensation is payable on the basis that an individual is not meant to bear the burden of the public benefit alone.¹² According to the Land Claims Court (“LCC”) in *Hermanus v Department of Land Affairs: In re Erven 3535 & 3536 Goodwood*,¹³ the purpose of compensation for expropriation is to uphold the ordinary principle of justice in which a person is compensated for the loss they suffer by the compulsion of law.¹⁴ Thus, as held in *Mhlanganisweni Community v The*

⁷ Iyer (2017) 52 *Journal of Public Administration* 515; Minutes of Proceedings of the National Assembly on Tuesday 27 February 2018 30–31. The engagement that the government has had with the High Level Panel, chaired by Former President Motlanthe, led the Panel to the conclusion that neither the powers the state already has to expropriate land for land reform purposes, nor “the provisions in the Constitution that allow compensation to be below market value in particular circumstances” have been used effectively, see *Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change* (2017) Pretoria: High Level Panel on the Assessment of Key Legislation and the Acceleration Of Fundamental Change <<https://www.parliament.gov.za/press-releases/download-report-high-level-panel-assessment-key-legislation-and-acceleration-fundamental-change>> (accessed 08-05-2020) 51. The Panel recommended that the state should use its existing expropriation powers more boldly, as opposed to constitutional amendment. However, the debate on how to effectively use expropriation for redistribution is still an ongoing one.

⁸ E Lahiff “Willing buyer, willing seller’: South Africa’s failed experiment in market-led agrarian reform” (2007) 28 *Third World Quarterly* 1577 1583.

⁹ Van der Walt (2005) 122 *South African Law Journal* 773.

¹⁰ A Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in B Hoops, EJ Marais, L van Schalkwyk & NK Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 126 128; WJ du Plessis “Valuation in the constitutional era” (2015) 18 *Potchefstroom Electronic Law Journal* 1726 1726; AJ van der Walt *Constitutional property law* 3 ed (2011) 506.

¹¹ B Hoops “Expropriation without compensation: A yawning gap in the justification of expropriation?” (2019) 136 *South African Law Journal* 261 264. Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1728.

¹² Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1731.

¹³ *Hermanus v Department of Land Affairs: In re Erven 3535 & 3536 Goodwood* 2001 1 SA 1030 (LCC) para 25.

¹⁴ A Gildenhuys & GL Grobler “Expropriation” in WA Joubert & JA Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 51.

Minister of Rural Development and Land Reform & Others (“*Mhlanganisweni*”), the amount determined must be geared specifically towards recompense.¹⁵

The case of *Du Toit v Minister of Transport* (“*Du Toit*”),¹⁶ is important precedent regarding the determination of compensation.¹⁷ In *Du Toit*, the Constitutional Court held that the expropriatee is meant to be put in the same position as they would have been had the expropriation not taken place.¹⁸ However, in the context of land reform, it has been noted that the compensation requirement inherently means that the white population are granted a profit in response to the black population’s pure loss of land suffered during apartheid.¹⁹ Claasens argues that this strengthens arguments against the use of market value in determining compensation.²⁰

In this regard, the inherent difference between the concept of value and compensation should be pointed out.²¹ Section 25(3) of the Constitution requires that compensation “reflect[s] an equitable balance between the public interest and the interests of those affected”.²² It is in achieving this balance that the difference between value and compensation becomes evident. The value that the public or the expropriatee puts on the expropriated property can easily become a subjective figure. The Constitution recognises

¹⁵ *Mhlanganisweni Community v The Minister of Rural Development and Land Reform & Others* [2012] ZALCC 7 para 50; Gildenhuis & Grobler “Expropriation” in Joubert & Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 51.

¹⁶ *Du Toit v Minister of Transport* 2003 1 SA 586 (C).

¹⁷ Du Plessis “The public purpose requirement in the calculation of just and equitable compensation” in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I* (2015) 378.

¹⁸ Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1731.

¹⁹ This is particularly the case when market value is used to compensate in land reform expropriations. Redistribution expropriations are meant to rectify the loss of land and economic status suffered by the black population during Apartheid. In light of this, Claasens argues that the white expropriatee is still granted a monetary benefit in the form of compensation over and above owning property gained during Apartheid. See A Claasens “Compensation for expropriation: The political and economic parameters of market value compensation” (1993) 9 *South African Journal on Human Rights* 422 423; Gildenhuis “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 147.

²⁰ Claasens (1993) 9 *South African Journal on Human Rights* 423; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 100.

²¹ Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 192.

²² Section 25(3) of the Constitution.

this by setting out factors to be taken into account to ensure just and equitable compensation is paid.²³ It has been accepted by the courts that the market value of the property is the sum of what a hypothetical willing buyer would pay for that property to a hypothetical willing seller in an open market.²⁴ This, however, does not equate just and equitable compensation.²⁵

This aspect of broadening the meaning of compensation from market value is rooted in the political negotiation that gave rise to section 25 of the Constitution, particularly regarding compensation.²⁶ It was in this political negotiation that market-led land reform was instituted as the way forward regarding land reform rather than a state interventionist approach utilising expropriation.²⁷ This market led approach was later confirmed in the *White paper on South Africa land policy* (“*White paper*”).²⁸ In a historical work on South Africa’s history, Terreblanche points out that the corporate sector had a large role to play in positioning the ANC in favour of the open market during the informal negotiations that took place in the 1990s.²⁹ The corporate sector presented itself as an impartial role player since apartheid, and could therefore convince the ANC that the transition was about majoritarian democracy

²³ Section 25(3) of the Constitution lists these factors as:

- (a) The current use of the property;
- (b) The history of the acquisition and use of property;
- (c) The market value of the property;
- (d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) The purpose of the expropriation.

²⁴ *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 3 SA 737 (T) 744H, with specific reference to precedent from the *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501; Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 51; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) 657.

²⁵ Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 200.

²⁶ Du Plessis “The public purpose requirement in the calculation of just and equitable compensation” in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I* (2015) 372, 374. See also *White paper on South Africa land policy* (1997) Pretoria: Department of Land Affairs <<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>> (accessed 14-09-2018) 39-40.

²⁷ Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 70; Lahiff (2007) 28 *Third World Quarterly* 1579; S Terreblanche *A history of inequality in South Africa 1652 – 2002* (2003) 101.

²⁸ Lahiff (2007) 28 *Third World Quarterly* 1582. See also *White paper on South Africa land policy* (1997).

²⁹ Terreblanche *A history of inequality in South Africa* (2003) 100. This corporate sector is represented by international role players in South Africa’s democracy, such as the International Monetary Fund and the World Bank. See Terreblanche *A history of inequality in South Africa* (2003) 96 and R Hall “Who, what, where, how, why? The many disagreements about land redistribution in South Africa” in B Cousins & C Walker (eds) *Land divided land restored* (2015) 127 134.

and not racially-based capitalism, or the socio-economic victims thereof.³⁰ The result was a transition to democracy that left the corporate sector largely unchanged. Therefore, in framing the market-led land reform programme, the corporate sector with land assets maintained the same market-related freedoms in the democratised South Africa, despite the land reform mandate.³¹ Thus, despite the broader factors that should be used to determine compensation in terms of section 25(3) of the Constitution, market value was maintained as a central feature in land reform.³² This was exacerbated by the market value centred approach in the 1975 Expropriation Act.

The use of market value in determining just and equitable compensation has changed since the shift into the constitutional era.³³ In light of South Africa's history of dispossession, moving towards a "transformative, constitutional legal culture of expropriation",³⁴ may improve the manner in which compensation is addressed in land reform.³⁵ Market value is only one factor to determine a just and equitable amount of compensation to be paid.³⁶ A recent confirmation of this is found in *Msiza v Director-General for the Department of Rural Development and Land Reform* ("Msiza II"),³⁷ in which Ngcukaitobi AJ pointed out that market value is meant to be an "entry point" to determine just and equitable compensation.³⁸ However, in *Uys N.O and Another v Msiza and Others* ("Msiza III")³⁹ the Supreme Court of Appeal ("SCA") seemingly conflated the distinction between determining value and

³⁰ Terreblanche *A history of inequality in South Africa* (2003) 100. A majoritarian democracy is one in which a winning party is elected on the basis of having gained the majority of votes in a free election. See RMJ Oduor "Liberal democracy: An African critique" (2019) 38 *South African Journal of Philosophy* 108 108.

³¹ Terreblanche *A history of inequality in South Africa* (2003) 100.

³² This was exacerbated by the market value centered approach in the Expropriation Act 63 of 1975

³³ Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1727; Ng'ong'ola "Property guarantees in old and new Southern African constitutions" in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 158; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 657.

³⁴ Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 300.

³⁵ Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 300; Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1727.

³⁶ Section 25(3)(c) of the Constitution.

³⁷ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC).

³⁸ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 30.

³⁹ *Uys N.O and Another v Msiza and Others* 2018 3 SA 440 (SCA).

determining compensation.⁴⁰ Du Plessis points out that the continued use of the 1975 Expropriation Act, notably pre-constitutional legislation, may contribute to the conflation of value and compensation.⁴¹ It is in terms of this legislation that all compensation for expropriation is determined.⁴² Section 12(1)(a)(i) of the 1975 Expropriation Act states that compensation for expropriation must be determined by the market value of the property.⁴³ The Constitution, however, establishes factors broader than market value to be taken into account to determine the compensation amount.⁴⁴ The determination of compensation is thus much broader than the market value of the expropriated property.

Market value is not the only value that can be imputed onto land in South Africa. Placing a value on land is a determination that is not only monetary in nature. This is because there is an element of human dignity in the meaning and worth placed on land by people, particularly poor people.⁴⁵ Access to land not only affects a person's wealth or housing, but also their quality of life and dignity.⁴⁶ Dignity, as a human right, is an important aspect of interpreting constitutional rights, particularly in jurisdictions trying to rectify histories of inequality and colonisation.⁴⁷ In this regard, Zimbabwe can be used as example. Similarly to South Africa, Zimbabwe was faced with vast inequality in land holdings after

⁴⁰ Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 200.

⁴¹ Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 200.

⁴² Section 26(1) of the 1975 Expropriation Act. See Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 201; Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 40.

⁴³ Section 12(1)(a)(i) of the Expropriation Act 63 of 1975 states that the amount of compensation will be determined based on:
the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer.

⁴⁴ See 4 2 3 2 below.

⁴⁵ N Koopman "Inclusive dignity and land reform in South Africa" (2014) 113 *Scriptura* 1 2.

⁴⁶ M Andrews "Struggling for a life in dignity" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 202 202.

⁴⁷ H Botha "Human dignity in comparative perspective" (2009) 2 *Stellenbosch Law Review* 171 172

independence from colonial rule.⁴⁸ In Zimbabwe, the promotion of dignity in an agrarian society is linked to a person's capacity to make their livelihood from land.⁴⁹ This sense of dignity is lost when a person is no longer capable of making a living or accessing land.⁵⁰ Redistribution of land should therefore take into account the fact that dignity is also restored to dispossessed populations by granting access to land.

Thus, there are many components that should be taken into account in the determination of compensation. The crux of the phrasing in section 25(3) is that compensation must be just and equitable.⁵¹ The applicable law must be one of general application, which in expropriation law will be a statute.⁵² The requirements for compensation are discussed below.

4 2 3 Requirements for the payment of compensation

4 2 3 1 *Time and manner for payment of compensation*

The time and manner of the payment of expropriation is determined by the 1975 Expropriation Act and the Constitution.⁵³ The manner of payment is generally accepted to be monetary in South Africa, although compensation is not always required to be money.⁵⁴ What is important to note that the validity of the expropriation as an administrative act is not

⁴⁸ B Chigara *Land reform policy: The challenge of human rights law* (2004) 108-109. This inequality was racially charged, and contributed to the wealth that white people initially found in what was then named Rhodesia, and the poverty that faced the black population.

⁴⁹ Chigara *Land reform policy* (2004) 109. See also SJ Ndlovu-Gatsheni "Dynamics of the Zimbabwe crisis in the 21st century" (2003) 3 *African Journal on Conflict Resolution* 99 126; F Mazwi, M Chibwana & RG Muchetu "Land, agrarian reform in Zimbabwe viewed from a transformative social policy perspective" (2017) 47 *Africanus* 1 3.

⁵⁰ Chigara *Land reform policy* (2004) 109. In Zimbabwe, this sense of sharing what one has with another who has none, such as farmland, in order to preserve the other person's dignity is known as *humwe*.

⁵¹ Du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in Hoops, Marais, Mostert, Sluysmans & Verstappen (eds) *Rethinking expropriation law I* (2015) 375; Van der Walt *Constitutional property law* 3 ed (2011) 506.

⁵² Van der Walt *Constitutional property law* 3 ed (2011) 453 - 455, this is due to the fact that there is a no common law power to expropriate. See also A Gildenhuys *Onteieningsreg* 2 ed (2001) 93. See 2 4 2 2.

⁵³ I Currie & J de Waal *The bill of rights handbook* 6 ed (2013) 553.

⁵⁴ ZT Boggempoel "Compliance with section 25(2)(b) of the Constitution: When should compensation for expropriation be determined?" (2012) 129 *South African Law Journal* 606 608; Van der Walt *Constitutional property law* 3 ed (2011) 509; Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 96.

dependent on the determination of compensation. This is because compensation can be negotiated and determined at a later stage, after the expropriation is determined.⁵⁵ In the case of *In re Farmerfield Communal Property Trust*,⁵⁶ the court found that the expropriator did not have the authority to determine compensation before the expropriation had taken place.⁵⁷ However, a distinction must be drawn between the determination and the payment of compensation.⁵⁸ In the context of redistribution expropriations, in accordance with the *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (“*Expropriation procedures*”),⁵⁹ the compensation amount should be determined when the notice of expropriation is served, while the state prepares for the expropriation.⁶⁰ The actual payment of compensation only takes (as a minimum) two weeks after the notice of expropriation is served on the owner.⁶¹ This logically allows a period for the expropriatee to contest the expropriation or the compensation amount.

In this regard, *Haffajee NO v eThekweni Municipality* (“*Haffajee*”) is important.⁶² The matter dealt with an expropriation by the eThekweni municipality of trust property owned by Haffajee. The trustees (the applicants) argued that the expropriation was invalid due to the ongoing negotiations regarding the compensation.⁶³ The delay in the determination of the compensation was due to a trustee arguing for alternative land to be expropriated, followed

⁵⁵ *Haffajee NO v eThekweni Municipality* 2011 6 SA 134 (CC) para 45; Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 195; D Iyer “Is the determination of compensation a pre-requisite for the constitutional validity of expropriation: *Haffajee NO v eThekweni Municipality*” (2012) 2 *Speculum Juris* 66 72; Van der Walt *Constitutional property law* 3 ed (2011) 509.

⁵⁶ *In re Farmerfield Communal Property Trust* 1999 1 SA 936 (LCC).

⁵⁷ *In re Farmerfield Communal Property Trust* 1999 1 SA 936 (LCC) para 13.

⁵⁸ Boggenpoel (2012) 129 *South African Law Journal* 607.

⁵⁹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) Pretoria: Land Reform Policy Committee <https://www.gov.za/sites/default/files/gcis_document/201409/landexpro0.pdf> (accessed 19-08-2019).

⁶⁰ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 1.6 Procedural framework for expropriations) 5.

⁶¹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 1.6 Procedural framework for expropriations) 5.

⁶² Iyer (2012) 2 *Speculum Juris* 67; Boggenpoel (2012) 129 *South African Law Journal* 606.

⁶³ *Haffajee NO v eThekweni Municipality* 2011 6 SA 134 (CC) paras 2 - 5.

by that trustee rejecting the initial compensation offer from the municipality.⁶⁴ The issue came to court after the municipality instituted eviction proceedings, against which the Trust argued the invalidity of the expropriation.⁶⁵

The court pointed out that the reading of section 25(3) of the Constitution did not exclude an interpretation suggesting that compensation must be determined before the expropriation.⁶⁶ However, in light of the purpose of section 25, it was noted that an inflexible interpretation of section 25 possibly would make the determination of just and equitable compensation difficult.⁶⁷ Thus, the flexible interpretation is arguably beneficial to reducing potential hindrance to the expropriation process, and would ensure that the time and manner of the payment of compensation causes the least delay in the process. If a flexible interpretation is utilised in redistribution expropriations going forward, there would possibly be fewer causes for contention in the procedure of paying compensation, and less cause to shy away from using the expropriation power.

4 2 3 2 *Amount of just and equitable compensation*

The requirement of just and equitable compensation comes directly from the phrasing of the Constitution.⁶⁸ In this regard, the difference between full and fair compensation is important. Full compensation is usually paid to put the owner in the position they would have been in had the expropriation not occurred.⁶⁹ Compensation according to the 1975

⁶⁴ *Haffajee NO v eThekweni Municipality* 2011 6 SA 134 (CC) paras 7 - 8.

⁶⁵ *Haffajee NO v eThekweni Municipality* 2011 6 SA 134 (CC) para 9.

⁶⁶ *Haffajee NO v eThekweni Municipality* 2011 6 SA 134 (CC) para 35; Van der Walt *Constitutional property law* 3 ed (2011) 509.

⁶⁷ Iyer (2012) 2 *Speculum Juris* 72.

⁶⁸ Section 25(3) of the Constitution; M Aliber "Unravelling the 'willing buyer, willing seller' question" in B Cousins & C Walker (eds) *Land divided land restored* (2015) 145 148; Ng'ong'ola "Property guarantees in old and new Southern African constitutions" in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 167; T Roux "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014) 46-34; Van der Walt *Constitutional property law* 3 ed (2011) 503; AJ van der Walt *Constitutional property clauses* (1999) 346.

⁶⁹ Gildenhuys "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 124.

Expropriation Act is ordinarily full compensation, according to market value.⁷⁰ The Constitution requires a just and equitable amount be compensated, of which market value is one factor. Thus, in place of full compensation, the Constitution authorises compensation that is in line with the values of the Constitution.⁷¹ These include justice, equality and fairness.

Fair compensation, however, has the requirement of offsetting the interests of the expropriated owner, against the public interest served by the expropriation.⁷² Applying “just and equitable” to the requirement of compensation is not unique to South Africa.⁷³ Gildenhuys points out that there are constitutions in different jurisdictions that guide the compensation requirement of expropriation in requiring that it be fair, full or adequate.⁷⁴ In this regard, some lessons can be drawn from the Malawian Constitution of 1996.⁷⁵

In the Malawian Bill of Rights, article 44(1)(4) permits expropriation for public utility only in instances of adequate notice, and appropriate compensation.⁷⁶ This is supplemented by

⁷⁰ Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 202-203.

⁷¹ Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 195.

⁷² Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 124.

⁷³ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 129, see also Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 98, in particular footnote 177.

⁷⁴ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 129-130, further supported by the comparative work of Van der Walt *Constitutional property clauses* (1999).

⁷⁵ Although this thesis does not propose to create an intricate comparative analysis with Malawian law, reference to this jurisdiction is intended to better elucidate some South African principles on compensation through contrast with differently applied principles in Malawi. Jurisdictions such as Namibia may also be apt for comparison, particularly on principles such as willing buyer/ willing seller, see JM Pienaar “Willing-seller-willing-buyer and expropriation as land reform tools: What can South Africa learn from the Namibian experience?” (2018) 10 *Namibian Law Journal* 41 41. A full comparative with Malawian constitutional or expropriation law does not fall within the ambit of this thesis, for further reading on the Malawian constitution, see DM Chirwa *Human rights under the Malawian constitution* (2011). Malawi, similarly to South Africa, Namibia, Zimbabwe and Botswana, also faces issues in post-colonial reform, see C Ng’ong’ola “The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe” (1992) 41 *International and Comparative Law Quarterly* 117 118.

⁷⁶ Ng’ong’ola “Property guarantees in old and new Southern African constitutions” in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 170; Chirwa *Human rights under the Malawian*

legislation such as the Malawian Land Acquisition Act of 1970 (“MLA”), which more specifically requires fair compensation in instances of expropriation.⁷⁷ The Malawian Constitution gives no particular guidance on the determination of “appropriate compensation”.⁷⁸ The MLA, interestingly, grants the Minister power to assess the fairness of compensation, rather than the courts.⁷⁹ The MLA does grant guidelines on determining fair compensation, including the price the owner of the land paid for it.⁸⁰ In determining appropriate compensation, market value serves as a useful starting point, since compensation is based on *restitutio in integrum* in Malawi.⁸¹ However, a value of compensation less than market value is justifiable in instances where the state lacks the resources to pay compensation.⁸² Thus, the wording of “appropriate compensation” is seemingly vague by intention.⁸³ This allows the state to justify appropriate compensation on the basis of the capacity of the state.

In South Africa, compensation is guided by principles different to those in Malawi. In Malawi, expropriation legislation governs expropriation generally, without a general land acquisition statute. The use of a general statute guiding expropriations of land specifically is potentially useful in South Africa. Unlike Malawi, there is the possibility in South Africa of

constitution (2011) 295; Van der Walt *Constitutional property clauses* (1999) 542. For research on the history of the Malawian Bill of Rights and expropriation clause, see Ng’ong’ola (1992) 41 *International and Comparative Law Quarterly* 125.

⁷⁷ Ng’ong’ola “Property guarantees in old and new Southern African constitutions” in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 170; Chirwa *Human rights under the Malawian constitution* (2011) 295.

⁷⁸ Chirwa *Human rights under the Malawian constitution* (2011) 295.

⁷⁹ Article 10(1) of the MLA. This was justified by the Malawian parliament due to the administrative knowledge that the administrator has, which the judiciary presumably lacks. See Ng’ong’ola (1992) 41 *International and Comparative Law Quarterly* 128.

⁸⁰ Article 10(2)(a)-(c) of the MLA; Ng’ong’ola “Property guarantees in old and new Southern African Constitutions” in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 170.

⁸¹ Chirwa *Human rights under the Malawian constitution* (2011) 295, thus the owner is meant to be put into the position they would have been in, had the expropriation not taken place.

⁸² Chirwa *Human rights under the Malawian constitution* (2011) 296.

⁸³ Ng’ong’ola “Property guarantees in old and new Southern African constitutions” in Chigara (ed) *Reconceiving property rights in the new millennium* (2012) 172; Chirwa *Human rights under the Malawian constitution* (2011) 296.

paying more than market value.⁸⁴ However, the potential for expropriation without compensation is also possible in South Africa.⁸⁵ It was pointed out that the 2003 case of *Nhlabathi and Others v Fick*⁸⁶ opened the door for the possibility of expropriation without compensation.⁸⁷ Furthermore, the 2019 Expropriation (draft) Bill makes specific provision for instances of nil compensation only in the cases of land expropriation.⁸⁸ In light of this, land expropriations in South Africa will have a myriad of compensation possibilities that do not apply to expropriations in general, should the 2019 Expropriation (draft) Bill be enacted. Furthermore, the amendment posed by the Constitution Eighteenth Amendment (draft) Bill 2019 notably intends to entrench the provision that compensation can be nil, specifically in land reform expropriations.⁸⁹ The amendment will also mandate that the state enact legislation that sets out the instances in which compensation could potentially be nil.⁹⁰ Thus, the factors that will determine expropriation compensation in land redistribution going forward will be different to the factors that apply to compensation generally. There is yet to be an expropriation with nil compensation paid by the state.

Another difference between South Africa and Malawi is that the courts are the authority that the determination on compensation in South Africa, and not the Minister, as in Malawi.⁹¹ Furthermore, the *restitutio in integrum*, which forms the basis for determining compensation in Malawi, is relegated to contract law in South Africa and is not the basis for compensation for expropriation in South Africa.⁹² Despite this position, case law in South Africa has

⁸⁴ *Ex Parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] ZALCC 54 para 34-35; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 102.

⁸⁵ Van der Walt *Constitutional property law* 3 ed (2011) 507; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 102; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 660.

⁸⁶ *Nhlabathi and Others v Fick* [2003] ZALCC 9.

⁸⁷ Van der Walt *Constitutional property law* 3 ed (2011) 507; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 102.

⁸⁸ Section 12(3) of the Expropriation (draft) Bill of 2019; see also Pienaar (2018) 4 *Juta Quarterly Review* 1.2.3.

⁸⁹ Section 1(a) of Constitution Eighteenth Amendment (draft) Bill (2019) Cape Town: Parliament <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191203Draft_advertised.pdf> (accessed 31-01-2020).

⁹⁰ Section 1(c) of Constitution Eighteenth Amendment (draft) Bill (2019).

⁹¹ Section 25(2)(b) of the Constitution.

⁹² See D Hutchison "Improperly obtained consensus" in D Hutchison & C Pretorius (eds) *The law of contract in South Africa* 2 ed (2012) 113 114.

suggested a trend of using compensation to place the expropriatee in the position they were before.⁹³ This trend is an important one to break when justifying expropriation for land reform. Expropriation is meant to redistribute land that historically was made accessible to only a small few. Thus, conceptually, to simply place the landowner in the position they were in before the expropriation would be costly, and maintain the benefits that some of the white population gained from apartheid. This is particularly because land is sought for its economic value. The issue of just and equitable compensation also highlights the disparities between the rich and the poor, and emphasises the need for equitable access to wealth such as land going forward.

Section 25(3) of the Constitution sets out the factors to be taken into account in determining just and equitable compensation, however this is notably not a closed list.⁹⁴ There is much writing on the judicial precedent regarding just and equitable compensation.⁹⁵ The authority on calculating compensation from the Constitutional Court in *Du Toit* is that the compensation payable is first determined by the empowering legislation, and then evaluated against the just and equitable standard as per section 25 of the Constitution.⁹⁶ Market value is meant to serve as a starting point for the determination of compensation that can then be shifted upwards or downwards based on the other factors of section 25(3) of

⁹³ Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 196.

⁹⁴ The section points out that the balance between the public interest and the interests of those affected should be calculated in a manner that includes the listed factors. See Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 660.

⁹⁵ See Currie & De Waal *The bill of rights handbook* 6 ed (2013) 551; Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 101-102, AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" (2006) 123 *South African Law Journal* 58 59; Van der Walt (2005) 122 *South African Law Journal* 766.

⁹⁶ *Du Toit v Minister of Transport* 2003 1 SA 586 (C) para 35, this was confirmed in *City of Cape Town v Helderberg Park Development* 2007 1 SA 1 (SCA) para 19. See also Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 101; AJ van der Walt "The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case" (2005) 122 *South African Law Journal* 765 771.

the Constitution.⁹⁷ This is because there it is difficult to quantify the other factors listed in section 25(3) of the Constitution.⁹⁸

In the context of land redistribution expropriations, further guidelines on the determination of compensation can be sought from the 1999 *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (“Expropriation procedures”).⁹⁹ The *Expropriation procedures* set out the procedural framework in which expropriation should function, and details around time frames and steps in the expropriation cycle.¹⁰⁰ In this framework, the calculation of the amount of expropriation is also provided.

According to the *Expropriation procedures*, the offer of compensation should be included by the time the expropriatee is given an expropriation hearing.¹⁰¹ The document points out that section 25(3) of the Constitution should be the starting point for the determination of compensation, but interestingly states that “compensation must therefore be determined as market value adjusted for the value of past subsidies”.¹⁰² Thus, the current use of the property, the history of acquisition and the purpose of the expropriation are not specifically highlighted in the document. This is an interesting interpretation of section 25(3), since the history of the acquisition and the purpose of the expropriation are arguably the factors that would distinguish Act 126 and ESTA expropriations from other public purpose expropriations. This is because expropriation in the context of redistribution would arguably be defined by the history of the property in question, and the constitutional aim of

⁹⁷ Currie & de Waal *The bill of rights handbook* 6 ed (2013) 552; Du Plessis *Compensation for expropriation under the Constitution* LLD Stellenbosch University (2009) 101. This approach was set out by Gildenhuys J in *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs* [2000] ZALCC 54 paras 34-35.

⁹⁸ Currie & de Waal *The bill of rights handbook* 6 ed (2013) 552.

⁹⁹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) Pretoria: Land Reform Policy Committee <https://www.gov.za/sites/default/files/gcis_document/201409/landexpro0.pdf> (accessed 19-08-2019). See 2 3 3 3.

¹⁰⁰ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.6 Procedural framework for expropriations) 4.

¹⁰¹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.5 When to include the compensation offer) 4.

¹⁰² *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.7.1.1 The amount of compensation) 7.

redistributing that property. If expropriations for redistribution purposes are to be promoted, updated guidelines that highlight factors such as the different purposes that redistribution serves and the use of expropriation applicable to Act 126 and ESTA, expropriations may find improved utilisation in the redistribution expropriation process.

The *Expropriation procedures* make reference to the Gildenhuis formula, utilised in determining the market value of the property in land reform.¹⁰³ The formula was made by Judge Gildenhuis in the Land Claims Court to guide the determination of compensation for expropriation in restitution matters.¹⁰⁴ Ntsebeza argues that this formula can arguably be applied in redistribution expropriations as well, because the formula only takes into account the market value and value of the direct state investment/subsidy.¹⁰⁵ In this regard, *Expropriation procedures* sets out a variation of the Gildenhuis formula, which should apply specifically to redistribution expropriations.¹⁰⁶ The uncertainty around the use of this formula potentially impacts the continued reluctance from the state to expropriate for redistribution purposes.¹⁰⁷

The matter of *Msiza v Uys* ("*Msiza I*")¹⁰⁸ is a recent example displaying the intricacies around shifting compensation downwards from market value. The case dealt with a claim of land in terms of the Land Reform (Labour Tenants) Act 3 of 1996 ("Labour Tenants Act") in Mpumalanga.¹⁰⁹ *Msiza I* dealt mainly with the legitimacy of the claim by P Msiza, the

¹⁰³ This is on the basis that land is property that can be quantified in terms of its value on an open market. There is provision for the calculation of compensation for property that does not have an open market, see Gildenhuis & Grobler "Expropriation" in Joubert & Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 86. Furthermore, if the expropriation is for a portion of a larger property, its value can be determined through open market valuation before the expropriation, less the value of the larger portion after the expropriation, see *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para 22.

¹⁰⁴ L Ntsebeza "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 107 122.

¹⁰⁵ Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 122.

¹⁰⁶ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.7.1.1.1 Variation on Gildenhuis formula) 6.

¹⁰⁷ Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 123.

¹⁰⁸ *Msiza v Uys* 2005 2 SA 456 (LCC).

¹⁰⁹ *Msiza v Uys* 2005 2 SA 456 (LCC) paras 1 - 2.

(deceased) plaintiff, and his family.¹¹⁰ The deceased plaintiff was found to be a labour tenant, and the award of land was granted in terms of the Act.¹¹¹

The compensation matter came before the court in *Msiza II* due to a disagreement about the amount to be paid for the expropriated property that was granted in *Msiza I*.¹¹² The LCC in *Msiza II* used *Du Toit* as authority for some of the principles around just and equitable compensation.¹¹³ The court in *Du Toit* noted that in light of the Constitution and the socio-economic context of expropriation, market value does not play a central role in the compensation question.¹¹⁴ However, market value does provide a starting point in the question of compensation because it is relatively clear to quantify, and from there the value can be adjusted upwards or downwards to get to a just and equitable outcome.¹¹⁵ In this regard, it is clear that the public interest is also promoted, rather than just the protection of the interests of the expropriatee.¹¹⁶ Thus, market value still serves as the starting point to determine just and equitable compensation. The determination of compensation therefore becomes a two-step process, firstly to determine the market value of the property, and secondly to determine just and equitable compensation.

In *Msiza II*, Ngcukaitobi AJ adopted this two stage approach and determined the market value of the property as a point of departure, but notably disagreed with the logic that the other factors in section 25(3) cannot be quantified.¹¹⁷ Factors such as the history of acquisition and records of the value of the property over time can be easily quantified and

¹¹⁰ *Msiza v Uys* 2005 2 SA 456 (LCC) paras 5 - 8.

¹¹¹ *Msiza v Uys* 2005 2 SA 456 (LCC) para 243.

¹¹² *Msiza v Uys* 2005 2 SA 456 (LCC) para 3.

¹¹³ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 37.

¹¹⁴ *Du Toit v Minister of Transport* 2003 1 SA 586 (C) para 37.

¹¹⁵ *Du Toit v Minister of Transport* 2003 1 SA 586 (C) para 37.

¹¹⁶ Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 661.

¹¹⁷ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 38. Van Wyk, in an analysis of the factors the court used in its determination of equitable compensation, points out that the court did not consider other interesting factors from case law, including goodwill as financial loss, see J van Wyk "Compensation for land reform expropriation" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 21 30.

determined.¹¹⁸ The court ultimately shifted the compensation amount below that of the market value.¹¹⁹ The SCA in *Msiza III* had to decide the issue of compensation and the extent to which development potential should (or could) influence the compensation award.¹²⁰ The Supreme Court of Appeal accepted that an amount less than market value compensation is possible, but the court would then still be required to determine if such an amount is just and equitable in accordance with past precedent.¹²¹

Interestingly, in *Msiza III*, the court used *Du Toit's* rationale regarding compensation,¹²² indicating that these principles apply to all expropriations of land, regardless of the purpose of the expropriation. This suggests that different land expropriations in effect utilise similar principles in the calculation of compensation.¹²³ The obvious place where purpose should differently determine compensation is in land reform cases, although *Du Toit* was not a land reform case.¹²⁴ This includes instances of expropriation of farmland for redistribution purposes.¹²⁵ Van der Walt points out that if it can be accepted that different levels of scrutiny apply to deprivations and expropriations, it is certainly possible to argue that different means of accommodating land reform expropriations (compared to public purpose expropriations, like those aimed at constructing new roads or airports) is possible.¹²⁶

Despite the remarks from these cases on market value, it has been noted that market value has still remained a pivotal feature in the determination of compensation.¹²⁷ A possible

¹¹⁸ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 38.

¹¹⁹ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) paras 61 - 63. See 3 5 below.

¹²⁰ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2018 3 SA 440 (SCA) para 14.

¹²¹ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2018 3 SA 440 (SCA) para 10.

¹²² *Msiza v Director-General for the Department of Rural Development and Land Reform* 2018 3 SA 440 (SCA) paras 10 -16.

¹²³ Van der Walt (2005) 122 *South African Law Journal* 773.

¹²⁴ Van der Walt (2005) 122 *South African Law Journal* 772.

¹²⁵ Van der Walt (2005) 122 *South African Law Journal* 773.

¹²⁶ AJ van der Walt "Overview of developments since the introduction of the constitutional property clause" (2004) 19 *SA Public Law* 46 81, see also Van der Walt (2005) 122 *South African Law Journal* 773.

¹²⁷ Gildenhuys & Grobler "Expropriation" in Joubert & Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) para 51, 53.

lesson that can be drawn from Malawi is the justification of reduced compensation on the basis of the unavailability of state resources. This is a notable issue in South Africa because a possible barrier to the land reform programme's success is the fact that some land expropriations are steeped in cost, which the capacity of the Department of Rural Development and Land Reform ("DRDLR") arguably cannot meet.¹²⁸ The Department itself has identified possible remedies, which include seeking further funding, expanding its budget and shifting away from an applicant driven reform programme to a state-driven approach, through legislative and administrative action.¹²⁹

One indication for why market value plays such a central role is the continued use of the Gildenhuys formula and the continued focus on market-led land reform.¹³⁰ The state would have a small to negligible role in determining the price of land, the result being that the budget will likely always have a shortfall in financing land acquisition.¹³¹ Landowners will have the more powerful role in determining the often inflated prices of land.¹³² The market is based on the bargaining of sellers and buyers, thus market value is not a static figure and is determined with little state regulation.¹³³ It is in this respect that the willing buyer/willing model is used in the expropriation process.¹³⁴ Thus, the continued central role that the market plays in the determination of property value may prove to limit the state's land acquisition powers. A property valuation scheme that is not so dependent on the bargaining of the market may be necessary to improve the state's ability to pay compensation.

¹²⁸ Iyer (2017) 52 *Journal of Public Administration* 512.

¹²⁹ Iyer (2017) 52 *Journal of Public Administration* 513. This state driven approach would entail a more direct involvement by the state in matters of land acquisition for land redistribution, such as through expropriation.

¹³⁰ Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 123. However, Du Plessis suggests that due to the difficulty in using the Gildenhuys formula, the use of the formula has been discontinued. However, policy has not clearly confirmed this. See Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 218.

¹³¹ Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 123.

¹³² Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 123.

¹³³ Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1729.

¹³⁴ Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1730; discussed in 4.3.2 below.

4 2 4 Conclusion

Three points emerge from the discussion of the compensation requirement in expropriation. The first is that the concept of compensation is a highly contested element in the expropriation process, and therefore is likely to be the part of the expropriation procedure that causes the most delay. The differences that exist between just and equitable compensation and the traditional notion of full recompense is one that should be reconciled in a clear manner. Compensation in South Africa is not bound by *restitutio in integrum* as in Malawi. Therefore, notions such as compensation above and below market value, or even nil compensation, should be a readily justifiable possibility for courts. This is particularly in light of the forthcoming 2019 Expropriation (draft) Bill and Constitutional Eighteenth Amendment (draft) Bill. A clear understanding of how just and equitable compensation is determined is necessary, even if nil compensation is paid. This will ensure that the standard to determine compensation in South Africa, namely justice and equity, is properly applied, and does not pose an obstacle to expropriations in redistribution going forward.

Secondly, the value of land and compensation are different concepts. The determination of just and equitable compensation for land expropriation is subject to factors broader than the market value. These factors are primarily, although not exclusively, sourced from the Constitution, and are aimed at ensuring redress for the land dispossession during apartheid. Moreover, the basis upon which land is valued may have to take into account extra-legal values that people attach to land. This includes human rights such as human dignity. Land can be a source of pride for a community, and a means of identity. Addressing this loss through redistribution means that expropriation should facilitate recovering that sense of identity and dignity. Thus, the purpose of redistribution expropriations cannot be separated from the determination of compensation. The definition of redistribution for the purposes of expropriation should be given renewed efforts, taking into account broader factors such as

community identity and dignity, to ensure that in determining just and equitable compensation, these broader extra-legal concepts are not a hindrance to the process.

Finally, property valuation plays an important role in determining the amount of compensation, and should be clearly determined in light of just and equitable principles. The central role that the market plays in valuation seems to reduce the state's capacity to adequately budget for compensation amounts. However, the importance of market value is due to the state's initial commitment to a market-based land reform programme.¹³⁵ The reliance on market value is due to the ease with which the value of the property can be quantified. However, this usefulness of market value in determining compensation should not be conflated with using the market to acquire land. It seems that the determination of compensation should be less focused on market valuation, and more dependent on the state's capacity to pay compensation. The expropriation power should not be hindered by the high costs of land due to market inflation. It is for these reasons that a regulated means of determining compensation in line with the Constitution is important in expropriation, thus ensuring that the process is not inhibited by the high costs of land.

In order to differentiate the expropriation and compensation process from market-led land acquisition, expropriation and market-based land acquisition in the context of redistribution are compared below.

4 3 The burden of land acquisition for redistribution

4 3 1 Introduction

It has been established that the discourse on compensation is greatly impacted by the historical negotiations of the Constitution.¹³⁶ Furthermore, a difficulty that arises in shifting away from market valuation is the fact that expropriation in the redistribution context was

¹³⁵ See 2 3 4; Pienaar (2018) 10 *Namibian Law Journal* 49.

¹³⁶ 4 2 2 above.

originally meant to be a reactionary mechanism, meant to be used when market based acquisition was unsuccessful.¹³⁷ It is difficult to determine if this directly deters the state from utilising expropriation, particularly when considering the legal requirement of compensation for expropriation. However, a useful question to ask is whether expropriation, and compensation, is more legally burdensome than the state buying land for redistribution on an open market. In this way it can be understood why the use of expropriation from a legal sense is not utilised as well as it could be.

In a 2003-study on the issues around market-led agrarian reform, Borras illustrates the key features of state- and market-led approaches to land reform.¹³⁸ In this comparison, Borras identifies key issues that affect land reform, which differed depending on whether the approach was state led or market led.¹³⁹ These include getting access to land, post-transfer beneficiary support, and project financing.¹⁴⁰ This section will draw on aspects of this comparison, putting focus on obtaining access to land and financing. The purpose of this exercise is twofold. Firstly, to juxtapose the expropriation and compensation process next to market-led land acquisition by the state. Secondly, to illustrate how closely linked compensation is to the problems attached to the overall expropriation process in redistribution. Table 6 below illustrates an adaptation of Borras' comparison, which will serve as the basis of this section.

¹³⁷ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA (1999) (1.1 Background) 1-2.*

¹³⁸ SM Borras "Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa" (2003) 3 *Journal of Agrarian Change* 367-374; Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 206-207.

¹³⁹ Borras (2003) 3 *Journal of Agrarian Change* 374-375; Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 206.

¹⁴⁰ Borras (2003) 3 *Journal of Agrarian Change* 374-375; Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 206.

Table 6: Key features of state and market led approaches based on pro-market explanations and claims

Issues	State-led (expropriation)	Market-led
<i>Getting access to land</i>		
• Acquisition method	Coercive; [compensation] payments at below market price,	Voluntary; 100% cash payment based on 100% market value of land
• Beneficiaries	Supply-driven; beneficiaries state-selected	Demand-driven; self-selected beneficiaries
• Implementation method	State-centralised; low degree of transparency and accountability	Privatized–decentralised; high degree of transparency and accountability
• Pace and nature	Protracted; politically and legally contentious	Quick; politically and legally Non-contentious
• Land prices	Higher	Lower
<i>Financing</i>		
• Mechanism	State subsidies; sovereign guarantee; beneficiaries pay subsidized land price; ‘dole-out’ mentality among beneficiaries	Flexible mechanism; co-sharing of risks; beneficiaries shoulder full cost of land; farm development cost given via grant
• Cost of reform	High	Low

Source: Key features of state and market led approaches based on pro-market explanations in SM Borras “Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa” (2003) 3 *Journal of Agrarian Change* 374. Edited by author.

Borras’ table presents market led acquisition in a fairly positive light, since it is a pro-market critique of agrarian reform.¹⁴¹ However, the South African experience indicates that the

¹⁴¹ Borras (2003) 3 *Journal of Agrarian Change* 368; Andrews “Struggling for a life in dignity” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 208.

market-led approach has been insufficient to meet the goals of land reform.¹⁴² The most immediate issue in land reform is usually pointed out as the cost. Therefore, this section will consider expropriation and market-led land acquisition in light of Borras' analysis. In this way it can be understood if compensation can specifically be attributed as a reason for the underutilisation of the expropriation process in redistribution.

4 3 2 Redistribution through market-led land acquisition

The nature of market-based land acquisition is not much different to the South African law of sale in the context of land transfer. The state, as the buyer, would purchase the property from the existing owner, who cooperatively sold the property.¹⁴³ Land acquisition in redistribution is usually acquired consensually from the existing owner.¹⁴⁴ Therefore, the acquisition method is through derivative acquisition of ownership. The principles that apply to derivative acquisition of ownership arguably apply in the instances in which the state buys land for redistribution on the open market.¹⁴⁵ Thus, as indicated by Borras, the trade is entirely based on voluntary sale.¹⁴⁶ The difference between the state buyer and natural person is that the state is bound to administrative principles in its decision to purchase.¹⁴⁷

The implementation method of market-led land acquisition is privatised. The Land summit of 2005 required that the Department of Land Affairs ("DLA") look at different methods of acquiring land for land reform, and land auctions were identified as one such means.¹⁴⁸ This

¹⁴² Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 208.

¹⁴³ G Bradfield & K Lehmann *Principles of the law of sale & lease* 3 ed (2013) 16; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 84.

¹⁴⁴ Gildenhuys "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 124.

¹⁴⁵ Bradfield & Lehmann *Principles of the law of sale & lease* 3 ed (2013) 16-17; AJ van der Walt & GJ Pienaar *Introduction to the law of property* 7 ed (2016) 141; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 83-84.

¹⁴⁶ Borras (2003) 3 *Journal of Agrarian Change* 374.

¹⁴⁷ C Hoexter *Administrative law in South Africa* 2ed (2012) 184-185.

¹⁴⁸ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) Pretoria: Department of Agriculture
<http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/manual%20for%20the

method is particularly relevant for redistribution because the Provision of Land and Assistance Act 126 of 1993 (“Act 126”) authorises the use of auctions as a means to acquire land.¹⁴⁹ The manual for the implementation of the Proactive Land Acquisition Strategy (“PLAS”) set out some guidelines, advantages, and disadvantages of using auctions as a means to acquire land for redistribution.¹⁵⁰ The advantages of acquiring land through auctions is the possibility of cheaper land prices, since the property sold is usually from insolvent or deceased estates and thus sold at reduced prices.¹⁵¹ However, there are a few issues attached with auctions as a method of acquisition.

One main issue with auctions is that the pricing of the land is not influenced by the purpose of redistribution. Due to the profit motive of the market, redistributive justice is not a central objective in land auctions.¹⁵² The result is that the purchase of land at auction could potentially be higher than market value, for which the state may not have adequately budgeted.¹⁵³ Due to the nature of auctions, the state would not be able to obtain property valuation reports before the auction, and would not be able to know the true value of the property.¹⁵⁴ Furthermore, in the general land market, landowners tend to trade with other landowners who are in similar bargaining positions.¹⁵⁵ This results in the maintenance of current landownership patterns, with little intention of reform.¹⁵⁶

Accountability in the implementation of redistribution through general market led land acquisition is low, contrary to Borras’ indication.¹⁵⁷ In this regard, the aims of the

%20implementation%20of%20the%20proactive%20land%20acquisition%20strategy.pdf > (accessed 11-03-2019) 260.

¹⁴⁹ Section 10(1)(a) of the Provision of Land and Assistance Act 126 of 1993; *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 261.

¹⁵⁰ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 260-261.

¹⁵¹ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 260.

¹⁵² Andrews “Struggling for a life in dignity” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 205.

¹⁵³ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 261.

¹⁵⁴ *Manual for the Implementation of the Proactive Land Acquisition Strategy* (2007) 261.

¹⁵⁵ Andrews “Struggling for a life in dignity” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 209.

¹⁵⁶ Andrews “Struggling for a life in dignity” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 209.

¹⁵⁷ Andrews “Struggling for a life in dignity” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 209.

redistribution programme become important. If the direction for the redistribution programme is to open up the market to non-racial commercial farming, the use of the market to achieve this goal is an understandable mechanism.¹⁵⁸ High land prices would be a major setback to achieving non-racial commercial farming. However, if the intention is to redistribute land on a large scale to those who do not have, then the market will not necessarily be the most efficient means to achieve this goal. Furthermore, the high price of land would not be the largest hurdle to overcome. The issue of identifying beneficiaries, as well as putting in place adequate frameworks to subsequently distribute the land acquired will also need to be overcome. This issue is equally applicable to expropriation in redistribution.

The pace of market-based land acquisition is arguably a lot faster in acquiring land than expropriation.¹⁵⁹ However, the administration of the land acquired must be strictly monitored in order to ensure that the acquired land reaches the relevant beneficiaries. The logical body to monitor this is the state, as the national administrator. It is in this regard that the initial land reform model as set out by the World Bank has failed in South Africa.¹⁶⁰ The state has not managed to bring about effective redistribution because it essentially played a passive role of facilitator in land reform.¹⁶¹ The problem that then exists is the rife corruption that plagues public procurement in government structures in South Africa.¹⁶² Thus, corruption is a hurdle to the cost of land acquisition, whether through expropriation or market-led means.

¹⁵⁸ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 206.

¹⁵⁹ See Table 6 in 4 3 1.

¹⁶⁰ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 211; see 2 2 3 for this model.

¹⁶¹ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 210.

¹⁶² PH Munzhedzi "South African public sector procurement and corruption: Inseparable twins?" (2016) 10 *Journal of Transport and Supply Chain Management* 1 2.

4 3 3 Willing buyer/willing seller (WB/WS)

An aspect of land acquisition that affects both expropriation and market-led land acquisition is the use of the willing buyer/willing seller (“WB/WS”) model. The WB/WS model was accepted as a part of land reform in the *White paper*.¹⁶³ The WB/WS model has often been blamed for the slow pace of land reform generally.¹⁶⁴ This is because it is directly a part of the land acquisition method of the state, whether through expropriation or market-led means.¹⁶⁵ In this regard, WB/WS is seen as a limitation on the land acquisition powers of the state, and thus is a potential hindrance to the utilisation of expropriation. It has been accepted by the courts that the market value of property is the sum of what a willing buyer would pay for the property on an open market.¹⁶⁶ However, concerns about the WB/WS model were raised as early as in the consultations that took place before the 1997 *White paper* was officially published.¹⁶⁷ The WB/WS model was supported as a mechanism of land acquisition for land redistribution because it was proposed by the World Bank.¹⁶⁸ Thus, despite the early concerns, the government committed itself to the WB/WS model in land redistribution.¹⁶⁹

The criticisms levelled against the WB/WS model are often raised in the general context of land acquisition, and not specifically in expropriation. The WB/WS is a part of expropriation because it plays a role in the determination of the market value of the property.¹⁷⁰ Aliber correctly points out that research that criticises the WB/WS model often

¹⁶³ *White paper on South Africa land policy* (1997) 9; 12; Lahiff (2007) 28 *Third World Quarterly* 1585.

¹⁶⁴ Aliber “Unravelling the ‘willing buyer, willing seller’ question” in Cousins & Walker (eds) *Land divided land restored* (2015) 145; R Hall “Transforming rural South Africa? Taking stock of land reform” in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 87 87.

¹⁶⁵ Hall “Transforming rural South Africa? Taking stock of land reform” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 98; R Hall & T Kepe “Elite capture and state neglect: New evidence on South Africa’s land reform” (2017) 44 *Review of African Political Economy* 122 123.

¹⁶⁶ *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 3 SA 737 (T) 744H, with specific reference to precedent from the *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501; Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 51; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman’s The law of property* 6 ed (2019) 657.

¹⁶⁷ *White paper on South Africa land policy* (1997) 24.

¹⁶⁸ See 2 2 3.

¹⁶⁹ *White paper on South Africa land policy* (1997) 12.

¹⁷⁰ Du Plessis *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009) 54.

does not adequately point to why the model is unfeasible for South Africa.¹⁷¹ An important aspect of the criticism against the WB/WS is the focus on redistributing land held by the white population, as beneficiaries of apartheid.¹⁷² The benefits that the white population gained from the history of land dispossession are not necessarily in agriculture currently.¹⁷³ By 2011, the number of white farmers had decreased dramatically since the early 2000s.¹⁷⁴ The focus of criticism for the failure in land reform fell to the identifiable group of white farmers, rather than the idea that commercialism and capitalism in South Africa do not align with land redistribution aims.¹⁷⁵ This is not to diminish the role of the white population in land dispossession, or to suggest that agricultural landholdings were not owned by majority white people at the beginning of the twentieth century.¹⁷⁶ However, the agricultural market has seemingly changed since then, and factors broader than the white agricultural sector are proving problematic for redistribution going forward.

Aliber suggests that the WB/WS model is useful in redistribution. He argues that a market led approach to land acquisition is more useful in redistribution than expropriation, compared to the use of expropriation in restitution.¹⁷⁷ Restitution is bound to restore a very specific piece of land, which means a landowner could possibly delay the process if not very willing

¹⁷¹ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 146.

¹⁷² Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 153-154; D Kook "White privilege, psychoanalytic ethics, and the limitations of political silence" (2011) 30 *South African Journal of Philosophy* 494 495.

¹⁷³ Due to the large number of white people who relocated to urban spaces after Apartheid ended, Aliber argues that the wealth that the white population now holds is not necessarily in agricultural land. Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 155.

¹⁷⁴ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 155.

¹⁷⁵ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 155. The idea that wealth in the form of property should be (re)distributed among the poor does not align with the aims of a capitalist society. See H Bernstein "'Changing before our very eyes': Agrarian questions and the politics of land in capitalism today" (2004) 4 *Journal of Agrarian Change* 190 195.

¹⁷⁶ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 155.

¹⁷⁷ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 158-159.

to negotiate.¹⁷⁸ Redistribution seeks to restore access to land for different projects, and can thus identify land in multiple places.¹⁷⁹ The result is that the state in redistribution is in a better position to take part in the market in order to purchase land rather than expropriate. Although this argument is logical, it is precisely for Aliber's reasons that the use of the market has not proven to be successful in redistribution. The use of WB/WS means that land acquisition (or the determination of market value) is always dependent on the will of the market.¹⁸⁰ The problem that existed with the active land market was that South Africa's agricultural land comprised of large parcels of land, often too big for small scale farmers and land reform beneficiaries.¹⁸¹ Landowners would thus more readily sell undesirable land and available small parcels of land. This resulted in beneficiaries of SLAG ending up on marginal land.¹⁸² The beneficiary group for redistribution is large, and if left to the market, marginal land will continually be the land that redistribution beneficiaries are granted.

Furthermore, land acquisition is not likely to be improved without a means of compelling land owners to make land available.¹⁸³ In this way expropriation in conjunction with the existence of the market are both important for improving land acquisition for redistribution going forward.¹⁸⁴ Conceptually, if the commercial land market continues to function in modern South Africa, the WB/WS model can never be entirely done away with, even in land expropriation. However, the use of regulated offices such as the Office of the Valuer-General ("OVG") suggests that the determination of compensation is one that is subject to the factors

¹⁷⁸ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 158; Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

¹⁷⁹ Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 158.

¹⁸⁰ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 98.

¹⁸¹ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

¹⁸² M Aliber & R Mokoena "The land question in contemporary South Africa" in J Daniel, A Habib & R Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) 330 333.

¹⁸³ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

¹⁸⁴ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

of section 25(3) of the Constitution, even if the expropriation does not go to court for the determination of compensation.¹⁸⁵ Expropriation is seemingly made too costly for the state due to compensation. However, the compensation issue cannot be separated from some of the other issues attached to expropriation in redistribution. Some of these issues and their connection to compensation are discussed below.

4 3 4 Redistribution through land expropriation

Expropriation is a form of original acquisition of ownership.¹⁸⁶ This means that the ability of the state to claim ownership of an expropriated object is not dependent on the consent of the previous owner.¹⁸⁷ The difference in the vesting of ownership for expropriation is that registration in the deed's registry office is not required.¹⁸⁸ Ownership thus passes to the state once the expropriation has taken place. The method is therefore a coercive one, with the possibility of compensation being paid at less than market value.¹⁸⁹ Andrews points out that this possibility of less than market value compensation often results in opposition from expropriated owners, who often undermine the land reform process.¹⁹⁰

The legislative and policy framework of redistribution determine how beneficiaries are selected and how expropriation should be utilised. In the context of redistribution, it is possible for expropriation to take place even if beneficiaries have not yet been identified.¹⁹¹ The implementation method of expropriation is a state centred one because expropriation is an administrative act.¹⁹² Although Borrás points out that this leads to low accountability

¹⁸⁵ See Pienaar (2018) 10 *Namibian Law Journal* 54 for research on the Property Valuation Act and the powers of the Office of the Valuer-General. See 4 3 5 below.

¹⁸⁶ Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 194; Van der Walt & Pienaar *Introduction to the law of property* 7 ed (2016) 126-127.

¹⁸⁷ Van der Walt & Pienaar *Introduction to the law of property* 7 ed (2016) 112.

¹⁸⁸ Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 194.

¹⁸⁹ See Table 6 in 4 3 1.

¹⁹⁰ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 206.

¹⁹¹ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) 2-4; See 2 3 3 3.

¹⁹² See 3 3 2 2.

and transparency, South African administrative regulation of expropriation is meant to promote good governance and accountability.¹⁹³

The pace of expropriation is a fairly slow one because of the many legislatively prescribed procedures that must take place, the high prices of land, and difficulties in the determination of compensation.¹⁹⁴ In the context of redistribution, guidelines for this procedure can be found in the *Expropriation procedures*, which sets out the requisite steps for an expropriation.¹⁹⁵ If simplified, the procedure consists of 8 steps in what the policy calls the expropriation cycle.¹⁹⁶ These steps are: (1) the decision on whether to expropriate; (2) preparing for hearing [for the expropriated owner]; (3) recommendation of expropriation and compensation; (4) the hearing; (5) preparing for the expropriation; (6) serving the expropriation and compensation notice; (7) payment of compensation; and (8) registration and transfer of the property.¹⁹⁷ The determination of compensation is included in the process from as early as step 1 of the expropriation cycle, which requires the state to get the property valued.¹⁹⁸ Property valuation is therefore an additional process,¹⁹⁹ but does not detract from the fact that it is part of only one step in the overall expropriation process. Although burdensome on the state and potentially slow, the process is not an insurmountably difficult one.

The effect that the use of expropriation has on land prices and the market is an important aspect of the burden of the expropriation procedure. Borrás' analysis indicates that in state-

¹⁹³ See 3 3 2 2.

¹⁹⁴ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368-a-policy-framework-for-land-acquisition-and-land-valuation-in-a-land-reform-context-and-for-the-establishment-of-the-office-of-the-valuer-general>> (accessed 18-04-2018) 7; Aliber "Unravelling the 'willing buyer, willing seller' question" in Cousins & Walker (eds) *Land divided land restored* (2015) 151.

¹⁹⁵ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.6 Procedural framework for expropriations) 4.

¹⁹⁶ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.6 Procedural framework for expropriations) 4.

¹⁹⁷ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.6 Procedural framework for expropriations) 4.

¹⁹⁸ *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) (1.6 Procedural framework for expropriations) 4.

¹⁹⁹ See 4 3 5 below.

led acquisition, the price of land is much higher and the distortions of prices in the land market are greater.²⁰⁰ However, this has seemingly been the case in the market-led method utilised by South Africa in redistribution.²⁰¹ In the 2005 Land summit, the DLA had to scrutinise the escalating prices of land and the need for the state to intervene in cases of price inflation.²⁰² Andrews attributes this to the market's general favour of already existing land owners, and the increasing land needs of large scale agriculture to remain profitable.²⁰³ The result was that the poor found little room to enter the land market, and the level bargaining position assumed by market-led land reform proved to be a fallacy.²⁰⁴ Despite these shortcomings in the market led approach, there is still a general reluctance by the government to use the expropriation power.²⁰⁵ The reason for this reluctance is not clearly identifiable, but a contributor may lie in financing the cost of compensation for land expropriations. Hall suggests that it is the lack of available land on the land market (for redistribution purposes), as well as high land prices that may contribute to the issues of redistribution.²⁰⁶ A means of addressing these issues is through regulated property valuation and land administration. The importance and use of land valuation, the offices and tools available in the field of property valuation, and the impact that this can have on the use of expropriation is discussed below.

²⁰⁰ See Table 6 in 4 3 1. See also Borras (2003) 3 *Journal of Agrarian Change* 374.

²⁰¹ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 210.

²⁰² Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 210; *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368-a-policy-framework-for-land-acquisition-and-land-valuation-in-a-land-reform-context-and-for-the-establishment-of-the-office-of-the-valuer-general>> (accessed 18-04-2018) 8.

²⁰³ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 210.

²⁰⁴ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 210.

²⁰⁵ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

²⁰⁶ Hall "Transforming rural South Africa? Taking stock of land reform" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 99.

4 3 5 Property valuation and land administration in redistribution

In order to better transform the current discourse regarding the approach to just and equitable compensation, the appropriate tools regarding property valuation and land administration need to be made available.²⁰⁷ Due to the specific nature of land reform, in 2000 the DLA created a *Handbook on property valuation* (“*Handbook*”).²⁰⁸ More current tools in this context include the Property Valuation Act 17 of 2014, which also establishes the *Office of the land valuer-general*.²⁰⁹ Furthermore, land administration has been proposed by the recent Advisory Panel on Land Reform and Agriculture (“Advisory Panel”) as a possible fourth pillar to land reform.²¹⁰ Property valuation and land administration is thus meant to aid and promote the success of redistribution. The purpose of this section is to explore property valuation and land administration in the context of redistribution, in order to gauge what role these concepts may play in the utilisation of expropriation going. In this way it can be understood whether these concepts are hindrances to the utilisation of expropriation, or potential vehicles to improved utilisation going forwards.

In 2000, the DLA created the *Handbook* in order to assist property valuers who did work for the DLA in land reform matters.²¹¹ The *Handbook* was designed to be a comprehensive set of guidelines for the determination of property value in land reform land acquisition, which includes expropriation for land reform.²¹² The *Handbook* envisaged the valuation of property and the determination of compensation as a two-stage process, namely the determination

²⁰⁷ Du Plessis (2015) 18 *Potchefstroom Electronic Law Journal* 1727.

²⁰⁸ *Handbook on property valuation* (2000) <http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/handbook-on-property-valuation> (accessed 28-08-2019); Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 217.

²⁰⁹ As introduced by the *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 7; and established by section 4 of the Property Valuation Act 17 of 2014. One of the functions of this statute is to aid the compensation process in expropriations by providing the values of land identified for land reform purposes.

²¹⁰ *Final report of the presidential advisory panel on land reform and agriculture* (2019) Pretoria: Advisory Panel on Land Reform and Agriculture <<https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>> (accessed 29-07-2019) 125.

²¹¹ *Handbook on property valuation* (2000) 1. There is a South African council for the property valuers profession. For information on this council, see <https://www.sacvp.co.za/>.

²¹² *Handbook on property valuation* (2000) 10.

of market value, followed by adjustment of the value according to the other factors listed in section 25(3) of the Constitution.²¹³ The figure that the valuer then comes to is a (potential) compensation amount, and not simply the value of the property.²¹⁴ The *Handbook* was intended to be an adaptable guideline, updated as policy changed.²¹⁵ Although the *Handbook* has not yet been updated, there have been other institutions and statutes aimed at guiding property valuation.

The OVG as introduced as early as the 2011 Green Paper on Land Reform.²¹⁶ The 2012 *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (“Policy framework for land acquisition and land valuation”) was established to create the framework in which an office for land valuation could function.²¹⁷ It is in this policy that the underutilisation of expropriation as a land reform mechanism was pointed out.²¹⁸ Section 2 of the Property Valuation Act 17 of 2014 furthermore establishes the powers of the OVG. The Advisory Panel notes that the actual powers and role of the OVG ought to be included in the latest 2019 Expropriation Bill.²¹⁹

The OVG was designed to provide valuations for all organs of state that transact in a manner that requires property valuation, such as land expropriation.²²⁰ The Land-valuer General and those in the OVG are required to be members of a regulated council, namely

²¹³ *Handbook on property valuation* (2000) 11.

²¹⁴ *Handbook on property valuation* (2000) 11; Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 217-218.

²¹⁵ The preface states that “as policy evolves, and court judgements refine our understanding of the application of the Constitution’s property clause [...] the Handbook will need to be revised”, *Handbook on property valuation* (2000) 1.

²¹⁶ See 2 3 3 6; see also TC Boshoff *A comparative analysis between prescribed valuation methodology and the judicial interpretation of just and equitable compensation* LLM North West University (2019) 52.

²¹⁷ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 4.

²¹⁸ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 4.

²¹⁹ *Final report of the presidential advisory panel on land reform and agriculture* (2019) 121; *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 31.

²²⁰ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 23; Pienaar (2018) 10 *Namibian Law Journal* 54.

the South African council of property valuers.²²¹ The OVG is meant to provide norms and standards that can guide the state in its determination of property value,²²² and therefore compensation for expropriation. Compensation higher than the value determined by the OVG is possible, although it is not clear if deviation below the value from the OVG is possible.²²³

The authority of the OVG came before the LCC in the case of *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* (“*eMakhasaneni*”).²²⁴ The matter concerned an expropriation of certain parcels of land by the DRDLR.²²⁵ The matter went before the LCC because the expropriated owners could not reach agreement with the Minister regarding the compensation amount.²²⁶ The Minister sought to uphold a compensation amount based on the report of the OVG, thus arguing that the court need not determine compensation.²²⁷ The court held that although the valuation provided by the OVG is useful, it does not hamper the authority of the court to determine compensation.²²⁸

Market value of property, even with the function of the OVG, is still the starting point to determine just and equitable compensation.²²⁹ The court, however, is authorised to determine compensation when negotiations between the state and expropriated owner are

²²¹ *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 26; see <https://www.sacpvp.co.za/> for information on this council.

²²² *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) 23.

²²³ See *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 35; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* 6 ed (2019) 661.

²²⁴ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC).

²²⁵ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 1.

²²⁶ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 2.

²²⁷ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 11.

²²⁸ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 36.

²²⁹ See 4 2 3 2 above.

unsuccessful.²³⁰ Although the jurisdiction of the court to determine compensation is not limited by the OVG;²³¹ the OVG is nonetheless empowered to determine compensation.²³² In the case of *Msiza II* the definition of market value from the International Valuation Standards Committee was used as a point of departure in determining the valuation of the property.²³³ These standards held that market value is the “estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller”.²³⁴ In *Msiza II*, the parties agreed to use a valuation method in which recent sales of land of similar size, in the nearby area and of similar use to the expropriated property.²³⁵ The question that became important before the court was whether the property was being valued at its current use, or its possible future use.²³⁶ The property valuation under the current use of the property was not in dispute; however, the value with the potential development was more than double the current use value.²³⁷ In this way, the expropriated owner could potentially gain much more than the property was worth.

The court rejected the developmental potential argument in *Msiza II*, on the grounds of the *Point Gourde* principle and the fact that compensation is not meant to be a means for property owners to distort the real value of land.²³⁸ The court eventually accepted a

²³⁰ *eMakhasaneni Community and Others v Minister of Rural Development and Land Reform and Others* 2019 4 SA 286 (LCC) para 34; *Moloto Community v Minister of Rural Development and Land Reform and Others* 2019 3 SA 523 (LCC) para 2. The wording of section 25(3) of the Constitution furthermore suggests that agreement on the compensation is meant to come first, the alternative of which is approval by the court. See Du Plessis “How the determination of compensation is influenced by the disjunction between the concepts of ‘value’ and ‘compensation’” in Hoops, Marais, van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 215.

²³¹ *Moloto Community v Minister of Rural Development and Land Reform and Others* 2019 3 SA 523 (LCC) para 26.

²³² Boshoff *A comparative analysis between prescribed valuation methodology and the judicial interpretation of just and equitable compensation* LLM North West University (2019) 59.

²³³ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 39.

²³⁴ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 39.

²³⁵ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) paras 40; 44.

²³⁶ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 40, 44; the court conceptualised potential future use as the “developmental potential” of the property.

²³⁷ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 44.

²³⁸ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) paras 46-47. The *Point Gourde* principle, derived from Trinidadian case law, guides the determination of

downward adjustment of the compensation amount on the basis that the amount paid by the owners was significantly less than what the land was worth when they bought it.²³⁹

This decision was overturned in the SCA on the basis that there was no indication that the original market value was unreasonable, or that the state was unable to pay the amount.²⁴⁰ The SCA pointed out that there were no issues in the valuation of the property, and the state was willing to pay the market value amount.²⁴¹ The court noted that all the factors that the LCC listed to justify a reduced compensation had already been taken into account in determining market value.²⁴² It is generally accepted that the expropriations for land reform potentially warrant a reduced compensation amount.²⁴³ However, the SCA decision in *Msiza III* suggests this principle will need greater justification to be accepted by courts. It is in this regard that incorporating nil compensation in legislation may be important.

Section 12 of the latest Expropriation (draft) Bill of 2019 provides for certain instances in which no compensation will be payable.²⁴⁴ The section justifies the payment of zero compensation on the grounds that in some instances it would be just and equitable for the

market value by precluding property value increases or decreases due to expropriation, and is still a part of South African law, see *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) para 41, *Ex parte Former Highlands Residents: IN re Ash and Others v Department of Land Affairs* [2000] ZALCC 54 para 26; *Khumalo v Potgieter* [1999] ZALCC para 26; Gildenhuys "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 141-142.

²³⁹ *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 5 SA 513 (LCC) paras 61-63.

²⁴⁰ *Uys N.O and Another v Msiza and Others* 2018 3 SA 440 (SCA) paras 26-27; Gildenhuys "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 149.

²⁴¹ *Uys N.O and Another v Msiza and Others* 2018 3 SA 440 (SCA) para 25.

²⁴² *Uys N.O and Another v Msiza and Others* 2018 3 SA 440 (SCA) para 25.

²⁴³ Gildenhuys "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 149-150.

²⁴⁴ Section 12(3) of the 2019 Expropriation (draft) Bill states:

It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

(a) Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);

(b) where the land is held for purely speculative purposes;

(c) where the land is owned by a state-owned corporation or other state-owned entity;

(d) where the owner of the land has abandoned the land;

(e) where the market value of the land is equivalent to, or less than, the present

value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.

compensation amount to be zero.²⁴⁵ In terms of the factors to determine just and equitable compensation, the possibility of expropriation without compensation theoretically always existed.²⁴⁶ The benefit of an explicit section that allows for nil compensation is the fact it is can be applied by both the OVG and the courts. Thus, conservative legal culture would not bar the possibility of reduced compensation for land reform expropriations. Section 12(3) furthermore applies only to land expropriations, and not expropriations of property in general. Thus, compensation as a hindrance to expropriation in redistribution is potentially removed by section 12(3). However, the issue that exists with section 12 of the 2019 Expropriation (draft) Bill is that many legal technical questions relating to the wording of the section are raised.²⁴⁷ Certain parts of the provisions are conceptually difficult to apply to expropriations, particularly in relation to abandoned land and state land.²⁴⁸

Despite the uncertainties around the wording in section 12(3), an explicit provision regarding lessened and nil compensation is potentially the justification that removes fiscal constraints and high property values as an obstacle to using expropriation.²⁴⁹ This is not to suggest that compensation as a constitutional requirement is problematic or needs removal. This is because there is little rationale for why expropriations for public purposes other than land reform should be subject to less than market value compensation.²⁵⁰ Gildenhuys points out that expropriation without compensation is not the obstacle that redistribution needs to overcome.²⁵¹ The Advisory panel, however, points out that expropriation without

²⁴⁵ Hence the section listing “nil compensation”, see JM Pienaar “Land reform” (2018) 4 *Juta Quarterly Review* para 1.2.3.

²⁴⁶ Van der Walt *Constitutional property law* 3 ed (2011) 506; Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 150.

²⁴⁷ Pienaar (2018) 4 *Juta Quarterly Review* para 1.2.3 (Compensation for expropriation).

²⁴⁸ Pienaar (2018) 4 *Juta Quarterly Review* para 1.2.3 (Compensation for expropriation).

²⁴⁹ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 150.

²⁵⁰ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 150.

²⁵¹ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law*

compensation is only one potential means to improve the pace of land acquisition for land reform by the state.²⁵² The key to improved affordability and utilisation of expropriation in redistribution potentially lies in effective land administration and not only in reduced compensation.

The importance of land administration is highlighted by the issues that the courts face regarding the use of property values in determining compensation. In the field of tenure reform, it has already been argued that information about properties and landholdings is an important part of land administration.²⁵³ Gildenhuys notes that possible contributors to the limited success and slow pace of redistribution and restitution lies in the fact the DRDLR has insufficient know-how regarding high selling prices of farmland, corruption and insufficient budget allocations.²⁵⁴ In this regard, land administration may be the answer to the corruption that limits land reform.

Pienaar defines land administration as “the integrated process of determining, recording, and disseminating information on the [...] value and use of land in the context of suitable land management”.²⁵⁵ In redistribution, Ntsebeza has noted that the reluctance by the state to expropriate is linked to political will rather than legal issues regarding compensation.²⁵⁶ Furthermore, if the courts had remained the only means to determine compensation besides the amount suggested by the expropriating authority, the protracted court process could

III: Fair compensation (2018) 153. This notion is supported by Hoops (2019) 136 *South African Law Journal* 261 262.

²⁵² *Final report of the presidential advisory panel on land reform and agriculture* (2019) Pretoria: Advisory Panel on Land Reform and Agriculture <<https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>> (accessed 29-07-2019) 62.

²⁵³ G Pienaar “Land information as a tool for effective land administration and development” in TW Bennet & H Mostert (eds) *Pluralism and development* (2012) 238 240; GJ Pienaar “Land tenure security: The need for reliable land information” (2013) 70 *The Journal of The Helen Suzman Foundation* 20 20.

²⁵⁴ Gildenhuys “Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective” in Hoops, Marais, Van Schalkwyk & Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) 154.

²⁵⁵ Pienaar “Land information as a tool for effective land administration and development” in Bennet & Mostert (eds) *Pluralism and development* (2012) 240.

²⁵⁶ Ntsebeza “Land redistribution in South Africa: The property clause revisited” in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 125.

furthermore delay an already slow expropriation process.²⁵⁷ The OVG is therefore an important part of expropriation in redistribution going forward. Structures such as the OVG that seeks to potentially accelerate the compensation determination may in fact reduce the number of legal hindrances to an expropriation, even if political will is present.

4 3 6 Conclusion

There are two conclusions that should be noted from the above discussion. In the first place, the process of land acquisition by the state is burdened with high costs regardless of how it is undertaken. There are many checks and balances that must be satisfied whether the state acquires land through expropriation or market-based acquisition. The benefits of expropriation are that the cooperation of the owner is not required, and the transfer of ownership does not have to take place through the deeds registry. The use of the WB/WS model in determining compensation means the market remains a possible hindrance to the expropriation process. The individual owner of expropriated property should not be in a position to delay the process of expropriation. The ability of individual owners to frustrate the process of expropriation suggests the negotiation for the transfer of land for redistribution, albeit faster than expropriation in land transfer, is not sufficient to meet the redistribution goals of land reform.

Market-based land acquisition, however, will always be limited by the willingness of the market to sell. Relying on such a method is geared towards redistribution, since it relies on individual owners to drive land reform. In a capitalist society, individual owners are not positioned to give up individual gain for the public benefit. Overall, both processes should validly exist as a means of land acquisition in redistribution, but this should not be an excuse

²⁵⁷ Ntsebeza "Land redistribution in South Africa: The property clause revisited" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 124.

for the state to shy away from expropriation when it is needed.²⁵⁸ The use of both mechanisms could do with revision in redistribution policy going forward to ensure that the state can afford compensation, if it cannot meet the market costs of land.²⁵⁹ Establishing an expropriation process that is not hindered by the willingness of landowners and the land market may be the key to improving utilisation of the mechanism in redistribution.

Secondly, compensation as a potential obstacle for expropriation is inextricably linked to the other problems attached to expropriation for land reform. The issues attached to expropriation in redistribution, and agrarian reform generally, have problems broader than compensation. Borras' table indicates that the acquisition method, beneficiaries, land market and land prices must all be considered before the issue of financing expropriation can be examined. Thus, financing the compensation for expropriation is a small part of the overall expropriation procedure. In South Africa, utilising a land market approach has proven to be insufficient in implementing land reform. However, this does not suggest that issues around the acquisition method, beneficiaries, land market and prices do not equally apply when using expropriation. All of these aspects must be adequately overcome, before compensation can be calculated. Although high land costs, which the state potentially cannot afford, is a notable hindrance, problems such as poor governance, corruption and uncertain goals in redistribution should not be underestimated and must be addressed before the cost of land can be addressed.

4 4 Conclusion

Compensation is a contentious topic in the field of redistribution expropriations. This is because compensating landowners in South Africa, as a response to historical

²⁵⁸ See *Implementation plan for the proactive land acquisition strategy* (2006) Pretoria: Department of Agriculture <<https://www.gov.za/documents/implementation-plan-proactive-land-acquisition-strategy>> (accessed 11-03-2019) 13.

²⁵⁹ Andrews "Struggling for a life in dignity" in Ntsebeza & Hall (eds) *The land question in South Africa* (2007) 213.

dispossession, seems to doubly benefit the beneficiaries of apartheid. Compensation is an integral requirement for the utilisation of expropriation, because it prevents the state from burdening individual owners for the benefit of the public at large. However, high land costs and the cost of compensation should not be a means to hinder the use of expropriation in redistribution.

Although there is no definitive indication that compensation is an obstacle to land redistribution expropriation, the requirement does point towards certain difficulties in expropriation in redistribution generally. The *Expropriation procedures* point out that expropriation is meant to be used when market-led negotiations have failed. However, the use of market-led land acquisition in redistribution has proven insufficient in reaching the aims of redistribution. In this regard, the high price of land, the limited reform in the land market and the inability of the state to adequately budget for land acquisition in the market meant that land acquisition for redistribution was very slow, if it happened at all. Further issues in this regard is corruption, and the lack of reform in the land market, which favours existing land owners over the beneficiaries of redistribution.

However, expropriation seems to face similar issues regarding the cost of land and the role of market value. The use of market value in the determination of compensation meant that the WB/WS model played a large role in expropriation. This meant that unwilling owners could effectively delay expropriation. State intervention through the OVG has meant that property valuation is determined with reference to the section 25(3) factors, and not simply market value. This shift away from market value does not answer the other issues that expropriation in redistribution faces. This includes lack of political will to expropriate, the capitalist market that does not align with redistributive aims and insufficient know-how regarding managing funds for redistribution. The compensation requirement points to the fact that expropriation in redistribution is faced with hindrances far broader than

compensating landowners. However, the use of state offices such as the OVG assists in ensuring that expropriation does not become more costly than the state can afford.

Chapter 5: Conclusion

5 1 Introduction

Redistribution in South Africa has been slow to bring about the necessary reforms in access to land since apartheid. One mechanism available to the state to bring about land redistribution is expropriation. However, the expropriation power has thus far been severely underutilised as a means of ensuring redistribution of land. Therefore, this thesis probed some of the potential obstacles to the utilisation of expropriation in land redistribution. This task is necessarily difficult as there may be various reasons why expropriation is underused in the context of redistribution, not the least of which is the lack of political will. The aims of this thesis were namely to determine if, and to what extent, the redistribution framework, administrative principles applicable to expropriation, and the compensation requirement point towards possible hindrances to the utilisation of expropriation.

The policies and legislation that make up the redistribution framework, and make provision for land acquisition by the state through expropriation, served as a point of departure for this thesis. Thereafter, the administrative hurdles placed on expropriation as an administrative act were considered. These hurdles included general administrative law, rationality and proportionality requirements, and the legitimate justification for expropriation. Lastly, the compensation requirement was discussed, in light of redistribution policy, the approach of South African courts toward market value compensation, and the burden of compensation for expropriation compared to the cost of market-led land acquisition. These factors have been investigated to discover whether they provide some indication towards the underutilisation of expropriation in the particular context of land redistribution. The main findings of this thesis are set out below.

5 2 Conclusions

5 2 1 Contextualisation of expropriation in redistribution

Chapter 2 investigated the use of expropriation in the redistribution framework. The redistribution framework is made up of policies and legislation. The chapter brought to light five important points, which potentially affect the utilisation of expropriation in redistribution.

The first finding was that redistribution is a broad field that needs to be better structured in order to adequately meet the demands of potential beneficiaries. Redistribution is required to address many problems left in the legacy of apartheid, including mass landlessness and homelessness in both the urban and rural contexts. A notable problem is the many unanswered questions that exist in the redistribution programme. These include: a means to access accurate information on the success of redistribution thus far; an adequate programme of granting improved access to land to both the urban and rural poor; and certainty regarding the model of land acquisition and distribution that underpins the framework of redistribution. Expropriation is a part of the model of land acquisition in redistribution,¹ but must be followed by a workable framework for subsequent redistribution of the acquired land. If clear and concise direction is set out in the policy framework regarding the above mentioned questions, it may be easier to understand how expropriation is meant to be utilised in the sub-programme going forward.

The second finding was that redistribution is a multi-faceted field in which expropriation has a specific role as a means of land acquisition. Therefore, redistribution must also be understood in view of fields broader than land reform law. These fields include: economic growth; planning law, which addresses many urban land issues through statutes such as SPLUMA; and constitutional law, which sets out many of the democratic practices used in

¹ See 2 2 3.

achieving human rights, such as meaningful engagement and public participation.² It is in this regard that the importance of a coherent redistribution policy framework is seen. Policy governs the direction and pace of redistribution, and should therefore take into account the various intersecting fields that affect redistribution. If the impact of these various legal fields is not taken into account at policy level, the task of taking into account these broader factors may only occur when utilising expropriation as a mechanism for acquiring land for redistribution. The expropriation procedure is already laden with requirements that test the validity and purpose.³ If redistribution of land is one such purpose, the policies that frame redistribution should adequately encompass as many of the applicable disciplines and fields as possible. This should ensure that the expropriation process is not burdened with more considerations than necessary.

The third finding is that the many statutes and policies that the Department of Rural Development and Land Reform (“DRDLR”) have instituted for redistribution have lacked an overarching direction for the redistribution sub-programme.⁴ Although redistribution had limited success in the early 2000s by redistributing small percentages of land,⁵ a consistent policy direction since the initial redistribution grants in 1994 has not been clear in the legislative or policy framework for redistribution since.⁶ A possible contributor to the lack of clear direction was found to be the fact that the shift from the initial World Bank model of land redistribution, a model that did not make use of expropriation, to a state-driven model that makes use of expropriation, was never clearly established. The limited use of expropriation in the initial stages of redistribution was due the initial projects of redistribution using less invasive methods of attempting to provide land access.⁷ This approach, however, did not bring about the results that the marginalised and beneficiaries of redistribution

² See 2 2 3.

³ See 2 4 2.

⁴ See 2 3 3.

⁵ See 2 2 3.

⁶ See 2 3 3.

⁷ See 2 3 3 2.

required. The shift towards the state driven model in an attempt to improve redistribution has not been as explicit or more successful thus far, and is potentially the reason why expropriation specifically for the purposes redistribution has not been used.⁸

An updated expropriation policy that takes into account the above-mentioned factors would potentially aid the uncertainties around how expropriation is meant to be used in the sub-programme.⁹ Furthermore, if a new expropriation bill is drafted, a policy by the DRDLR specifically on expectations of expropriation may prove beneficial for both redistribution and expropriation. It is once more in policy that these directives are found.¹⁰ If this shift in approach is more expressly stated in the redistribution framework going forward, it may be easier to improve the utilisation of expropriation as a means of land acquisition. Redistribution policy since 2006 seems to be an indication of the state taking a more direct stance towards land acquisition. In this way, the use of expropriation for redistribution purposes will possibly improve, if better integrated into the redistribution strategies in future.

The fourth finding is that expropriation cannot be seen as a stand-alone solution for the slow pace of redistribution South Africa. Expropriation is a singular part of the redistribution process, from the acquisition of land to the subsequent (re)distribution of land.¹¹ The speed and improved use of expropriation as acquisition is nullified by the delay of distribution. Thus, a means of overcoming the burdens attached to expropriation only become meaningful when the policy on redistribution is equally efficient. Information around land and landholdings is required to become more accessible, such as land registries, land audits and the proposed expropriation registry.¹² This may improve research on expropriation because it is difficult to account for underutilisation with no current centralised means of listing the number of expropriations taking place.

⁸ See 2 2 3.

⁹ See 2 3 3 3.

¹⁰ See 2 3.

¹¹ See 2 2 3.

¹² See 2 4 4 2.

A possible solution to information surrounding expropriations may be found in the statute that replaces the Expropriation Act 63 of 1975 (“1975 Expropriation Act”). There have been a number of attempts to update the 1975 Expropriation Act to bring it in line with the Constitution. The most notable features from the various Expropriation Bills tabled since 2008 are the expropriation register, the Expropriation Advisory Board and the provision for nil compensation. Although the Expropriation Advisory Board has not been brought forward into the Expropriation Bill B4D-2015 or Expropriation Bill (draft) of 2018 (“2019 Expropriation (draft) Bill”),¹³ the expropriation register may prove highly beneficial for research on expropriation. Interrogating the underutilisation of expropriation, particularly in redistribution, will be made easier with a record of current and past expropriations becoming available to the public. Since the 1975 Expropriation Act is pre-constitutional, the different draft Bills aimed at replacing the Act have introduced concepts that will bring expropriation law more in line with section 25 of the Constitution.

Lastly, much of the uncertainty around redistribution and the mechanism of expropriation is seemingly because of the gap that exists in redistribution policies setting directives for the use of expropriation. Legislation does not contain the redistribution directives, although it should be noted that there is very little legislation that makes provision for expropriation in redistribution. It is policy that determines the goals of redistribution. Thus, a changing expropriation framework will not make the mechanism more useful in redistribution until a policy sets up a means to implement it. It is this gap that exists between the redistribution policies and the mechanism of expropriation that leaves the role of expropriation in redistribution elusive. It is these uncertainties that likely play a big role in the underutilisation of expropriation in redistribution.

¹³ GG 42127 of 21-12-2018.

5 2 2 Administrative law as a vehicle for expropriation

Chapter 3 investigated the administrative law principles that apply to expropriation. The chapter identified four conclusions regarding the impact that these administrative considerations have on the utilisation of expropriation is redistribution.

The first was that an expropriation is subject to considerations in administrative law over and above the ones contained in section 25 of the Constitution. Administrative law is useful because it provides for lawful and constitutional use of public power. Administrative principles, such as good governance and *batho pele*, ensure that the administration utilises its power in a manner consistent with the Constitution.¹⁴ Expropriation, as an exercise of public power, should therefore be exercised in a manner that is lawful, procedurally fair and reasonable. Although not attached to administrative law, the less invasive means and alternative project arguments furthermore support the lawful and reasonable requirements in administrative law. Challenging an expropriation on the grounds of less invasive means or alternative project argument will require an evaluation similar to reasonableness in terms of administrative law. These arguments are particularly relevant in the context of redistribution expropriations due to the *Policy and procedure for expropriation of land in terms of Act 126 and ESTA 1999*, which provide for the consideration and guidelines applicable to redistribution expropriations.¹⁵ Thus, administrative considerations provide a higher standard to be overcome in redistribution expropriations, than the requirements in terms of section 25(2) of the Constitution. These considerations are useful in ensuring that expropriations in redistributions are lawful, reasonable and consistent with the Constitution.

The second finding was that the application of the spectrum between rationality and proportionality easier to conceptualise in terms of administrative law than in terms of section 25 of the Constitution. Administrative law provides a useful way to determine the

¹⁴ See 3 2 2.

¹⁵ See 2 3 3 3 and 3 2 5.

reasonableness of an expropriation, through section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and the considerations from *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.¹⁶

Thus, the spectrum between rationality and proportionality can be conceptualised in terms of reasonableness. The arbitrariness standard in the specific context of expropriation needs further clarification, particularly if the 2019 Expropriation (draft) Bill is enacted. It is not clear if courts will consistently apply the *FNB* methodology going forward, which would mean arbitrariness may potentially apply to expropriation in the redistribution context, and section 25(2) of the Constitution does not make reference to arbitrariness. An expropriatee may choose to challenge an expropriation either through section 25(2) of the Constitution or through PAJA, as indicated by the *Kohler Bricks (Pty) Ltd v The City of Cape Town and Another*.¹⁷ An expropriation is always required to be reasonable in terms of administrative law; however, applying the non-arbitrariness requirement to expropriation needs significant substantiation. Thus, administrative law simplifies the task of challenging the rationality or proportionality of an expropriation. This theoretically simplifies the use of these terms in expropriation, and therefore does not pose a hindrance to the utilisation of expropriation in redistribution.

Thirdly, the legitimate justification for expropriation was found to be an important legal aspect to expropriation and should feature more prominently in discourse on redistribution expropriations going forward. The legitimate justification refers to considerations both in expropriation law and in administrative law that contribute to limiting potential reasons to challenge the decision to expropriate. An expropriation can potentially be challenged through administrative law even if the expropriation is valid in terms of section 25(2) of the Constitution. It is in this regard that the considerations such as the legitimate purpose, the

¹⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC). See 3 2 2.

¹⁷ *Kohler Bricks (Pty) Ltd v The City of Cape Town and Another* [2019] ZAWCHC 6 (15 February 2019). See 3 2 1.

suitability and need for the project, and the balance between the project's purpose and the public interest, become important. If these considerations are not adequately addressed, an expropriation can be challenged through judicial review in terms of PAJA. In this way, these extra administrative hurdles must be overcome in addition to the expropriation requirements in section 25 of the Constitution. However, these hurdles do not seem to pose an obstacle to the state making use of the expropriation power, and therefore promote the lawful utilisation of expropriation in redistribution.

Lastly, the chapter found that the difficulties that exist in applying administrative considerations to expropriations do not overtly seem to be the reasons for underutilisation of expropriation in redistribution. Although the difficulty in conceptualising and justifying some of the administrative concepts could potentially deter expropriators from embarking on an expropriation, it is not clear whether these issues form part of the initial considerations taken by the expropriator. Thus, these considerations cannot be directly imputed as a reason for the limited utilisation of expropriation in redistribution. The administrative considerations instead seem to strengthen the lawful use of expropriation in South Africa and should be closer integrated into the expropriation discourse. Although the administrative considerations applicable to expropriation apply over and above the section 25(2) requirements of the Constitution, these considerations in fact allow for improved utilisation of expropriation in a manner that is consistent with the Constitution.

5 2 3 Compensation as a potential hindrance for redistribution expropriations

Chapter 4 investigated the compensation requirement for expropriation, highlighting some of the principles that remain contentious in the determination of compensation. It was established that the concept of compensation is likely to be the part of the expropriation procedure that causes the most delay due to the negotiations that must take place. The differences that exist between just and equitable compensation and the traditional notion of

full recompense is one that should be reconciled in a clear manner in future. Compensation in South Africa is not bound by *restitutio in integrum* as in Malawi.¹⁸ Therefore, notions such as compensation above and below market value, even nil compensation, should be readily justifiable. This is particularly in light of the forthcoming 2019 Expropriation (draft) Bill and the Constitution Eighteenth Amendment (draft) Bill of 2019, which makes provision for the possibility of nil compensation.

A notable finding was the fact that the value of land and the determination of compensation are different concepts.¹⁹ The determination of just and equitable compensation for land expropriation is subject to factors broader than the market value. These factors are sourced from the Constitution and are aimed at ensuring redress for the land dispossession during apartheid. Moreover, the basis upon which land is valued may have to take into account extra-legal values that people attach to land. This includes human rights, such as human dignity. Land can be a source of pride for a community, and a means of identity. Addressing this loss through redistribution means that expropriation should facilitate recovering that sense of identity and dignity. Thus, the purpose of redistribution expropriations cannot be separated from the determination of compensation, but does not necessarily mean that this poses an obstacle to expropriation.

It was also found in chapter 4 that property valuation plays an important role in determining the amount of compensation, and should be clearly determined in light of just and equitable principles.²⁰ The central role that the market plays in valuation seems to reduce the state's capacity to adequately budget for compensation amounts. However, the importance of market value is due the state's initial commitment to a market-based land reform programme.²¹ The reliance on market value is due to the ease with which the value of the property can be quantified. However, the usefulness of market value in determining

¹⁸ See 4 2 3 2.

¹⁹ See 4 2 2.

²⁰ See 4 3 5.

²¹ See 4 3 3.

compensation should not be conflated with using the market to acquire land. The expropriation power should not be hindered by the high costs of land due to market inflation. It is for these reasons that a regulated means of determining compensation in line with the Constitution is important in expropriation.²² If not, expropriation in the redistribution context will continue to be hindered by land costs, and underutilisation of the expropriation power may not improve.

A further aspect of importance is the fact that the process of land acquisition by the state is burdened with high costs regardless of how such acquisition is undertaken. There are many checks and balances that must be satisfied, regardless of whether the state acquires land through expropriation or market-based acquisition.²³ The benefits of expropriation are that the cooperation of the owner is not required, and the transfer of ownership does not have to take place through the deeds registry. The use of the willing buyer/ willing seller model in determining compensation means the market remains a possible hindrance to the expropriation process. The individual owner of expropriated property should not be in a position to delay the process of expropriation. The ability of individual owners to frustrate the process of expropriation suggests the negotiation for the transfer of land for redistribution, albeit faster than expropriation in land transfer, may not be sufficient to meet the redistribution goals of land reform.

Market-based land acquisition, however, will always be limited by the willingness of the market to sell. Relying on such a method is not(?) geared towards redistribution, since it relies on individual owners to drive land reform. In a capitalist society, individual owners are not positioned to give up individual gain for the public benefit. Overall, both processes should validly exist as a means of land acquisition in redistribution, but this should not be an excuse for the state to shy away from expropriation when it is needed.²⁴ The use of both

²² See 4 3 5.

²³ See 4 3 4, 4 3 5.

²⁴ See 4 3 2.

mechanisms could do with revision in redistribution policy going forward to ensure that the state can afford compensation, if it cannot meet the market costs of land.²⁵ Establishing an expropriation process that is not hindered by the willingness of landowners and the land market may be the key to improving utilisation of the expropriation mechanism in redistribution.

Finally, the compensation requirement is inextricably linked to the other problems attached to expropriation for land reform. The issues attached to expropriation in redistribution, and agrarian reform generally, have problems broader than compensation. The acquisition method, beneficiaries, land market and land prices must all be considered before the issue of financing expropriation can be examined.²⁶ Thus, financing the compensation for expropriation is a small part of the overall expropriation procedure. In South Africa, utilising a land market approach has proven to be insufficient in implementing land reform. However, this does not suggest that issues around the acquisition method, beneficiaries, land market and prices do not equally apply when using expropriation. All of these factors must be adequately overcome before compensation can be calculated. Although high land costs, which the state potentially cannot afford, is a notable hindrance, problems such as poor governance, corruption and uncertain goals in redistribution are seemingly larger issues that must be addressed before compensation, and expropriation more broadly, can be adequately utilised to achieve successful land redistribution.

5 3 Way forward and concluding remarks

In conclusion, the redistribution programme and the utilisation of expropriation as a mechanism for this programme is fraught with uncertainty. The expropriation power may need to be viewed in a more dynamic light as legislation and possibly the Constitution are

²⁵ See 4 3 2.

²⁶ See 4 3 1.

adapted to suit the needs of land reform today. The slow pace of redistribution is compounded by the underutilisation of land acquisition mechanisms such as expropriation. Although the expropriation power is saddled with requirements from different fields of law, these extra hurdles serve as a means to ensure that the expropriation power is always utilised in a manner consistent with the Constitution. Thus, in a world of human error and political will, these extra hurdles may hinder the utilisation of expropriation. However, without these extra hurdles, the valid and legal use of expropriation in redistribution should be questioned.

The underutilisation of expropriation in redistribution can be attributed in part to the broad and confusing redistribution framework and the lack of legislation that adequately provides for the expropriation power, and the legitimate justification thereof. Issues in governance and corruption further suggest that the political will to expropriate may need further investigation to truly improve the utilisation of expropriation. Overall, these obstacles need to be addressed; because without a clear and concise redistribution framework, supported by the requisite political will, the mechanism of expropriation will remain a vehicle with no driver or clear direction.

Bibliography

A

Agri South Africa "Submission on the Expropriation Bill [B16-2008]" (17-06-2008) *Parliamentary Monitoring Group* <<http://www.pmg.org.za/report/20080617-expropriation-bil-public-hearings>> (accessed 30-05-2019)

Aliber M "Unravelling the 'willing buyer, willing seller' question" in B Cousins & C Walker (eds) *Land divided land restored* (2015) Pretoria: Jacana Media (Pty) Ltd 145-161

Aliber M & Mokoena R "The land question in contemporary South Africa" in J Daniel, A Habib & R Southall (eds) *State of the nation: South Africa 2003 – 2004* (2003) Cape Town: HSRC Press 330-348

Amoo SK *Property law in Namibia* (2014) Pretoria: Pretoria University Law Press

Andrews M "Struggling for a life in dignity" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) Cape Town: HSRC Press 202-219

B

Bernstein H "Changing before our very eyes': Agrarian questions and the politics of land in capitalism today" (2004) 4 *Journal of Agrarian Change* 190-225.

Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* LLD Stellenbosch University (2015)

Binswanger HP & Deigninger K "South African land policy: The legacy of history and current options" (1993) 21 *World Development* 1451-1475

Boggenpoel ZT "Compliance with section 25(2)(b) of the Constitution: When should compensation for expropriation be determined?" (2012) 129 *South African Law Journal* 606-620

Boggenpoel ZT *Property remedies* (2017) Cape Town: Juta

Borras SM "Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa" (2003) 3 *Journal of Agrarian Change* 367-394

Boshoff TC *A comparative analysis between prescribed valuation methodology and the judicial interpretation of just and equitable compensation* LLM North West University (2019)

Botha H "Human dignity in comparative perspective" (2009) 2 *Stellenbosch Law Review* 171-220

Bradfield G & Lehmann K *Principles of the law of sale & lease* 3 ed (2013) Cape Town: Juta

Braude NL "A 'uniform procedure' for all expropriations? Customary property rights and the 2015 Expropriation Bill" (2017) 1 *Stellenbosch Law Review* 68-96

Burns Y *Administrative law under the 1996 Constitution* 4 ed (2012) Durban: LexisNexis

C

Changuion L & Steenkamp B *Disputed land: The historical development of the South African land issue 1652 – 2011* (2012) Pretoria: Protea Book House

Chaskalson M "The property clause: Section 28 of the Constitution" (1994) 10 *South African Journal on Human Rights* 131-139

Chigara B *Land reform policy: The challenge of human rights law* (2004) Aldershot: Ashgate Publishing Limited

Chirwa DM *Human rights under the Malawian constitution* (2011) Cape Town: Juta & Co

Claasens A "Compensation for expropriation: The political and economic parameters of market value compensation" (1993) 9 *South African Journal on Human Rights* 422-427

Coetzee T "Governance practices in Africa" (2017) 4 *Journal of African Studies* 155-177

Congress Alliance of the People *The Freedom Charter* (1955) Johannesburg: Congress

Alliance of the People <

http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf> (accessed on 03-12-2018)

Corder H "The development of administrative law in South Africa" in G Quinot (ed) *Administrative justice in South Africa* (2015) Cape Town: Oxford University Press 1-25

Cousins B "How do rights become real? Formal and informal institutions in South Africa's land reform?" (1997) 28 *IDS Bulletin* 59-68

Currie I "What difference does the Promotion of Administrative Justice Act make to administrative law?" 2006 *Acta Juridica* 325-351

Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) Cape Town: Juta

D

Dagan H "Eminent domain and regulatory takings: Towards a unified theory" in B Hoops, EJ Marais, L van Schalkwyk & NK Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) The Hague: Eleven International Publishing 21-42

Davies R, O'Meara D & Dlamini S *The struggle for South Africa: A reference guide to movements, organizations and institutions new edition vol 1* (1988) London: Zed Books Ltd

Davy B *Land policy: Planning and the spatial consequences of property* (2012) Surrey: Ashgate Publishing Ltd

De la Harpe S, Rijken C & Roos R "Good governance" (2008) 2 *Potchefstroom Electronic Law Journal* 1-15

Devenish G "Restrictive interpretation: An analysis of the relevance of context, ambiguity and the maxims employed in the process of restrictive interpretation of statutory provisions of legislation" (1992) 1 *Tydskrif vir Regswetenskap* 1-26

Devenish GE, Govender K & Hulme D *Administrative law and justice in South Africa* (2001) Durban: Butterworths Publishers (Pty) Ltd

- Du Plessis WJ** *Compensation for expropriation under the constitution* LLD Stellenbosch University (2009)
- Du Plessis WJ** "The (shelved) Expropriation Bill B16-2008: An unconstitutional souvenir or an alarmist memento?" (2011) 22 *Stellenbosch Law Review* 352-375
- Du Plessis E** "Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on land reform" (2014) 17 *Potchefstroom Electronic Law Journal* 798-831
- Du Plessis E (WJ)** "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I* (2015) The Hague: Eleven International Publishing 369-388
- Du Plessis WJ** "Valuation in the constitutional era" (2015) 18 *Potchefstroom Electronic Law Journal* 1726-1759
- Du Plessis E** "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" in B Hoops, EJ Marais, L van Schalkwyk & NK Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) The Hague: Eleven International Publishing 191-222
- Du Plessis W, Olivier N & Pienaar JM** "Expropriation, restitution and land redistribution: An answer to land problems in South Africa?" (2003) 18 *SA Public Law* 491-514
- Dube P** "Cutting through the noise of land expropriation without compensation" (11-01-2019) *Business Live* available at <<https://www.businesslive.co.za/fm/features/2019-01-11-cutting-through-the-noise-of-land-expropriation-without-compensation/>> (accessed 30-05-2019)
- Dugard J & Seme N** "Property rights in court: An examination of judicial attempts to settle section 25's balancing act re restitution and expropriation" (2018) 34 *South African Journal on Human Rights* 33-56

E

Ebrahim H "The making of the South African Constitution: Some influences" in P Andrews & S Ellman (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) Johannesburg: Witwatersrand University Press 85-102

Erlank W "Green paper on land reform: Overview and challenges" (2014) 17 *Potchefstroom Electronic Law Journal* 0614-0639

F

Farina CR "Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power" (2004) 19 *SA Public Law* 489-512

Fraser N "Social justice in the age of identity politics: Redistribution, recognition and participation" in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) New York: Verso 7-88

Fredman S "Redistribution and recognition: Reconciling inequalities" (2007) 23 *South African Journal on Human Rights* 214-234

G

Gibson JL "Group identities and theories of justice: An experimental investigation into the justice and injustice of land squatting in South Africa" (2008) 70 *The Journal of Politics* 700-716

Gildenhuys A *Onteieningsreg* 2 ed (2001) Durban: Butterworths

Gildenhuys A "Full compensation, fair compensation or no compensation in expropriations for land reform: A South African perspective" in B Hoops, EJ Marais, L van Schalkwyk &

NK Tagliarino (eds) *Rethinking expropriation law III: Fair compensation* (2018) The Hague: Eleven International Publishing 123-158

Gildenhuys A & Grobler GL "Expropriation" in WA Joubert & JA Faris (eds) *Law of South Africa* Vol 10 part 3 2 ed (2012) Durban: LexisNexis

H

Hall R "Land restitution in South Africa: Rights, development and the restrained state" (2004) 38 *Canadian Journal of African Studies* 654-671

Hall R "Transforming rural South Africa? Taking stock of land reform" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) Cape Town: HSRC Press 87-106

Hall R "A political economy of land reform in South Africa" (2010) 31 *Review of African Political Economy* 213-227

Hall R "Two cycles of land policy in South Africa: Tracing the contours" in W Anseeuw & C Alden (eds) *The struggle over land in Africa: Conflicts, politics and change* (2010) Cape Town: HSRC Press 175-192

Hall R "Who, what, where, how, why? The many disagreements about land redistribution in South Africa" in B Cousins & C Walker (eds) *Land divided land restored* (2015) Pretoria: Jacana Media (Pty) Ltd 127-144

Hall R *Submission to the portfolio committee on public works on Expropriation Bill of 2015* (2015) Institute for Poverty, Land and Agrarian Studies (PLAAS) <
http://repository.uwc.ac.za/bitstream/handle/10566/4588/expropriation_bill_plaas_submission_2015.pdf?sequence=1&isAllowed=y> (accessed 27-08-2019)

Hall R & Kepe T "Elite capture and state neglect: New evidence on South Africa's land reform" (2017) 44 *Review of African Political Economy* 122-130

Hall R & Ntsebeza L "Introduction" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) Cape Town: HSRC Press 1-24

Hendricks F “Rhetoric and reality in restitution and redistribution: Ongoing land and agrarian questions in South Africa” in F Hendricks, L Ntsebeza & K Helliker (eds) *The promise of land* (2013) Pretoria: Jacana Media (Pty) Ltd 27-53

Hendricks F, Ntsebeza L & Helliker K “Land questions in South Africa” in F Hendricks, L Ntsebeza & K Helliker (eds) *The promise of land* (2013) Pretoria: Jacana Media (Pty) Ltd 1-26

Hendricks F & Pithouse R “Urban land questions in contemporary South Africa: The case of Cape Town” in F Hendricks, L Ntsebeza & K Helliker (eds) *The promise of land* (2013) Pretoria: Jacana Media (Pty) Ltd 103-129

Hoexter C *Administrative law in South Africa* 2 ed (2012) Cape Town: Juta

Hoops B “The public purpose for the expropriation of land: A framework for assessing its democratic legitimacy” in B Hoops, EJ Marais, H Mostert, JAMA Sluysman and LCA Verstappen (eds) *Rethinking expropriation law I: Public interest in Expropriation* (2015) The Hague: Eleven International Publishing 237-278

Hoops B “The alternative project argument in the context of expropriation law (part 1)” 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 680-696

Hoops B *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) Cape Town: Juta

Hoops B “Expropriation without compensation: A yawning gap in the justification of expropriation?” (2019) 136 *South African Law Journal* 261-302

Hutchison D “Improperly obtained consensus” in D Hutchison & C Pretorius (eds) *The law of contract in South Africa* 2 ed (2012) Cape Town: Oxford University Press 113-144

I

Iles K “Limiting socio-economic rights: Beyond the internal limitations clauses” (2004) 20 *South African Journal on Human Rights* 448-465

Iyer D “Is the determination of compensation a pre-requisite for the constitutional validity of expropriation: *Haffajee NO v eThekweni Municipality*” (2012) *Speculum Juris* 66-74

Iyer D “The role of government in expediting land expropriation: Reshaping the future of land reform” (2017) 52 *Journal of Public Administration* 508-519

J

James D *Gaining ground? ‘Rights’ and ‘property’ in South African land reform* (2007) Johannesburg: Wits University Press

K

Kepe T & Hall R *Land redistribution in South Africa: Commissioned report for high level panel on the assessment of key legislation and the acceleration of fundamental change* (2016) Parliament of South Africa <
https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf> (accessed 11-03-2019)

Kgwadi E & Nefale M “The negative impacts of World Bank market based land reform: A South African case study” in F Barros, S Sauer & S Schwartzman (eds) *The negative impacts of World Bank market based land reform* (2003) Brasil: Rede Brasil 295-308

Kidd M “Reasonableness” in G Quinot (ed) *Administrative justice in South Africa* (2015) Cape Town: Oxford University Press 169-191

Kidd M “Reasons” in G Quinot (ed) *Administrative justice in South Africa* (2015) Cape Town: Oxford University Press 193-218

Klare K “Legal culture and transformative constitutionalism” (1998) 14 *South African Journal on Human Rights* 146-168

Klug H "In the shadow of Zimbabwe: Public interest, land reform and the transfer of property in South Africa" in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I* (2015) The Hague: Eleven International Publishing 153-184

Kook D "White privilege, psychoanalytic ethics, and the limitations of political silence" (2011) 30 *South African Journal of Philosophy* 494-501

Koopman N "Inclusive dignity and land reform in South Africa" (2014) 113 *Scriptura* 1-8

L

Lahiff E "'Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform" (2007) 28 *Third World Quarterly* 1577-1597

Lahiff E "Land redistribution in South Africa" in HP Binswanger-Mkhize, C Bourguignon & R van den Brink (eds) *Agricultural land redistribution: Toward greater consensus* (2009) Washington DC: The World Bank 169-200

Lipton M *Land reform in developing countries: Property rights and property wrongs* (2009) New York: Routledge

M

Madlingozi T "Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution" (2017) 1 *Stellenbosch Law Review* 123

Mbazira C "'Appropriate, just and equitable relief' in socio-economic rights litigation: The tension between corrective and distributive forms of justice" (2008) 125 *South African Law Journal* 71-94

- Marais EJ** “When does state interference with property (now) amount to expropriation? An analysis of the *AgriSA* court’s state acquisition requirement (Part I)” (2015) 18 *Potchefstroom Electronic Law Journal* 2983-3031
- Marais EJ** “A common-law presumption, statutory interpretation and section 25(2) of the Constitution — A tale of three fallacies. A critical analysis of the Constitutional Court’s *Arun* judgment” (2016) 133 *South African Law Journal* 629-663
- Marais EJ & Maree PJH** “At the intersection between expropriation law and administrative Law: Two critical views on the Constitutional Court’s *Arun* judgment” (2016) 19 *Potchefstroom Electronic Law Journal* 1-54
- Marais EJ** “Providing better protection for expropriatees? Preliminary thoughts on the interpretation of ‘arbitrarily’ in clause 2(1) of the Expropriation Bill B4D-2015” (2017) 33 *South African Journal on Human Rights* 97-119
- Mazwi F, Chibwana M & Muchetu RG** “Land, agrarian reform in Zimbabwe viewed from a transformative social policy perspective” (2017) 47 *Africanus* 1-17
- Mbokazi N** “Understanding land redistribution policy-making and policy implementation: Case studies from the Eastern Cape – land reform” 2018 *New Agenda: South African Journal of Social and Economic Policy* 22-27
- Mészáros G** *Social movements, law and the politics of land reform: Lessons from Brazil* (2013) New York: Routledge
- Mngxitama A** “Why Dikgang Moseneke is wrong on land expropriation” (29-04-2016) *Black Opinion* < <https://blackopinion.co.za/2016/04/29/dikgang-moseneke-wrong-land-expropriation/> > (accessed 15-07-2018)
- Moseley WG** “Neoliberal agricultural policy versus agrarian justice: Farm workers and land redistribution in South Africa’s Western Cape Province” (2007) 89 *South African Geographical Journal* 4-13

- 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) Berlin: Springer
- Mostert H** "The distinction between deprivations and expropriations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 4 *South African Journal on Human Rights* 567-592
- Mostert H** "The poverty of precedent on public/public interest: An analysis of pre-constitutional and post-apartheid jurisprudence in South Africa" in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) The Hague: Eleven International Publishing 59-92
- Mostert H** "Revising the procedure for expropriations in South Africa: 2015 Bill and 1975 Act compared" (2016) 5 *European Property Law Journal* 170-205
- Mostert H, Pienaar JM & Van Wyk J** "Land" in WA Joubert, JA Faris and LTC Harms (eds) *Law of South Africa* Vol 14 part 1 2 ed (2010) Durban: LexisNexis
- Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J** *The principles of the law of property in South Africa* (2010) Cape Town: Oxford University Press
- Muller G, Brits R, Pienaar JM & Boggempoel Z** *Silberberg and Schoeman's The law of property* 6 ed (2019) Durban: LexisNexis
- Munzhedzi PH** "South African public sector procurement and corruption: Inseparable twins?" (2016) 10 *Journal of Transport and Supply Chain Management* 1-8
- Mureinik E** "Administrative law in South Africa" (1986) 103 *South African Law Journal* 615-645
- Murray C** "Negotiating beyond deadlock: From the constitutional assembly to the court" in P Andrews & S Ellman (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic Law* (2001) Johannesburg: Witwatersrand University Press 103-127

N

Ndlovu-Gatsheni SJ "Dynamics of the Zimbabwe crisis in the 21st century" (2003) 3 *African Journal on Conflict Resolution* 99-136

Ng'ong'ola C "The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe" (1992) 41 *International and Comparative Law Quarterly* 117-136

Ng'ong'ola C "Property guarantees in old and new Southern African constitutions" in B Chigara (ed) *Reconceiving property rights in the new millennium* (2012) New York: Routledge 154-183

Nginase XH *The meaning of 'public purpose' and 'public interest' in section 25 of the Constitution* LLM Stellenbosch University (2009)

Ntsebeza L "Land redistribution in South Africa: The property clause revisited" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) Cape Town: HSRC Press 107-131

O

Oduor RMJ "Liberal democracy: An African critique" (2019) 38 *South African Journal of Philosophy* 108-122

P

Parliament of the Republic of South Africa "Public works committee resolves to reject Expropriation Bill" (28-08-2018) *Parliament of the Republic of South Africa, Press release* <<https://www.parliament.gov.za/press-releases/public-works-committee-resolves-reject-expropriation-bill>> (accessed on 18-09-2018)

Patel R "A short course in politics at the university of Abahlali baseMjondolo" (2008) 43 *Journal of Asian and African Studies* 95-111

- Pienaar G** “Die grondwetlikheid van die voorgestelde onteieningsraamwerk vir Suid-Afrika”
2009 *Tydskrif vir die Suid-Afrikaanse Reg* 344-352
- Pienaar G** “Land information as a tool for effective land administration and development” in
TW Bennet & H Mostert (eds) *Pluralism and development* (2012) Cape Town: Juta & Co
238-271
- Pienaar GJ** “Land tenure security: The need for reliable land information” (2013) 70 *The Journal of The Helen Suzman Foundation* 20-27
- Pienaar JM** *Land reform* (2014) Cape Town: Juta
- Pienaar JM** “Land reform embedded in the Constitution: Legal contextualization” (2015) 114
Scriptura 1-20
- Pienaar JM** “Land reform” (2018) 4 *Juta Quarterly Review*
- Pienaar JM** “Willing-seller-willing-buyer and expropriation as land reform tools: What can
South Africa learn from the Namibian experience?” (2018) 10 *Namibian Law Journal* 41-
64
- Pithouse R** “Our struggle is thought, on the ground running: The university of *Abahlali baseMjondolo*” (2006) 40 *Centre for Civil Society Research Report* 5-47
- Pithouse R** “Abahlali baseMjondolo and the struggle for the city in Durban, South Africa”
(2009) 6 *Cidades* 241-270
- Pithouse R** “Urban land question is also urgent” (09-03-2018) *Abahlali baseMjondolo*
<<http://abahlali.org/node/16422/>> (accessed 11-03-2019)
- Pityana SM** “The ‘land question’: The South African Constitution and the emergence of a
conservative agenda” in B Cousins & C Walker (eds) *Land divided land restored* (2015)
Pretoria: Jacana Media (Pty) Ltd 161-174
- Plasket C** “Disproportionality – the hidden ground of review: *Medirite (Pty) Ltd v South African Pharmacy Council & Another*” (2019) 1 *South African Law Journal* 15-26

Posterman RL & Hanstad T "Land reform in the twenty-first century: New challenges, new responses" (2006) *Seattle Journal for Social Justice* 763-800

Q

Quinot G "Regulating administrative action" in G Quinot (ed) *Administrative justice in South Africa* (2015) Cape Town: Oxford University Press 95-118

Quinot G & Liebenberg S "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" in S Liebenberg & G Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) Cape Town: Juta & Co 197-221

Quinot G & Maree P "Administrative action" in G Quinot (ed) *Administrative justice in South Africa* (2015) Cape Town: Oxford University Press 66-94

R

Ranwedzi EN *The potential and limits of the proactive land acquisition strategy: Land reform implementation in Gauteng province of South Africa* LLM University of the Western Cape (2013)

Rautenbach IM "Expropriation and compensation for limitations of the right to property that do not amount to expropriation" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 585-597

Republic of South Africa, Advisory Panel on Land Reform and Agriculture *Final report of the presidential advisory panel on land reform and agriculture* (2019) Pretoria: Advisory Panel on Land Reform and Agriculture <<https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>> (accessed 29-07-2019)

Republic of South Africa, High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the high level panel on the*

assessment of key legislation and the acceleration of fundamental change (2017)

Pretoria: High Level Panel on the Assessment of Key Legislation and the Acceleration Of Fundamental Change <<https://www.parliament.gov.za/press-releases/download-report-high-level-panel-assessment-key-legislation-and-acceleration-fundamental-change>> (accessed 08-05-2020)

Republic of South Africa, Department of Agriculture *Comprehensive agricultural support programme* (2003) Pretoria: Department of Agriculture <<https://www.nda.agric.za/docs/casp/casp.htm>> (accessed 13-12-2018)

Republic of South Africa, Department of Agriculture *Implementation plan for the proactive land acquisition strategy* (2006) Pretoria: Department of Agriculture <<https://www.gov.za/documents/implementation-plan-proactive-land-acquisition-strategy>> (accessed 11-03-2019)

Republic of South Africa, Department of Agriculture *Manual for the implementation of the proactive land acquisition strategy* (2007) Pretoria: Department of Agriculture <http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/manual%20for%20the%20implementation%20of%20the%20proactive%20land%20acquisition%20strategy.pdf> (accessed 11-03-2019)

Republic of South Africa, Department of Agriculture and Commission on the Restitution of Land Rights *Settlement and implementation support programme* (2007) Pretoria: Commission on the Restitution of Land Rights and Department of Agriculture <https://www.gov.za/sites/default/files/gcis_document/201411/dlasynthesisreportsept2007.pdf> (accessed 13-12-2018)

Republic of South Africa, Departments of Agriculture and Land Affairs *Land redistribution and agricultural development* (2001) Pretoria: Departments of Agriculture and Land Affairs < <https://www.nda.agric.za/docs/Policy/redistribution.htm>> (accessed on 08-10-2018)

Republic of South Africa, Departments of Agriculture and Land Affairs *National land summit 27 – 31 July 2005* (2005) Johannesburg: Departments of Agriculture and Land Affairs <https://www.nda.agric.za/docs/landsummit/land_summit.htm> (accessed on 11-03-2019)

Republic of South Africa, Department of Land Affairs *Municipal commonage policy and procedures* (1997) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/161-municipal-commonage-policy-and-procedures>> (accessed 11-03-2019)

Republic of South Africa, Department of Land Affairs *White paper on South Africa land policy* (1997) Pretoria: Department of Land Affairs <<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>> (accessed 14-09-2018)

Republic of South Africa, Department of Land Affairs *Policy and procedures for expropriation of land in terms of Act 126 and ESTA* (1999) Pretoria: Land Reform Policy Committee <https://www.gov.za/sites/default/files/gcis_document/201409/landexpro0.pdf> (accessed 19-08-2019)

Republic of South Africa, Department of Land Affairs *Handbook on property valuation* (2000) Pretoria: Department of Land Affairs <http://www.ruraldevelopment.gov.za/phocadownload/Land_Acquisition_Warehouse/handbook-on-property-valuation> (accessed 28-08-2019)

Republic of South Africa, Department of Rural Development and Land Reform *Green paper on land reform* (2011) Pretoria: Department of Rural Development and Land Reform <https://www.gov.za/sites/www.gov.za/files/land_reform_green_paper.pdf> (accessed 18-04-2018)

Republic of South Africa, Department of Rural Development and Land Reform *Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general* (2012) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1368-a-policy-framework-for-land-acquisition-and-land-valuation-in-a-land-reform-context-and-for-the-establishment-of-the-office-of-the-valuer-general>> (accessed 18-04-2018)

Republic of South Africa, Department of Rural Development and Land Reform *State land lease and disposal policy* (2013) Pretoria: Department of Rural Development and Land Reform <http://www.ruraldevelopment.gov.za/phocadownload/Policies/state_land_lease_and_disposal_policy_25july2013.pdf> (accessed 11-03-2019)

Republic of South Africa, Department of Rural Development and Land Reform *Land audit report* (2017) Pretoria: Department of Rural Development and Land Reform <<http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126>> (accessed 13-12-2018)

Republic of South Africa, Parliament Constitution Eighteenth Amendment (draft) Bill (2019) Cape Town: Parliament <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191203Draft_advertised.pdf> (accessed 31-01-2020).

Republic of South Africa, Parliament *The National Land Reform Framework Bill* (2017) Cape Town: Parliament <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf> (accessed 11-03-2019)

Republic of South Africa, National Assembly of Parliament Minutes of Proceedings of the National Assembly on Tuesday 28 February 2017 [Unrevised Hansard] <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 23-07-2018)

Republic of South Africa, National Assembly of Parliament Minutes of Proceedings of the National Assembly on Tuesday 27 February 2018 [Unrevised Hansard] <[https://www.parliament.gov.za/hansard?sorts\[date\]=-1&page=9&offset=80](https://www.parliament.gov.za/hansard?sorts[date]=-1&page=9&offset=80)> (accessed 25-07-2018)

Roux T "Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court" (2004) 20 *South African Journal on Human Rights* 511-543

Roux T "Land restitution and reconciliation in South Africa" in F du Bois & A du Bois-Pedain (eds) *Justice and reconciliation in post-apartheid South Africa* (2008) New York: Cambridge University Press 144-171

Roux T "Property" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014) 46

S

Schauer F "Legal development and the problem of systemic transition" (2003) 13 *Journal of Contemporary Legal Issues* 261-187

Slade BV *The justification of expropriation for economic development* LLD Stellenbosch University (2012)

Slade BV "The less invasive means argument in expropriation law" 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 199-215

Slade BV "'Public purpose or public interest" and third party transfers" (2014) 17 *Potchefstroom Electronic Law Journal* 167-206

Slade B “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in B Hoops, E Marais, H Mostert, J Sluysmans & L Verstappen (eds) *Rethinking expropriation law I: Public interest in expropriation* (2015) The Hague: Eleven International Publishing 331-348

Slade BV “Compensation for what? An analysis of the outcome in *Arun Property Development (PTY) LTD v Cape Town City*” (2016) 19 *Potchefstroom Electronic Law Journal* 1-25

Slade BV “The ‘law of general application’ requirement in expropriation law and the impact of the Expropriation Bill of 2015” (2017) 50 *De Jure* 346-362

Slade BV “The effect of avoiding the *FNB* methodology in section 25 disputes” (2019) 40 *Obiter* 36-46

T

Terreblance S *A history of inequality in South Africa 1652 – 2002* (2002) Scottsville: University of Natal Press

Tsawu S *An historical overview and evaluation of the sustainability of the land redistribution for agricultural development (LRAD) programme in South Africa* MPhil Stellenbosch University (2006)

V

Van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* LLD Stellenbosch University (2015)

Van der Walt AJ “Towards the development of post-apartheid land law: An exploratory survey” (1990) 23 *De Jure* 1-45

Van der Walt AJ *Constitutional property clauses* (1999) Cape Town: Juta & Co

- Van der Walt AJ** "Living with new neighbours: Landownership, land reform and the property clause" (2002) 119 *South African Law Journal* 816-840
- Van der Walt AJ** "Moving towards recognition of constructive expropriation" (2002) 65 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 459-473
- Van der Walt AJ** "Overview of developments since the introduction of the constitutional property clause" (2004) 19 *SA Public Law* 46-89
- Van der Walt AJ** "Striving for better interpretation – a critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878
- Van der Walt AJ** "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng (CC)*" (2005) 122 *South African Law Journal* 75-89
- Van der Walt AJ** "The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case" (2005) 122 *South African Law Journal* 765-778
- Van der Walt AJ** "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" (2006) 123 *South African Law Journal* 23-40
- Van der Walt AJ** "Constitutional property law" (2008) 4 *Juta Quarterly Review*
- Van der Walt AJ** *Constitutional property law* 3 ed (2011) Cape Town: Juta
- Van der Walt AJ** "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94.
- Van der Walt AJ** *Property and constitution* (2012) Pretoria: Pretoria University Law Press
- Van der Walt AJ** "Constitutional property law" 2013 *Annual Survey of South Africa* 216-230
- Van der Walt AJ & Pienaar GJ** *Introduction to the law of property* 7 ed (2016) Cape Town: Juta & Co

- Van der Walt AJ & Slade BV** "Public purpose and changing circumstances: *Harvey v Umhlathuze Municipality & Others*" (2012) 129 *South African Law Journal* 219-235
- Van Wyk J** *Planning law* 2 ed (2012) Cape Town: Juta
- Van Wyk J** "Compensation for land reform expropriation" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 21-35
- Van Zyl J & Binswanger H** "Market-assisted rural land reform: How will it work?" in J van Zyl, J Kirsten & HP Hinswanger (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) Cape Town: Oxford University Press
- Venter WL** "The statutory remedies available to landowners that are faced with unfounded restitution claims in terms of the Land Rights Act 22 of 1994" (2003) 2 *Stellenbosch Law Review* 235-255
- Viljoen S** "Substantive adjudication of the decision to expropriate property" (2017) 28 *Stellenbosch Law Review* 444-465

W

- Walker C** "Redistributive land reform" in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) Cape Town: HSRC Press 132-151
- World Bank** *Options for land reform and rural restructuring in South Africa* (1993) Washington DC: World Bank
<<http://documents.worldbank.org/curated/en/707271468302672976/pdf/779910WP0lan d00n0Box377320B00OUO090.pdf>> (accessed 14-08-2019)

Z

- Zikode S** "Our country is the greatest strength of the *Abahlali baseMjondolo* movement (SA) (shackdwellers)" (2008) 43 *Journal of Asian and African Studies* 113-117

Zimmerman J "Property on the line: Is an expropriation-centered land reform constitutionally permissible?" (2005) 122 *South African Law Journal* 378-418

Index of Legislation and Constitution

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa, Act 200 of 1993

Development Facilitation Act 67 of 1995

Distribution and Transfer of Certain State Land Act 119 of 1993

Expropriation Act 55 of 1965

Expropriation Act 63 of 1975

Expropriation Amendment Act 19 of 1977

Expropriation Amendment Act 3 of 1978

Expropriation Amendment Act 21 of 1982

Expropriation Amendment Act 45 of 1992

Expropriation Bill B16-2008

Expropriation Bill B4D-2015

Expropriation Bill (draft) in GN 234 of 2013 GG 36269 of 20-03-2013

Expropriation Bill (draft) in GN 116 of 2018 GG 42127 of 21-12-2018

Extension of Security of Tenure Act 62 of 1997

Glen Grey Act of 1894

Group Areas Act 41 of 1950

Extension of Security of Tenure Act 62 of 1997

Land Reform (Labour Tenants) Act 3 of 1996

Land Use Planning Ordinance 15 of 1985

Mineral and Petroleum Resources Development Act 22 of 2002

National Roads Act 54 of 1971

Native Land Act 27 of 1913

Promotion of Administrative Justice Act 4 of 2000

Property Valuation Act 17 of 2014

Provision of Certain Land for Settlement Act 126 of 1993

Provision of Land and Assistance Act 126 of 1993

Regulation of Agricultural Land Holdings Bill in GN 229 of 20178 GG 40697 of 17-03-2017

Restitution of Land Rights Act 22 of 1994

Restitution of Land Rights Amendment Act 15 of 2014

Spatial Planning and Land Use Management Act 16 of 2013

State Land Disposal Act 48 of 1961

Subdivision of Agricultural Land Act 18 of 1977

Transformation of Certain Rural Areas Act 94 of 1998

Table of Cases

Administrator Transvaal v J van Streepen (Kempton Park) (Pty) Ltd 1990 4 SA 644 (A)

Agri South Africa v Minister for Minerals and Energy and Others 2013 4 SA 1 (CC)

Arun Property Development (Pty) Ltd v Cape Town City 2015 2 SA 584 (CC)

Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC)

Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality
[2010] ZAFSHC 11

*Bel Porto School Governing Body and Others v Premier of the Western Cape Province
and Another* 2002 3 SA 265 (CC)

Bonnet v Department of Agricultural Credit and Land Tenure 1974 3 SA 737 (T)

City of Cape Town v Helderberg Park Development 2007 1 SA 1 (SCA)

Du Toit v Minister of Transport 2003 1 SA 586 (C)

Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works [2010] ZAGPPHC 154 (12 October
2010)

Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works [2011] ZASCA 246 (1 December
2011)

Ex Parte Former Highland Residents: In re Ash and Others v Department of Land Affairs
[2000] ZALCC 54

*Executive Council of the Western Cape Legislature v President of the Republic of South
Africa* 1995 4 SA 877 (CC)

*First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African
Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance*
2002 4 SA 768 (CC)

Harksen v Lane 1998 1 SA 300 (CC)

Haffajee NO and Others v eThekweni Municipality and Others 2011 6 SA 134 (CC)

Harvey v Umhlathuze Municipality and Others 2011 1 SA 601 (KZP)

Hermanus v Department of Land Affairs: In re Erven 3535 & 3536 Goodwood 2001 1 SA 1030 (LCC)

In re Farmerfield Communal Property Trust 1999 1 SA 936 (LCC)

Kohler Bricks (Pty) Ltd v The City of Cape Town and Another [2019] ZAWCHC 6

Koyabe v Minister for Home Affairs and Others 2010 4 SA 327 (CC)

Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd 2004 1 SA 308 (SCA)

Mhlanganisweni Community v The Minister of Rural Development and Land Reform & Others [2012] ZALCC 7

Moloto Community v Minister of Rural Development and Land Reform and Others 2019 3 SA 523 (LCC)

Msiza v Uys 2005 2 SA 456 (LCC)

Msiza v Director-General, Department of Rural Development and Land Reform and Others 2016 5 SA 513 (LCC)

Nhlabathi and Others v Fick [2003] ZALCC 9

Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others 2010 4 SA 242 (SCA)

Pentree Ltd v Nelson Mandela Bay Municipality 2017 4 SA 32 (ECP)

Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501

Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc 2001 2 SA 1 (CC)

Pharmaceutical Manufacturers Association of South Africa in re: the ex parte application of the President of the Republic of South Africa 2000 2 SA 674 (CC)

President of Republic of South Africa and Another v Hugo 1997 4 SA 1 (CC)

President of the Republic of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC)

S v Makwanyane 1995 3 SA 391 (CC)

Salem Party Club and Others v Salem Community and Others 2018 3 SA 1 (CC)

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape 2015 6 SA 125 (CC)

Staufen Investments (Pty) Ltd v The Minister of Public Works and Others 2019 2 SA 295 (ECP)

Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa 2004 3 SA 346 (SCA)

Uys N.O and Another v Msiza and Others 2018 3 SA 440 (SCA)

Annexures

Table 1: World Bank models of land redistribution

	Market-assisted acquisition	Administrative acquisition
Market-assisted distribution	(A) With both stages handled by market mechanisms, such as the willing-buyer, willing-seller model. The role of the state is limited to monitoring and facilitating the process.	(C) Here the state acquires the land (through expropriation or direct purchase) and relies on a market device for distribution, such as a bidding process.
Administrative distribution	(B) In this case, the state acquires land in the market and then administers the settlement program. Examples include homeland consolidation and betterment schemes	(D) An example of an administratively handled land redistribution is the process of directed resettlement on state owned or expropriated land.

Source: World Bank “Models of land redistribution” in *Options for land reform and rural restructuring in South Africa* (1993) 33. Edited by author.

Table 2: Timeline of policy, legislation and political events in redistribution and expropriation

1975	Expropriation Act 63 of 1975
1977	Expropriation Amendment Act 19 of 1977
1978	Expropriation Amendment Act 3 of 1978
1982	Expropriation Amendment Act 21 of 1982
1992	Expropriation Amendment Act 45 of 1992
1993	Interim Constitution of the Republic of South Africa Act 200 of 1993 Provision of Certain Land Settlement Act 126 of 1993 World Bank makes proposals for rural restructuring in <i>Options for land reform and rural restructuring in South Africa</i> (1993)
1994	Community land conference on the land charter Restitution of Land Rights Act 22 of 1994 Settlement/Land Acquisition Grant, 1994, by the Department of Land Affairs
1996	Constitution of the Republic of South Africa, 1996 Land Reform (Labour Tenants) Act 3 of 1996
1997	White Paper on Land Reform, 1997 by the Department of Land Affairs
1998	Provision of Certain Land Settlement Act 126 of 1993 is renamed to become Provision of Land and Assistance Act 126 of 1993
1999	Policy and procedures for expropriation of land in terms of Act 126 And ESTA (1999)
2001	Land Redistribution and Agricultural Development, 2001, by the Department of Land Affairs Landless People's Movement is formed
2003	<i>Comprehensive Agricultural Support Programme</i> (2003), by the Department of Agriculture
2005	National Land Summit, 2005, by the Departments of Agriculture and Land Affairs The movement of <i>Abahlali baseMjondolo</i> mobilises
2006	Proactive Land Acquisition Strategy, 2006, is launched by the Department of Land Affairs
2007	Draft Policy on the Expropriation Bill 2007

	<i>Settlement and Implementation Support Programme</i> (2007), by the Commission on the Restitution of Land Rights and Department of Agriculture
2008	Expropriation Bill B16-2008
2009	The Department of Land Affairs becomes the Department of Rural Development and Land Reform
2011	Green Paper on Land Reform, 2011, by the Department of Rural Development and Land Reform
2012	Policy framework for land acquisition and land valuation in a land reform context and for the establishment of the office of the valuer-general, 2012, by Department of Rural Development and Land Reform
2013	Expropriation Bill (draft) in GN 234 of 2013 GG 36269 of 20-03-2013 State Land Lease and Disposal Policy, 2013, by the Department of Rural Development and Land Reform
2014	Property Valuation Act 17 of 2014
2015	Expropriation Bill B4D-2015
2017	Property Valuation Census Parliamentary call for amendment to section 25 of the Constitution
2018	Parliamentary call for expropriation without compensation Expropriation Bill (draft) in GN 116 of 2018 GG 42127 of 21-12-2018
2019	<i>Final report of the presidential advisory panel on land reform and agriculture</i> , 2019

Source: Author's own design.

Table 3: Considerations for a legitimate redistribution expropriation in South Africa

State question	Consideration
Legitimate purpose	Public purpose/public interest Suitability test
Suitability and need for the (redistribution) project and expropriation	Rationality
Balance between project's public benefits and adversely affected interests	Proportionality in terms of reasonableness Section 36(1) of the Constitution

Source: Adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

Table 4: Expropriation Bills and Acts

	1975 Expropriation Act	2008 Expropriation Bill	2013 Expropriation (draft) Bill	2015 Expropriation Bill	2019 Expropriation (draft) Bill
Legitimate purpose	Section 2,3, 5	Section 2 - 5	Section 2-5	Section 2-4	Section 2-4
Suitability of project and Suitability of expropriation	Section 6-9	Section 10- 14	Section 6-12	Section 5-11	Section 5-11
Balance between project's public benefits and adversely affected interests	Section 6	Section 8(6)	Section 6-7	Section 5-6	Section 5-6

Source: Author's own design, y-axis adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

Table 5: Expropriation provisions in land redistribution legislation

	Provision of Land and Assistance Act 126 of 1993	Extension of Security of Tenure Act 62 of 1997	Restitution of Land Rights Act 22 of 1994	Land Reform (Labour Tenants) Act 3 of 1996
Expropriation power	Section 12	Section 26	Section 42E(2)-(3)	Section 2(1), (2)
Legitimate purpose	Section 2 Section 12	Section 1 Section 26	Section 22(1)(b)	Section 2
Suitability of project and Suitability of expropriation	Section 12(2) Section 4-8	Section 4(1)	Sections 2-3 Sections 4-6 Section 42E(1)	Section 3(1) Section 16(1)
Balance between project's public benefits and adversely affected interests	Section 5-6	-	Section 42E(1)	Section 4(8)

Source: Author's own design, y-axis adapted from "Requirements in the examined jurisdictions that give at least a partial answer to the comparative questions" in B Hoops *The legitimate justification of expropriation: A comparative law and governance analysis* (2017) 58-59.

Table 6: Key features of state and market led approaches based on pro-market explanations and claims

Issues	State-led (expropriation)	Market-led
<i>Getting access to land</i>		
• Acquisition method	Coercive; [compensation] payments at below market price,	Voluntary; 100% cash payment based on 100% market value of land
• Beneficiaries	Supply-driven; beneficiaries state-selected	Demand-driven; self-selected beneficiaries
• Implementation method	State-centralised; low degree of transparency and accountability	Privatized–decentralised; high degree of transparency and accountability
• Pace and nature	Protracted; politically and legally contentious	Quick; politically and legally Non-contentious
• Land prices	Higher	Lower
<i>Financing</i>		
• Mechanism	State subsidies; sovereign guarantee; beneficiaries pay subsidized land price; ‘dole-out’ mentality among beneficiaries	Flexible mechanism; co-sharing of risks; beneficiaries shoulder full cost of land; farm development cost given via grant
• Cost of reform	High	Low

Source: Key features of state and market led approaches based on pro-market explanations in SM Borras “Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa” (2003) 3 *Journal of Agrarian Change* 374. Edited by author.