**The Constitutionality of Expropriation**

**Without Compensation**

*Tembeka Ngcukaitobi\**

*Michael Bishop†*

#

# I Introduction

Does the Constitution permit expropriation without compensation? If so, in what circumstances? If compensation is paid, how must the amount be calculated, and what process must be followed?

The idea of expropriation without compensation is not novel in our law. As far back as 1915, the Appellate Division recognised that Parliament had a right to expropriate without compensation, although there was a presumption against it.[[1]](#footnote-1) And both the Constitutional Court[[2]](#footnote-2) and the Land Claims Court[[3]](#footnote-3) have posited the idea that expropriation without compensation could be constitutional in certain circumstances. Even conservative academics have argued that compensation is inefficient, and that it is better to price in the risk of uncompensated compensation through insurance, and discounts on the market price of property.[[4]](#footnote-4)

Moreover, expropriation without compensation is common in our law. Property, including land, is regularly seized and forfeited to the state, particularly when it is connected to organised crime.[[5]](#footnote-5) And what may often be thought of as expropriation in ordinary terms – the compulsory transfer of rights from one private party to another – does not trigger a constitutional duty to pay just and equitable compensation.[[6]](#footnote-6)

It is true that some authors hold the opposite view. Rautenbach, for example, has written: “*There is no provision in section 25 for expropriation without compensation. It can only be inserted by constitutional amendment. The judiciary does not have the power to do so.*”[[7]](#footnote-7) He is wrong.

The question under the Constitution is not whether expropriation without compensation is constitutionally permissible. It is. The question is when it is permissible to expropriate without compensation. In particular, when is it constitutionally permissible to expropriate land without compensation in order to advance land reform?

If compensation is to be paid, how much should be paid, and how should the amount be determined. At present, the government and the courts have generally paid market value for property. And the law requires that – if there is a dispute about the amount of compensation owed – it must be determined by courts.

This may impede land reform. It makes the expropriation of land more expensive both because of the amount that must be paid, and the cost of a court process to determine that amount.

This is not constitutionally required. The Constitution permits the payment of compensation that is below, even *significantly* below, market value. And the Constitution permits the amount of compensation to be determined through administrative means – as long as it is subject to court approval of some type. Precisely when expropriation is permitted without compensation, or with limited compensation, is complicated by the multi-layered structure of the property clause.

But stripped of technical legal analysis, the questions are fairly simple. If a law is passed that expressly provides that no compensation, or limited compensation will be paid, it will pass constitutional muster if: (a) the law is reasonably required to advance the goal of land reform; (b) the amount of compensation is proportional to the nature and degree of the loss suffered by the owner; and (c) courts can exercise review jurisdiction over the manner and the amount of payment of compensation.

In summary, our view is that the Legislature is entitled to pass laws to further land reform that provide for expropriation without compensation in limited categories where: (a) the land is not being efficiently used; (b) the owner will suffer only economic harm; (c) there is a safety valve where expropriation without compensation would suffer particular harsh consequences; and (d) it does not apply to foreign-owned land.

In addition, the state can legislate to provide for compensation to be administratively determined at a value significantly below market value, provided that the amount is subject to some form of judicial review. Whether those laws will survive an inevitable constitutional attack will depend on the details of the law, particularly the extent to which they are flexible and subject to judicial oversight. It will also depend on the strength of the evidence the government can produce to show that paying more compensation, or providing for a more intensive judicial role, would impede land reform.

The remainder of this article is structured as follows. **Part II** sets out the meaning of s 25. **Part III** summarises the relevant international law. **Part IV** advises on what types of laws permitting no or limited compensation will be consistent with the Constitution and international law.

# II the meaning of section 25

This Part sets out the meaning of s 25 of the Constitution. As will become apparent, s 25 has multiple inter-related parts that need to be considered both separately, and together.

## *A* The Historical Context to section 25

The Courts have repeatedly made it clear that s 25 must be interpreted within the historical context in which it was enacted. In *Shoprite Checkers*, Froneman J aptly explained:

“the pre-constitutional conception of property … entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.” [[8]](#footnote-8)

Most recently, in *Daniels*, the Court spent significant time on the history of dispossession, particularly as it related to farm dwellers and labour tenants. Madlanga J wrote:

“Dispossession of land was central to colonialism and apartheid.  It first took place through the barrel of the gun and “trickery”. This commenced as soon as white settlement began, with the Khoi and San people being the first victims. This was followed by “an array of laws” dating from the early days of colonisation.  The most infamous is the Native Land Act (subsequently renamed the Black Land Act) (Black Land Act).  Mr Sol Plaatje, one of the early, notable heroes in the struggle for freedom in South Africa who lived during the time this Act was passed, says of it, “Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth”.”[[9]](#footnote-9)

The Court’s analysis of history is important because it demonstrates its awareness of the urgent need for land reform. As the Court held in *AgriSA*: “*We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country.*”[[10]](#footnote-10) In addition, it demonstrates that s 25 protects conception of property that is not a traditional, individualist notion of property rights, but a social understanding of property. “*This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state’s social responsibilities.*”[[11]](#footnote-11)

## *B* Overview of section 25

Section 25 has multiple parts. They must be interpreted together to form a coherent whole. They must be seen as mutually supportive, not as creating internal conflict.

Section 25 has two general categories of clauses. Sections 25(1), (2) and (3) entrench negative property rights – the rights not to be arbitrarily deprived of property, and the right for property not to be expropriated without just and equitable compensation, determined by agreement or approved by a court.

Next, ss 25(4) to (9) are the positive elements of the right – they “*underline the need for the redress and transformation of the legacy of grossly unequal distribution of land in this country.*”[[12]](#footnote-12) They include express and repeated commitments to “*land reform*” and to “*equitable access*” to land and natural resources.[[13]](#footnote-13) They also create express rights to secure tenure,[[14]](#footnote-14) and to restitution for dispossession after 1913.[[15]](#footnote-15)

Accordingly, in the first case to consider the property clause, the Constitutional Court said:

“The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.”[[16]](#footnote-16)

This unique structure of s 25 means that the negative elements of the right must be interpreted in line with the positive elements of the right. This is expressly required by: s 25(4) which states that the public interest includes land reform; s 25(5) which mandates the state to take measures to promote equitable access to land; and s 25(8) which, as we detail below, requires the other provisions of s 25 to be interpreted so that they do not impede land reform.

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## *C* Expropriation and Deprivation

The focus of this paper is expropriation. However, it is necessary to be clear about the difference between an expropriation (requiring compensation under s 25(3)) and a deprivation (that does not demand compensation may not be arbitrary under s 25(1)). Certain types of conduct that may ordinarily described as expropriations are not, in constitutional law, regarded as expropriations that demand just and equitable compensation. As the Court held in *Reflect-All*:

“The purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.”[[17]](#footnote-17)

The line between deprivation and expropriation is therefore important to assessing when the constitutional obligation to compensate arises.

Deprivation means the interference of property that is significant enough to have a legally relevant impact on the rights of an affected in order for the action to qualify as deprivation. In *Mkontwana*,[[18]](#footnote-18) the Constitutional Court observed that:

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation . . . . [A]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.[[19]](#footnote-19)

In *Mkontwana*, for example, the law at issue prevented the transfer of property until outstanding rates had been paid. This limited part of the right of ownership – the right to sell the property – but did not constitute an expropriation because ownership remained with the owner.

Expropriations are a sub-category of deprivations. All expropriations are also deprivations, and must, in theory, comply with s 25(1) and ss 25(2) and (3).[[20]](#footnote-20) We explain in the section titled **Structure of Expropriation Analysis** why compliance with ss 25(2) and (3) will also constitute compliance with s 25(1).

Internationally, there is much debate about where the line is crossed from a deprivation to an expropriation. In our law, it seems that an expropriation differs from other deprivations of property in three ways: (1) An expropriation constitutes a deprivation of the “*core content*” of the property right; (2) When property is expropriated, the right is transferred to the state; and (3) The transfer to the state is not temporary.[[21]](#footnote-21)

As the Constitutional Court has explained:

“To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost[[22]](#footnote-22)… There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.”[[23]](#footnote-23)

This issue was dealt with in *Agri South Africa* which addressed a challenge to the Mineral and Petroleum Resource Development Act. The Applicants argued that the MPRDA constituted an expropriation because it made the state the custodian of all mineral rights, and gave it the power to determine who could exercise those rights. The Constitutional Court held that it did not constitute an expropriation, because the mineral rights did not vest in the state

As the concurring judgment in *Agri SA* explained, this approach to expropriation has serious consequences: “*This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country’s resources, from being recognised as expropriation.*”[[24]](#footnote-24)

The application of this principle in the land reform context is obvious. If the state declares itself the custodian of certain categories of land and transfers that land from the current owners to others, on a strict application of *Agri SA* it does not expropriate the land. It is then not required to comply with ss 25(2) and (3), but only to establish that the deprivation is not arbitrary in terms of s 25(1). That, for example, is the approach taken by the Land Reform (Labour Tenants) Act which provides for transfer directly from the landowner to the labour tenant.[[25]](#footnote-25)

However, the principle must be tempered in two ways. First, the complete transfer of land from one party to another may be arbitrary in terms of s 25(1) unless it is accompanied by some compensation. Still, the manner of determining compensation, and the ultimate amount will not be subject to the strict standards in ss 25(2) and (3).

Second, the Constitutional Court is aware of the need not to take an overly technical approach to the concept of “acquisition” by the state. In adjudging whether any particular legislative measure constitutes an acquisition, the Court will consider both the needs to protect property rights, and “*the constitutional imperative to transform our economy with a view to opening up access to land and natural resources to previously disadvantaged people*”.[[26]](#footnote-26) It is not guaranteed that the form of transfer of property rights adopted by the MPRDA will always be held to be a deprivation, particularly if the Court believes it is an improper attempt to expropriate by another name, or if it does not strike the appropriate balance.

## *D* Section 25(1): Arbitrary Deprivation

As demonstrated in the previous section, certain state conduct that results in the transfer of land does not constitute an expropriation. It will, however, constitute a deprivation that, in terms of s 25(1) must: (a) Occur in terms of a law of general application; and (b) not be arbitrary.

We do not understand there to be any intention to expropriate land other than through legislation. We therefore focus on the requirement of non-arbitrariness.

This is the part of s 25(1) that has received the most attention of the Constitutional Court. Four parts of its jurisprudence are relevant.

First, there is both a substantive and a procedural component to the arbitrariness analysis. A deprivation is arbitrary “*when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.*”[[27]](#footnote-27)

Second, whether a deprivation is ‘arbitrary’ depends on an evaluation of the nature and extent of the deprivation, compared to the purpose of the deprivation. A deprivation of ownership of land will generally require a more compelling purpose than deprivation of lesser rights, in moveable or incorporeal property.[[28]](#footnote-28)

Third, the extent of the relationship between means and ends occurs on a sliding scale between mere rationality, and full proportionality. As Nkabinde J explained in *Reflect-All*:

“In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate.”[[29]](#footnote-29)

Fourth, a deprivation can be rendered non-arbitrary if some compensation – whether in money or in kind – is paid.

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## *E* Section 25(2): Compensation Determined by a Court

Section 25(2) reads:

“(2) Property may be expropriated only in terms of law of general application—

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

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

Section 25(2) sets the three key requirements for an expropriation.

First, it must be in terms of a law of general application. This includes legislation or regulation. Again, as we do not understand that there is any intention to expropriate outside of the bounds of a law of general application, we do not consider this requirement any further.

Second, it must be for a public purpose or in the public interest. Section 25(4) holds expressly that the “*public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources*”. This paper is limited to the constitutionality of expropriation with limited or no compensation for the purpose of land reform. We do not consider the constitutionality of expropriation for other purposes.

Third, the final s 25(3) requirement is about the process for determining compensation. Compensation must either be determined by agreement, or be “*decided or approved*”by a court. This provision is central to any attempt to expropriate land without compensation or with limited compensation.

The provision is an aspect of the broader constitutional right enshrined in s 34 of the Constitution to have “*any dispute that can be decided by the application of law decided in a fair, public hearing before a court*”. The Constitutional Court has held: “*In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court.*”[[30]](#footnote-30) The SADC Tribunal has found that legislation that sought to strip Zimbabwe’s courts of jurisdiction to determine whether just and equitable compensation had been paid was contrary to international law.[[31]](#footnote-31)

A total ouster of the judicial role to “*decide or approve*” the amount of compensationwould not only be contrary to s 25(2)(b), it would be extremely difficult to justify under s 25(8). Courts are notoriously protective of their role, and will be very unlikely to give up this specifically-assigned constitutional role.

However, there is considerable flexibility within s 25(2)(b). It requires that the amount of compensation is “*decided or approved*” by a court. This entails that the court can either play an original role (decide), or a reviewing role (approve).

It would be consistent with s 25(2)(b) for the amount of compensation to be determined, in the first instance, by an executive or administrative body – a state valuer for example – or by the application of a formula, provided that: (a) The discretion of the administrator is confined by adequate guidelines contained in legislation or regulation; and (b) there is some form of by a court to ensure it does not have unduly harsh consequences in specific instances.

The more difficult question is what standard the court should apply. Must the court be granted the unfettered right to approve the amount of compensation? Or would it be permissible to limit the court to reviewing whether the initial determination was rational, reasonable, or some other standard?

There are reasons to believe that a court would accept the second, more limited role. In expropriation a court plays two primary roles. The first is an optional review role where there is a challenge to the administrative decision to expropriate. The second is a mandatory role in determining the amount and time and manner of payment of compensation. In the latter role, the court is directly involved in the setting of a price. Absent legislative guidance, this function is less than inviting for the courts, whose institutional make up is more suited to the determination of rights, rather than the setting of price. Limiting the role of the courts in also consonant with the language of the Constitution which requires the courts to “decide” or “approve” the compensation (s 25(2)(b)). Thus, requiring courts to review the primary decisions of administrators will not violate the language of the Constitution. An analogy can also be drawn to the Constitutional Court’s attitude to minimum sentencing legislation adopted in the late 1990s. The law provided minimum sentences, including life sentences, for various offences. This was contrary to the ordinary principle that courts would impose sentences based on the individual circumstances of the offender. It also violated the right not to be treated in a cruel, inhuman and degrading manner because it could permit a sentence that was grossly disproportional. As the Court explained;

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.”[[32]](#footnote-32)

Nonetheless, the Constitutional Court upheld the law on the basis that it provided a “safety valve”. It permitted the Court to alter the minimum sentence if there were “*substantial and compelling circumstances*” to do so. This phrase was interpreted to ensure that no grossly disproportionate sentence could be imposed.

A similar principle could be applied to the determination of compensation. It may well be consistent with s 25(2) for the state to determine the amount of compensation, subject only to court interference if there are “substantial and compelling” circumstances to intervene.

The justification for such an approach would be to relieve the bottleneck of requiring every compensation amount to be determined by a court. It would allow for far quicker expropriation – and therefore far quicker land reform – to: (a) place the duty on the landowner to approach a court; and (b) to limit the court’s ability to interfere with the amount. If such a regime is properly structured, we believe it could pass constitutional muster.

## *F* Section 25(3): Just and Equitable Compensation

Before we address s 25(3) directly, we briefly consider theories about *why* we pay compensation. These are important for determining when compensation should be paid, and how much should be paid. We then deal with the courts’ current approach to determining just and equitable compensation, and explain why it is wrong and is likely to be overturned by the Constitutional Court.

### 1 Theories of Compensation

There are two general philosophical or economic reasons why compensation is required for expropriation.

First, compensation is paid to prevent inefficient expropriation. The idea is that requiring the state to pay compensation prevents the state from expropriating land for a purpose that will be less economically or socially efficient than the current use of the property.

This rationale obviously breaks down where the land is not currently being efficiently used, or where the purpose of the expropriation is plainly economically or socially preferable to the current use. Where expropriation with limited or no compensation incentivises more efficient state conduct, it will be justifiable under this rationale.

Second, compensation is paid to spread the cost of expropriation. If no compensation is paid, the owner bears the full cost of whatever public purpose is served. That is not only a cost in money, but a cost in liberty and ability to participate in the political community. Compensation is fair because it spreads the burden to the entire community who fund the expropriation through taxes.

The obvious difficulty with this argument in the South African context of expropriation for land reform must take into account the historical fact of racialised dispossession. Paying full compensation will require Black people to fund the purchase of land that was taken from them under colonialism or Apartheid. Fairness in the South African context requires that the burden is borne primarily by those who benefited from past wrongs.

The other note is that sometimes expropriation will not have consequences that substantially affect liberty or political participation. Where an owner holds large amounts of property, and the state only seeks to expropriate a small portion, the impact on the owner is far lower than if the same property was the owner’s sole source of wealth or income.

### 2 Section 25(3)

The calculation of just and equitable compensation is governed by s 25(3), which reads:

“The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

(a) the current use of the property;

(b) the history of the acquisition and use of the 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.”

The courts have regularly stressed that s 25(3) does not privilege market value above the other listed (and unlisted) factors. In *Du Toit*, for example, the Constitutional Court wrote: “*Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.*”[[33]](#footnote-33) The wording of s 25(3) – which expressly calls for an “*equitable balance*” – make that conclusion obvious.

However, the recent decision of the Supreme Court of Appeal in *Uys NO v Msiza* (***Msiza***) undermines that principle. Although the SCA too repeated the mantra that market value is merely one factor, it adopted two methods that, *in practice*, make market value the primary determining factor: (a) the two-stage approach; and (b) the prohibition on “double counting”.

### 3 The Two-Stage Approach

First, according tothe Supreme Court of Appeal,[[34]](#footnote-34) courts must adopt a two-stage approach to determining just and equitable compensation. In step one, the court determines the market value of the property. Then, in step two, it decides whether that value should be adjusted up or down in light of the other s 25(3) factors. This approach is generally justified on the basis that market value is the only factor that can be objectively quantified.

In our view, the two-stage approach is mistaken and, if it is given the opportunity, the Constitutional Court is likely to reject it. We say this for three reasons.

*One,* market value is not the only factor that can yield a numerical value. As the Land Claims Court has held: “*it is easy to work out the history of acquisition, and reference may also be had to historical records to determine the value of land over time.*”[[35]](#footnote-35) Put differently, one can determine how much the current owners paid for the property, and then increase it based on, for example, the CPI. This is the approach used to determine “*just and equitable*”compensation for claimants under the Restitution Act where restoration is not possible.[[36]](#footnote-36) Moreover, as Harms JA accepted in *Helderberg*, the amount of state subsidy is also capable of determination and yields a concrete value.[[37]](#footnote-37)

*Two*, the two-stage approach is inconsistent with the text of s 25(3). As appears from this case, it can result in an improper disregard for equally relevant factors. As Van Wyk has recently argued:

“The two-step approach that was developed in the courts is not ideal. One must accept that the goal is not ‘market value’ but ‘just and equitable’ compensation. A contextual determination of compensation that aims at the "just and equitable" is required. The courts must be mindful of this.”[[38]](#footnote-38)

Or as Langa ACJ explained: “*In my view, the Constitution expressly insists upon a different approach – one which makes justice and equity paramount, not as a second level “review” test but as the test for the calculation of compensation.*”[[39]](#footnote-39) Psychological evidence also strongly suggests that adopting the two stage approach will have an “*anchoring effect*” on judges that will cause them to reach an ultimate answer that is close to market value than if they started with a different number.[[40]](#footnote-40)

*Three*, it is a fallacy that market value is objectively determinable. While there may be cases where valuers agree on the market value, often they disagree wildly. That is especially the case when there are not many comparable sales of the land. As King AJ put it, the task of a court determining market value “*is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuators make the task of the super valuator seemingly ‘curiouser and curiouser’.*”[[41]](#footnote-41)

*Four*,in cases where market value is in dispute, it will often be extremely difficult to extricate the other factors listed in s 25(3) from a determination of market value. Assessing market value requires the court to consider not only the current, actual value of the land, but also what the value would have been but for the expropriation. That necessarily requires an assessment that is intimately connected to “*the current use of the property*” (s 25(3)(a)), “*the history of the acquisition and use of the property*” (s 25(3)(b)), and “*the purpose of the expropriation*” (s 25(3)(e)).

### 4 “Double Counting”

In *Msiza v Uys*, Land Claims Court determined that just and equitable compensation in a labour tenant claim was R1.5 million, when the market value was R1.8 million. It did so because of the use of the land, the history of its acquisition, and the fact that the landowners knew that labour tenants occupied the land when they bought it.

The Supreme Court of Appeal overturned the reduction from market value. It held that the various factors that the Land Claims Court had considered to justify the reduction “*had all been taken into account [by the valuer] in considering market value.*”[[42]](#footnote-42) It was therefore inappropriate to take them into account again in determining what compensation was just and equitable.

In our view, this approach is mistaken and is likely to be overturned by the Constitutional Court. There are two related errors in the SCA’s reasoning. One: the Constitution expressly requires all those factors to be considered, knowing that some of them would obviously be relevant in the determination of market value. Two: the weight of the various factors must be weighed by the court when it determines what is just and equitable, not by the valuer when she determines market value. Even if the same factors are considered, the purpose is different, as is the entity determining the weight.

Particularly in the context of expropriation for the purposes of land reform, the history of the property, the purpose of the expropriation should be given particularly heavy weight. *Msiza* precludes that possibility.

### 5 Msiza should be reversed

The consequence of *Msiza* is that – without intervention – just and equitable compensation will be market value by another name. There may be small deviations in unusual cases, but in most cases courts will decide that market value is just and equitable. While *Msiza* stands, is virtually inconceivable that a Court will conclude that it could be just and equitable to pay no, or nominal compensation.

In our view, that position is mistaken. At least where the expropriation is aimed at land reform, it will generally be consistent with s 25(3) to pay substantially less than market value. Both courts and academics have regularly assumed that is the case. In some limited instances, it may be permissible to pay no compensation or only token or nominal compensation. We return to what those instances might be below.

But as the law stands after *Msiza*, courts will not apply existing laws permitting expropriation to allow compensation below market value. Under *Msiza*, a law permitting below market value would be difficult to defend on the basis that it grants “just and equitable compensation”. This is a serious stumbling block for land reform. In our view, there are three possible mechanisms to address the problem.

The state or civil society could provide the Constitutional Court with an opportunity to overrule *Msiza*. Unfortunately, the Department of Rural Development and Land Reform elected not to appeal the *Msiza* judgment. Mr Msiza, too, will not lodge an appeal in the Constitutional Court. If the Constitutional Court does not hear it, the Government or civil society should find an alternative test case to bring before the Constitutional Court.

Alternatively, Parliament could pass legislation that expressly provides for an alternative mechanism to calculate just and equitable compensation at below market value (we suggest some possibilities below). The Government could then defend that legislation on the grounds that: (a) *Msiza* was wrongly decided and the legislation is consistent with s 25(3); or (b) if it limits s 25(3), the limitation is justifiable under s 25(8).

Lastly, Parliament could amend the Constitution to rewrite s 25(3) to allow for compensation significantly below market value in certain instances.

### 6 The Correct Approach

There is no single correct approach to calculating just and equitable compensation. As we have argued above, the Constitution does not require compensation to be determined on a case-by-case basis by a court. It permits the Legislature and the Executive to pass legislation determining how that calculation will occur.

That does not require, in the first instance, a consideration of all the listed factors. It permits a more blunt approach to determining what is just and equitable, as long as it is subject to correction by courts where the application has unduly harsh consequences.

A factor that is not mentioned in s 25(3), but that seems particularly relevant is the impact on the owner. The expropriation of the same property may have very different impacts. If it is owned by a company and the property constitutes a small portion of the company’s total wealth, expropriation with no or little compensation will have a limited impact. But expropriating the same property from a person who has no other meaningful assets will have a particularly serious impact. The principle is the same as progressive taxation. Those who own more can be expected to contribute more. Those who own less, should contribute less.

### 7 Timing of Compensation

Section 25(3) requires not only that the amount of compensation is just and equitable, but also that “*the time and manner of payment must be just and equitable*”. aaaaaaaaIn *Haffejee*,[[43]](#footnote-43) the Constitutional Court held that this does not necessarily mean that compensation must be determined and paid prior to the expropriation. While it will generally be just and equitable to determine the compensation before expropriation, there will be situations where the determination of the amount can occur after expropriation. This is particularly so given that, even if land is expropriated, the former owners will be occupiers entitled to the protections against eviction in s 26(3) of the Constitution.

This is an important possibility. One of the stumbling blocks to land reform is that landowners can drag out a dispute about compensation. While that occurs, the land remains in the hands of the landowner. In *Msiza*, for example, there was a delay of fourteen years after he was awarded the land to the judgment by the SCA.

One way to overcome that obstacle is to provide for a bifurcated process for determining compensation. The state first determines administratively – by a state valuer, or applying a formula. Once that amount is determined, it is paid and the property can be expropriated. If the landowner is dissatisfied with the amount, she is free to approach a court to approve the amount. But doing so will not prevent the expropriation.

That approach preserves the right of the landowner in terms of s 25(2) to have the expropriation “*approved*” by a court, and ensures that the time and manner of the compensation is just and equitable.

## *G* Section 25(8): Limitation

To the extent that any law contravenes one of the provisions of ss 25(1)-(3), it may be justified in terms of s 25(8). The provision reads:

“No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

The import of s 25(8) is accurately summarised by the following passage:

“Section 25(8) clearly envisions categories of expropriated land for which 'market value' should not factor into the compensation analysis; legislation authorizing expropriations for the purpose of land redistribution should accordingly be justifiable under s 36 to the extent that it is procedurally sound and duly takes into account the welfare and livelihood of expropriatees. Proportionate concern for the individual or family affected by an expropriation is the test of s 36. Proportionality may require that expropriatees be left with more than merely the means to make a living, but it will not always demand an enquiry into the market value of the land expropriated. It is far from obvious, for example, that large landholders should receive compensation at some percentage of market value where they stand to lose only a fraction of their land wealth. It may very well be 'reasonable and justifiable' under the proportionality analysis of s 36 to forego calculation of market value where the expropriated family retains enough land wealth to secure a very comfortable livelihood. It must never be forgotten that the Constitution is committed to addressing the appalling conditions of poverty under which the vast majority of the rural population lives. There is only so much wealth to go around in South Africa; this inescapable fact suggests that some amount of redistribution from rich to poor, white to black, is inevitable if the promise of the new democratic order is to be realized.”[[44]](#footnote-44)

As Zimmerman points out, s 25(8) has an interesting drafting history. It is the product of compromise – the ANC’s desire to ensure that property rights did not impede land reform, and the NP’s goal to protect white property rights from unjust expropriation. It was amended during last minute negotiations to subject land reform to the proportionality review of the general limitations clause.[[45]](#footnote-45) Some academics argue that the strange juxtaposition of the first and second sentences that resulted from the negotiations render the provision superfluous.[[46]](#footnote-46)

We disagree. In our view, s 25(8) serves two clear purposes.

**Interpretation:** It must influence the interpretation of ss 25(1) to (3). It means that deprivations that are necessary for land reform are less likely to be arbitrary. It means that limitations on the role of courts in s 25(2)(b) in the land reform context should be more tolerable. And it should influence the outcome of the s 25(3) analysis, particularly by emphasising the purpose of the expropriation when land reform is at stake. As noted earlier, we have relied on this aspect of s 25(8) in our discussions of ss 25(1)-(3) above.

**Limitation:** If a law is found to limit s 25(2)(b) or s 25(3),[[47]](#footnote-47) s 25(8) “*should weigh heavily in on the side of the poor and landless in any proportionality review under s 36.*”[[48]](#footnote-48) Put differently, if the criterion in s 25(8) is met, it is a strong indication that the law is “*reasonable and justifiable in an open and democratic society*”.

The more difficult question is when an interpretation or application of ss 25(1)‑(3) can be said to “*impede*” land reform. Impede means to obstruct, hinder, or interfere. We consider what sort of evidence would need to be put up to make the case that paying more (or any) compensation would impede land reform.

Lastly, s 25(8) refers to s 36(1) of the Constitution. It provides:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(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.”

The meaning of the provision was accurately summarised by the Court in *S v Manamela*:

“In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”[[49]](#footnote-49)

In our view, the core issue in determining whether a no or limited compensation regime meets this proportionality standard is its flexibility. While strict rules make land reform more efficient, they tend to lead to unjust results in certain cases. Courts will find those measures unattractive, particularly in this context where the Constitution assigns them a specific role.

The key in designing measures that pass the proportionality requirement will be to balance efficiency with flexibility. The other key will be to produce evidence to show that less restrictive means (systems that provided greater or more individualised compensation) would impede land reform. We return to this below.

##

## *H* The Structure of Expropriation Analysis

As we make clear below, the basic substantive questions that a court will ask when it considers whether expropriation without compensation is constitutional are clear. But how those questions arise within the s 25 analysis is complicated. Because we do not believe this difference is likely to affect the outcome of any challenge to legislation authorising expropriation without compensation, we do not seek to answer it conclusively. However, it is important to be clear about the possible routes to the key substantive questions addressed below. There are subtle differences that – although they may not determine the outcome – will determine how the arguments are presented.

There are two possible approaches to the analysis.

First, the approach set out by the Constitutional Court in *FNB*.On this approach, a court must always ask the following questions, in the following order:

“(a) Does that which is taken away … amount to “property” for purpose of section 25?

(b) Has there been a deprivation of such property?

(c) If there has, is such deprivation consistent with the provisions of section 25(1)?

(d) If not, is such deprivation justified under section 36 of the Constitution?

(e) If it is, does it amount to expropriation for purpose of section 25(2)?

(f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?

(g) If not, is the expropriation justified under section 36?”

Under this approach, a court must always first consider whether a deprivation (including an expropriation) is arbitrary within the meaning of s 25(1). Given the nature of the arbitrariness test, it is very unlikely that ss 25(2) or (3) will alter the outcome. Put differently, “*an expropriation that complies with the justification requirements for expropriation will also be a deprivation that complies with the requirements for non-arbitrariness, and an expropriation that does not comply with the justification requirements for expropriations will also not comply with the requirements for non-arbitrariness.*”[[50]](#footnote-50) As Roux has pointed out, this approach “*renders all of the other stages of the constitutional property clause inquiry largely redundant, thus undermining the capacity of these stages to perform a rule-setting function*”.[[51]](#footnote-51)

The alternative view is that, when the law at stake provides for an expropriation, the Court should not conduct the s 25(1) analysis, but should instead determine whether the law complies with ss 25(2) and (3). This is the approach followed in other countries, and places far greater emphasis on the distinction between deprivation and expropriation.

In our view, the second approach is preferable. The Constitution sets out clear requirements for lawful expropriation in ss 25(2) and (3). An expropriation that meets those requirements could never be regarded as arbitrary in terms of s 25(1). There is, therefore, no purpose in making that far more general inquiry.

However, for the purposes of this paper, it matters not. The key substantive factors that drive both the arbitrariness analysis under s 25(1), and the expropriation analysis under ss 25(2) and (3) (with both tests applied in light of ss 25(4)-(8)) are likely to be the same.

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# iII International Law

In this Part, we briefly consider the relevant international law. We do so for three reasons. First, customary international law is law in the Republic.[[52]](#footnote-52) If it limits the ability to compensate without expropriation, that must be considered when the Legislature acts. Second, South African has international obligations in terms of multilateral regional treaties, bilateral investment treaties (**BITs**) and customary international law. As a matter of constitutional principle, South Africa is not obliged to comply with those obligations on the domestic plane. But it should be aware whether any domestic law will breach its international duties. And third, international law is relevant for interpreting the Bill of Rights.[[53]](#footnote-53)

We consider four sources of international law that touch on compensation for expropriation: Customary international law; Bilateral investment treaties; The South African Development Community Treaty (**SADC Treaty**); and The African Charter on Human and People’s Rights (**African Charter**).

## *A* Customary International Law

Customary International Law (**CIL**) recognises states’ right to expropriate property within their territory, including property belonging to foreign nationals. However, when it comes to property owned by foreign nationals, CIL imposes certain requirements on such an expropriation. First, the expropriation must be for a public purpose and must not be discriminatory. Second, the expropriation must lawful. This second requirement means that the expropriation must not breach principles of international law, including treaties.[[54]](#footnote-54)

If an expropriation is unlawful, then the normal principles of state responsibility apply, and the breaching state may be liable to pay for compensation and damages for its unlawful expropriation.[[55]](#footnote-55) For example, to expropriate property in violation of a treaty will give rise to the liability of the breaching state vis-à-vis the innocent state (and its foreign nationals who are owners of that property).

The first important point to note is that CIL imposes **no restrictions** on states’ rights to expropriate its own nationals’ property. CIL generally regulates relationships between states, not between states and their own citizens. However, the fact that CIL places limitations on the expropriation of foreign-owned property is something that must be considered in designing any alternative expropriation regime.

With regard to foreign-owned property, the pertinent question is whether compensation is a further requirement for a *lawful* expropriation of foreign property under CIL. It is. Although there have been historical objections to the obligation to pay compensation, the generally accepted position in CIL is that there is an obligation to pay some compensation.

The debate is about the nature of the compensation that is required. Various developed states (especially the United States of America) have asserted that CIL requires “prompt, adequate, and effective” compensation.[[56]](#footnote-56) This is known as the Hull Formula, and its supporters argue that it represents the default, traditional rule in CIL. It translates to compensation in the form of market value, and placing the owner of the property in the patrimonial position they would have been in but for the expropriation.

However, the Hull Formula – and the idea of market value compensation – is certainly not accepted in CIL. The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 reads:

“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases **the owner shall be paid** **appropriate compensation**, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.”

What amounts to appropriate compensation can vary significantly. This approach suggests that South Africa would be afforded significant leeway to determine how much compensation to pay – as long as it pays some compensation.

## *B* BITs

We have not considered the BITs that South Africa has in fact concluded. We note only that it is common for BITs to include provisions regulating the expropriation of land held by nationals of the foreign state. The precise provisions of those BITs will determine the nature of South Africa’s obligations, and whether they limit the legislature’s ability to expropriate with no or limited compensation.

## *C* African Charter

Article 14 of the African Charter reads: “*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*” Article 14 is elaborated on in the Pretoria Declaration on Economic, Social and Cultural Rights in Africa of 2004. The Declaration is not binding, hard law, but is soft law used to interpret the Charter. Item 5 reads:

“The right to property in article 14 of the Charter relating to land and housing entails among other things the following:

1. Protection from arbitrary deprivation of property;
2. Equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;
3. **Adequate compensation for public acquisition, nationalisation or expropriation;**

…

e. Equitable redistribution of land through due process of law to redress historical and gender injustices;

f. Recognition and protection of lands belonging to indigenous communities”

The African Commission on Human’s and People’s Rights has held that the right in art 14 accrues to nationals of a state and to foreign nationals who own property in the state.[[57]](#footnote-57) That right cannot be violated except “*in the interest of the public or in the general interest of the community*” and “*in conformity with the provisions of the appropriate laws*”; this latter aspect referring to domestic and international laws.[[58]](#footnote-58) This makes the international laws discussed in the previous section relevant to interpreting art 14.

The limitations to the right to property should be determined in the light of the principle of proportionality, meaning that interference in the right to property must be “*proportional to a legitimate need, and should represent the least restrictive measure possible*”.[[59]](#footnote-59) Limitations, to be lawful, also require “*adequate compensation determined by an impartial court of competent jurisdiction*”.[[60]](#footnote-60)

Accordingly, under the African Charter, South Africa is required to pay “*appropriate*” or “*adequate*” compensation when it expropriates property. Given the express acknowledgment in the Pretoria Declaration about the need for historical redress, it is unlikely that appropriate will always demand market value compensation. However, it is unclear whether no compensation can ever be “appropriate”.

There is one communication of the African Commission that held expropriation without compensation was inconsistent with the Charter.[[61]](#footnote-61) But that in that instance the law of the relevant country – the DRC – required compensation. It is far from certain whether the type of narrow exceptions permitting expropriation without compensation would be inconsistent with the Charter.

In our view, South Africa is likely to be afforded a margin of appreciation in this area. As long as it has clear laws and permits judicial intervention to avoid unnecessarily harsh results, South Africa should be able to defend its laws.

## *D* SADC Treaty

The SADC Treaty contains no express provision regulating expropriation. However, the SADC Tribunal has held that compensation is a requirement as a matter of SADC law. In *Campbell v Zimbabwe*,[[62]](#footnote-62) the Tribunal had to consider Zimbabwe’s laws that permitted expropriation of land without compensation of agricultural land for resettlement purposes. The Tribunal held that the laws were contrary to Zimbabwe’s international obligations:

“It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the Applicants under international law to be paid, and the correlative duty of the Respondent to pay, fair compensation. Moreover, the Respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation.”[[63]](#footnote-63)

It is not clear what the source for the supposed “*clear legal position*” was. As we have explained above, CIL only requires compensation for the expropriation of foreign-owned land. The African Charter requires compensation, but it is not clear that the SADC Tribunal had the authority to enforce that treaty against Zimbabwe. The Tribunal’s ruling has been criticised on exactly these grounds.[[64]](#footnote-64)

In our view, the Tribunal’s finding should not be seen as an absolute international prohibition on expropriation without compensation:

The ruling is legally dubious. Outside the African Charter, there is no international obligation on South Africa to compensate nationals. The Tribunal has no power to create new legal obligations on states.

The Zimbabwean law was particularly wide and unlimited. It applied to a wide swathe of land, without exception, and without any judicial limitations. The types of laws we have motivated for in this paper are far narrower, and far more likely to withstand international scrutiny.

It is unclear whether the SADC Tribunal will continue to have jurisdiction to resolve complaints by individuals. While, in theory, it retains that jurisdiction it is not currently operational and a recent protocol seeks to remove that jurisdiction; although that protocol has yet to come into force.[[65]](#footnote-65)

# IV Expropriation with No or Limited Compensation

In this Part, we consider various options that depart from the current approach of either “willing buyer willing seller” or “close to market value” that the state currently applies. With regard to each option, we explain whether it would be consistent with s 25(1)-(3), or s likely to constitute a limitation of the right in terms of s 25(8).

We stress that it is difficult to predict with certainty how the Constitutional Court will react to notional pieces of legislation. There are three core issues that will determine whether any of the proposed measures will survive constitutional attack. First, the evidence that the state is able to produce that adherence to the current practice will “*impede*” land reform. Second, whether the system seeks to balance the nature of the loss with the amount of compensation based on justifiable factors. Third, the flexibility of the system – courts will be more likely to uphold a system that does not set absolute rules, but allows deviation in special circumstances.

## *A* Compensation will Impede Land Reform

The key issue to justify any expropriation without compensation – or even with limited compensation – will be to show that the legislation is a proportionate measure to avoid an impediment to land reform. This requires an assessment of the following questions. What qualifies as “*land, water and related reform in order to redress the results of past racial discrimination*”? Can the state show that it does not have sufficient funds to pay more compensation? Why would it impede land reform to allow a court decide on a case-by-case basis what amount of compensation is justified? Given the failure to efficiently implement existing measures for land reform, can the state rely on the cost of paying “full” compensation as a justification?

### 1 What is land reform?

Section 25(8) does not apply to all laws. It is triggered only by “*legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination*”. The Constitution recognises three forms of land reform, all three of which are designed to redress racial discrimination: (a) Promotion of “equitable access” to land envisaged under ss 25(4) and (5) (**land redistribution**); (b) Provision of secure tenure under s 25(6) (**tenure reform**); and (c) Restitution of land dispossessed after 19 June 1913 in terms of s 25(7) (**land restitution**).

Legislation designed to advance any of these three goals will certainly meet the definition of land reform to redress racial discrimination in s 25(8). Given the breadth of land redistribution, this will cover a wide range of possible approaches to land reform.

Land reform is often regarded relating primarily to agricultural land. There is no reason why that should be the case. The idea of “*equitable access*” to land is not only about the amount of land that is owned by various races. It also relates to where that land is owned. Measures that are designed to address apartheid urban geography should also qualify under s 25(8). For example, measures to access land in inner cities to make them available to Black people who have historically been forced to live on the outskirts of cities could be justified under s 25(8).

The “*water and related reform*” is harder to define with precision. It would obviously include measures to ensure that Black farmers have equitable and sufficient access to water to make use of their land.

### 2 Budget

The obvious rebuttal to any attempt to expropriate without compensation is that if the state wants to expropriate, it should simply re-allocate resources so that it can pay more compensation. Put differently, the argument will be that paying close-to-market-value compensation will not impede land reform because the state can afford to pay compensation at that level.

There is precedent for this type of argument. In *Blue Moonlight* the Court held that the City of Johannesburg’s failure to budget to provide alternative accommodation to people evicted from private residences was no justification for not providing that alternative accommodation.[[66]](#footnote-66) The analogy would be that if the state’s budget cannot be relevant to determining whether, and to what extent, it should pay compensation under s 25.

There are two problems with this type of argument. First, the issue in *Blue Moonlight* concerned only one constitutional obligation – the obligation to provide alternative accommodation – and the failure to budget for it. Other constitutional obligations were affected only indirectly by reductions in budget to meet those ends. In this context, there are two constitutional obligations directly at play: the obligation to pay just and equitable compensation, and the obligation to reform unequal access to land. These competing obligations are mediated in the ways identified above.

Nonetheless, a proper calculation of the comparative cost of paying compensation is likely to be extremely persuasive to a court. This analysis would seek to compare the cost of paying compensation at close-to-market-value, combined with the administrative cost of judicial determination on a case-by-case basis with the cost of paying limited or no compensation, and the cost of an alternative administrative means of determining compensation (with a judicial safety valve). If that is combined with a significant increase in the budget for land reform, a court will be hesitant to question the state’s decision about how to allocate resources.

However, if there is no meaningful increase in the resources allocated to land reform, and no assessment of the consequences of paying greater compensation, a court will be less likely to accept that the measure meets the purpose of s 25(8) – whether in its role of interpreting the rights in ss 25(1)-(3), or limiting those rights. The goal for the state would be to demonstrate that paying compensation according to the current system would “*impede*” land reform because it would significantly delay the its ability to transfer land as it waited for funds to become available.

### 3 The determination will impede land reform

The prior section considered how the *budget* necessary to fund the current approach will impede land reform. But the system might also cause delay. As we noted earlier, both the Restitution Act and the Land Reform Act require that, if there is no agreement about compensation, it must be determined by a court. This has several negative consequences for speedy land reform.

It disincentivises owners from agreeing to compensation, at least while the *Msiza* approach prevails. It incentivises the state to pay market value to avoid the delay and cost of litigation. It incentivises landowners to force litigation in order to either delay the expropriation, or force a better offer. All of this increases both the time and the cost of land reform.

In our view, the major advantage of a system that provides for no compensation, or predetermined compensation is to avoid these perverse incentives. It removes the ability for landowners to delay expropriation or push up the price. And it will avoid delays in expropriation while any fights about compensation are determined. The state will have to demonstrate – based on evidence of how the current system has operated – that it impedes land reform. There are several studies that already provide this type of evidence.

### 4 The State is Responsible for Delays

A strong likely rebuttal to any reliance on s 25(8) is that it is not the existing legislation that causes the impediment, but the state’s failure to properly implement it. This is certainly partially true. The state has been inexcusably remiss in its implementation of both the Restitution Act and the Labour Tenants Act. It has also failed to enforce the protections provided in ESTA. If it had properly implemented the existing statutes, and taken full advantage of all the mechanisms they provide, there is no doubt that substantially more progress would have been made.

It must also be accepted that reducing compensation and altering the manner in which it is determined are not, on their own, the answer to all issues regarding land reform. The state must still put in place the mechanisms to speedily assess contested restitution and labour tenant claims by significantly increasing the capacity of the Land Claims Court and the alternative dispute resolution mechanisms those statutes permit. It must also provide the necessary pre- and post-restitution support to communities who are given land to ensure that the make effective and equitable use of the land, and ensure that people – particularly in the former homelands – have secure tenure to their own land and are not subject to the whims of traditional leaders. Without these and other related reforms and investments land reform will remain ineffective even with alternative compensation mechanisms.

Nonetheless, the history of neglect and the existence of additional impediment will not, in our view, be a bar to relying on s 25(8) to justify compensation reforms. The government’s obligations under ss 25(4) to (7) cannot be affected by its past conduct. This government, today, must take reasonable measures to advance land reform. Measures cannot become unreasonable or unjustified because the government, in the past, acted unreasonably. The government should be able to show that even if it had fully applied the existing measures, they would still constitute an impediment to land reform for the budget and system reasons set out above.

The existence of other impediments does not mean that the calculation and determination of compensation is not an impediment. As long as the legislature does not treat expropriation with limited or no compensation as the silver bullet for land reform, and demonstrates a commitment to address the other issues, a court is unlikely to hold that the existence of other impediments means the government cannot address one of them.

In sum, any defence of limited compensation laws must acknowledge the existence of past failures and other obstacles. But the government should still be able to justify limited or no compensation laws.

##

## *B* No Compensation

The first option is to expropriate property without any compensation. There are three possible ways this can be achieved under s 25.

First, the legislation could be constructed so that the loss of property is a deprivation, not an expropriation. This can be done by transferring the land directly from existing landowners to new landowners. The law will then have to be justified in terms of s 25(1).

Second, the state could argue that, in a very limited set of circumstances, expropriation without compensation s “*just and equitable*” under s 25(3).

Third, the state could accept that expropriation without compensation would limit either s 25(1) or s 25(3), but seek to justify the limitation in terms of s 25(8).

Whichever theoretical route is used to justify expropriation without compensation, the fundamental questions are likely to be the same. Are the categories narrowly defined to cover situations where the ordinary justifications for compensation do not apply? Is expropriation without compensation reasonably necessary to further land reform? Is provision made for exceptions where expropriation without compensation would cause especially harsh results?

### 1 Narrow Categories

Allowing compensation without any compensation is unlikely to be upheld by the Court in general circumstances. However, if the Legislature identifies specific categories where legislation

In our view, there are four possible circumstances where property could be expropriated without compensation: (a) the land is abandoned or unused; (b) the land is held purely for speculative purposes; (c) the land is under-utilised and owned by public entities; or (d) the land is actively farmed by labour tenants in the absence of a title deed holder. This applies only to expropriation without compensation in these instances will be for the purpose of land reform and not for other public purposes such as the building of roads, dams and so on. Expropriation without compensation outside the land reform context will be extremely difficult to justify.

What justifies treating these particular categories of land as not warranting any compensation? Two issues stand out. One: the common theme for all the categories is that there is no emotional connection to the land in any of those cases. The owner will suffer, at worst, pure economic loss. In some situations there will be little or no loss at all. Two: the land is not being used productively. The justification for land reform is both to redress historic wrongs, but also to ensure that access to land is “*equitable*”. Allowing land to be unutilised, while others are landless – even if it is not subject to a specific restitution or labour tenant claim – does not promote “equitable” access to land. It may be possible to identify other situations that meet these two criteria – only economic meaning, and unutilised – that would also justify expropriation without compensation.

Whichever of the three technical options is used – s 25(1), s 25(3) or s 25(8) – these two factors are the key bases to justify expropriation without compensation.

Section 25(1): when assessing whether the deprivation is arbitrary, the nature and extent of the loss is compared to the reason for it. Ordinarily the complete deprivation of land requires strong justification. But in these instances the land only has economic meaning to the owner. It is, in some ways, the equivalent of taxation rather than expropriation. The justification is strong because: (a) it is to meet the purposes in ss 25(4) to (8); and (b) the land is not currently serving a useful purpose.

Section 25(3): if the payment of zero compensation is defended as just and equitable under s 25(3) the “*current use*” of the property, and the “*purpose of the expropriation*” strongly support reducing compensation from market value.

Section 25(8): even if a court concludes that zero compensation cannot be justified under s 25(3), the legislation can be defended under s 25(8). The key issue here will be the showing that compensation with compensation would impede land reform.

### 2 Exceptions

Even though the four categories are identified to be situations where expropriation without compensation will not be unduly harsh on the current landowners, there are likely to be situations where it will have a disproportionate impact to expropriate without any compensation. For example, the land may be abandoned, but there may be good reasons for the present abandonment, and a reasonable intention to use the land in the future. Or the land may be held for speculative purposes, but it may be the only investment of the landowner. Expropriation without compensation may leave the landowner destitute.

The way to deal with these possibilities is, as foreshadowed earlier, to allow landowners to approach a court to contest whether their land falls in the specified category and argue that, even though they are in the category, there are substantial and compelling circumstances that justify a departure from the default rule of zero compensation.

In order not to defeat the purpose of not impeding land reform, it will be important that this opportunity to approach a court is a burden that rests on the landowner and does not prevent the expropriation from continuing while the challenge is determined.

## *C* Limited Compensation

In our view, expropriation without any compensation will only be justified in the limited situations identified above (and other similar situations). It is doubtful whether expropriating that land alone will be sufficient to meet the demands for land reform. What may provide a far more effective way to achieve land reform is to combine expropriation without compensation in limited circumstances with limited compensation in other circumstances. The limits relate to both the determination and the calculation of compensation.

### 1 Calculation

There are a variety of possible ways in which compensation can be determined other than by placing competing valuer reports before a court. Some options include:

* Determination by a state valuer with clear guidelines for how to weigh competing concerns. There could also be an internal appeal mechanism that would be cheaper and more efficient than a court. This avoids the difficulty of competing valuation reports. But it will still be an expensive exercise to set up the bureaucracy of a state valuer.
* Compensation could be determined by market value reduced by a particular percentage. For example, 50% of market value. Of course, this still relies on a determination of market value. This option
* An alternative value could be used, such as the municipal valuation, or an altered version of the municipal valuation. The advantage of this approach is that the municipal valuation will already be determined.
* Or it could be calculated with reference to the original purchase price adjusted according to inflation. The Constitutional Court has accepted this is an acceptable method to determine just and equitable compensation for restitution claimants where restoration is not possible.
* The government could determine a formula that considers multiple factors – municipal valuation, previous purchase price, current use and others – to determine the compensation payable.
* A flat rate could be payed per hectare, which is predetermined for different areas and different types of land.

We do not express a view about which of these options would best serve the state’s goals. Whatever method might be adopted would have to balance competing concerns: efficiency and cost of calculation, the amounts the method will generate, the flexibility, and the likelihood that it could be defended against constitutional attack. The ability to defend any particular method of calculation will also depend on the extent to which the initial calculation can be altered by judicial intervention.

### 2 Judicial Role

Requiring courts to make the initial and final determination of compensation is inefficient. Excluding courts altogether will almost certainly be unconstitutional. There are multiple ways to conceive a judicial role between those two extremes.

There are three questions. First, how does the court become involved? The calculation could be subject to automatic review by the Court, or to optional review by the owner or the government. The legislation could also set the time periods within which reviews must be brought and determined.

Second, on whom does the onus lie? Must the state justify the amount, or must the owner put up evidence to show that the amount is not justifiable?

Third, what standard will the court apply? The court could review on ordinary administrative grounds. Or it could be limited to a “substantial and compelling” type standard. The legislation could also specify the types of substantive considerations that the Court should take into account – the prejudice to the owner, the deviation from market value and so on.

These are difficult systemic questions. But even the most restrictive conceptualisation – review only by the owner, who bears the onus to show substantial and compelling circumstances – will likely pass constitutional muster if the evidentiary basis for s 25(8) is met.

V Conclusion

Is it constitutionally permissible to expropriate land or property without compensation? That is the question we are asked to answer in this paper. The answer is yes. But only in limited circumstances, and subject to procedural and judicial safeguards.

The Constitution permits expropriation without compensation in one of three ways. First, as a non-arbitrary deprivation in terms of s 25(1). If the state does not acquire property, but transfers it from one private party to another, it does not expropriate property and is not obliged to pay compensation. Second, as just and equitable compensation in terms of s 25(3). The courts’ current interpretation of “*just and equitable compensation*” would likely exclude this possibility. But in our view, the Constitutional Court is likely to uphold an interpretation that permits no or little compensation to be paid if the purpose is to advance land reform. Third, as a limitation of the rights in ss 25(1) or (3) as permitted by s 25(8). Section 25(8) makes it clear that the other parts of s 25 should not “*impede land reform*”. If the government can show that paying compensation would impede land reform, and paying no compensation is proportional in the circumstances, it will be permissible under s 25(8) to either expropriate with limited or no compensation.

We are unable to find any rational basis for the argument that expropriation without compensation should apply as a default position to all circumstances. Expropriation of property is used in two ways under the Constitution. First, as a measure to enable the state to acquire property for public purposes, and second as a measure to facilitate access to property in the broader public interest, particularly by persons who previously were denied access to property by state action. In the first category (public purposes) expropriations tend to affect everybody regardless of background. Many black persons are compelled to give up their property to enable the state to fulfil public goals. No rational argument exists why those people should not be compensated. However, in the second category (of land expropriated in the broader public interest) different considerations apply. Property may have been acquired through racial discrimination, and may be required to achieve the constitutional goals of equality and access to land.

In our view, there is no clear line or closed list of situations where expropriation without compensation will be constitutionally permissible. The key constitutional standard is proportionality between the loss of the owner, and the public benefit of the expropriation. Because the Constitution demands land reform, expropriations for that purpose may be justifiable with no or limited compensation. Expropriation is more likely to be justified where it has the following characteristics: (a) the loss suffered by the owner is purely economic; and (b) the land is not currently being used productively by the owner.

The precise categories may be subject to debate, but the following situations are likely to justify expropriation without compensation: (a) abandoned land; (b) hopelessly indebted land; (c) land held purely for speculative purposes; (d) unutilised land held by state entities; (e) land obtained through criminal activity[[67]](#footnote-67); and (f) land occupied by labour tenants.[[68]](#footnote-68)

Whether these or similar categories of land are chosen, to survive constitutional scrutiny legislation permitting expropriation without compensation must ensure that: (a) the categories will have to be carefully defined; (b) expropriation without compensation will not have unduly harsh consequences for the owner; and (c) the expropriation without compensation will have to be subject to the procedural limits set out above.

Under international law, it is generally unlawful to expropriate foreign-owned property without compensation. However, it is permissible to pay significantly below market value. Legislation may have to exclude foreign-held land from being expropriated without any compensation.

The Constitution requires that the amount of compensation to be paid must be “*determined or approved*” by a court. It will be unworkable to require courts to determine in the first instance whether expropriation without compensation is just and equitable in each instance. It is therefore necessary for legislation to establish an administrative mechanism to determine whether land falls into a category subject to expropriation without compensation. That could be determined by executive officials, or by an independent administrative body.

The administrator would determine whether the land falls within the categories specified in legislation for expropriation without compensation, and whether there are substantial and compelling circumstances to pay some compensation. The procedure before the administrator should comply with the ordinary standards for administrative decision-making.

In order to survive constitutional attach, that decision must be subject to judicial oversight. However, the duty to approach the court can be placed on the owner. Moreover, the bringing of the review need not delay the expropriation. The Court can be limited to determining whether the administrator acted consistently with the Promotion of Administrative Justice Act. That would include the power to intervene if it believed substantial and compelling circumstances justifying some compensation existed.

We have focused on the possibility of expropriation without any compensation. While that is possible under the Constitution, the instances in which it is permissible are limited. On its own, we do not believe this will likely to fulfil the state’s obligations with regard to land reform.

The more effective mechanism is to use legislation to reverse the current approach that requires just and equitable compensation to be determined by agreement or by courts, and permits little (if any) deviation from market value. An efficient administrative system for determining compensation at significantly below market value, and created a limited judicial role, has far more potential to realise the existing constitutional possibilities for land reform.

1. \* Member of the Johannesburg Bar.

† Honorary Research Associate, UCT; Member of the Cape Bar; Counsel, Legal Resources Centre. The authors would like to acknowledge the research assistance of Eshed Cohen and Michael Tsele in preparing this paper.

 *Simmer & Jack Pty Mines Ltd v Union Government (Minister of Railways & Harbours)* 1915 AD 368 at 398, holding *“It is, of course, within the power of the Legislature to deprive an owner of valuable property without compensation”*. See also *Krause v SAR&H* 1948 (4) SA 554 (O) at 562-3; and *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1986 (4) SA 576 (W) at 579. On appeal in Sandton Town Council v Erf 89 Sandown *Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) it was held that it is within the power of the legislature to decide whether or not to expropriate property without compensation. However, where there is ambiguity in the legislation, it should be construed in favour of the subject whose rights of ownership are extinguished or attenuated by the act of expropriation. [↑](#footnote-ref-1)
2. *First National Bank* at para 97, holding *“The formulation of property rights and their institutional framework differ, often widely, from legal system to system. Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation.”* [↑](#footnote-ref-2)
3. *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC). [↑](#footnote-ref-3)
4. R Posner *Economic Analysis of Law* (6 ed, 2003) at 57. [↑](#footnote-ref-4)
5. See the [*Prevention of Organised Crime Act* 121 of 1998](http://www.fic.gov.za/Documents/02.POCA.pdf). [↑](#footnote-ref-5)
6. *Agri South Africa*. [↑](#footnote-ref-6)
7. I Rautenbach ‘Expropriation and arbitrary deprival of property: five forensic constructions’ (2013) *TSAR* 743 at 753. [↑](#footnote-ref-7)
8. *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 (6) SA 125 (CC) at para 34. [↑](#footnote-ref-8)
9. *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 14. [↑](#footnote-ref-9)
10. *Agri SA* at para 61. [↑](#footnote-ref-10)
11. *Agri SA* at para 62. [↑](#footnote-ref-11)
12. *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) at para 30. [↑](#footnote-ref-12)
13. Constitution ss 25(4), 25(5) and 25(8). [↑](#footnote-ref-13)
14. Constitution ss 25(6) and (9). [↑](#footnote-ref-14)
15. Constitution s 25(7). [↑](#footnote-ref-15)
16. *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC) at para 50. [↑](#footnote-ref-16)
17. *Reflect-All* at para 63. [↑](#footnote-ref-17)
18. *Mkontwana v Nelson Mandela Metropolitan Municipality and Another;* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) para 32. [↑](#footnote-ref-18)
19. Ibid para [↑](#footnote-ref-19)
20. *FNB* at paras 57-8. [↑](#footnote-ref-20)
21. *Harksen v Lane NO* at para 35. [↑](#footnote-ref-21)
22. *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58. [↑](#footnote-ref-22)
23. Ibid para 59. [↑](#footnote-ref-23)
24. Ibid at para 105 (our emphasis). [↑](#footnote-ref-24)
25. In *Uys N.O and Another v Msiza and Others* [2017] ZASCA 130, the Supreme Court of Appeal treated this as expropriation. [↑](#footnote-ref-25)
26. *Agri SA* at para 63. See also para 64. [↑](#footnote-ref-26)
27. *FNB* at para 100. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. *Reflect-All* at para 49. [↑](#footnote-ref-29)
30. *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 82. See also *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC) at paras 16-7. [↑](#footnote-ref-30)
31. *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008] SADCT 2. [↑](#footnote-ref-31)
32. *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 38. [↑](#footnote-ref-32)
33. *Du Toit v Minister of Transport* [2005] ZACC 9; 2005 (11) BCLR 1053 (CC); 2006 (1) SA 297 (CC) at para 36. [↑](#footnote-ref-33)
34. *Uys v Msiza* at paras 11-13. [↑](#footnote-ref-34)
35. LCC Judgment at para 38: Record Vol 4, p 387. [↑](#footnote-ref-35)
36. See *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC); *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others, Rainy Days Farms (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others* [2012] ZASCA 173; [2013] 1 All SA 381 (SCA); 2013 (3) SA 263 (SCA). [↑](#footnote-ref-36)
37. *Helderberg* (n 42) at para 19. [↑](#footnote-ref-37)
38. J Van Wyk ‘Compensation for land reform expropriation’ (2017) *TSAR* 21 at 27. See also J Zimmerman ‘Property on the Line: Is an Expropriation-centered Land Reform Constitutionally Permissible?’ (2005) 122 *SALJ* 378 at 417 (criticising the adoption of the two-stage approach and the over-emphasis on market value: “*The shared emphasis on market value in the policy and jurisprudence on the new property clause appears to stem from an extreme wariness of nonquantifiable Constitutional compensation factors and an over reliance on transnational or 'universal' compensation doctrine. Where the flexible and unusual provisions of s 25 have the potential to differentiate the South African property clause from its comparative analogs, they are either ignored or attributed very cautious and conservative content.*”) [↑](#footnote-ref-38)
39. *Du Toit* (n 11) at para 84 (emphasis in original). [↑](#footnote-ref-39)
40. WH Gravett ‘The Myth of Rationality: Cognitive Biases and Heuristics in Judicial Decision-Making’ (2017) 134 *SALJ* 53. See also E Foster ‘Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?’ (2009-2010) 77 *Tennessee LR* 623; B Englich ‘Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations’ (2006) 28 *Law & Policy* 497. [↑](#footnote-ref-40)
41. *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956A. [↑](#footnote-ref-41)
42. *Uys v Msiza* at para 25. [↑](#footnote-ref-42)
43. *Haffejee NO and Others v eThekwini Municipality and Others* [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) [↑](#footnote-ref-43)
44. Zimmerman. [↑](#footnote-ref-44)
45. Zimmerman at 413-5. [↑](#footnote-ref-45)
46. See, for example, Van der Walt *Comparative Analysis* at 147; Budlender et al *Juta’s New Land Law* (1998)at 1-73. [↑](#footnote-ref-46)
47. It is difficult to imagine how s 25(8) could be relied on to conclude that a limitation of s 25(1) – with its flexible, potentially proportional standard – could still be justified. See, for example, *Opperman* at paras 73-5. [↑](#footnote-ref-47)
48. Zimmerman at 416. [↑](#footnote-ref-48)
49. [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. [↑](#footnote-ref-49)
50. Rautenbach at 757. [↑](#footnote-ref-50)
51. T Roux ‘The “Arbitrary Deprivation” Vortex: Constitutional Property Law after *FNB*” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 265 at 275. [↑](#footnote-ref-51)
52. Constitution s 232. [↑](#footnote-ref-52)
53. Constitution s 39(1)(b). [↑](#footnote-ref-53)
54. TW Bennet and J Strug *Introduction to International Law* (2013) at 182; Patrick J. Smith ‘Determining the Standard Compensation for the Expropriation of Nationalised Assets: Themes for the Future’ 23 *Monash U. L. Rev.* 159 (1997) at 159; C. F. Amerasinghe ‘Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice *The International and Comparative Law Quarterly*, Vol. 41, No. 1 (Jan., 1992), pp. 22-65 at 37-8. L. Yves Fortier & Stephen L. Drymer **‘**Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*’ *ICSID Review - Foreign Investment Law Journal*, Volume 19, Issue 2, 1 October 2004, pp 293–327 at 295-6; Kenneth M. Siegel, The International Law of Compensation for Expropriation and International Debt: A Dangerous Uncertainty, 8 Hastings Int'l & Comp. L. Rev. 223 (1985) at 234. [↑](#footnote-ref-54)
55. *Chorzow Factory Case (Indemnity) (Merits)* (1928) PCIJ Reports, Series cA, No 17, 46; *Amoco International Finance Corp v Iran* (1987) 15 Iran-USCTR 189, 193; Amerasinghe op cit at 37-8. [↑](#footnote-ref-55)
56. Heibein op it at 767; C. F. Amerasinghe ‘Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice *The International and Comparative Law Quarterly*, Vol. 41, No. 1 (Jan., 1992), pp. 22-65 at fn 10; *Libyan American Oil Co. Arbitration* (1977), (1982) 62 I.L.R. 140 at 207; Bernard Kishoiyian ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ 14 *Nw. J. Int'l L. & Bus.* 327 (1993) at 328; Brice M. Clagett ‘The Expropriation Issue before the Iran-United States Claims Tribunal: Is Just Compensation Required by International Law or Not’ 16 *Law & Pol'y Int'l Bus.* 813 (1984) at 815. [↑](#footnote-ref-56)
57. Communication 286 /2004 – *Dino Noca vs Democratic Republic of the Congo* para 128-9. [↑](#footnote-ref-57)
58. *Dino Noca* para 144; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya*, Communication no 276/2003, May 2009, par. 211. [↑](#footnote-ref-58)
59. *Endorois Welfare Council* para 214; *Dino Noca* para 145. [↑](#footnote-ref-59)
60. *Dino Noca* para 147. [↑](#footnote-ref-60)
61. *Dino Noca*. [↑](#footnote-ref-61)
62. *Campbell*. [↑](#footnote-ref-62)
63. Ibid. [↑](#footnote-ref-63)
64. Gino J Naldi ‘*Mike Campbell (Pvt) Ltd et al* v The Republic of Zimbabwe: Zimbabwe’s Land Reform Programme Held in Breach of the SADC Treaty’ (2009) 53 *Journal of African Law* 305 at 317-8. [↑](#footnote-ref-64)
65. See generally *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZAGPPHC 4. [↑](#footnote-ref-65)
66. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 74 (“*it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*”) [↑](#footnote-ref-66)
67. We have not considered the consequences for the application of legislation such as [*Prevention of Organised Crime Act* 121 of 1998](http://www.fic.gov.za/Documents/02.POCA.pdf). [↑](#footnote-ref-67)
68. This is a slight exception as the justification for expropriation without compensation is also that the labour tenants have, through their (and their forefathers’) labour, already compensated the owner. [↑](#footnote-ref-68)