

UNPACKING SECTION 25: IS SOUTH AFRICA'S PROPERTY CLAUSE AN OBSTACLE OR ENGINE FOR SOCIO-ECONOMIC TRANSFORMATION?

Jackie Dugard

Abstract

... Does section 25 provide an appropriate framework within which to tackle 'the land question' in a transformative way? Or, to put it differently, what in section 25 would prohibit transformation if the government of the day wanted to prioritise this?

INTRODUCTION

Out of the crooked timber of humanity, no straight thing was ever made.¹

Apart from the election of the new party president (and the other 'Top Six' officials),² the issue that dominated the African National Congress (ANC)'s 54th elective congress in Johannesburg in December 2017 was the evolving crisis around the evident failures of post-apartheid land reform. Following what by all accounts was a heated deliberation, the ANC resolved to adopt a radical programme to fast track land redistribution without compensation.³ Accordingly, the ANC's 'January 8 Statement' 2018 pledged 'the expropriation of land without compensation', albeit in a manner that 'not only meets the constitutional requirement of redress, but also promotes economic development, agricultural production and food security'.⁴ And, on 27 February 2018, the National Assembly adopted a motion to assign to the Constitutional Review Committee the issue of a possible amendment of the Constitution to allow for radical land reform.⁵

Such moves, however politically motivated and as yet undefined, have occurred against the devastating reality of widening and persistently racialised socio-economic inequality⁶ and, specifically, unequal access to property and especially land. A legacy of South Africa's

¹ Immanuel Kant (1784) Proposition 6, Essay on 'Idea for a Universal History with a Cosmopolitan Purpose' (credit for reminding me of this quote: Elmien du Plessis Elmien (2017) 'Property in Transitional Times: The Glaring Absence of Property at the TRC', in Mia Swart and Karin van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years on* (Leiden: Brill Nijhoff) pp. 94-120 at 98.

² In a relatively tight race against closest rival, Nkosazana Dlamini-Zuma, on 18 December 2017 Cyril Ramaphosa was elected as the fourteenth president of the ANC (following the resignation under party pressure of President Jacob Zuma, Ramaphosa was elected by the National Assembly as South Africa's fifth president on 15 February 2018).

³ See Lameez Omarjee (20 December 2017) 'ANC reaches resolution on land reform': <https://www.fin24.com/Economy/anc-reaches-resolution-on-land-reform-20171220>; and Marianne Merten (21 December 2017) '#ANCdecides2017: Land expropriation without compensation makes grand entrance': <https://www.dailymaverick.co.za/article/2017-12-21-ancdecides2017-land-expropriation-without-compensation-makes-grand-entrance/#.WubX7C-B2i4>

⁴ <http://www.politicsweb.co.za/documents/the-ancs-january-8th-statement-2018--cyril-ramapho>

⁵ <https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution>

⁶ Although South Africa has made commendable progress in eradicating extreme poverty since 1994, mainly through social grants and free basic service provision, during the same period, racialised inequality has grown. With a Gini coefficient of between 0.660 and 0.696, and across almost all measurements, South Africa is one of the most unequal countries in the world. See for example: <https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries>; and <https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-the-world>

oppressive past, the scale of colonial and apartheid land dispossession and injustice is summarised by Ben Cousins and Ruth Hall below:

The loss of black land rights in South Africa occurred through a protracted and complex process of direct coercion and indirect pressures spanning more than three centuries. Although conflict over land predated European colonialism, the long history of dispossession was shaped by the establishment of a Dutch settlement at the Cape in 1652, followed by the movement of both British and Boer settlers into the hinterland and the series of ‘frontier’ wars that this provoked. Growing competition between white farmers and mine-owners for cheap labour following the discovery of diamonds and gold in the late nineteenth century prompted measures to undermine the relatively successful and independent black peasantry (Bundy 1988). Most significantly was the introduction of legal restrictions on black land ownership through the Natives Land Act of 1913. This law designated land on a racial basis and prohibited black South Africans from acquiring, leasing or transacting land outside small ‘native reserves’, later formalised as ethnic ‘homelands’, which were scattered around the country. The 1913 Act designated some 7% of the country for these reserves, and the Native Trust and Land Act, a [1938] follow-up to the 1913 Land Act, set quotas for additional land to be added to the reserves ... to bring the total area to approximately 13% of the country over time.

The displacement of the indigenous population that followed exceeded that in any other colonial state in Africa. Through the twentieth century, black communities were forcibly removed from their land and independent farmers turned into tenants who, in turn, either became landless laborers or were displaced. Many communities lost land in the name of conservation when large regions were proclaimed ‘protected areas’ and residents removed to make way for national or provincial parks. Those who were not employed by the mines, farms or factories were variously referred to as the ‘discarded’ or ‘surplus’ people (Desmond 1970, Platzky and Walker 1985) and, through a system of influx control, deported to the homelands. In towns and cities, the Group Areas Act of 1950 etched deep divisions, segregating residential areas and prompting large-scale removals of black residents to townships on the urban periphery or in faraway homelands... In addition, large numbers of people (possibly several million) were affected by so-called ‘betterment’ planning in the African Reserves, which saw designations of blocks of land for grazing, crop production and residential settlement and relocation of homesteads and fields; in the process many people lost access to land for cropping purposes.⁷

Notwithstanding various government efforts since 1994 to redress access to land and align contested property regimes in the public interest, the white minority continues to own a disproportionately large amount of land.⁸ The untransformed pattern of ownership of (and

⁷ Ben Cousins and Ruth Hall (2015) ‘The Restitution of Land Rights Amendment Act of 2014’, technical analysis commissioned by the Legal Resources Centre pp 1-2 (in author’s possession): <http://www.plaas.org.za/staff-member/hall>. See also Tembeka Ngcukaitobi (2018) *The Land is Ours: South Africa’s First Black Lawyers and the Birth of Constitutionalism*, especially Part I pp. 11-38.

⁸ Although it is generally accepted that white ownership of land (and property more generally) is still disproportionately high compared with population size, there are no comprehensively accurate statistics on the racial profile of land ownership in South Africa. Thus, although a 2013 land audit conducted by the Department of Rural Development and Land Reform (<http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf>) indicated that 79 percent of land (including agricultural, mining and urban land) may still be privately-owned (with some questions regarding ownership of municipal and Trust land having been under-reported), the audit did not reveal the racial composition of land ownership. Therefore, according to the Chief Surveyor-General (Mmuso Riba), ‘there is no basis’ for the claim that whites own 80% of South Africa (Anim van Wyk, 14 September 2014 ‘Do 40,000 whites own 80% of SA?’, *Africa Check*: <https://africacheck.org/reports/do-40000-whites-own-80-of-sa-the-claim-is-incorrect/>). AgriSA (an agricultural industry association) has persistently questioned government statistics on land, arguing for example that national statistics on the numbers of black farmers were simply not available and that the statistics do not reflect state-owned land, including traditional authorities, which in KwaZulu/Natal for example, amounts to 50 percent of the land (see for example Yolandi Groenewald, 3 May 2015, ‘Who owns the land?’, *City Press*: <http://city-press.news24.com/News/Who-owns-the-land-Ownership-by-numbers-20150503>). Some of the factors complicating the task of ascertaining the racial (and gender) profile of land ownership are informational gaps regarding ownership by sectional title schemes, companies, communal property associations and trusts. There are also problems relating to the transfer process and title deeds registration system. During 2017, the absence of

access to) land has become a potent symbol of the broader failures of South Africa's transition from apartheid. As Elmien du Plessis highlights, the purpose of land reform was 'not merely to return land to claimants', but also more comprehensively to right the wrongs of the past, to redress, to heal, to 'reverse racially skewed patterns of landownership' and to 'deracialise the privilege in property rights', as well as to acknowledging the 'hurt of dispossession and the histories of injustice'.⁹

At the heart of the current political deliberation, has been contestation over section 25 of the Constitution,¹⁰ the 'property clause', which is widely perceived to be an obstacle to transformation. For example, Black First Land First's submission to the Portfolio Committee on Public Works' public hearings on the Expropriation Bill on 4 August 2015 sets out that 'Section 25 legalises land theft and legitimises colonialism ... Section 25 in its entirety is a yoke around the necks and shackles in the feet and hands of our people. It makes us slaves in our own land'.¹¹ Formally, the National Assembly mandate to the Constitutional Review Committee explicitly is to consider amending section 25 to allow more radical land reform. More polemically, the Azanian People's Organisation (AZAPO) has called for the scrapping of section 25 and the nationalisation of land to (re)establish 'black power'.¹² And, academically, Magobe Bernard Ramose has argued that section 25 is a fatal obstacle to the objective of achieving justice for indigenous black South Africans.¹³

The rising consternation over the property clause is not surprising. Section 25 manages a political tension that was at the heart of South Africa's historic constitutional negotiations: how to deal with a reality in 1994 in which whites owned approximately 87 per cent of the land, despite comprising only about 10 per cent of the population. During the negotiations, on the one hand the National Party and various liberal interests, along with large commercial enterprise (largely controlled by the white minority), wanted to ensure that existing ownership of property by the white minority would be protected. On the other hand, more radical wings of the African National Congress and aligned liberation movements saw the need for major restitution and redistribution of land to correct the historical injustices of colonialism and apartheid (colonial apartheid).¹⁴ Section 25, as well as the precursor section 28 in the Interim Constitution,¹⁵ represents a political compromise, seeking to balance the rights and interests of

reliable information on land ownership prompted the Minister for Rural Development and Land Reform, Gugile Nkwinti, to call for a thorough colonial land audit to 'transform the historic patterns of ownership, use and occupation' (<http://www.sanews.gov.za/south-africa/government-conduct-pre-colonial-land-audit>). [Nov 2017 AUDIT analysis]

⁹ Elmien du Plessis (2017) 'Property in Transitional Times: The Glaring Absence of Property at the TRC', in Mia Swart and Karin van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years on* (Leiden: Brill Nijhoff) pp. 94-120 at 107. See also Ruth Hall (2010) 'Reconciling the Past, Present and Future' in Cheryl Walker, Anna Bohlin, Ruth Hall and Thembele Kepe (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (UKZN Press) pp. ?? at 17.

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

¹¹ Black First Land First (4 August 2015) 'Return the stolen land – that's the only real solution! Sankara policy and political school submission to the Portfolio Committee of Public Works on Public Hearing on the Expropriation Bill [2015]':

<https://black1stland1st.wordpress.com/2015/08/04/return-the-stolen-land-thats-the-only-real-solution-sankara-policy-and-political-school-submission-to-the-portfolio-committee-of-public-works-on-public-hearing-on-the-expropriation-bill/>

¹² Input by AZAPO representative, Lepeto Nkubela, at UNISA debate on expropriation without compensation, Pretoria 30 April 2018: <https://www.enca.com/south-africa/catch-it-live-unisas-land-expropriation-debate>

¹³ M B Ramose and Derek Hook (2016) 'To whom does the land belong' 50 *Psychology in Society* pp?

¹⁴ See for example Heinz Klug (2000) *Constituting Democracy: Law, Globalisation and South Africa's Political Reconstruction* (Cambridge) pp. 124-136.

¹⁵ Interim Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

the (overwhelmingly white) haves against the rights and interests of the (overwhelmingly black) have-nots. Thus, section 25 undoubtedly affords a degree of protection to existing property owners by prohibiting arbitrary deprivation of property.¹⁶ However, at the same time, it includes an imperative to advance access to land on an equitable basis, and a framework to pursue land restitution, inter alia through authorising expropriation (albeit with some form of compensation) when in the public interest, which is explicitly defined as including ‘the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources’.¹⁷

Reflecting an increasingly uneasy bundle of imperatives from Marxist redistribution and restorative restitution through recognition of traditional communal land rights to liberal protection of private property, section 25’s Janus-like character has given rise to a schizophrenic public discourse. At the same time as there are calls to amend and even abolish section 25, many poor people and communities are appealing to the government to speed up private property titling processes, and property owners, as well as traditional authorities, are demanding greater protection of their property rights. Against this backdrop, rather than interrogating what has (and has not) been achieved since 1994, this paper examines the potential and limits of the property clause to understand the extent to which section 25 is an obstacle or engine for socio-economic transformation in South Africa.

UNPACKING SECTION 25

Section 25 contains 8 sub-sections, making the property clause the longest in the Bill of Rights. Section 25(1), (2) and (3) constitute the more defensive sub-sections, with section 25(4)-(8) constituting the more reformist sub-sections.¹⁸ In 1996, at the time the Final Constitution came into effect, it was clear that the defensive sub-sections would overwhelmingly act to the benefit of white, historically-advantaged persons (who by far constituted the majority of property owners); whereas the reformist sub-sections were focused on benefitting historically-disadvantaged black persons. It is perhaps worth noting that over time, and as more black people have become property owners, the defensive sub-sections serve all property owners, while the reformist sub-sections continue to benefit historically-disadvantaged black persons. Indeed, one of the (arguably more liberal) arguments for including property rights’ protections after 1994 was to extend these to the previously excluded black majority, whose property-related rights had been regularly disrespected and violated under apartheid. As voiced by Constitutional Court judge, Albie Sachs, in *Port Elizabeth Municipality v Various Occupiers* (*Port Elizabeth Municipality*):

The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private

¹⁶ Section 25(1) of the Constitution prohibits arbitrary deprivation of property.

¹⁷ Section 25(2) of the Constitution provides that property may be expropriated only in terms of a law of general application ‘for a public purpose or in the public interest’ and subject to compensation. Section 25(4) of the Constitution highlights that ‘the public interest’ includes ‘the nation’s commitment to land reform’. Sections 25(2) to (9) set out the parameters of expropriation and land restitution. Land restitution is further elaborated on in the Restitution of Land Rights Act 22 of 1994.

¹⁸ Juanita Pienaar (2014) *Land Reform* p. 167 points out that section 25 embodies a ‘clearly more reform-centred and expansive land reform approach’ than its precursor section 28 of the Republic of South Africa Act 200 of 1993 (Interim Constitution).

persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.¹⁹

Naturally – and especially from an ideological perspective - the increasingly, but far from representative, multi-racial profile of private property ownership is not intrinsically evidence of the transformative (or non-transformative) nature of section 25. Regardless of ideological positioning on private property, section 25's attempt to balance various interests 'contributes greatly to its substantive complexity' and undoubtedly creates tensions and potential conflicts.²⁰

Section 25(1): arbitrary deprivation

Importantly, section 25 does not provide an individual positive guarantee, or right to property per se.²¹ Rather, section 25(1) establishes a negative right - the right to not be arbitrarily deprived of property, stating that no-one 'may be deprived of property except in terms of a law of general application', and 'no law may permit arbitrary deprivation of property'. This provision protects property owners, whether historically-advantaged or historically-disadvantaged, from having their property arbitrarily deprived.²² Although this might at first appear to be a conservative right, the courts have interpreted this sub-section transformatively in two key respects.

First, in terms of the relationship between deprivation and expropriation (with expropriation constituting the harshest, comprehensive and permanent, form of deprivation),²³ the courts have on the whole interpreted deprivation quite widely and, concomitantly, interpreted expropriation quite narrowly.²⁴ This is a progressive interpretation because, in the light of the requirement for compensation in the context of expropriation, a more limited interpretation of what constitutes expropriation (and a wider interpretation of deprivation) means having to draw less on public funds to compensate property owners.

¹⁹ 2005 (1) SA 217 (CC) para 15 (*Port Elizabeth Municipality*).

²⁰ Juanita Pienaar (2014) *Land Reform* p. 175.

²¹ Section 25's precursor, section 28 of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), also did not contain a traditional property clause but it had a more robustly articulated protection of property rights in that section 28(1) recognised the right of everyone to 'acquire and hold rights in property'. This formulation was dropped in favour of the weaker iteration pursued in section 25 of the Final Constitution. See for example Juanita Pienaar (2014) *Land Reform* Chapter 5 'Land Reform embedded in the Constitution 167-191. Section 28(2) of the Interim Constitution provided a stronger protection against deprivation than that of section 25(1) of the Final Constitution, stating: 'No deprivation of any rights in property shall be permitted otherwise than in accordance with a law'.

²² Andre van der Walt explains that a deprivation (such as the inability to transfer one's immovable property without obtaining a municipal rates clearance certificate, or having to accommodate unlawful occupiers while the state provides alternative accommodation) restricts or limits the use of private property in the public interest without necessarily taking away the property – it affects everyone in that situation more or less equally, whereas expropriation entails taking away the property permanently from one owner for the public use (VdW *Law of Property* (5th) p. 313).

²³ See for example, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

²⁴ A disappointing exception is the Constitutional Court's decision in *Arun Property Development (Pty) Ltd. v City of Cape Town* 2015 (2) SA 584 (CC) (*Arun*), in which, instead of finding that the City of Cape Town's unauthorized, excessive vesting of property was simply unlawful administrative action to be set aside, the Court found this to have amounted to expropriation and that the property developer was therefore entitled to compensation. For a critique of the *Arun* judgment see Jackie Dugard and Nompumelelo Seme (2018) 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation', 34(1) *South African Journal on Human Rights* pp. 33-56 at 51-55.

Similarly, the courts have clarified that, while wholesale regulatory regime change projects embarked on by the post-apartheid state may amount to (non-arbitrary) deprivation, these do not amount to expropriation, relieving the state of the obligation to pay compensation to the multitude of affected property owners. Thus in *Agri South Africa v Minister for Minerals and Energy (AgriSA)*,²⁵ the Constitutional Court (CC) validated the transformative objective of the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA), which seeks to ‘promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa and to ‘substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources’.²⁶ *AgriSA* also validated the MPRDA’s operation - which had the effect of terminating the rights of any old-order mining rights holder which failed to convert its rights to new-order mining rights - by finding that, although constituting (non-arbitrary) deprivation, this did not amount to expropriation and, as such, was not subject to compensation. By doing so, the judgment endorsed the MPRDA’s transformative objectives and confirmed the state’s project to redistribute mineral rights from old-order (overwhelmingly historically-advantaged) to new-order (historically-disadvantaged) holders.

Second, the courts have clarified that property owners might have to tolerate some degree of deprivation of their property rights in the context of balancing property rights with other constitutional rights such as the right of unlawful occupiers to housing, and that having to put up with unlawful occupation for months at a time will not in itself constitute arbitrary deprivation. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Blue Moonlight)*,²⁷ which concerned an application by a private property developer to evict 86 desperately poor unlawful occupiers from an inner city building, the CC highlighted that, although the property owner could not be expected to be burdened with providing accommodation to the occupiers indefinitely, ‘a degree of patience should be reasonably expected of it’ while the municipality lined up alternative accommodation.²⁸ In the *Blue Moonlight* case, the CC operationalised this principle by ordering the municipality to provide the occupiers with alternative accommodation within four months of the judgment being delivered, and authorising an eviction only after the occupiers had been relocated in the alternative accommodation.²⁹

As highlighted by the CC, the property owner, which ‘wishes to exercise its right to develop its property’,³⁰ cannot be expected indefinitely to provide free housing to the Occupiers, but its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable:³¹

The South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26(1) and the right not to be evicted arbitrarily from one’s home in section 26(3).³²

²⁵ 2013 (4) SA 1 (CC) (*AgriSA*).

²⁶ MPRDA section 2.

²⁷ 2012 (2) SA 104 (CC) (*Blue Moonlight*).

²⁸ *Blue Moonlight* para 101.

²⁹ *Blue Moonlight* para 104.

³⁰ *Blue Moonlight* para 3.

³¹ *Blue Moonlight* para 97.

³² *Blue Moonlight* para 34 (footnotes omitted).

Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and to access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property but also addresses the need to redress the grossly unequal social conditions ... Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by a law of general application and if not arbitrary. Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable ... A court must consider an open list of factors in the determination of what is just and equitable. The relevant factors to be taken into account in this case are the following. The Occupiers have been in occupation for more than six months. Some of them have occupied the property for a long time. The occupation was once lawful. Blue Moonlight was aware of the Occupiers when it bought the property. Eviction of the Occupiers will render them homeless. There is no competing risk of homelessness on the part of Blue Moonlight, as there might be in circumstances where eviction is sought to enable a family to move into a home. It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.³³

Section 25(2), (3) and (4): expropriation for a public purpose or in the public interest³⁴

The power of the state to expropriate private property – sometimes referred to as eminent domain – is a common feature of most legal frameworks and is regularly used by governments around the world to pursue the public purpose of building roads or dams etc. In South Africa, expropriation generally is set out in section 25(2), which establishes that property can be expropriated only in terms of a 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.

Apart from the usual public purposes, section 25(4) explicitly authorises the state to expropriate 'in the public interest'³⁵ for the purposes of land reform, land restitution and 'to bring about equitable access to natural resources', and clarifies that 'property is not limited to land'.³⁶ Nonetheless, section 25's expropriation framework has been popularly cast as being inimical to transformation because of its supposed reliance on a 'willing buyer, willing seller', market value-driven compensation approach – an approach that, for largely unexplained reasons, has to date been pursued by the government, despite not being mandated by the Constitution.

³³ *Blue Moonlight* paras 35-40 (footnotes omitted).

³⁴ This section draws on Jackie Dugard (2017) 'The Right to Land Remains a Thorny Issue', Jean Meiring (ed) *South Africa's Constitution at Twenty One* (Penguin Random House South Africa) pp. 160-170.

³⁵ Section 28 of the Interim Constitution had a 'rather limited scope' for expropriation, allowing expropriation only for a 'public purpose', which was reformulated for the Final Constitution specifically to acknowledge the need for land reform and restitution (Juanita Pienaar (2014) *Land Reform* 170).

³⁶ The provisions in section 25(4) that the 'public interest' includes the 'nation's commitment ... to reforms to bring about equitable access to all South Africa's natural resources'; and that 'property is not limited to land', create significant room for the state to undertake systemic transformation of property regimes such as water, minerals, land etc. There is not the space here to deal with the resources aspect, but it should be noted that there has been a wholesale restructuring in relation to water ownership and rights, overseen by the Water Services Act 108 of 1997 and the National Water Act 36 of 1998; and, as explained above, a similar substantial restructuring of the regime governing ownership of and rights to minerals under the MPRDA.

It is probable that the persistence of a ‘willing buyer, willing seller’, market value-driven compensation approach in the post-apartheid era is at least partially explained by a mistaken continued reliance on section 12(a)(i) of the Expropriation Act 63 of 1975 (Expropriation Act), which refers to compensation for expropriation reflecting ‘the amount which the property would have realised if sold on the date of notice in the open market ...’ – a clause that, under the apartheid regime, certainly did mandate a ‘willing buyer, willing seller’ market value-driven approach. Crucially, however, as a pre-constitutional piece of legislation, the Expropriation Act must comply with the Constitution to be lawful. This means that section 25(3) of the Constitution’s formulation for compensation must take precedence.³⁷

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 of the property 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.

It is clear from section 25(3)(a-e) that market value is simply one of a range of (in-exhaustive) factors to be considered when deciding how much compensation to award in cases of expropriation. This list implies a system of calculation in which market value might be the starting point but that, following proper consideration of all the other factors, the final amount could be substantially lower and could be very close to zero.³⁸ A recent Land Claims Court (LCC) case, *Msiza v Director-General, Department of Rural Development and Land Reform and Others*³⁹ (*Msiza LCC*), has confirmed this legal interpretation, emphasising that the guiding principle in section 25(3) is for just and equitable compensation rather than market value compensation, meaning that, even if market value is a useful starting point in deciding the amount of compensation, a court can award below-market value compensation in the public interest:

In this trial, the third and fourth respondents [the affected property owners] were insistent upon the payment of market value for compensation. I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under s 25 of the Constitution where property or land has been acquired by the state in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a court assesses just and equitable compensation. It is not correct to submit, as was done on

³⁷ While the subsidiarity principle establishes that where there is legislation to give effect to a constitutional right, any person alleging a violation of the right should rely on the legislation rather than directly on the Constitution, direct reliance on the Constitution is possible when the legislation does not properly give effect to the constitutional right (Juanita Pienaar (2014) *Land Reform* (Juta: Cape Town) p. 188). Nonetheless, a cleaner approach would be for the Expropriation Act to be amended to bring it in line with the Constitution. Parliament has been attempting to enact a new Expropriation Act for many years. The latest version of the Expropriation Bill (B4D-2015) was approved by Parliament on 26 May 2016. However, during mid-2016 the Bill was sent back to Parliament by President Zuma to clarify the process for passing the Bill. If the current Constitutional Review Committee is looking for legislation to amend, the Expropriation Act would be a good place to start.

³⁸ So, for example, according to the formulation of section 25(3), where the property had been egregiously dispossessed, was not being used for food crops, had benefitted from substantial state subsidies under apartheid, and where the expropriation was going to result in the restitution of the land to a community of farmers, compensation might be extremely low. The fact that this does not happen, or very rarely happens, in land claims processes is not a legal/constitutional issue. Rather, it is an issue of convention, practice or implementation that could, legally, be shifted towards a more transformative, less status-quo, approach to compensation.

³⁹ 2016 (5) SA 513 (LCC) (*Msiza LCC*).

behalf of the landowners, that the jurisprudence of this court has installed market value as a pre-eminent consideration. Properly understood, the jurisprudence of this court shows that market value is regularly used as an entry point to the analysis because it is the most tangible factor in all of the factors listed in s 25(3). This is not to make market value the most important factor in the analysis of just and equitable compensation; the object is always to determine compensation which is just and equitable, not to determine the market value of the property.⁴⁰

Indeed, in the prior expropriation case of *Khumalo and others v Potgieter and others (Khumalo)*, the LCC used market value as merely the starting point for its determination of the value of compensation.⁴¹ And in *Du Toit v Minister of Transport (Du Toit)*, the CC emphasised the Constitution's requirement that compensation be 'just and equitable', having regard to 'all relevant circumstances' including (but not limited to) those listed in section 25(3).⁴² Beyond market value, the other factors included in the mandatory but non-exhaustive list in section 25(3) have a transformative, public interest basis. The current use of the property is a consideration that establishes justification for the expropriation of scarce resources, such as land and minerals', where these are 'not being used productively and they are needed for reformative purposes, such as access to housing or access to the mining industry for historically disadvantaged parties, or to support emerging farmers'.⁴³ The history of the acquisition of the property implicitly authorises a discounting of the amount of compensation in respect of any property was acquired as a result of forced removals and/or made available to white farmers at discounted prices and/or accompanied by state subsidies,⁴⁴ as tied with the consideration of 'the extent of direct state investment and subsidy', referencing the inequity of white farmers who have received substantial state subsidies receiving market value compensation (amounting to a double subsidy for historically advantaged persons) in instances of expropriation. Finally, 'the purpose of the expropriation' offers justification 'for expropriations that are aimed at alleviating pressing social needs', and also justifying 'downward adjustment of the amount of compensation'.⁴⁵

It is true that the reference in section 25(2)(b) to any such expropriation being 'subject to compensation' suggests that some form of compensation must be awarded. However, as explained above, it is possible that on a proper calculation of all the factors, the compensation could amount to very little or nothing at all. Moreover, regarding the requirement in relation to compensation that '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', it has been conclusively established by the CC that, while it is ideal for the amount, time and manner of compensation to be established prior to the expropriation, this is not necessary.⁴⁶ In other words, an owner may not hold up an impending expropriation by arguing over the price.

⁴⁰ *Msiza* LCC paras 29-30. In September 2017, the *Msiza* LCC judgment was successfully appealed to the Supreme Court of Appeal, which, while not disputing the framework for the calculation of compensation of the LCC judgment, disagreed with the calculation and awarded a higher amount to the landowners (*Uys N.O. and Another v Msiza and Others* [2017] ZASCA 130 (29 September 2017) (*Msiza* SCA)). At the time of writing the claimants were considering appealing the SCA judgment and/or applying for direct access to the CC to try to argue inter alia that using market value as the entry point for any determination of compensation is antithetical to section 25's purpose and formulation.

⁴¹ [1999] ZALCC 59 (*Khumalo*) paras 93-101.

⁴² 2006 (1) SA 297 (CC) (*Du Toit*) paras 30-33.

⁴³ Mostert et al p. 128 citing G. Budlender (1998) 'Constitutional protection of property rights' in G. Budlender, V. Latsky and T Roux (eds) *Juta's New Land Law* (Cape Town, Juta) pp 1-56.

⁴⁴ Mostert et al p. 129.

⁴⁵ Mostert et al p. 129.

⁴⁶ *Haffejee NO v eThekweni Municipality* 2011 (6) SA 134 (CC).

From the above it is clear that section 25 mandates neither a willing buyer, willing seller regime nor market value compensation for expropriation. Indeed, as clarified by the LCC in *Khumalo and Msiza* (LCC), as well as the CC in *Du Toit*, the courts have stressed that the constitutional framework of ‘just and equitable compensation’ (rather than the Expropriations Act) should govern expropriations. It is perplexing that the post-apartheid government has overwhelmingly pursued a market-value, willing-buyer-willing-seller approach and it is clear that any limits of such approaches are not the result of constitutional obstacles. Rather, any such limits or failures are the result of political and/or bureaucratic choices, implying problems with the polity rather than the Constitution.

Section 25(5) foster conditions to gain access to land and section 25(6) tenure security

Sections 25(5) and 25(6) are widely permissive authorisations for the state to pursue programmes to advance access to land and tenure security. Advancing access to land could be in the form of facilitating land ownership or it could entail making land available for secure occupation and use. Regarding land ownership, section 25(5) clearly empowers – and indeed obliges – the state to pursue land redistribution (including via expropriation). To give legal effect to this mandate, there are two main laws: the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) and the **Provision of Land and Assistance Act** 126 of 1993 (PLAA).

The LTA exists to benefit a particular category of land user: a person⁴⁷ who resides on or has the right to reside on the farm or another farm of the owner; who has or has had the right to use cropping or grazing land on the farm in exchange for labour; and whose parent or grandparent resided or resides on such farm or had the use of cropping or grazing land in exchange for labour.⁴⁸ The redistributive objective of the LTA is contained in Chapter III, which sets out parameters for the acquisition of ownership by labour tenants. Section 16(1) of the LTA establishes that a labour tenant can apply for an award of land ‘which he or she is entitled to occupy or use in terms of section 3’, which provides that ‘a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members to occupy and use’ that part of the farm which ‘he or she or his or her associate was using and occupying on that date’; or ‘the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties’; or ‘rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm’ – any such claim must be made within four years of the commencement of the LTA. In line with section 25(3) of the Constitution, according to section 23 of the LTA, the owner of affected land is entitled to ‘just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land’.

The LTA, as underpinned by section 25, thus provides a very transformative framework for the redistribution of land. Unfortunately, there have been numerous problems with the administration of this component of the LTA, with hardly any section 16 claims having been resolved (apart from *Msiza*), giving rise to protracted litigation brought by the Legal Resources Centre on behalf of the Association for Rural Advancement (AFRA) and various labour tenants

⁴⁷ This, according to section 1(xi)(c) of the LTA, includes a successor of a labour tenant but excludes a farm worker (farm workers are covered by ESTA). Pienaar and Brickhill note that, although the purpose of the LTA is to phase out labour tenancy whereas the purpose of ESTA is to provide ongoing protection against the exploitation of farm workers, the continued distinction between labour tenants and farm workers is not ideal (Pienaar and Brickhill CLOSA 48-16).

⁴⁸ Section 1(xi) of the LTA.

to have a Special Master of Labour Tenants appointed to ensure that the Minister of Rural Development and Land Reform implements multiple court orders for redistribution of land under the LTA. On 8 December 2016, the LCC, which has primary jurisdiction over the LTA (along with the RLRA and ESTA), ruled that, by refusing to implement labour tenants' land ownership claims since the early-2000s, the Minister and Director General of the Department of Rural Development and Land Reform had acted inconsistently with the Constitution and it granted an order appointing a Special Master of Labour Tenants, who is tasked to produce a plan to implement all the amassed labour tenants claims to facilitate ownership, which must be done in collaboration with the Department of Rural Development and Land Reform.⁴⁹

In its amended form,⁵⁰ the PLAA is the main legislative mechanism to realise the land redistribution programme. From a legal perspective, the PLAA provides an extraordinarily transformative framework in terms of which land⁵¹ is designated by the Minister of Rural Development and Land Affairs for the purposes of redistribution to persons who have no land or limited access to land, persons wishing to upgrade their land tenure or persons who have been dispossessed of their right in land but do not have a right to restitution under the RLRA.⁵² Tragically, as with the LTA and ESTA machinery, the PLAA has been under-utilised. More generally, the November 2017 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change paints a bleak picture of government efforts to comply with section 25(5) of the Constitution.⁵³

Regarding land occupation and use, in recognition of the large numbers of black people who live (and often work) on land that someone else owns, section 25(6) establishes the need for the state to recognise and protect land occupation and use rights even where these rights clash with land ownership rights. Section 26(9) requires Parliament to enact legislation to give effect to section 25(6), and several laws have been promulgated to this end. Chief among these legal reforms are the LTA, which (apart from enabling land acquisition) provides enhanced protection against the exploitation and eviction of labour tenants (Chapter II, LTA);⁵⁴ the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA),⁵⁵ which governs the

⁴⁹ <http://irc.org.za/ircarchive/press-releases/3711-press-release-court-orders-special-master-for-labour-tenant-land-claims>

⁵⁰ The Provision of Certain Land for Settlement Amendment Act 26 of 1998.

⁵¹ Both state and privately-owned land can be designated but privately-owned land can only be designated for this purpose if it has been made available by the owner (who would then receive compensation).

⁵² Pienaar and Brickhill CLOSA 48-21.

⁵³ Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) (HLPR), chapter 3, pp. 205-231:

https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

⁵⁴ Section 3(1) of the LTA stipulates that a person who was a labour tenant on 2 June 1995 shall have the right 'with his or her family members to occupy and use that part of the farm' that he or she was using and occupying on that date. Section 9(1) establishes that a labour tenant who is over 65 years of age, or as a result of disability is unable personally to provide labour to the owner or lessee; and has not nominated a person to provide labour in his or her stead, 'shall not be evicted' for reasons of failure to work for the owner or lessee.

⁵⁵ IPILRA was meant to be a temporary Act but the legislation designed to replace it – the Communal Land Rights Act 11 of 2004 (CLARA) - was declared unconstitutional by the CC in *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC). IPILRA has therefore had to be extended every year until new legislation governing customary land is passed. IPILRA protects several categories of rights: use or occupation of, or access to land in terms of i) any tribal, customary or indigenous law or practice of a tribe; or ii) the custom, usage or administrative practice in a particular area or community where the land at any time vested in the South African Development Trust, the government of any self-governing territory or the former governments of the four national states.

tenure security of people who occupy and use land under customary land law;⁵⁶ the Extension of Security of Tenure Act 62 of 1997 (ESTA),⁵⁷ which provides enhanced protection against the eviction of people who occupy non-formally proclaimed township areas with the consent of the owner;⁵⁸ and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which protects unlawful occupiers anywhere in South Africa from being evicted un-procedurally or unjustly.

The courts have played an important role in interpreting the scope of these laws, particularly PIE and, more recently, also ESTA. Regarding ESTA, beyond affirming the additional protections against unjust evictions,⁵⁹ the courts have established that ESTA protects a range of rights including the right for a wife to remain on the land independently of her husband who has validly been dismissed and evicted and for him, on the basis of the right to family life, to be allowed to join her on the premises.⁶⁰ The CC has also recently, in *Daniels v Scribante and Another*,⁶¹ ruled that in cases where landowners refuse to improve their accommodation ESTA occupiers have the right to make such improvements that are necessary to live in acceptable conditions. Following an amendment to ESTA in 2001 that provided for burial rights in certain circumstances,⁶² the LCC found in *Nhlabathi v Fick*⁶³ (*Nhlabathi*) that, contrary to the arguments of the landowner that the ‘appropriation of a grave deprives the land-owner of property’, the right to burial was introduced by legislation as part of the constitutional mandate to ensure legally secure tenure,⁶⁴ and that the appropriation of a grave in terms of ESTA amounts to a ‘minor intrusion’ only and not requiring compensation.⁶⁵

The right afforded to spouses to independently remain on the land, the right for farm dwellers to live in adequate standards of accommodation, and the right to bury on the land regardless of the owner’s wishes, constitute significant and transformative inroads of use and occupation rights vis-à-vis ownership rights. In addition, in recognition of the typical vulnerability and low-income status of occupiers covered by ESTA, in *Nkuzi Development Association v*

⁵⁶ IPILRA, over which there are enduring problems (related to the difficulty of aligning communal land rights and traditional leadership authority with constitutional imperatives to ensure that people living under customary law arrangements are not left with diminished rights especially vis-à-vis traditional systems of decision-making and adjudication), is not discussed in this paper (see for example...). Suffice to say that, whatever the complexities of IPILRA and the broader frameworks for governing customary land law (including the controversial Traditional Leadership and Governance Framework Act 41 of 2003 and the proposed, highly contested, Traditional Courts Bill), it is not section 25 that blocks transformative change (however this may be defined) in the communal land rights arena.

⁵⁷ In addition to security of tenure provisions, ESTA, like the LTA, provides for redistribution (Chapter II, ESTA). However, this form of land redistribution has hardly been invoked and where it has, it has not been very successful (Juanita Pienaar and Jason Brickhill (2nd Edition, Original Service: 03-07) ‘Chapter 48: Land’ in CLOSA ... 48-16.

⁵⁸ This includes a right to family life (not present in the Constitution) in section 6(1)(d), burial rights (section 6(4)) and safeguards against unfair eviction (sections 8-13).

⁵⁹ See Pienaar CLOSA pp. 48-37 to 48-42.

⁶⁰ *Conradie v Hanekom* 1999 (4) SA 491 (LCC) and *Klaase and Another v Van der Merwe N.O. and Others* 2016 (6) SA 131 (CC) [? re husband’s right to rejoin].

⁶¹ 2017 (4) SA 341 (CC).

⁶² Section 6(2)(dA) of ESTA now provides that an occupier ‘has the right to bury a family member who resided on the land at the time of his or her death, in accordance with their religion or cultural belief, if an established practice in respect of the land exists’. And, according to section 6(5), ‘family members of a long-term occupier have the right to bury the occupier on the land on which he or she was resident at the time of death.’

⁶³ [2003] 2 All SA 323 (LCC) (*Nhlabathi*).

⁶⁴ *Nhlabathi* para 26(d).

⁶⁵ Pienaar CLOSA p. 48-34 to 48-35 citing *Nhlabathi* paras 27-30.

*Government of the Republic of South Africa*⁶⁶ the LCC interpreted ESTA as providing a right to legal representation at state expense for occupiers whose tenure is threatened or infringed.⁶⁷

Regarding PIE, in a series of cases, the courts have established a set of transformative principles that clarify not only the state's obligations, but also the constitutional and public interest-related duties of property owners and the limits of property ownership rights, in relation to unlawful occupiers:

- the state has an obligation to devise and implement a reasonable housing policy that, at the minimum, provides emergency shelter for those who would otherwise be rendered homeless by an eviction;⁶⁸
- where an eviction would render occupiers otherwise homeless, it would ordinarily not be just and equitable to evict them without the state providing alternative accommodation;⁶⁹
- the state has an obligation to meaningfully engage occupiers regarding evictions;⁷⁰
- the state has the same obligation to provide emergency shelter to evictees who would otherwise be rendered homeless regardless of whether the eviction is initiated by the state or a private land owner;⁷¹
- where the provision of emergency shelter (whether directly or via a service provider) entails draconian rules such as gender-segregation and lockout during the day, this is unconstitutional and an unjustified limitation of occupiers' rights;⁷²
- where, because of the scale of the unlawful occupation, it is unfeasible to order an eviction because it would not be just and equitable to do so, the state might be compelled to purchase (or expropriate) the property from the property owner to fulfil its constitutional obligations;⁷³
- the state cannot use disaster management legislation as a way to evict occupiers without complying with PIE;⁷⁴
- private owners seeking to evict unlawful occupiers bear the onus of showing that it is just and equitable to evict the unlawful occupiers (rather than the unlawful occupiers having to prove that it would not be just and equitable to evict them);⁷⁵ and
- a private land owner might have to tolerate unlawful occupation for some time until the state can line up the provision of emergency shelter.⁷⁶

⁶⁶ 2002 (2) SA 733 (LCC).

⁶⁷ Pienaar CLOSA 48-36.

⁶⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA (CC).

⁶⁹ *Port Elizabeth Municipality*.

⁷⁰ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC).

⁷¹ *Blue Moonlight*.

⁷² *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).

⁷³ *Fischer v Persons listed on Annexure X to the Notice of Motion and those persons whose identity are unknown to the Applicant and who are unlawfully occupying or attempting to occupy Erf 150 (remaining extent) Phillipi, Cape Division, Province of the Western Cape and Others; Stock and Others v Persons unlawfully occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd and Others; Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the Applicant unknown and who are unlawfully occupy remainder Erf 149, Phillipi, Cape Town and Others* 2018 (2) SA 228 (WCC) (30 August 2017).

⁷⁴ *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC).

⁷⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

⁷⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*. 2005 (5) SA 3 (CC); *Blue Moonlight*.

Finally, although in most cases the courts have ultimately granted eviction orders following ensuring that alternative accommodation/emergency shelter was provided, in a recent case the court found that it was not just and equitable to evict a group of people - including two pensioners, who had lived on the property for 44 years working for the previous owner – from a property purchased by the current property owner, which wanted to redevelop the property for higher-income persons.⁷⁷

Section 25(7) restitution

Land restitution is probably the most complex and emotive of the land reform processes outlined in section 25. It has also been one of the least successful processes in terms both of the relatively low number of instances in which land has been restored to claimants, and the questionable success of restitution where this has occurred.⁷⁸ Indeed, owing to difficulties with the process,⁷⁹ the majority of claimants whose claims have been validated have opted for relatively paltry cash settlements rather than going through the lengthy restitution process.⁸⁰ Arguably, however, the evident failures of the restitution mandate have much more to do with Land Claims Commission/government implementation (or lack thereof), as well possibly as judicial interpretation, than with the text of section 25(7) per se.

The scope and detail of section 25(7) have been fleshed out in the Restitution of Land Rights Act 22 of 1994 (RLRA). The RLRA echoes the key features and requirements of section 25(7) but adds a deadline for making any land claims, of 31 December 1998. The RLRA was amended by the Restitution of Land Rights Amendment Act 15 of 2014, which re-opened the land claim process until 30 June 2019. However, in mid-2016 this Act was declared unconstitutional (on the basis of insufficient consultation with affected communities) by the CC in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*.⁸¹

⁷⁷ *All Builders And Cleaning Services CC v Matlaila and Others* [2015] ZAGPJHC 2 (16 January 2015).

⁷⁸ See the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) (HLPR), chapter 3, pp. 232-257: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf; see also Ben Cousins and Ruth Hall (2015) 'The Restitution of Land Rights Amendment Act of 2014', technical analysis commissioned by the Legal Resources Centre pp 1-2 (in author's possession): <http://www.plaas.org.za/staff-member/hall>

⁷⁹ Systemic problems, as highlighted in the HLGR, include, at the level of the Land Claims Commission: high staff turnover and insufficient training, ineffective bureaucratic processes (with files in many places in disarray) and corruption; and, regarding the claims themselves, conflicting and overlapping claims, often resulting in the 'bunching' of unrelated claimants together (HLPR), chapter 3, pp. 232-257: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

⁸⁰ According to the Department of Rural Development and Land Reform in August 2017, of the approximately 80,000 claims settled to date, all but 7,478 claimants opted for cash settlements rather than land transfers: <https://www.notesfromthehouse.co.za/opinion/item/54-questions-that-leave-more-questions-than-answers>. See also Bernadette Atuahene (2014) *We Want What's Our: Learning from South Africa's Land Restitution Program* (Oxford University Press); XYZ; and HLPR (November 2017), chapter 3, pp. 232-257: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

⁸¹ 2016 (5) SA 635 (CC). Scholars such as Cousins, Claasens, Hall and Gasa have critiqued the re-opening of the land claims process as being a way for the government to empower embattled traditional authorities, pointing out that on several occasions President Zuma publicly encouraged traditional leaders to lodge land claims in the second round (Ben Cousins and Ruth Hall October 2014 p. 23). In addition, Minister of Rural Development and Land Reform, Gugile Nkwinti, has stated that Communal Property Associations will not be allowed within communal areas, implicitly endorsing apartheid definitions of 'tribes' as the only 'traditional communities' that count (Aninka Claasens, 2014 'Haste over land rights bill not just in aid of buying votes', Land & Accountability

Notwithstanding the slow and oftentimes difficult Land Claims Commission process, which is still working through the land claims received in the first round (as lodged before 31 December 1998),⁸² there have been some progressive legal victories in terms of interpretation of key concepts. For example, in an early case, *In Re Kranspoort Community*, the LCC rejected a narrow interpretation of the requirement (in both section 25(7) and the RLRA) for ‘community’, arguing that it ‘would be a grave injustice if the RLRA is to be interpreted so that the tragic consequences of a removal become the main reason why a community restitution claim aimed at remedying the removal should fail’.⁸³ Another transformative clarification was provided by the CC in *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd*, when it generously interpreted the words (again reflected in both section 25(7) and the RLRA) ‘as a result of past racially discriminatory laws or practices’ to mean ‘as a consequence of’ and not necessarily ‘solely as a consequence of’.⁸⁴ This interpretation allowed for more claims to satisfy the requirement, even where the dispossession/removal was not the sole consequence of past racially discriminatory laws or practices e.g. where other factors might also have played a role.

On the more contentious side, there is the thorny issue of the large number of cases in which restitution is deemed not feasible – mainly in urban areas and/or where there has been substantial subsequent development of the property. In such cases, the Land Claims Commission and courts have offered monetary compensation to claimants in lieu of restitution. The question arises as to whether the compensation in such cases can be regarded as ‘equitable redress’ as required by section 25(7) and the RLRA. A recent case that highlights the difficulties and shortcomings of compensation in such situations is *Florence v Government of the Republic of South Africa (Florence)*.⁸⁵ In this case - in which restitution of a piece of land in Cape Town was deemed not feasible by virtue that it had, in the 25+ years since dispossession, been developed into a parking lot and shopping complex - the CC grappled with how to calculate compensation for the claimants. The Court settled on a formula which, summarised, is as follows:

- Take as the starting point the value of the property at the time of dispossession – in this case it had been valued at R32,000 in 1970. Subtract any monies received for the property – in this case R1,350 was paid to Mr Florence, leaving a shortfall of R30,750.
- Then, in order to capture ‘the changes in value over time’ as per section 33(eC) of the RLRA, add CPI (inflation), in this case establishing an amount of compensation owed of R1,488,890 (plus a court-awarded solatium of R10,000).⁸⁶

Research Centre, University of Cape Town: <http://www.customcontested.co.za/haste-land-rights-bill-just-aid-buying-votes/>

⁸² According to the HLPR, there are still 19,000 unfinalised and 7,000 unsettled claims arising from the claims process that closed at the end of December 1998; at an average rate of 560 claims being settled per year, it will take approximately 35 years to process these claims - HLPR (November 2017), chapter 3, p. 233: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf

⁸³ 2000 (2) SA 124 (LCC) para 48.

⁸⁴ 2007 (6) SA 199 (CC) para 69.

⁸⁵ 2014 (6) SA 456 (CC).

⁸⁶ In a dissenting opinion (in which Cameron J, Froneman J and Majiet, AJ concurred), Van der Westhuizen J would have awarded R2,211,732.54, which reflects the amount had the under-compensated amount been invested in a 32-day notice deposit facility since the day of the LCC initial judgment in the matter.

At first blush, the amount of close to R1,500,000 seems like an attractive sum. However, the problem is that the property had a current market value of almost ten times this amount. Arguments might be raised about whether the claimants, had they not been dispossessed, would have developed the property in the same way. But what if they would have? And, regardless, can one regard this amount of compensation as ‘equitable redress’ when compared with the current market value? Does this not constitute what Ms Florence argued was ‘an illogical discrepancy between the value of restitution in the form of restoration and restitution in the form of financial compensation’?⁸⁷ The *Florence* judgment starkly raises an apparent conundrum from a transformation and/or restorative justice perspective of how to determine the value of compensation to claimants who are not granted restitution,⁸⁸ a puzzle that is made all the more complex given the de facto awarding of market value to dispossessors.

Section 25(8) any other measures

As highlighted above, it would be possible, legally, for the government to pursue a much more aggressive land reform and land restitution programme with a greater emphasis on redistribution of land through expropriation that pays less than market value compensation. But would it be possible for the government to bypass the compensation clause entirely? Arguably, as motivated for here, the requirement for ‘just and equitable compensation’ according to section 25(3)’s matrix, provides an appropriate and profoundly transformative method for balancing the various rights and considerations and achieving what, in some circumstances, might be nil compensation. However, if this is not considered to be sufficiently transformative a premise for government action, tantalisingly, section 25(8) of the Constitution, which has not received much attention and has yet to be litigated, states: ‘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)’. This suggests it is conceivable that, should action be pursued, and/or a law be adopted that enables the state to expropriate property for the purpose of land restitution without any compensation, this could be deemed constitutional if found ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...’.

⁸⁷ *Florence* para 147.

⁸⁸ The dissenting opinion of Froneman J comes closest to acknowledging the underlying injustice of the discrepancy in compensation: ‘I find it difficult, however, to conceive how one can ever adequately determine proper compensation for people who were forced to sell their property at the time of dispossession. The only way to compensate them for their loss is restoration or, if restoration is not possible, something as close as possible in financial terms to restoration. In this kind of case the CPI, as representing the change in the value of money, may be inappropriate, and the present market value of the property could serve as evidence of its inappropriateness’ (*Florence* para 203).

CONCLUSION

Post-apartheid property law is required to help bring about reforms that would eradicate that [inequitable] legacy as far as possible. Property law is therefore deeply involved in the constitutional project of reversing the effects and the legacy of apartheid as a broad socio-economic and political state of affairs.⁸⁹

+ restitution, expropriation, compensation...

- (ultimate eviction – notwithstanding the tremendous advance of this approach - compared with that under apartheid, which entailed unlawful occupiers ('squatters') having no rights vis-à-vis the claims of private ownership⁹⁰ - in most cases ...); - non-feasibility and compensation (equitable redress)

Need to identify source of the problem: law itself; judicial interpretation; policy and political implementation... (as well as solutions – HLP re filling the gap e.g. RLRA with law...)

Expropriation Act... Law v politics... 'The key question is not whether section 25 serves as an obstacle, but rather, whether our policies have lived up to the Constitution's clarion call for the state to undertake programmes of land restitution and land redistribution'.⁹¹ AND NB issue of what land reform was hoped to achieve, and whether there are better ways to do so ...

Questions that need to be discussed and resolved:

- What are the objectives of restitution, redistribution and reform? Is it about ownership or secure tenure? Are the relevant policies and programmes aligned to the objectives? For example, in 2009 the Proactive Land Acquisition Strategy stopped transferring title to land reform beneficiaries, opting for leasehold to stop beneficiaries from selling (including to former owners); and how to ensure no diminished rights for customary land rights holders?
- Are we talking about restorative justice or economic inclusion? Do we know whether we are achieving these goals?
- Is transfer of land the optimal way to achieve these goals?
- If not section 25(3), what framework to consider the overlapping and competing rights (e.g. KhoiSan, Zulu King, traditional authority v community etc.)?
- How to deal with the overwhelmingly skewed ownership by men?

Quote from Andries Du Toit in *Kranspoort*:

This brings us to the most pressing and painful part of the problem – which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is that the land is not the only thing that was lost. What was destroyed through ... removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods *of which the land was but a part*, and which gait it its function and its value. The terrible truth of Restitution has thus been that the moment of return to the land is often a moment of disappointment and anti-climax. To settle on the spot from which one's forebears – or even a younger, more vigorous, more hopeful self – were

⁸⁹ AJ van der Walt (2012) *Property and Constitution* 12.

⁹⁰ See for example Stuart Wilson, Jackie Dugard and Michael Clark (2015) 'Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the South African Constitutional Court', 31(3) *SAJHR* pp. 472-503.

⁹¹ Enoch Godongwana (chair of the ANC's economic transformation committee) (19 March 2017) 'Land reform: We must not be reckless' *City Press*: <https://www.news24.com/Opinions/Voices/we-must-not-be-reckless-20170319-2>

once removed, is not necessarily to return to that more authentic, more dignified, more hopeful mode of existence. As we have seen in numerous cases ... to return to face the complex, dispiriting and painful problems of the new South Africa once again in new and often more intractable ways. For communities have grown, services are needed and the rural and national economies that made certain forms of existence possible may no longer be in place. If existence without piped water and electricity was acceptable in the past, it is no longer so – and these services have to be paid for, and paid for in a very different, increasingly globalised, economy. In all too many cases, we may be looking at a scenario where the land is returned to those who lost it – only to be lost again to the banks, or to those who are willing to pay good cash for it.⁹²

⁹² Andries Du Toit (unpublished conference paper 1999) ‘The End of Restitution: Getting Real about Land Claims), Land and Agrarian Reform Conference, Pretoria, 26-28 July 1999 as cited in *Kranspoort* para 108 (footnotes 147 and 153).