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Deconstructing section 25(3) of the Constitution. Have the courts adopted a progressive approach in interpreting section 25(3): A critical study of *Uys NO and Another v Msiza and Others*?

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ABSTRACT

Section 25(2) of the Constitution provides that property may expropriated only in terms of law of general application for a public purpose or in the public interest, subject to compensation. Section 25(3) provides further that the amount of compensation, and the manner and time of payment, must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regards to all relevant circumstances, including, *inter alia*, the purpose of the expropriation (s 25(3)(e)).

Academic commentators such as Du Plessis have argued that these provisions implicitly provide for compensation below market value or nil compensation (so-called "compensation without expropriation") where the purpose of an expropriation is a constitutionally special one, such as land reform. In light of this fact, they argue further, it is unnecessary to amend section 25 to explicitly provide for compensation below market value or nil compensation (see E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 376).

While this argument was adopted by the Land Claims Court in *Msiza v Director-General Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC), it appears to have been rejected, at least implicitly, by the Supreme Court of Appeal in *Uys NO v Msiza* 2018 (3) SA 440 (SCA). The judgment of the Supreme Court of Appeal thus appears to support the decision taken by the National Assembly to amend section 25 of the Constitution to authorise expropriation of land for land reform purposes in those circumstances identified in an Act of Parliament.

The purpose of this dissertation is to critically analyse the manner in which the Supreme Court of Appeal interpreted and applied section 25(3) of the Constitution in *Uys NO v Msiza*.

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CHAPTER ONE: INTRODUCTION

1.1 Background

The land question is a very emotive one in South Africa. This is because the history of land in South Africa is largely a history of dispossession. This history deprived black South Africans, not only of their land but also of their dignity, their homes, their livelihoods and their sense of belonging and way of life. These consequences were eloquently captured by Sol Plaatjie in his book *Native Life in South Africa* when he stated that following the enactment of the Native Land Act of 1913, "t*he South African native found himself, not actually a slave, but a pariah in the land of his birth".*[1]

Given this history, it is not surprising that section 25 of the Constitution[2] does not only protect the right to private property. In addition, it also establishes a constitutional framework for an extensive programme of land reform and imposes an obligation on the state to take positive steps to give legislative and administrative effect to this programme. The protection of private property is set out in section 25(1) to (3) of the Constitution, while the constitutional framework for land reform is set out in sections 25(4) to 25(8).

Sections 25(1) to (3) read as follows:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property

(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.

(3) 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;

[1] ST Plaatjie *Native Life in South Africa* (2007) at 21.
[2] Constitution of the Republic of South Africa, 1996 (hereafter the "Constitution").

(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".

And sections 25(4) to (8) read as follows:

"(4) For the purposes of this section:

(a) 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; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) 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).

(9) Parliament must enact the legislation referred to in subsection (6)."

In order to give legislative and administrative effect to the land reform provisions of section 25, Parliament has passed a wide range of statutes over the past twenty years. These include the Provision of Land and Assistance Act;[3] the Restitution of Land Rights Act;[4] the Land Reform (Labour Tenants) Act;[5] the Interim Protection of Informal Land Rights Act;[6] the Communal Property Associations Act;[7] the Extension of Security of Tenure Act;[8] and the Communal Land Rights Act.[9]

[3] 126 of 1993.
[4] 22 of 1994 (hereafter the "Restitution Act").
[5] 2 of 1996 (hereafter the "LTA").
[6] 31 of 1996 (here after the "IPILAR").
[7] 28 of 1996 (hereafter the "CPA").
[8] 62 of 1997 (hereafter the "ESTA")
[9] 11 of 2004 (hereafter the "CLARA"). This Act was declared unconstitutional by the Constitutional Court in 2010 (see *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC)).

Despite taking these steps, it is generally accepted that the land reform programme has not been as successful as it could have been. In its *Final Report*, for example, the Presidential Advisory Committee on Land Reform and Agriculture states that the land reform programme has failed to establish "a new generation of sustainable household, small scale and commercial black farmers".[10] It points out in this respect that between 1994 and 2018, the state redistributed less than 10% of all commercial farmland and that this figure falls far below the state's initial target of redistributing 30% of all commercial farmland by 1999.[11]

Apart from confirming that the land reform programme has not been successful, the Presidential Advisory Committee on Land Reform and Agriculture has also identified many of the reasons for this sad state of affairs. These include "a dearth or absence of security of tenure, a lack of transfer of title deeds of the acquired portions of land to beneficiaries and poor post-settlement support".[12] At the heart of the problem, the Presidential Advisory Committee states further, "is the poor capability of the state which is characterised by deficient coordination, limited and misaligned allocated resources (both public resources and private resources, particularly the finance sector) and further complicated by corruption".[13]

The poor capability of the state, the Presidential Advisory Committee goes on to state, also extends to inefficiencies in the process of land acquisition and the systematic challenges faced in pre- and post-settlement support that results in the collapse of land reform schemes. Other problems relate to poor land administration "that exacerbates problems of tenure in communal and peri-urban areas, resulting in a large portion of the population not being registered and therefore excluded from effectively participating in the mainstream economy".[14]

[10] Presidential Advisory Committee on Land Reform and Agriculture *Final Report* May 2019 at 11. See also the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Final Report* November 2017 at 202. See also L Ntsebenza "Land redistribution in South Africa: The property clause revisited" in L Ntsebenza and R Hall (eds) *The Land Question in South Africa: The challenge of transformation and redistribution* (2007) 107 at 119.
[11] Presidential Advisory Committee on Land Reform and Agriculture *Final Report* May 2019 at 12.
[12] Presidential Advisory Committee on Land Reform and Agriculture *Final Report* May 2019 at 11
[13] Presidential Advisory Committee on Land Reform and Agriculture *Final Report* May 2019 at 11.
[14] Presidential Advisory Committee on Land Reform and Agriculture *Final Report* (May 2019) at 11.

Besides these reasons, some local academic and local political commentators have argued that failure of land reform programme may also be traced back to section 25 of the Constitution and, especially section 25(2)(b) which provides that property may be expropriated only subject to compensation.[15] This requirement, they argue further, does not only make it difficult for the state to acquire land for land reform purposes in a cost-effective manner, but also legitimizes and rewards the colonial and apartheid dispossession of land. It thus frustrates the redistribution of land and the restoration of dignity of black South Africans. It "rubs salt in the wound".[16]

Although this argument is contentious,[17] it was adopted by the Constitutional Review Committee in 2018. The Review Committee recommended that section 25 of the Constitution should be amended to explicitly provide for expropriation without compensation as a legitimate option for land reform. They contended that this would address historic wrongs, ensure equitable access to law and empower the majority of South Africans to participate in the ownership of land.[18] Similarly, the Ad Hoc Committee adopted this argument to Amend Section 25 of the Constitution in 2019. They recommended that section 25 of the Constitution must be changed. Consequently, a Draft Bill was published. The Bill provides for amendment of section 25 of the Constitution to explicitly provide that where land is expropriated for the purposes of land reform, the amount of compensation may be nil.[19] Instead of blaming the failure of the land reform programme on section 25(2)(b) of the Constitution, however, other local commentators have argued that it should be blamed on the state's reluctance to

[15] See, for example also L Ntsebenza "Land redistribution in South Africa: The property clause revisited" in L Ntsebenza and R Hall (eds) *The Land Question in South Africa: The challenge of transformation and redistribution* (2007) 107 at 119. Also, see the motion introduced by the EFF in the National Assembly, *National Assembly of the Republic of South Africa Minutes of Proceedings* 27 February 2018 on page 8.

[16] See, for example, Black First Land First *Written Submission to Parliament on Review of the Land Clause of the Constitution* (June 2018) and Foundation for Human Rights *Submission to the Constitutional Review Committee* (November 2018). See also African National Congress *Report on the Possible Review of Section 25 of the Constitution* (November 2018) and Economic Freedman Fighters *Report on the Review and Amendment of Section 25 of the Constitution* (November 2018).

[17] See, for example, the South African Human Rights Commission *Submission to the Joint Constitutional Review Committee regarding Section 25 of the Constitution* (June 2018); Slade et al *Submission to Parliament on the review of section 25 of the Constitution* (September 2018); and Du Plessis *Submission to Parliament's Constitutional Review Committee on Land Expropriation Without Compensation* (September 2018).

[18] Joint Constitutional Review Committee *Report on the possible review of section 25 of the Constitution* (November 2018) at par 7.

[19] Draft Constitution Eighteenth Amendment Bill. Clause 1 of this Bill amends section 25(2)(b) by adding a proviso. This proviso reads as follows: "Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil". Subsection 3A goes on to provide that "[n]ational legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil".

rely on the provisions of sections 25(2) and 25(3).[20] If the state had based its approach to acquiring land for land reform purposes at least partly on expropriations, rather than entirely on the principle of a willing-seller/willing-buyer, it is very unlikely that the courts would have adopted a reactionary jurisprudence and put obstacles in the way of such an approach. This is because section 25(3) implicitly authorises compensation below market value and, in an appropriate case, nil compensation.[21]

While this last argument may be correct in theory, the courts do not always appear to be willing to accept it in practice.[22] In its recent judgment in *Uys NO v Msiza*,[23] for example, the Supreme Court of Appeal refused to accept that compensation below market value should be awarded to the landowner in question, even though his land was expropriated for the purposes of implementing the LTA. Instead, it awarded the landowner the market value of the land as compensation. The approach adopted in this judgment, therefore, may provide a strong argument in favour of amending section 25 of the Constitution to explicitly provide for compensation below market value or nil compensation in the context of land reform as envisaged by the Constitution Eighteenth Amendment Bill.[24]

The purpose of this dissertation, therefore, is to critically analyse the manner in which the Supreme Court of Appeal interpreted and applied section 25(3) of the Constitution in *Uys NO v Msiza* in light of the argument that the Constitution implicitly provides for compensation below market value or nil compensation where the purpose is a constitutionally special one, such as land reform. In particular, the purpose of this dissertation is to critically analyse the weight the Supreme Court of Appeal attached to the land reform purpose of an expropriation and whether this may or should justify an award of compensation below market value or even nil compensation.

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[20] See, for example, Serjeant-at-Bar "Tardiness, not Constitution, to blame for land crises" 13 March 2018 *Mail and Guardian* 28. See also Land and Accountability Research Centre *Submission to Parliament's Joint Constitutional Review Committee with respect to the review of section 25 of the Constitution* (June 2018) and Socio-Economic Rights Institute *Note on Expropriation* (November 2018).

[21] See, for example, Serjeant-at-Bar "Tardiness, not Constitution, to blame for land crises" 13 March 2018 *Mail and Guardian* 28. See also Land and Accountability Research Centre *Submission to Parliament's Joint Constitutional Review Committee with respect to the review of section 25 of the Constitution* (June 2018) at 22 and Socio-Economic Rights Institute *Note on Expropriation* (November 2018).

[22] See, for example, J Lorenzen "Compensation at market value for land reform? A critical assessment of the MalaMala judgment's approach to compensation for expropriation in South Africa" 2014 *Recht in Afrika – Law in Africa – Droit en Afrique* 151.

[23] 2018 (3) SA 440 (SCA).

[24] Constitution Eighteenth Amendment Bill, 2019

1.2. The research question

As noted above that the purpose of this dissertation is to critically analyse the manner in which the Supreme Court of Appeal interpreted and applied section 25(3) of the Constitution in *Uys NO v Msiza* in light of the argument that the Constitution implicitly provides for compensation below market value or nil compensation where the purpose is a constitutionally special one, such as land reform.

More particularly, the purpose of this dissertation is to:

(a) discuss the manner in which the courts have interpreted and applied the provisions of section 25(3) of the Constitution prior to *Uys NO v Msiza*;

(b) discuss the argument that the Constitution implicitly provides for compensation below market value or nil compensation where the purpose is constitutionally special;

(c) set out and discuss the manner in which the Supreme Court of Appeal interpreted and applied the provisions of section 25(3) in *Uys NO v Msiza*; and

(c) critically analyse the judgment in *Uys NO v Msiza* in light of the argument that the land reform is a constitutionally special purpose which justifies compensation below market value or nil compensation.

1.3. The purpose of the study

The land debate in South Africa has polarised the nation and made policy direction to be ambivalent. Also, the debate has put section 25 of the Constitution into a spotlight where it is either glorified or demonised for the South African land reform initiatives.[25] This study is significant because it will contribute to this current debate and hopefully contribute to the policy direction in South Africa.

The study is conducted at the peak of land debate and compensation of expropriated land is at the centre of the whole debate. Despite the Constitution Eighteenth Amendment Bill which intends to

[25] See, for example, Afriforum *Submission to the Parliament Constitutional Review Committee and BLF Submission to the Parliament Constitutional Review Committee* (5 September 2018). See also Oriana *Submission to the Parliament Constitutional Review Committee* (5 September 2018).

explicitly provide for a nil compensation with regards of expropriation for land reform purposes,[26] it is still important to analyse section 25(3) of the Constitution to see how the courts have interpreted it.

1.4. The research methodology

This is a qualitative study. The study critically answers the research questions by collecting, investigating and analysing primary and secondary legal sources. The analysis and investigation identify the contradictions, inconsistencies, controversies, gaps and the degree of court's shift towards transforming its constitutional interpretation of property clause. Therefore, the primary and secondary sources that are analysed are books, chapters in books, journal articles, statutes, internet websites and cases that will enhance the argument.

1.5. The structure of the study

This dissertation consists of six chapters.

Chapter One: Introduction
The background to the study is set out in Chapter One. Apart from the background, this chapter also includes the research questions, the purpose of the study, the research methodology and the structure of the study

Chapter Two: The two-stage approach
The manner in which the courts have interpreted and applied the factors listed in section 25(3) of the Constitution prior to the judgment in *Uys NO v Msiza* is set out and discussed in this chapter. This chapter focuses specifically on the relationship between "market value" (paragraph (c)) and the other section 25(3) factors.

Chapter Three: The purpose of the expropriation
While Chapter Two focuses in the relationship between market value and the other section 25(3) factors, this chapter focuses on the "purpose of the expropriation" (paragraph (e)) and whether a

[26] The Constitution Eighteenth Amendment Bill, 2019

constitutionally special purpose such as land reform justifies below market value compensation or nil compensation.

Chapter Four: The pre-Msiza academic commentary

The academic arguments in favour of recognising land reform as a constitutionally special purpose prior to the *Msiza* judgments are set out and discussed in Chapter Four.

Chapter Five: The Msiza judgments

The judgment of the Land Claims Court in *Msiza v Director-General of the Department of Rural Development and Land Reform*[27] and the subsequent judgment of the Supreme Court of Appeal in *Uys NO v Msiza*[28] are set out and discussed in this chapter.

Chapter Six: Conclusion and analyses

[27] 2018 (3) SA 440 (SCA).
[28] 2016 (5) SA 513 (LCC).

CHAPTER TWO: THE TWO-STAGE APPROACH

2.1 Introduction

The purpose of this and the next chapter is to set out and discuss the manner in which the courts interpreted and applied section 25(3) of the Constitution prior to the judgments in *Msiza v Director-General of the Department of Rural Development and Land Reform*[29] and *Uys NO v Msiza Others*[30] (the *Msiza* judgments). Although they overlap, a distinction may be drawn between those pre-*Msiza* cases which focused on "market value" (paragraph (c)) and its relation to the other factors listed in section 25(3) of the Constitution and those which focussed on the "purpose of the expropriation" (paragraph (e)) and whether the purpose justifies compensation below market value.

The first category of cases includes *Khumalo v Potgieter*[31] and *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs*[32] and will be discussed in this chapter. The second category include *Du Toit v Minister of Transport*[33] and *Mhlanganisweni Community v Minister of Rural Development and Land Reform*[34] and will be discussed in Chapter Three.

The two *Msiza* judgments will be discussed in Chapter Five.

2.2 *Khumalo v Potgieter*

2.2.1 The facts

In this case, the applicants, who were labour tenants, applied in terms of the LTA for an award of the land they were entitled to occupy in accordance with their labour tenancy agreement. The LTA provides in this respect that a labour tenant is entitled to apply to the Director-General of the Department of Land Reform for ownership of the land he or she occupies and uses in terms of the

[29] 2016 (5) SA 513 (LCC).
[30] 2018 (3) SA 440 (SCA).
[31] [2000] 2 ALL SA 456 (LCC).
[32] [2000] 2 ALL SA 26 (LCC).
[33] 2006 (1) SA 297 (CC).
[34] [2012] ZALCC 7 (19 April 2012).

labour tenancy agreement.[35] In addition, it also provides that if the labour tenant's application is successful, the state must expropriate the land and pay "just and equitable compensation" to the land owner as prescribed by section 25(3) of the Constitution.[36]

After submitting their application, the applicants entered into a deed of settlement with the defendant, who was the owner of the land. Apart from the award of land itself, the deed of settlement provided that the defendant should be paid compensation in the amount of R1.2 million. The deed of settlement was then referred to the Director-General of the Department of Land Affairs (as it was then known) for approval. The Director-General, however refused to do so on the grounds that the amount of compensation was not just and equitable because it was excessive.

Acting in terms of the LTA, the Director-General then referred the deed of settlement to the Land Claims Court so that it could determine an amount of compensation that was just and equitable. One of the key questions the Court had to answer, therefore, is what is meant by the concept of "just and equitable compensation".

2.2.2 The reasoning of the court

The Land Claims Court agreed with the Director-General and found that the amount agreed on by the applicants and the defendant was not just and equitable. Instead of R1.2 million, the Court awarded the defendant an amount of R400 000.

In arriving at this conclusion, the Land Claims Court began by very briefly referring to international and comparable foreign law. In both of these sources of law, the Court held, "there is widespread equation of the concept of just compensation for expropriation with market value compensation."[37] Academic commentators have also argued that just and equitable compensation should usually be market value compensation, unless the other factors listed in section 25(3) required an upward or downward adjustment.[38]

[35] Section 16.
[36] Section 23.
[37] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 19
[38] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 23.

In light of these arguments, the Land Claims Court held further, it would determine the amount of just and equitable compensation using a two-stage approach. During the first stage, the Court would determine the market value of the expropriated property using the principles that have been adopted by the courts in the past in order to calculate compensation for expropriation. During the second stage, the Court would determine whether the market value needed to be adjusted in light of the other factors listed in section 25(3) of the Constitution.[39]

After setting out these principles, the Land Claims Court turned to apply them to the facts. In this respect, the Court began by determining the market value using the comparable sales method. After doing so, the Court considered whether it should be adjusted in light of the other factors. In this respect, the Court took into account only two of the other factors, namely the "current use of the property" (paragraph (a)) and the "history of the acquisition and use of the property" (paragraph (b)).

Insofar as the current use of the property was concerned, the Land Claims Court held that the fact that the property was occupied by labour tenants and that they were required to provide labour to owner conferred a slight benefit on the land. The market value, therefore, should be adjusted slightly upwards.[40] Insofar as the history of the property was concerned, the Court held that the fact that the labour tenants could not be evicted and were entitled to claim ownership of the land imposed a significant burden on it. The market value, therefore, should be adjusted significantly downward.[41]

Taking all of these considerations into account, the Land Claims Court held that it would be just and equitable to award the defendant R400 000.[42]

2.3 *In re Ash v Department of Land Affairs*

2.3.1 The facts

In this case the applicants applied for the restitution of land rights in terms of the Restitution Act in the form of monetary compensation and not actual restoration. The applicants, who were all classified as

[39] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 23.
[40] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 94.
[41] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 95.
[42] *Khumalo v Potgieter* [2000] 2 ALL SA 456 (LCC) at para 100.

blacks or coloureds during the apartheid era. They based their claim on the ground that they had been forced to sell the land they owned after the area in which they were located was declared a white group area in 1958.[43]

After the applicants lodged their claims with the Commission for the Restitution of Land Rights, they were referred to the Land Claims Court for resolution. In the Land Claims Court, the Department of Land Affairs accepted that the applicants satisfied the requirements of section 2(1) of the Restitution Act. This section provides that a person is entitled to restitution of a right of land if he, was "dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices."[44]

The Department, however, argued that the claimants did not satisfy the requirements of section 2(2) of the Restitution Act. This section provides that a person is not entitled to restitution if "just and equitable compensation in section 25(3) of the Constitution or any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession."[45] The applicants did not satisfy the requirements of section 2(2), the Department argued further, because they had been paid for their land at the time they were dispossessed.

2.3.2 The reasoning of the court

The Land Claims Court found that while some of the applicants had received just and equitable compensation at the time they were dispossessed, others had not. This meant that some of the applicants were not entitled to restitution of their rights in land in the form of monetary compensation, while others were. In arriving at this decision, one of the key questions that Court had to answer was, what is meant by the concept of just and equitable compensation in section 25(3) of the Constitution?

In this respect, the Land Claims Court began by carefully examining the approach followed in comparable foreign jurisdictions, such as Australia, Germany, Malaysia, Switzerland, the United States and the European Union. In all of these jurisdictions just and equitable compensation is usually

[43] The land in question was located in the Highlands township which itself was located near to Pretoria. This township was declared to be a white group area in terms of the Group Areas Act 69 of 1955 (paras 39-44).
[44] Section 2(1).
[45] Section 2(2).

considered to be the market value of the expropriated property, calculated on the date of the expropriation.[46]

Unlike the approach followed in foreign jurisdictions, the Land Claims Court held, market value is only one of the factors that has to be taken into account when determining just and equitable compensation in South Africa. Apart from market value, the other factors listed in section 25(3) of the Constitution must also be taken into account. Given, however, that "market value" (paragraph (c)) and the "extent of direct state investment and subsidy" (paragraph (d)) are the only factors which are "readily quantifiable", a two-stage approach should be adopted.[47]

In terms of this two-stage approach, the Land Claims Court held further that the market value of the land should be determined first. Once the market value had been determined, the other factors should be taken into account. In light of these other factors, a court must then adjust the amount of market value either upward or downward in order to arrive at an amount of compensation that is just and equitable.[48]

After setting out these principles, the Land Claims Court turned to apply the two-stage approach to the facts. In this respect, however, the Court based its decision simply on the market value of the land. This is because none of the parties led any evidence in respect of the other factors listed in section 25(3) of the Constitution. Without such evidence it was impossible to know whether the market value should be adjusted either upwards or downwards. The Court, therefore, refused to do so.[49]

Finally, it is important to note that the Land Claims Court also suggested, without actually deciding, that the onus of proving that the claimant did not receive just and equitable compensation and, therefore, was entitled to claim restitution of a right in land fell onto the claimant and not the landowner or the state.[50]

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[46] *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at paras 7-32.
[47] *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at para 34.
[48] *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at para 35.
[49] *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at paras 77-75.
[50] *Ex parte Former Highlands Residents: In re Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at paras 78-80.

2.4. Academic analysis

Bishop and Ngcukaitobi have criticized the two-stage approach on the following grounds:

- Market value is not the only factor that can be quantified. The history of acquisition, for example, may indicate how the land was paid for and this can be used to determine the numerical value of the property.[51]
- Market value is "inconsistent with the text of section 25(3)".[52] This is because the goal of section 25(3) is "just and equitable' compensation and not "market value" compensation.[53]
- Market value is not objectively determinable. This is because there are different methods of valuing property and the manner in which valuers apply these methods may differ.[54]
- Where there is dispute in value, it is not easy to extract the other section 25(3) factors from the market value factor.

2.5 Comment

The following points may be made in light of these judgments and criticisms:

First, the so-called "two-stage approach" to determining just and equitable compensation was adopted for the first time in *Khumalo v Potgieter* and confirmed in *Ash v Department of Land Affairs*. In terms of this approach, a court must begin by determining the market value of the property and then adjust the market value either upward or downward in light of the other section 25 factors.

[51] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation" at 9, paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.
[52] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation" at 9, paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.
[53] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation" at 9, paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.
[54] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation" at 9, paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.

Second, while the two-stage approach does represent a logical and practical method of determining just and equitable compensation by taking into account the section 25(3) factors, academic commentators.[55] as well as a minority of the Constitutional Court,[56] have pointed out that it runs the risk of favouring market value over the other section 25(3) factors and thus undermining the intention of the drafters of the Constitution.

Third, the risk of favouring market value of the other section 25(3) factors was exacerbated *In re Ash v Department of Land Affairs* where the Land Claims Court held, not only, that it was unwilling to consider the other section 25(3) factors in the absence of evidence relating to them, but also that the onus of adducing such evidence rests on the claimants.

Fourth, given that it may be very difficult and very expensive to gather evidence relating to the other section 25(3) factors and that the claimants in land reform cases will usually be poor, the strict approach adopted *In re Ash v Department of Land Affairs* seems to unjustifiably favour the land owner.

2.6 Conclusion

As the discussion set out in this chapter demonstrates, the pre-*Msiza* case law focussed initially on the relationship between "market value" and the other factors listed in section 25(3) and resulted in the adoption of the "two-stage approach". Although this approach has the benefit of being both logical and practical, it also has the potential to favour market value over all of the other section 25(3) factors and thus to favour land owners over land claimants, as illustrated in *re Ash v Department of Land Affairs.* Despite these disadvantages, the two-stage approach was adopted by a majority of the Constitutional Court in *Du Toit v Minister of Transport*.[57] This judgment is discussed in the next chapter.

[55] Zimmerman J "Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?" 2005 *SALJ* 378 at 411 and E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 378.
[56] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC at para 81.
[57] 2006 (1) SA 297 (CC).

CHAPTER THREE: THE PURPOSE OF THE EXPROPRIATION

3.1 Introduction

As pointed out above, the purpose of this chapter is to set out and discuss those cases in which the courts have focussed on the "purpose of the expropriation" (paragraph (e)) and whether the purpose can justify compensation below market value. These cases include *Du Toit v Minister of Transport*[58] and *Mhlanganisweni Community v Minister of Rural Development and Land Reform.*[59] Each of these cases will be discussed in turn.

3.2 *Du Toit v Minister of Transport*

3.2.1 The facts

In this case the Road Board occupied the applicant's land for a period of 18 months and excavated 80 000 cubic metres of gravel in order to build a public road. In the notice of expropriation, the Board served on the applicant, it claimed that it was expropriating the right to "use [the applicant's] land temporarily" in terms of section 8(1)(c) of the National Roads Act.[60] Section 8 of the Roads Act[61] provides for "expropriation of land or building material as well as the right to use land temporarily."[62] This meant, the Board argued, that in terms of section 12(1)(b) of the Expropriation Act,[63] it was simply required to pay the applicant the value of what he actually lost, namely R6 060.00.[64]

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[58] 2006 (1) SA 297 (CC).
[59] [2012] ZALCC 7 (19 April 2012).
[60] 54 of 1971 (hereafter the "Roads Act").
[61] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 4.
[62] Section 8(1) of the Roads Act provides that "[t]he Board may, subject to an obligation to pay compensation:
(a) expropriate land for a national road or for works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of vehicles, machines, equipment, tools, stores or material;
(b) take gravel, stone, sand, clay, water or any other material or substance on or in land for the construction of a road or for works or for purposes referred to in paragraph (a);
(c) take the right to use land temporarily for any purpose for which the Board may expropriate such land."
[63] 63 of 1975.
[64] Section 12(1) of the Expropriation Act provides that "[t]he amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed:
(a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of:
(i) the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer; and

In response, the applicant argued that the Board did not expropriate the right to temporarily use his land in terms of section 8(1)(c). Instead, it had expropriated "gravel from [his] land" in terms of section 8(1)(b) of the Roads Act. This meant, the applicant argued further, that in terms of section 12(1)(a) of the Expropriation Act, the Board was required to pay him the market value of the gravel that it had taken, namely R801 980.00. In addition, the applicant also argued, the Board was required to pay him market value because this was just and equitable as required by section 25(3) of the Constitution.

After the Roads Board rejected the applicant's argument, he applied to the High Court for an order setting its [Board's] decision aside. The High Court agreed with the applicant and granted the order. The Minister then appealed to the Supreme Court of Appeal, which upheld the appeal and set the High Court's decision aside. The applicant then appealed to the Constitutional Court. One of the questions the Constitutional Court had to answer was how the Expropriation Act, which was passed before the transition to democracy in 1994, should be interpreted in light of the provisions of section 25 of the Constitution.

3.2.2 The reasoning of the majority of the court

The majority of the Constitutional Court agreed with the decision made by the Roads Board and dismissed the appeal. In arriving at this decision, the majority began by emphasising that the Constitution is the supreme law of the Republic. This means that all laws must comply with its .provisions and, more particularly, that all expropriation laws, including the Roads Act and the Expropriation Act, must comply with the provisions of section 25 of the Constitution.[65] It follows, therefore, that the standards set out in section 25(3) are "peremptory and [that] every amount of compensation agreed to or decided upon by a court must comply" with them.[66]

(ii) an amount to make good any actual financial loss caused by the expropriation; and
(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:
Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined:
(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
(bb) in any other suitable manner."

[65] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 26.
[66] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 28.

Given that the provisions of section 12(1)(a) and (b) of the Expropriation Act provide for market value compensation and actual financial loss compensation respectively, the majority held, it is clear that they differ from the provisions of section 25(3) of the Constitution which provide for just and equitable compensation.[67] Despite these differences, however, it was not possible to simply bypass the Act and rely directly on the Constitution. This is because the applicant did not challenge the constitutional validity of the Act. Instead, section 12(1)(a) and 12(1)(b) must be interpreted in conformity with the Constitution.[68]

In this respect, the majority started by pointing out that the factors listed in section 25(3) of the Constitution are in "peremptory terms"[69] and differ with section 12(1) of the Act.[70] However, the majority argued further, the "section 25(3) factors do not make it peremptory that all factors listed be applied. Instead, the list is open-ended and factors will be applied only if they are applicable."[71] In addition, other factors may also be applied if they are applicable. The goal is to arrive at an amount that is just and equitable.[72] This means that there may be cases in which market value compensation provided for in section 12(1)(a) of the Expropriation Act and actual financial loss provided for in section 12(1)(b) will be just and equitable. It also means, however, that there may be cases in which these forms of compensation will not be just and equitable.[73]

In order to ensure that the amount of compensation awarded in terms of section 12(1)(a) and 12(1)(b) of the Expropriation Act is always just and equitable, the majority pointed out further, a two-stage approach should be adopted. In terms of this approach, a court must first determine the amount of compensation that is payable in terms of section 12(1)(a) and 12(1)(b) and then go on to determine whether this amount is just and equitable under section 25(3) of the Constitution.[74] Although this two-stage approach was practical, the majority conceded, it was not ideal and it would have been preferable if Parliament had amended the Expropriation Act to bring it in line with the Constitution. Nevertheless, the two-stage approach did allow the courts to give effect to both the Expropriation Act and the

[67] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 28.
[68] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29.
[69] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 31
[70] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 30
[71] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 33
[72] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 330.
[73] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras 32-34.
[74] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 35.

Constitution.[75] In addition, it was not new and had been adopted by the Land Claims Court in *Ash v Department of Land Affairs.*[76]

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After setting out these principles, the majority turned to apply them to the facts. In this respect, the majority began by finding that the Roads Board was correct. It had not expropriated the applicant's gravel in terms of section 8(1)(b) of the Roads Act, but rather the right to temporarily use the applicant's land in terms of section 8(1)(c).[77] This meant, therefore, that the Roads Board did not have to pay the applicant the market value of the gravel in terms of section 12(1)(a) of the Expropriation Act, but rather his actual financial loss in terms of section 12(1)(b).[78] In other words, the Roads Board simply had to pay him R6 060.00, provided this amount was also just and equitable in terms of section 25(3). In order to determine whether it was, the majority went on to consider the factors listed in that section.

Insofar as the factors listed in section 25(3) of the Constitution were concerned, the majority considered each one in turn, including the purpose of the expropriation. In this respect, the majority held that:

- the land was not currently being used for the purpose of excavating gravel (factor (a));
- the land had been bought for the purpose of farming and not excavating gravel (factor (b));
- there had been no direct state investment and subsidy in the acquisition and beneficial capitalisation of the land (factor (d)); and
- the purpose of the expropriation was to upgrade a national road which would benefit the general public as well as the applicant's personal and professional needs as a farmer (factor (e)).[79]

In light of these and other relevant considerations, the majority concluded, that applicant's actual financial loss did amount to just and equitable compensation. It, therefore, dismissed the appeal.[80]

3.2.3 The reasoning of the minority of the court

[75] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 36.
[76] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 37.
[77] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 39.
[78] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras 40-45.
[79] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras 48-52.
[80] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at paras 54-55.

Although the minority also agreed that the appeal should be dismissed, they disagreed with the two-stage approach adopted by the majority. In this respect, the minority argued that the problem with the two-stage approach is that it prioritises the market value over other listed factors and that it "would be unwieldy to apply".[81] The two-stage approach also perpetuates the importance of market value at the expense of the consideration of other factors of justice and equity.[82]

3.3 *Mhlanganisweni Community v Minister of Rural Development and Land Reform*

3.3.1 The facts

In this case, the applicants applied for the restitution of land rights in terms of the Restitution Act in the form of actual restoration of the dispossessed land. Although both the landowners and the Minister of Rural Development and Land Reform accepted that the claim was valid, the landowners and especially the Minister argued that it was not feasible to restore the land to the claimants.

The Minister argued it was not feasible to restore the land for the following reasons: first, a world-renowned eco-tourism destination, known as Mala Mala, had been established on the land; second, the market value of the land was R989 057 000; third, the land would have to be expropriated in order to restore it to the claimants; and, finally, the state could simply not afford to pay so much money as compensation to the land owners.[83]

In light of these arguments, the Regional Land Claims Commissioner referred the matter to the Land Claims Court in order to determine whether restoration of the land itself was feasible. Section 33 of the Restitution Act provides in this respect, that when it comes to determining whether restoration is feasible, one of the factors a court has to take into account is how much compensation will have to be paid for the land. Another factor is whether it would be fair to require the state to pay that amount. One of the key questions the Land Claims Court had to answer, therefore, was whether the market value of the land was just and equitable?

[81] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 84.
[82] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 81.
[83] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at para 10

3.3.2 The reasoning of the court

The Land Claims Court found that the market value of the land would be a just and equitable amount of compensation for the purposes of section 25(3) of the Constitution. In arriving at this decision, the Court began by noting that in order for compensation to be "just and equitable" it must strike an equal balance between "what is given and what was lost".[84] The purpose of compensation, therefore, is "to place in the hands of the expropriated owner the full money equivalent of the expropriated property".[85]

When it comes to determining what is just and equitable compensation, the Land Claims Court noted further that the two-stage approach should be followed. This is because market value is an important consideration to take into account.[86] In addition, the two-stage approach has been followed, not only by the Constitutional Court, but also by the Supreme Court of Appeal and the Land Claims Court itself.[87]

After setting out these principles, the Land Claims Court turned to apply them to the facts. In this respect the Court began by carefully examining the reports submitted by various expert valuers. Following this examination, the Court came to the conclusion that the estimated market value of the land together with its improvement was R725 million.[88]

After determining the market value, the Land Claims Court went on to consider whether it should be adjusted in light of the other factors listed in section 25(3) of the Constitution. In this respect, the Court examined each factor in turn, including the purpose of the expropriation. Insofar as these factors were concerned, the Court held that:

- the land was used for eco-tourism (factor (a));
- the mere fact that the landowners had made a lot of money should not be held against them (factor (b));
- there had been no direct state investment and subsidy in the acquisition and use of the land (factor (d)); and

[84] *Mhlanganisweni Community v Minister of Rural Development and Land Reform*) [2012] ZALCC 7 at para 50.
[85] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at para 51.
[86] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at para 52.
[87] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at para 53.
[88] *Mhlanganisweni Community v Minister of Rural Development and Land Reform*) [2012] ZALCC 7 at paras 54-59.

- the fact that the purpose of the expropriation was the restitution of land rights did not mean that the amount of compensation should be automatically reduced to promote the constitutional goals of land reform (factor (e)).[89]

In light of these points, the Land Claims Court held that none of the other factors listed in section 25(3) of the Constitution required the market value to be adjusted upwards or downwards. The market value, therefore, was just and equitable. Having decided that the market value was just and equitable, the Court went on to conclude that it was not feasible to restore the land because the land claimed by the claimants was very different from what they had lost.[90]

3.4 Comment

The following points may be made in light of these judgments:

First, in *Du Toit v Minister of Transport* a majority of the Constitutional Court endorsed the two-stage approach, which was originally adopted by the Land Claims Court in *Khumalo v Potgieter* and subsequently confirmed in *Ash v Department of Land Affairs.*

Second, despite the fact that the expropriation did not serve a special constitutional purpose such as land reform, the Constitutional Court awarded the land owner his actual financial loss and not the market value of the land. In others words, the Court awarded the land owner compensation at below market value.

Third, unlike in *Du Toit v Minister of Transport*, in *Mhlanganisweni Community v Minister of Rural Development and Land Reform* the expropriation did serve a special constitutional purpose, namely land reform. Despite this fact, the Land Claims Court refused to award the land owner below market value compensation.

[89] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at paras 60-73.
[90] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* [2012] ZALCC 7 at paras 91-96.

Fourth, the weight which the Constitutional Court and the Land Claims attached to the purpose of the expropriation in *Du Toit v Minister of Transport* and *Mhlanganisweni Community v Minister of Rural Development and Land Reform* respectively has been criticised by academic commentators. While the Constitutional Court attached too much weight in *Du Toit*, the Land Claims Court attached too little in *Mhlanganisweni Community*.

3.5 Conclusion

Apart from the relationship between "market value" and the other factors listed in section 25(3), the "purpose of the expropriation" (paragraph (e)) featured prominently in the pre-*Msiza* case law. As the discussion set out in this chapter demonstrates, the manner in which the Constitutional Court and the Land Claims Court interpreted and applied this factor, however, is not only confusing, but also controversial. It is not surprising, therefore, that these judgments have been criticised by academic commentators. These criticisms are discussed in the next chapter.

CHAPTER FOUR: THE PRE-*MSIZA* ACADEMIC ANALYSIS

4.1. Introduction

As pointed out in Chapter Three, the weight which the Constitutional Court and the Land Claims attached to the purpose of the expropriation in *Du Toit v Minister of Transport* and *Mhlanganisweni Community v Minister of Rural Development and Land Reform* respectively has been criticised by academic commentators. While the Constitutional Court attached too much weight to the purpose in *Du Toit*, the Land Claim Court attached too little in *Mhlanganisweni Community*.

These criticisms are based on two arguments, first, that where the purpose of the expropriation is constitutional special then compensation at below market value may be justifiable; and, second, given South Africa's history of land dispossession, expropriation for land reform is a constitutional special purpose. The arguments may be traced back to an article published in 1998 in the *South African Law Journal* by Professor Jill Zimmerman.[91]

Some of Zimmerman's arguments were challenged and others were developed further in an article published in the following year in the same journal by Professor Andre Van der Walt.[92] More recently, the same arguments have also been considered by Professor Elmien du Plessis.[93] The purpose of this chapter is to set out and discuss these arguments in turn.

4.2 Zimmerman

In her article, Zimmerman begins by arguing that the use of the phrase "public interest" in both section 25(2) and section 25(4) of the Constitution makes it clear that land reform may be implemented at least partly through the expropriation of land and, accordingly, that land reform is a legitimate basis for

[91] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ at* 378.
[92] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay "just and equitable" compensation for expropriation' 2006 *SALJ* 23.
[93] E du Plessis 'The public purpose requirement in the calculation of just and equitable compensation' in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 369. See also J Lorenzen "Compensation at market value for land reform? A critical assessment of the MalaMala judgment's approach to compensation for expropriation in South Africa" 2014 *Recht in Afrika – Law in Africa – Droit en Afrique* 151.

expropriation.[94] Apart from providing a legitimate basis for expropriation, Zimmerman argues further that the use of the phrase "public interest" in both section 25(2) and section 25(4) of the Constitution also makes it clear that land reform is a factor that must be taken into account when determining just and equitable compensation.[95]An important consequence of these provisions, therefore, is that land reform is constitutionally special when it comes to the calculation of just and equitable compensation and tips the "compensation balance" in favour of land reform from the very start.[96]

Zimmerman argued that given that land reform is constitutionally special, the state is entitled to enact legislation that includes a series of standardised compensation "discounts", based on different categories of land (although this does not mean that there should be a single, one-size-fits-all, discount for every land reform expropriation).[97] Although standardised compensation discounts may be applied to land reform expropriations, Zimmerman goes on to argue, the amount of compensation paid will still have to be determined on a case-by-case basis. This is largely because some of the factors listed in section 25(3) of the Constitution are "individualistic in nature, for example, the market value of the land and the extent of direct state investment and subsidy in the land."[98]

Although these two factors are individualistic in nature, the other section 25(3) factors are more general in nature. These more general factors can be used to develop and justify standardised, across-the-board, compensation discounts for similar cases.[99] The "current use of the property", for example, can be used to develop and justify standardised, across-the-board, compensation discounts for those land uses that obstruct the public interest, such as land owned for speculative purposes or labour tenants or land that is underutilised.[100]

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[94] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 406.
[95] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 406.
[96] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 407.
[97] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 407.
[98] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 407.
[99] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 408.
[100] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 408.

In summary Zimmerman contends that market value "should not be overstated". Instead, the importance of all the section 25(3) factors should be considered equally.[101] Furthermore, she argues that there are cases where expropriation is of public interest and is undertaken for land reform where expropriation may require nil or minimal compensation.[102] She identified categories of land where expropriation could be lowered or not paid at all, namely, underutilised or unutilised land, speculative land and land expropriated for labour tenants or farmworkers.[103]

4.3 Van der Walt

In an article published the following year in the same journal, Van der Walt begins by agreeing with Zimmerman that land reform is constitutionally special. Apart from the history of land dispossession and the economic, political and social role that land plays in South Africa, the structure of section 25 of the Constitution itself (the juxtaposition of provisions that protect private property and that promote land reform) confirms that land reform is constitutional special.[104]

Van der Walt contends that the mere fact that land reform is constitutionally special, however, does not justify the conclusion that the constitutional balance is tipped in favour "of land reform from the very start".[105] This is because land reform has already been factored into the careful balance that section 25 strikes between private interests and the public interest. In other words, because land reform is constitutionally special it forms part of the public interest and, as such, has to be balanced or weighed against private interests on a case-by-case basis.[106]

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[101] Zimmerman J "Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?" 2005 *SALJ* 378 at 411.
[102] Zimmerman J "Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?" 2005 *SALJ* 378 at 411.
[103] Zimmerman J "Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?" 2005 *SALJ* 378 at 408.
[104] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 37.
[105] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 37-38.
[106] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 38.

The problem with the approach advocated by Zimmerman, Van der Walt argues further, is that the purpose of the expropriation by itself, cannot be sufficient on its own to justify the absence or the amount of compensation in just the same way that any other single factor by itself, such as market value, cannot be sufficient on its own to justify the amount of compensation. Instead, all of the factors listed in section 25(3) of the Constitution must be considered together.[107]

It follows, therefore, Van der Walt concludes, that he does not agree that section 25 of the Constitution is "weighted in favour of land reform from the start."[108] In his view, section 25 contains "a very delicate and carefully calibrated balance that leaves open the possibility that the scales will be tipped in favour of either"[109] private or public interests in a specific case. "The courts, therefore, have to consider all circumstances carefully in every individual case and then decide how compensation should be determined, rather than working on the assumption that the section favours land reform and that a blanket discount, therefore, is in order".[110]

4.4 Du Plessis

In her more recent contribution, Du Plessis argues that when it comes to determining just and equitable compensation it is important to distinguish between the reference to a "public purpose" in section 25(2) of the Constitution and the reference to a "public purpose" in section 25(3).[111] In her view, the reference to a public purpose in section 25(2) is a reference to one of the *requirements* for a valid expropriation, while the reference to a public purpose in section 25(3) is a reference to one of the *factors* that must be taken into account when determining just and equitable compensation.[112] She laments the fact that

[107] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 38.
[108] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 40.
[109] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 40.
[110] AJ van der Walt "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" 2006 *SALJ* 23 at 40.
[111] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 376.
[112] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 376.

the courts "tend to confuse public purpose as a requirement with public purpose as a factor"[113] when calculating just and equitable compensation and, as a result, have arrived at contradictory conclusions which frustrate rather than facilitate the land reform goals of the Constitution.[114]

This tendency, Du Plessis argues further, is clearly illustrated in *Du Toit v Minister of Transportation*[115] and *Mhlanganisweni Community v Minister of Rural Development and Land Reform*.[116] In *Du Toit* the Constitutional Court endorsed the High Court decision to award compensation below market value even though the purpose of the expropriation was not constitutionally special. It was simply to build a national road for public purpose. As a result, the land owner was "unfairly burdened by receiving less than market value for an ordinary, run-of-the-mill expropriation".[117] In *Mhlanganisweni Community*, however, the Land Claims Court refused to award compensation below market value even though the purpose of the expropriation was constitutionally special, namely to restore land in terms of the Restitution Act. As a result, the public interest was unfairly burdened by having to pay market value for an expropriation aimed at promoting the land reform goals of the Constitution.[118]

In both cases, Du Plessis argues, "the requirement that compensation must take place for public purpose or in the public interest was misconstrued".[119] Furthermore, she asserts that if the *Du Toit* decision stands, the state will always expropriate resources from private citizens below market value for the benefit of general public.[120] She emphasises that the upkeep of national asset should be spread among all citizens. However, she asserts that market value should not be important in cases where the "constitutional imperative to transformation is sought,"[121] like in the *Mhlanganisweni Community*

[113] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) Rethinking expropriation law I: Public interest in expropriation (2014) at 377.
[114] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 377.
[115] 2006 (1) SA 297 (CC).
[116] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (156/2009) [2012] ZALCC 7 (19 April 2012).
[117] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 378.
[118] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 378.
[119] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 378
[120] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 379
[121] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 379

case. Her main contention is the confusion of the justification of the public purpose requirement with public purpose as a factor in influencing the calculation of compensation.

Like Van der Walt, Du Plessis also argues, that when it comes to determining just and equitable compensation the public purpose factor must be "sensitive to the context within which expropriation is done." [122] This means that while there will be cases in which the purpose of the expropriation will be reflected in a reduction of compensation, there will also be cases in which it will not be. This is because the "legitimacy of the public purpose is not always reflected by the reduction of compensation". [123]

Her main argument is that payment of market value would probably be just and equitable where there is balance between public interest and the interests of those affected by expropriation, whereas, the reduction of market value can be justified when expropriation is for land reform purposes and section 25(3)(e) can strike the balance between the public interest and the interests of those affected in this case.[124] She argues that private ownership rights and transformation rights must not compete because they are both constitutional imperative. Instead, when compensation is calculated, there has to be "balancing and reconciling claims in a just manner"[125] as it is done in international jurisprudence.

Finally, Du Plessis also suggests that legislature must provide clear guidelines on calculation of just and equitable compensation rather than copy and paste section 25(3) and courts must break away with legal culture of full indemnity when they are adjudicating transformation-orientated cases.[126]

4.5 Summary

In light of the arguments set out above, the following points may be made:

[122] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 379.
[123] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 380
[124] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 380
[125] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 387
[126] E du Plessis "The public purpose requirement in the calculation of just and equitable compensation" in B Hoops and E Marias (eds) *Rethinking expropriation law I: Public interest in expropriation* (2014) at 387.

First, given South Africa's colonial and apartheid history of land dispossession, Zimmerman, Van der Walt and Du Plessis all agree that land reform is constitutionally special and that it does not only justify the expropriation of land in the public interest, but may/should also justify compensation below market value.

Second, given that land reform is constitutionally special, Zimmerman argues that it should tip the scale in favour of compensation below market value from the very start. Van der Walt and Du Plessis disagree. Van der Walt argues that it should not tip the scale from the very start because land reform has already been factored into section 25. Whereas Du Plessis emphasises on striking a balance between public interest and the interests of those affected to allow public interest factor to play a critical role in reducing the amount of compensation below market value.

Third, in the same way that a constitutionally special purpose such as land reform should not automatically outweigh all of the other section 25(3) factors, neither should market value. Instead, all of the section 25(3) factors should be weighed together on a case-by-case basis taking into account the purpose of section 25(3) of the Constitution and the context of each particular case.

Fourth, according to Zimmerman, the sorts of cases in which a land reform purpose may outweigh the other section 25(3) factors and result in compensation below market value include underutilised or unutilised land, speculative land and land expropriated for labour tenants or farmworkers.

It is interesting to note that some of these cases are similar to those identified in section 12(3) of Expropriation Bill of 2019 as cases where nil compensation may be awarded. The Expropriation Bill in section 12(3) provides in this respect that:

"It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

(a) where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);

(b) where the land is held for purely speculative purposes;

(c) where the land is owned by a state-owned corporation or other state-owned entity;

(d) where the owner of the land has abandoned the land;

(e) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land".[127]

Finally, both Zimmerman and Du Plessis argue that Parliament must intervene and pass an Act which not only identifies the circumstances in which compensation below market value may be awarded, but which also sets a discounted amount for each category.

4.6 Conclusion

As the discussion set out in this chapter demonstrates, the manner in which the courts and academic commentators have interpreted section 25(3) of the Constitution differs significantly. While the courts have been reluctant to accept that land reform is a constitutionally specially purpose and as such must/should justify compensation below market value or nil compensation, academic commentators have not. Instead, academic commentators have accepted the first point as a given and have instead focussed on the second, namely whether a land reform purpose should automatically result in a blanket discount or not. Following the judgment of the Land Claims Court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform*,[128] however, it appeared as though the courts, or at least some courts, were now willing to accept that land reform was a constitutional special purpose that could justify compensation below market value. Unfortunately, this development proved to be short lived when the Supreme Court of Appeal set aside the Land Claims Court's decision on appeal. These two judgments are discussed in the next chapter.

[127] Draft Expropriation Bill, 2019.
[128] [2012] ZALCC 7 (19 April 2012).

CHAPTER FIVE: THE *MSIZA* JUDGMENTS

5.1 Introduction

Although the argument that land reform is a constitutionally special purpose and may/should justify compensation below market value was expressly rejected by the Land Claims Court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform,*[129] it was expressly adopted by the same court in *Msiza v Director-General of the Department of Rural Development and Land Reform.*[130] When the Land Claims Court's decision was taken on appeal, the Supreme Court of Appeal was presented with an opportunity to resolve these conflicting approaches and determine whether land reform may/should justify compensation below market value. Although it does not expressly state so, the Supreme Court of Appeal essentially supported the approach followed in *Mhlanganisweni Community* and awarded market value. The purpose of this chapter is to discuss the *Msiza* judgments.

5.2 *Msiza v Director General for the Department of Rural Development and Land Reform*

5.2.1 The facts

The applicant was a labour tenant on a farm owned by the Dee Cee Trust (the third and fourth respondents were the trustees). Apart from the applicant, both his father and his grandfather were also labour tenants on the same farm. As the phrase suggests, a labour tenant is a person who provides labour to the owner of land in return for the contractual right to occupy a portion of that land together with his family and use it to graze cattle and grow crops.[131]

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[129] [2012] ZALCC 7 (19 April 2012).
[130] 2016 (5) SA 513 (LCC).
[131] A labour tenant is defined in section 1 of the LTA as "a person:
(a) who is residing or has the right to reside on a farm;
(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker".

Labour tenancy agreements are governed partly by the LTA. One of the goals of this Act is to protect the security of tenure of labour tenants by regulating the manner in which they may be evicted.[132] Another goal is to improve the security of tenure of labour tenants by conferring a right on them to claim ownership of the land that they have occupied and used in terms of their labour tenancy agreement.[133]

A labour tenant's right to claim ownership of the land he or she is occupying and using is set out in Chapter III of the Act. Chapter III provides in this respect that a labour tenant may apply to the Director-General of the Department of Land Reform for ownership of the land he or she occupies and uses in terms of a labour tenancy agreement.[134]

Chapter III goes on to provide that after the Director-General has received the claim, he or she must inform the owner of the land. The owner must then indicate whether he or she accepts that the applicant is a labour tenant or not. After the Director-General has received the owner's response, he or she must attempt to settle the claim by mutual agreement.[135]

[132] See sections 6, 7,9,10 and 11 of LTA

[133] See section 16 of LTA

[134] Section 16. This section reads as follows: "Subject to the provisions of this Act, a labour tenant or his or her successor may apply for an award of:
(a) the land which he or she is entitled to occupy or use in terms of section 3;
(b) 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;
(c) rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm; and
(d) such servitudes of right of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with the rights which he or she enjoys or has previously enjoyed as a labour tenant, or such other compensatory land or rights in land and servitudes as he or she may accept in terms of section 18(5): Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director-General in terms of section 17 within four years of the commencement of this Act:.

[135] Section 17. This section reads as follows:
"(1) An application for the acquisition of land and servitudes referred to in section 16 shall be lodged with the Director-General.
(2) On receiving an application in terms of subsection (1), the Director-General shall:
(a) forthwith give notice of receipt of the application to the owner of the land and to the holder of any other registered right in the land in question;
(b) in the notice to the owner, draw his or her attention to the contents of this section and section 18;
(c) cause a notice of the application to be published in the Gazette; and(d) call upon the owner by written request, to furnish him or her within 30 days

If the Director-General is unable to settle the claim by mutual agreement, he or she must refer it for arbitration to an arbitrator or for adjudication to the Land Claims Court. The decision of the arbitrator or the Land Claims Court will then be final.[136] Once the claim has been finalised, the state must expropriate the land and pay just and equitable compensation to the land owner as prescribed by the provisions of section 25(3) of the Constitution.[137]

In this case, the Dee Cee Trust (the "Trust") denied that the applicant was a labour tenant and the Director-General referred the dispute to the Land Claims Court which found in favour of the applicant. After the Land Claims Court found in favour of the applicant, the state sought to expropriate the land but could not come to an agreement with the Trust on the amount of just and equitable compensation that should be paid.

The reason why the state and the Trust could not come to an agreement is because the state argued that compensation should be calculated on the basis of the land's current agricultural use and that its market value was R1 800 000, while the Trust argued that compensation should be calculated on the basis of the property's development potential and that its market value was R4 360 000. This dispute was then referred to the Land Claims Court for determination. After the parties had led evidence, the Court directed them to submit arguments setting out the test to be applied when the amount of compensation must be determined in terms of section 25(3) of the Constitution.

[136] Section 18. This section reads in part as follows:
"(5) No agreement for the settlement of any application shall be of any effect unless the Director-General has certified that he or she is satisfied that it is reasonable and equitable, or unless it is incorporated in an order of the Court in terms of this Act.
(6) The Director-General shall submit any agreement certified by him or her in terms of subsection (5), to the Court.
(7) If:
(a) the owner does not submit proposals in terms of subsection (1); or
(b) the applicant rejects a proposal in terms of subsection (4); or
(c) the parties reach an agreement but the Director-General is not satisfied that it is reasonable and equitable, the Director-General shall, at the request of any party, refer the application to the Court and inform the other parties that he or she has done so".

[137] Section 23. This section reads as follows:
"(1) The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.
(2) The amount of compensation shall, failing agreement, be determined by the arbitrator or the Court.
(3) Compensation shall, failing agreement, be paid in such manner and within such period as the arbitrator or the Court may determine as just and equitable".

5.2.2 The reasoning of the court

(a) Introduction

Insofar as the test to be applied to section 25(3) of the Constitution was concerned, the Land Claim Court began its analysis by confirming that market value is not the basis for determining compensation in terms of section 25(3). This is because market value is simply one of the circumstances that has to be taken into account.[138]

Furthermore, the court stated that the land owner was not correct when he submitted that the jurisprudence of the Land Claims Court has identified market value as the pre-eminent consideration. Rather, what the jurisprudence of the Land Claims Court has shown is that market value is frequently used as the "entry point" to the analysis.[139]

The Land Claims Court noted that although market value is frequently used as the entry point of the analysis this does not make it the most "important factor".[140] Instead, "[t]he object is always to determine compensation that is just and equitable, not to determine the market value of the property."[141] It follows, therefore, that compensation which is below market value can be awarded provided it is just and equitable.[142]

(b) The two-stage approach

After setting out these points, the Land Claims Court shifted its focus to the two-stage approach. In this respect, the Court started by pointing out the logic underlying the two-stage approach but went on

[138] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 29

[139] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 30

[140] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 30

[141] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 30

[142] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 32.

to state that this should not be misconstrued as "accepting the logic of the two-staged approach"[143] because, just like market value, the other factors listed in section 25(3) and especially paragraph (d) are also capable of being easily quantified. Consequently, there is no valid reason to begin with market value.[144] Despite levelling these criticisms against the two-stage approach, however, the Court (somewhat surprisingly) held that it would still apply this method.

(c) Market value

Having adopted the two-stage approach, the Land Claims Court then turned to consider each stage. In this respect, the Court first determined the market value of the land using the "comparable sales method"[145] and came to the conclusion that it was worth R1 800 000. This was also the amount that the state had indicated it was willing to pay.[146] The Court then went on to consider each of the other factors listed in section 25(3) in turn.

(d) The current use of the property

Insofar as the current use of the property was concerned, the Land Claims Court pointed out that when the Trust bought the affected property it was fully aware of the fact that the applicant was occupying and using the land for agricultural purposes. In addition, the Trust was also aware that the applicant's grandfather had lodged a claim for ownership of the land in terms of Chapter III of the LTA.[147] Furthermore, the Trust had never used the land in question[148] and the current use of the property was agricultural.[149]

[143] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 38

[144] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 38

[145] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 44.

[146] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 47

[147] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 49.

[148] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 50

[149] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 51.

(e) The history of acquisition and use of the property

Insofar as the history of the acquisition and use of the property was concerned, the Land Claims Court began by pointing out that this factor is vital in the South African context because it allows a court to determine whether the property was acquired below the market value during the apartheid era or not. If the property was acquired below market value, it would be unfair to award compensation in a form of market value. This is because the owner would benefit twice.[150]

After setting out these principles, the Court turned to investigate the history of the acquisition and use of the property itself. In this respect, it pointed out that the Trust bought the farm in 1999 for R400 000.[151] Despite paying only R400 000 for the entire 352ha farm, however, the Trust had valued the 45ha portion claimed by the applicants at R4 360 000.[152]

Furthermore, the Court held that although the value of property had undoubtedly appreciated since 1999, it was very unlikely that it had appreciated to the extent argued by the Trust. In addition, it was important to note that the intention of section 25(3) was not "to reward property speculation."[153] This meant that "payment in excess of R4m did not reflect the equitable balance between the public interest and his interests as required by section 25 of the Constitution."[154] The Court then confirmed that the compensation amount must be reduced because, first, the Trust paid less when it purchased the property in 1999; second, the Trust was aware of the application for land ownership when it purchased the land; and. third, the long years that the applicants had occupied the land gave them a "significant interest in the land".[155]

[150] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 53.
[151] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 55.
[152] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 59.
[153] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 61.
[154] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 61.
[155] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 63

(f) The extent of direct state investment and subsidy

Insofar as the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property was concerned, the Land Claims Court pointed out that this factor is aimed at ensuring that the state does compensate an owner who was subsidised by apartheid government to improve the property. This is because the owner would benefit twice. In the case at hand, however, that the state had not invested in or subsidised the farm and, consequently, this factor was not relevant in this case.[156]

(g) The purpose of expropriation

Insofar as the purpose of the expropriation was concerned, the Land Claims Court pointed out that this factor is aimed at promoting land reform in South Africa.[157] This means that when section 25(3)(e) "is read in conjunction with section 25(8) of the Constitution, which directs the state to promote land reform," it follows "that compensation below market value can be paid in land reform cases."[158] The inclusion of this factor in section 25(3), thus, "effectively creates a counterweight to market value," which has dominated the process of calculating compensation.[159]

(h) Application of the factors

After discussing each factor, the Land Claims Court summarised its findings. In this respect, it held that not only was there a disproportionate chasm between the amount the landowner paid to purchase the land and the compensation they were claiming, but also that "the landowner had made no significant investment in the land and that the use of the land had not changed since it was acquired".[160]

In addition, the landowner knew at the time it bought the land that the applicants were living on it; that the applicants had been awarded ownership of their portion; and that the purpose of the expropriation was land reform and that in such a case the state should not be saddled with an extravagant claim for

[156] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 64.
[157] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 66.
[158] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 66
[159] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 66
[160] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 80.2

compensation. [161]In light of this summary, the Land Claims Court went on to reduce the amount of compensation by R300 000 to R1 500 000.

5.3 Comment

The following points may be made in light of this judgment:

First, the Land Claims Court levelled a number of important criticisms against the two-stage approach and that these criticisms appear to be correct. Despite these criticisms, however, the Court still applied the two-stage approach. This seems to undermine its criticisms.

Second, for the first time the Land Claims Court accepted the arguments made by academic commentators that land reform is a constitutionally special purpose which may justify compensation below market value

Third, even though the decision to reduce the amount of compensation to below market value appears to be correct, it is difficult to understand how the Land Claims Court arrived at an amount of R300 000. Unfortunately, it did not explain this.

5.4 *Uys NO v Msiza*

5.4.1 The facts

After the Land Claims Court handed down its judgment, the trustees of the Dee Cee Trust appealed to the Supreme Court of Appeal. They based their appeal on the ground, *inter alia*, that the Land Claims Court had arbitrarily reduced the market value of the property by R300 000 simply because the purpose of the expropriation was land reform.

[161] *Msiza v Director General of the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) at para 80.6

5.4.2 The reasoning of the court

The Supreme Court of Appeal agreed with the trustees and upheld that appeal. In arriving at this decision, the Court began by referring with approval to the two-stage approach adopted by the Constitutional Court in *Du Toit v Minister of Transport*.[162] This approach is appropriate, the Court stated, not only because it was adopted by the Constitutional Court, but also because market value is usually the one factor capable of objective determination. Therefore, it is a convenient starting point for determining what constitutes just and equitable compensation.[163] This approach, however, must be applied with care to ensure that all of the factors set out section in section 25(3) are given equal weight.[164]

After referring to the two-stage approach with approval, the Supreme Court of Appeal turned its attention to the market value of the land. In this respect, the Court began by stating that a report prepared by the state's expert valuer was particularly significant. This is because he took into account, not only the physical features attaching to the land, but also its historical and present use by the Msiza family. Taking all of these factors into account, the state's expert valuer came to the conclusion that the market value of the land was R1 800 000. Given the comprehensive approach adopted by the state's expert value, the Court concluded, his decision could not be faulted.[165]

Having come to the conclusion that the market value of the land was R1 800 000, the Supreme Court of Appeal turned to consider the reasons given by the Land Claims Court for deciding that just and equitable compensation should not be the market value of the land, but rather an amount below market value, namely R1 300 000. In this respect, the Court started by rejecting the finding that there was a "disproportionate chasm"[166] between the price paid by the Trust when it bought the land and the market value at the time of the determination. The difference in these amounts, the Court held, was simply a result of the increase in the value of the land.[167]

[162] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 10.
[163] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 12.
[164] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 13.
[165] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at paras 15-16.
[166] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 15
[167] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 24.

Apart from this finding, the Supreme Court then stated that the Land Claims Court also based its decision on a number of other grounds. These included the failure of the Trust to make any significant investment in the land since its acquisition; the unchanged use of the land; the Trust's knowledge of the impediment to development; the occupation and use of the land by the Msiza family since 1936 as labour tenants; and the applicant's successful claim in terms of Chapter III of the Labour Tenants Act. Although all of these factors were clearly relevant, the Court stated further, they had already been taken into account by the state's expert valuer when he valued the property at R1 800 000.[168]

Given this fact, the Supreme Court of Appeal concluded, there was "no justification for stigmatising the Trust's claim as 'extravagant'. Nor was there any evidence that the fiscus [was] unable to pay R1,8 million for the land. In fact, it accepted that the valuation was appropriate" and it was willing to pay this amount.[169] There were thus no facts to justify the R300 000 deduction, which was consequently irrational and arbitrary.[170] The appeal, therefore, had to be upheld.

5.5. Academic analysis

Even in cases where the courts have articulated the anti-centrality of market value in determining just and equitable compensation, like in *Msiza* where Ngcukaitobi AJ held that market value was not the basis for the determination of compensation but the point of departure is justice and equity,[171] ultimately, the Court applied the two-stage approach which seems to be venerating market value above other factors. Furthermore, the Supreme Court of Appeal in *Uys NO v Msiza* though it confirmed that market value is not above other factors listed in section 25(3), the Court nevertheless proceeded to use the two-stage approach where market value took precedent over other factors.

Ngcukatoibi and Bishop[172] have criticised *Msiza* decision and argued that the Supreme Court of Appeal erred in overturning the Land Claims Court's decision because:

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[168] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 25.
[169] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 26.
[170] *Uys NO v Msiza* 2018 (3) SA 440 (SCA) at para 27.
[171] 2016 (5) SA 513 (LCC)
[172] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.

- "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.
- 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." [173]

They strongly argued that this decision buffers the possibility of weighing in other factors which are vital in cases of expropriation for land reform purposes, such as history of the property and purpose and the purpose of expropriation. [174] Furthermore, they contended that if this decision is not taken on review there is a danger to misconstrue just and equitable compensation as market value and the courts will be reluctant to rule that is just and equitable to pay nil or lesser compensation. [175]

Thus, they put three mechanism that can ameliorate this condition, namely:

- the *Msiza* case should be reviewed by the Constitutional Court;
- new legislation that will explicitly provide "alternative mechanism to calculate just and equitable compensation at below market value;"[176] and
- amendment of the section 25(3) of the Constitution to allow payment of compensation below the market value *in certain instances*. [177] (my emphasis)

I agree with this criticism because if *Msiza's* logic is allowed to stay, our jurisprudence will be impoverished. Therefore, we need legislation that will explicitly provide for compensation below

[173] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 10.
[174] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 10.
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[177] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 11.

market value or nil compensation. This has become a dominant view that is even captured in the constitution eighteen amendment bill.

5.6 Comment

The following points may be made in light of these judgments and criticisms:

First, irrespective of whether one agrees or disagrees with the judgment of the Land Claims Court in *Msiza*, it has the merit of critically engaging with some of the complex and controversial issues that section 25(3) of the Constitution gives rise and especially the role of section 25(3)(e), the purpose of the expropriation.

In this respect, the Land Claims Court judgment stands in marked contrast to the judgment of the Supreme Court of Appeal which avoids engaging with any of the constitutional issues raised by the lower court. Instead, it focuses almost exclusively on the facts. This is very disappointing particularly in the context of a constitutional democracy which is based on the value of justification. It also leaves the section 25(3) jurisprudence poorer.

Second, although the Supreme Court of Appeal was careful to state that all of the factors set out in section 25(3) of the Constitution must be given equal weight and that market value is simply one component of a set, it may be argued that an unintended consequence of its judgment is to favour market value over the other factors.

This is demonstrated most starkly in the argument that the state's expert valuer had taken the current use of the property, the history of the acquisition and use of the property and the land reform purpose of the expropriation into account when he calculated the market value of the property and that the Land Claims Court had accepted this.

The problem with this argument, first, is that it is not clear from the Land Claims Court judgment that the state's expert valuer had in fact taken these factors into account when he calculated the

market value of the property; and, second, even if he did, whether he took them into account in order to determine the market value of the property or just and equitable compensation. This argument also subsumes these factors under market value and fails to treat them as separate considerations.

Third, while the judgment of the Land Claims Court provides judicial authority for Van der Walt's argument that land reform can justify compensation at less than market value in an appropriate case, the judgment of the Supreme Court of Appeal essentially rejects this argument. The problem with the Supreme Court of Appeal's judgment, however, is that it once again confuses public purpose as a requirement for a valid expropriation with public purpose as a factor to be taken into account when determining the level of compensation. As Du Plessis has pointed out, the problem with confusing the different roles that public purpose plays in each context is that it could frustrate the transformation goals of the Constitution.

5.7 Conclusion

As the discussion set out above demonstrates, with one exception, the courts do not appear to be willing to accept that land reform is a constitutionally special purpose and as such must/should justify compensation at below market value or nil compensation. The reluctance on the part of the courts to accept this point, therefore, may provide a strong argument in favour of amending section 25 of the Constitution to explicitly provide for compensation below market value or nil compensation in the context of land reform. This argument is explored in more detail in the next and final chapter.

CHAPTER SIX: ANALYSIS AND CONCLUSION

6.1. Introduction

The purpose of this chapter is to argue that it is necessary to amend section 25 of the Constitution to explicitly provide for compensation below market value or nil compensation in those cases in which the purpose of the expropriation is land reform. In addition, the purpose of this chapter is to identify the manner in which compensation below market value may be determined as well as the circumstances in which nil compensation may be awarded.

6.2. Amending the Constitution

In light of the case law discussed in this dissertation, the following points may be made:

First, the two-stage approach adopted by the courts to determine just and equitable compensation is contentious. This is because it is based on the arguments that market value is an objective factor and that none of the other factors are objective. Both of these arguments are wrong. In addition, the two-stage approach is also contentious because it tends to favour market value over the other section 25(3) factors. In some cases, the courts have simply ignored the other section 25(3) factors and in other cases they have attached very little weight to them. They have also placed the onus on the land reform claimants to prove them.

Second, even in those cases in which the courts have taken the other section 25(3) factors into account, they have misinterpreted them and, in particular, they have misinterpreted the purpose of the expropriation factor (paragraph (e)). Insofar as this factor is concerned, the courts have classified ordinary, run-of-the-mill expropriations as constitutionally special and have awarded compensation below market value. This has prejudiced private land owners by imposing an unfair burden on them. At the same time, they have also refused to classify land reform expropriations as constitutionally special and have awarded compensation at market value. This has prejudiced the public interest in land reform by imposing an unfair burden on the state.

Third, the section 25(3) jurisprudence reached a particularly low point in *Uys NO v Msiza* where the Supreme Court of Appeal, not only rejected the argument that land reform is constitutionally special, but appear to ignore all of the other section 25(3) factors in favour of market value. In addition, it abdicated its responsibility to determine just and equitable compensation to an expert valuer. As Ngcukaitobi and Bishop have pointed out, there are two related errors in the Court's reasoning.[178] First, the Constitution expressly requires all of the section 25(3) factors to be considered, despite knowing that 'some of them would obviously be relevant in the determination of market value". Second, 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."[179]

An important consequence of this disappointing jurisprudence is that it raises real doubts as to whether the courts will ever interpret section 25(3) of the Constitution in a manner that recognizes land reform as a constitutionally special purpose which may/should be awarded compensation at below market value or nil compensation. If the courts cannot be relied to interpret section 25(3) in this manner, and it seems that they cannot, then it follows that the only way to ensure that land reform is recognized as a constitutionally special purpose is for Parliament to intervene and amend section 25 of the Constitution to give effect to this interpretation of section 25(3).

As pointed out in Chapter One, the Constitutional Review Committee has recommended that section 25 of the Constitution should be amended to explicitly provide for expropriation without compensation as a legitimate option for land reform and the Ad Hoc Committee to Amend Section 25 of the Constitution has published a draft Bill amending section 25 of the Constitution to explicitly provide for nil compensation where the purpose is land reform. A discussion of this draft Bill, however, falls outside the scope of this dissertation.[180]

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[178] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.

[179] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 10.

[180] For an insightful and thought-provoking analysis of the draft Bill see T Ngcukaitobi "What section 25 means for land reform" 13 December *Mail and Guardian* 29.

6.3 Compensation below market value or nil compensation

6.3.1 Introduction

If we accept that land reform is a constitutionally special purpose which may/should be awarded compensation below market value or nil compensation, then two further questions arise: first, in how should compensation below market value be determined; and second, in which circumstances may nil compensation be awarded. Both of these questions have been addressed by Ngcukaitobi and Bishop in their paper entitled "The constitutionality of expropriation without compensation".[181]

Insofar as the first question is concerned, Ngcukaitobi and Bishop argue that there are a variety of ways in which compensation below market value may be determined. Among these are the following:

- First, the amount of compensation could be determined by a state valuer acting within a set clear guideline which indicate how much weight should be attached to each of the factors set out in section 25(3) in different contexts.

- Second, the amount of compensation could be determined either by reducing the market value of the land by a particular percentage, for example 50% of the market value, or by basing the amount of compensation on the municipal valuation of the land.

- Third, the amount of compensation could be determined by identifying the original purchase price and then simply adjusting it for inflation. This approach has already been adopted by the Constitutional Court in *Florence v Government of the RSA*.[182]

[181] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019.
[182] 2014 (6) SA 456 (CC). See also *Jacobs (In re: The farm Uap) v Department of Land Affairs; Jacobs (In re: Erf 38) v Department of Land Affairs* [2019] ZASCA 122 (26 September 2019).

- Last, the amount of compensation could be based simply on a flat rate per hectare, which is predetermined for different parts of the country and different types of land.[183]

Ngcukaitobi and Bishop do not prefer one method over the others. They argue that whichever method is chosen it must balance the following 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 and it must also be subject to judicial review."[184]

Insofar as the second question is concerned, Ngcukaitobi and Bishop argue that there are four possible circumstances where nil compensation may be awarded. These are as follows:

- where the land is abandoned or unused;
- where the land is held for speculative purposes;
- where the land is under-utilized land and owned by public entities, and
- where the land which is farmed by labour tenants and the title deed holder is absent.[185]

Nil compensation is justified in these four circumstances, they argue further, for two reasons. First, "there is no emotional connection to the land in any of [these circumstances]. The owner will suffer, at worst, pure economic loss. In some situations, there will be little or no loss at all."[186] Second, "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".[187]

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[183] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 21-22.
[184] T Ngcukaitobi and M Bishop The constitutionality of expropriation without compensation", paper present at the *Constitutional Court Review IX Conference*, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: https://www.wits.ac.za/law/constitutional-court-review-conference/, accessed on 20 December 2019 at 21-22.
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It is interesting to note, that some of the circumstances identified by Ngcukaitobi and Bishop overlap with those identified by the drafters of the 2019 draft Expropriation Bill.[188]

6.3.2 The 2019 Expropriation Bill

(a) Introduction

As a part of the process of amending section 25 of the Constitution to provide for nil compensation in those cases in which the purpose of the expropriation is land reform, the Minister of Public Works also published a draft Expropriation Bill in 2019. The purpose of this draft Bill is, *inter alia*, to give effect to the proposed constitutional amendment by identifying in more detail the circumstances in which nil compensation may be awarded. These circumstances are set out in clause 12(3) of the draft Bill.

(b) Nil compensation

Clause 12(3) of the draft Bill identifies five circumstances in which nil compensation may be awarded. It provides in this respect as follows:

"It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

(a) where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
(b) where the land is held for purely speculative purposes;
(c) where the land is owned by a state-owned corporation or other state-owned entity;
(d) where the owner of the land has abandoned the land;
(e) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land."[189]

[188] Expropriation Bill B of 2015.
[189] Draft Constitution Eighteenth Amendment Bill, 2019

(c) Comment[190]

A number of points may be made in respect of the provisions of clause 12(3) of the draft Bill. Among these are the following:

First, clause 12(3) refers to those cases in which land is expropriated in the "public interest" rather than to those in which land is expropriated for 'land reform' purposes. While the public interest does encompass land reform, the clause fails to indicate clearly that land reform is a constitutionally special purpose.

Second, the circumstances set out in clause 12(3) may be divided into three groups. First, those that focus on the current use of the property (paragraph (a) and (b)); second those that focus on the market value and extent of direct state investment in the property (paragraph (e)); and those that focus on the ownership of the land (paragraphs (c) and (d)).

Third, while paragraphs (a), (b) and (e) seem to fall within the factors expressly listed in section 25(3) of the Constitution, paragraphs (c) and (d) seem to fall outside the factors listed in section 25(3). Although this does not make it unconstitutional, clause 12(3) seems to have a wider scope than section 25(3). In addition, paragraph (d) is also a bit confusing. This is because some courts have held that abandoned land belongs the state.

Fourth, clause 12(3) of the draft Bill can assist government in placing homeless people in the abandoned buildings in the cities although the draft Bill does not mention abandoned buildings, government can argue that it is in the public interest to do so and the draft Bill is clear that factors listed in clause 12(3) are not limited. However, in the rural areas where there are absent landowners who have since abandoned their land and left the tenants there, government can expropriate such land for public interest in terms of clause 12(3).

Fifth, although nil compensation can be classified as a compensatory discount, it is the most extreme form of discount. Apart from this extreme compensatory discount, clause 12(3) does not provide for

[190] In most of these comments I am indebted to the discussion we had with Prof Warren Freedman.

the sorts of less extreme compensatory discounts that Zimmerman[191] suggested. An important consequence of this failure is that compensatory discounts will be applied only in extreme cases, which will be few and far between. If clause 12(3) provided for less extreme compensatory discounts they would probably be used more frequently and thus have a bigger impact.

Last, apart from amending the Constitution to expressly provide that land reform is constitutionally special and consequently that compensation may be below market value or nil, either the Constitution or the Expropriation Act should be amended to provide for a new method of calculating compensation. As both Zimmerman and Du Plessis suggested, it should not be left to the courts. This will give flexibility to the courts to determine compensation on case by case basis. also, the courts must be provided with power to review and must be explicit in the Act as well;[192]

6.4 Recommendations

This study has shown that courts are against two stage approach or centrality of the market value theoretically but most of the judgements seem to regard that market value is more important than other section 25(3) factors of the Constitution. Therefore, this confirms that it may be perceived that courts are biased towards market value when determining just and equitable compensation. Although there is a school of thought that argues that courts do not venerate the market value above other factors but they use market value as an entry point where justice and equity are encapsulated in the consideration of other factors. Therefore, they (the proponents of that school of thought) warn us not to misconstrue the two-stage approach as a tool that glorifies the centrality of market value above other listed and unlisted factors of section 25(3), but must be viewed as a pragmatic entry point where justice and equity are subsumed.

I argue that the approach of the courts has unintentionally perpetuated the importance of market value sometimes at the expense of other consideration of section 25(3) factors or "factors of justice and

[191] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 407.
[192] J Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 at 418

equity,"[193] as Langa CJ held in minority judgement of *Du Toit* case. This view was also emphasized by the Panel of Expert's report where the experts acknowledged that section 25 of the constitution in its current form is "compensation-centric and focused." This uncontested *Msiza* precedence impoverished our jurisprudence in ensuring that land reforms as the constitutional imperative are realised. I also agree with the view that our courts and academics are starting to acknowledge the importance of other factors beyond market value and there is a shift to this direction.

To this end, the following recommendations may be made:

First, it appears that the issue of compensation is constitutional important, this begs the commitment from all law makers to deal with this issue constructively and ensure that compensation value reflects the flexibility of also allowing payment of compensation below market value in certain instances. To this end, law makers must legislate unambiguous, comprehensive and clear framework of expropriation laws where courts can easily interpret the content of section 25(3) of the Constitution.

Second, public interest is often compromised by the preoccupation of establishing market value first before applying other section 25(3) to determine whether to increase or reduce the amount of compensation, this must be avoided and all factors be considered equally.

Third, there is a need for constitutional amendment of section 25(3) in that, the approach adopted in *Uys NO v Msiza* suggests that the courts are reluctant to accept that land reform is constitutionally special and, consequently, that compensation may/should be below market value or nil. It follows, therefore, that the Constitution should be amended to expressly provide for such an approach.

Fourth, the new Expropriation Act must clearly state the definition of just and equitable compensation and contain possible formulae to calculate just and equitable compensation;

Fifth, the judiciary should treat expropriation cases as hard cases and resolve them in accordance with the Constitution and law. This will include developing common law before them so as to promote the values of the constitution as a whole.

[193] *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 81

Sixth, the application of two stage approach must not be applied as the means to an end rather, it must be applied as an entry point which will encapsulate justice and equity.

Seventh, section 25(3) must always be interpreted purposively and generously with an objective "of healing the division of the past and establishing a society based on democratic values, social justice and fundamental human rights."[194]

6.5 Conclusion

The thesis endeavored to highlight the manner in which courts have interpreted section 25(3) of the constitution. It contended that although the courts have rejected that market value is a central factor in the calculation of just and equitable compensation, however, the majority of judgements that were discussed, applied market value as an entry point, thus making it central. This is an indication that lawmakers must assist courts by crafting legislation that will explicitly provide for circumstances that nil compensation or below market value compensation must apply.

The question that is posed by this thesis can thus be answered by noting that courts have not been asked to interpret what is meant by just and equitable compensation. Also, in the interpretation of section 25(3) of the Constitution, the courts were somehow restrained by implicit terms of section 25(3), thus moving slowly towards pushing the compensation payment below market value, these developments are indicating that there is no possibility of zero compensation or compensation in kind in the current constitutional framework. Notwithstanding the SCA Msiza case, in my view this case sharpens the debate and offers an opportunity to ponder deeply about the country's commitment to heal the divisions of the past.

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