



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
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EXPROPRIATION OF LAND AGAINST THE BACKDROP OF TRANSFORMATIVE
CONSTITUTIONALISM

By

Samkelo Mbali

Student Number: U19227524

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Student Supervisor:

Lizelle le Roux

Date of submission

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SUMMARY OF THE STUDY

This study investigates the expropriation of land against the backdrop of transformative constitutionalism in South Africa. I examine the current Expropriation Act (new Act) and focus on section 12(3)(a)-(d) which provides for nil compensation in certain instances of expropriation.¹ The lack of a provision expressly allowing expropriations to be done at nil compensation has necessitated an effort to amend section 25 of the Constitution.² On 07 December 2021, a motion was tabled in the National Assembly to amend section 25 of the Constitution to allow for expropriations at nil compensation. The motion did not pass because the African National Congress (ANC) fell short of the required two-thirds majority, as neither the Democratic Alliance (DA) nor the Economic Freedom Fighters (EFF) supported the amendment.³ This failure and the inherent limitations of the old Expropriation Act gave rise to the new Expropriation Act.⁴

The main aim of the new Expropriation Act is to better realise the section 25 obligation to redress the result of a pastracial discrimination through the expropriation of land that was taken from the majority of black people by the white minority. The current Expropriation Act seeks to address how the state will expropriate land at nil compensation in certain instances. The primary challenge of the new Expropriation Act lies in section 12(3)(a)-(d), which specifies four circumstances under which nil compensation may be applied. However, it also indicates that it is not 'limited to' these instances.⁵ The list is consequently not exhaustive and in theory, allows for expropriations against nil compensation under other unknown circumstances not stipulated under section 12(3)(a)-(d).⁶ The Act creates legal uncertainty and, if not

¹ Expropriation Act 13 of 2024.

² The Constitution of the Republic of South Africa, 1996. Some authors argue that section 25(3) of the Constitution already allows for nil compensation to be awarded under certain circumstances, although 'nil compensation' is not expressly included in the formulation of section 25(2) or (3). The focus of this study is not on the implied potential of sections 25(2)-(3) to allow nil compensation but rather on discussing the explicit inclusion of nil compensation in section 12(3) of the Expropriation Act 13 of 2024.

³ J Coetzee and J Marais 'Expropriation without compensation – it is not the end of the road and is still on the table' (15 December 2021) *Fasken* at <https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation> (accessed on 25 January 2025) 1-2.

⁴ Expropriation Act 63 of 1975.

⁵ Expropriation Act (n1) section 12(3)(a)-(d).

⁶ B Meyer 'Expropriation of land without compensation – where are we?' (24 March 2021) *CDH* at cliffedekkerhofmeyr.com/news/publications/2021/Agri/agriculture-aquaculture-and-fishing-sector-alert-24-march-expropriation-of-land-without-compensation-where-are-we.html (accessed 24 January 2025).

administered with great oversight and frugality, can create a myriad of social and economic problems which include agricultural sustainability, the loss of employment, homelessness, a reluctance by foreign investors and even the possibility of State abuse and corruption.⁷

This study compares the new Expropriation Act to the old Expropriation Act. It investigates whether the new Expropriation Act passes constitutional challenges by analysing the limitation of nil compensation in terms of the section 36 limitation clause. Some of the social and economic issues that may arise from the practical implementation of nil compensation are discussed. Transformative constitutionalism as a possible lens to understand and interpret nil compensation is examined.

The new Expropriation Act became law on 23 January 2025. Almost immediately, several political parties criticised the promulgation of this Act and indicated their intentions to challenge its legitimacy.⁸ This study was undertaken before the promulgation of the Act. However, many of the criticisms lodged at this Act still align with the concerns raised in this study.

⁷ See the Special Investigating Unit Annual Report: 2012/13 at <https://pmg.org.za/committee-meeting/16570/> (accessed 25 January 2025). Also see 'Sustainability' at <https://www.iisd.org/mission-and-goals/sustainable-development#:~:text=What%20is%20sustainable%20development%3F,to%20meet%20their%20own%20needs> (accessed 25 January 2025). Sustainability is described as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

⁸ This study was undertaken before the Expropriation Bill was signed into law, and the final draft for examination purposes was submitted in October of 2023. For some of the new criticism launched at the Act, see D Singh 'Opposition parties threaten legal action over South Africa Expropriation Bill' (24 January 2025) at <https://www.africanlawbusiness.com/news/opposition-parties-threaten-legal-action-over-south-africa-expropriation-bill/> (accessed at 25 January 2025).

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Chapter 1: Introduction

1.1. Introduction

The central theme of this study is section 12(3)(a)-(d) of the new Expropriation Act, which makes provision for the expropriation of land at nil compensation under certain circumstances. The Expropriation Act operates in conjunction with section 25(2) of the Constitution, which allows the state to expropriate property in terms of the law of general application, for a public purpose or in the public interest and subject to compensation.⁹ Expropriations refer to the state's jurisdiction or power to take property, including land, without the permission or consent of the owner, but against compensation as set out in section 25(3). It could be argued that, although not expressly included in section 25(3), the Constitution already allows for nil compensation if it is just and equitable to do so, reflects an equitable balance between public interest and the interests of those affected and after the relevant circumstances have been examined. Lubbe and Du Plessis explain the difference between expropriation at nil compensation versus expropriations without compensation. Nil compensation refers to the circumstances in which the factors in section 25(3) of the Constitution have been weighed up and the state concludes that 'compensation at R0' is just and equitable. The obligation to pay compensation therefore remains, but the amount that is just and equitable can be R0. However, this argument did not inform or influence the decision to initiate and introduce legislation amending section 25.¹⁰ Section 12(3) of the Act provides for the circumstances under which nil compensation may be just and equitable when land is expropriated. It provides 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 not being used, and the owner's primary purpose is not to develop the land or use it to generate income but to benefit from the appreciation of its market value;
- (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in

⁹ The Constitution (n2) section 25 (2).

¹⁰ HJ Lubbe and WJ Du Plessis 'Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits' (2021) 11 *Constitutional Court Review* 80 and 98.

that regard, and the organ of the state acquired the land for no consideration;

- (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
- (d) 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.'

One of the main problems with section 12(3)(a)-(d) is that although the specific circumstances under which nil compensation is payable are set out, the list is not exhaustive.¹¹ The Act creates ambiguity and legal uncertainties that, when implemented in practice, can result in several social and economic problems.

The purpose of section 25 is to show a constitutional commitment to redress the injustices of the past, specifically the injustices pertaining to land.¹² Whereas sections 25(2)-(3) set out the conditions for legal expropriations, sections 25(4)-(9) reflect the commitment to equitable access, tenure security and land reform. For the Constitution to achieve its commitment to transformation and equitable access, an equitable balance must be reflected between the person whose property is expropriated and the public interest by considering all the factors listed under section 25(3)(a)-(e) of the Constitution. The previous Expropriation Act supports the realisation of expropriations through the principle of willing buyer, willing seller and the concept of compensation that must be in line with the market value of the property expropriated.¹³ However, the willing buyer, willing seller principle is not included in section 25 and the consideration of market value is but one of the factors mentioned in section 25(3) to consider when calculating compensation.¹⁴ Lahiff argues that the requirement of the willing buyer, willing seller has been slowing the process of more equitable access to land.. There

¹¹ Meyer (n6). Also, see Expropriation Act (n1): the phrase 'not limited to' makes this list not exhaustive and opens the door to other instances wherein nil compensation can be allowed.

¹² S Viljoen 'Expropriation without compensation: Principled decision-making instead of arbitrariness in the land reform context (part 1)' (2020) 1 *Journal of South African Law* 35.

¹³ Expropriation Act (n4) sections 12(1)(a), 54 and 55.

¹⁴ See section 25(3): relevant circumstances include (a) the current use of the property;(b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. Also see Viljoen (n12) 36.

seems to exist a general unwillingness among landowners to sell their land, especially to subdivide and sell off a portion of their land, which, due to the large size of South African farms, is often necessary to make it suitable for new entrants to the agricultural sector.¹⁵ Mubecua and Mbatha indicate that the concept of market value that is so widely used as a benchmark for calculating compensation may, in fact, make the restoration process so unnecessarily expensive that it threatens the political and economic viability thereof.¹⁶

In a seminal article by Karl Klare, the concept of transformative constitutionalism (TC) was introduced into the lexicon of South African constitutionalism and explained as:

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.¹⁷

Klare argues for a commitment to constitutional transformation from democratic politics, political processes and social and institutional power relations.¹⁸ He implies that this transformation must be constitutional, or in other words, must be achieved through the Constitution and must instigate a reform or even a revolution that remains in line with the law. Liebenberg agrees that transformative constitutionalism 'implies fundamental changes to unjust economic and social structures' while at the same time, seeking 'to achieve a more equitable distribution of social and economic resources.'¹⁹ The expropriation of land as set out in section 25(2)-(3) of the Constitution and the

¹⁵ E Lahiff 'Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform' (2007) 28 *Third World Quarterly* 1585.

¹⁶ MA Mubecua & MW Mbatha 'Expropriation of Land in the Pre and During Democratic South Africa: Compensation or Nil Compensation?' (2021) 18 *African Renaissance* 175.

¹⁷ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. Also see The Constitution (n2) section 25(4) that explains public interest to include a commitment to land reform and access to land on an equitable basis.

¹⁸ S Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, democracy and development* 401.

¹⁹ S Liebenberg *Socio-economic rights: adjudication under a transformative constitution* (JUTA Claremont 2010) 541. Also see The Constitution (n2) section 25(4).

commitment to land reform as stipulated in section 25(4), can thus be seen as a constitutional commitment to 'large-scale social change' and of achieving the equitable distribution of resources as envisioned in the Constitution.

Against the background of TC and of the constitutional commitment to equal access and the redress of past racial discrimination, it becomes clear that the old Expropriation Act did not, in its implementation, promote the constitutional obligation to reform access to land, neither did it realise Klare or Liebenberg's notions of large-scale social change and a redistribution of resources. The new Expropriation Act thus seems like a timeous addition to realise the constitutional goals as it does not refer to the principles of willing buyer, willing seller or over-emphasise market value.²⁰ It does, however, address the possibility of nil compensation in instances of State expropriation, which, although seemingly in line with the concepts of large-scale social change as envisioned by Klare, can result in several legal and practical difficulties when implemented. Although the specific circumstances under which nil compensation is payable are set out, the list is not exhaustive and there may be other circumstances under which the land is expropriated for nil compensation. These circumstances are still unclear and create a great deal of legal uncertainty. Some fear its ambiguity and vagueness can even halt transformation and again purport a property system of inequality where the State targets minority groups.²¹ The rights in the Bill of Rights are interconnected, interdependent, and mutually reinforced. Therefore, the reality of expropriating property without compensation may also affect other rights such as equality, human dignity and even the rights of children to shelter.²² If not managed responsibly and with great oversight, the practical implications of nil compensation can result in a number of real-life problems, including food insecurity, loss of employment, homelessness, the sustainability of land for future generations, and a lack of international and national investment. Another critical concern is that its open-ended character can lead to abuse of power and corruption by the State.²³ South

²⁰ See The Constitution (n2): section 12 (1)(c) lists the consideration of market value as one of a number of relevant circumstances that need to be regarded in deciding on just and equitable compensation.

²¹ Viljoen (n12) 35, 44-45 and 47.

²² See The Constitution (n2) sections 9, 10 and 28.

²³ See M Gaopalelwe 'Corruption in Land Administration and Governance: A Hurdle to Transitional Justice in Post-Apartheid South Africa?' (2021) 42 *Obiter* 561-579.

Africa's socio-political context is marked by corruption and inefficiency, which makes it dangerous to give the state unchecked expropriation powers.²⁴

Section 25(8) of the Constitution states that:

No provision in 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 the departure of the provisions of this section is in accordance with the provisions of section 36(1).

Lubbe and Du Plessis argue that the impact of section 25(8) on cases of land reform, deprivations, expropriations and the determination of compensation (or the compensation requirement itself) is that, although it will warrant a more tolerant review, such expropriations must still be reasonable and justifiable in terms of section 36(1).²⁵ Section 36 stipulates that the rights in the Bill of Rights may be limited 'only in terms of law of general application' provided that the limitation is 'reasonable and justifiable' in an 'open and democratic society' based on human dignity, equality and freedom.²⁶ Section 12(3)(a)-(d) constitutes a limitation on the right to be expropriated against compensation as per section 25(2). The reasonable test set out by section 36 requires a proportionality analysis wherein the relative importance of the limitation must be balanced against the right to be compensated in instances of expropriations.²⁷ The importance of the constitutional commitment to transformation must, therefore, be balanced with the importance of the right to be compensated for expropriations. Section 36(1) (a)-(e) offers a number of relevant factors that must be considered when determining whether the limitation is reasonable and justifiable. This means that the need for land reform does not automatically trump the right of individual owners to be compensated when expropriated but that every case of expropriation at nil compensation must be judged on its fairness, weighing the public interest against the harm done to the property owner. When taking into consideration 'all relevant factors' as stipulated in both section 25(3) of the Constitution and section 12(1) of the current Expropriation Act, one should look at how severe past injustices were, how beneficial property transfer is expected to be towards the public interest, as well as the social

²⁴ Viljoen (n12) 37 and 47.

²⁵ Lubbe & Du Plessis (n10) 93.

²⁶ The Constitution (n2) section 36.

²⁷ Lubbe & Du Plessis (n10) 94.

and economic situation of the people whose property is being taken away.²⁸ Section 36 offers a robust framework to ensure that implementing expropriation without compensation does not become a tool for arbitrary or politically motivated actions, thereby maintaining the integrity of constitutional promises for genuine, equitable transformation.

1.2. Background

South Africa's land reform project is hampered by a number of obstacles. These obstacles include:

corruption within government officials tasked to carry out the project. The latest report from the SIU shows that there is evidence of various types of corruption in the land reform project in that there are illegal land grants; inflated beneficiary numbers; non-existent or false beneficiaries; forgery of valuation documents; and officials' family members listed as beneficiaries.²⁹

Since democracy, South Africa has implemented a multifaceted land reform programme to address problems of historical dispossessions and rural poverty. The African National Congress (ANC) set a target to return 30 per cent of the land taken under colonialism and apartheid to its previous owners by 1999.³⁰ When the 1999 target was missed, an extension was provided to 2014.³¹ The ANC's 52nd national conference took place in Polokwane in 2007. It resolved, among other things, that the government should establish an appropriate institution with the necessary resources and authority to drive and coordinate an integrated programme of rural development, land reform, and agrarian change.³² There was little change after this conference. On 16 April 2008, the Expropriation Bill was tabled in Parliament to replace the old Expropriation Act. This was criticised, and the government decided to withdraw the

²⁸ Lubbe & Du Plessis (n10) 94.

²⁹ See *Special Investigating Unit Annual Report: 2012/13* (n7) 2.

³⁰ Lahiff (n15) 1577 and 1581.

³¹ E Lahiff and G Li 'Land Redistribution in South Africa-A Critical Review' in *Agricultural Land Redistribution and Land Administration in Sub-Saharan Africa: Case Studies of Recent Reforms* at <http://documents.worldbank.org/curated/en/525981468302460916/Land-redistribution-in-South-Africa-a-critical-review> (accessed on 25 January 2025).

³²<https://www.gov.za/news/speeches/speech-j-phaahla-deputy-minister-rural-development-and-land-reform-department-rural>.

Bill.³³ In 2013, a significantly revised Expropriation Bill was re-tabled and adopted two years later. In February 2017, the Bill was returned to Parliament by the then president, Jacob Zuma, and the National House of Traditional Leaders over concerns about public participation and consultations with invested parties. However, the Bill remained unattended amidst the factions on policy ahead of the 2017 Nasrec conference. In 2018, a decision was taken to amend the Expropriation Bill to expressly include the possibility of expropriation without compensation, much like the suggested constitutional amendment that was to follow.³⁴

On 07 December 2021, the National Assembly could not pass the amendment to section 25 of the Constitution to allow for expropriation without compensation. The ANC fell short of the required two-thirds majority to pass the amendment as both the Democratic Alliance (DA) and the EFF did not support the amendment.³⁵ With this failure, it seemed as if the issue had disappeared, but that was not the case. The National Assembly adopted the Expropriation Bill, which President Cyril Ramaphosa has now signed into law.

The introduction of the Act has sparked significant debate. Critics argue that provisions for nil compensation could undermine property rights and deter investment. The Democratic Alliance indicated its strong opposition to the law as it takes issue with the enactment process. At the same time, the Freedom Front Plus vowed to challenge the constitutionality of the law as it threatens private ownership. The Economic Freedom Fighters has called the move a 'legislative cop-out' by the ANC as the governing party.³⁶ Internationally, there has also been some reaction with figures like U.S. President Donald Trump expressing concerns and cutting aid to South Africa seemingly over the expropriation of land policy.

1.3. Problem statement

³³ BV Slade 'Public purpose or public interest and third-party transfers' (2014)17 *Potchefstroom Electronic Journal* 166-206.

³⁴ M Merten 'The politics of expropriation without compensation –when rhetoric and reality clash' (25 March 2021) *The Daily Maverick* at <https://www.dailymaverick.co.za/article/2021-03-25-the-politics-of-expropriation-without-compensation-when-rhetoric-and-reality-clash/> (accessed 24 January 2025).

³⁵ Coetzee and Marais (n3) 1-2.

³⁶ K Ngcobo 'South African president signs controversial land seizure law' (24 January 2025) at <https://www.bbc.com/news/articles/cvg9w4n6gp5o> (accessed 30 January 2025).

The expropriation of property as provided for by section 25(2) of the Constitution, is a constitutional measure to redress the racially discriminatory laws of the past. Section 25(3) provides the requirements for such an expropriation by the State and offers a number of legal factors to consider when expropriating. So far, the expropriation of land has been a slow and highly political process. The courts have over-emphasised the importance of compensation in line with the market value and have utilised the Expropriation Act 63 of 1975 as the main guideline to effect successful expropriation. This Expropriation Act states that compensation for the expropriated property will be based on a willing buyer, willing seller basis and that such compensation should be determined by the market value.³⁷ In an effort to redress the constitutional promise of equitable access to land and tenure security, a number of legislative efforts were made to amend section 25(3) and to include nil compensation as an acceptable practice explicitly. These efforts aligned with what Klare calls transformative constitutionalism, wherein he argues for large-scale social change through the law. However, this amendment failed in Parliament. Another effort was made to further the redress of land through the new Expropriation Act, which includes the possibility of nil compensation and no longer relies on the willing buyer, willing seller principle.

Section 12(3) of the current Expropriation Act has as its background racial land dispossession and inequalities, which were exacerbated by apartheid policies that favoured the white minority. The Act aims to provide a more transformative approach to the practicalities of expropriation and includes four instances, though not limited to them, in which nil compensation may be appropriate.³⁸ This legislative effort to realise the constitutional promise of greater access to land and redress of racial discrimination through the list provided in section 12(3)(a)-(d) may result in some highly problematic social and economic issues. These issues include vagueness, which leads to legal uncertainty; the infringement of other fundamental rights when nil compensation is realised; a renewed inequality, especially against minority groups; the unsustainability of land and resources; and even the possibility of State abuse and corruption. Any of these will have serious economic and societal consequences and defy the constitutional goals and the greater project of transformative constitutionalism that

³⁷ Expropriation Act (n4) sections 12(1)(a); 54 and 55.

³⁸ Expropriations Act (n1) section 12(3)(a)-(d).

drives societal changes through the realisation of socio-economic rights. It is the constitutionality of nil compensation, whether the limitation can be deemed justified according to section 36 and the reading of nil compensation in certain expropriations through the lens of transformative constitutionalism, that this study seeks to address.

1.4. Research Questions

The questions which lie at the heart of this study are:

- a) What was the proposed Constitutional Eighteenth Amendment Bill to section 25? How does the Expropriation Act 13 of 2024 differ from the Expropriation Act 63 of 1975 specifically pertaining to the issues of public purpose or public interest, market value, willing buyer, willing seller and nil compensation?
- b) Is the change in terms of nil compensation in instances of State expropriations in line with the Constitution? How does section 36 guide the proportional balancing of the limitation of fundamental rights (the right to receive compensation in instances of expropriation) versus the constitutional obligations to equitable access to land? Is the concept of nil compensation in line with international law?
- c) What are some of the possible effects of land expropriation against nil compensation in terms of social and economic affairs in South Africa?
- d) Does the principle of transformative constitutionalism justify expropriation with nil compensation and will the possibility of nil compensation further the goals and ideals of the transformative project?

1.5. Chapter outline

Chapter 1 serves as an introduction to the study, giving a brief background of the land inequalities and land dispossessions that happened prior to the adoption of constitutional democracy. The chapter includes the problem statement, research questions, research methodology and chapter outline.

Chapter 2 offers a broad analysis of the Expropriation Act of 2024, beginning with a brief historical overview of its promulgation. It also compares the 2024 Act to the Expropriation Act of 1975, with particular emphasis on the concepts of willing buyer, willing seller and market value. This chapter is intentionally placed before the

discussion on the constitutionality of the Expropriation Act to provide a detailed explanation of its provisions, especially Section 12(3)(a)-(d).

Chapter 3 investigates whether nil compensation in instances of State expropriations can be deemed constitutional. The interplay between section 36 that guides the limitations of fundamental rights will be critically investigated and the question as to whether nil compensation is in line with international law will be discussed.

Chapter 4 examines some of the possible social and economic effects of land expropriation at nil compensation.

In **Chapter 5**, transformative constitutionalism as a ground for justification of nil compensation against the landowner is explored and interrogated to determine whether land may be expropriated to restore or redress land injustices of the past and restore the land to rightful owners, subject to nil compensation. Transformative constitutionalism is aimed at restoring the injustices of the past where rightful owners were deprived of their land, and seeks to restore land into the hands of the rightful owners through legal measures.

Chapter 6 provides final conclusions to this study.

1.6. Methodological framework

1.6.1. Methodology

The primary research methodology for this study is desktop, qualitative research. This involves a secondary type of research that focuses on gathering and analysing existing information from publicly or privately available sources rather than by conducting data through interviews, surveys or experiments. Qualitative research focusses on understanding, examining and interpreting texts, principles and contexts to generate arguments and insights. It has ontological, epistemological, and methodological elements. It recognises that its findings are not independent from the knower or free from the inarticulate premises of the author and that reality is dynamic, shaped by the cultural contexts, worldviews, and value systems of different groups. It focusses on the what, how and why questions and seeks to answer issues about quality and

meaning rather than quantifying variables like amounts, intensity, or frequency.³⁹ This methodology was chosen because the study considers social and economic issues in South Africa that are closely connected to our particular worldview and context as South Africans. In the examination of the current Expropriation Act and the section 12(3)(a)-(d) inclusion of nil compensation, ontological and epistemological arguments have to be considered. Furthermore, the research examines, analyses, and interprets various authoritative and persuasive sources of law. There are no interviews, surveys or experiments used.

1.6.2. Sources

International and regional tools are the primary sources used to collect information for this research. International law is a largely consensual system, consisting of norms that states in sovereign equality freely accept to govern themselves and other subjects of law.⁴⁰ On the other hand, national law can be defined narrowly or broadly. Firstly, it designates any set of rules with which a province endows itself because of the distinctive values shared by its members. Secondly, it encompasses any rule having a regional scope of application.⁴¹ The Constitution of the Republic of South Africa, in particular, section 25 will also be used to answer the research questions. Furthermore, the domestic framework in terms of legislation, case law, state reports, non-government reports, investigations, and commission findings are also used. Journal articles and other secondary sources are examined. There are no physical, official, or informal interviews with any individuals.

1.6.3. Reliability of sources

The sources identified above are typically recognised as trustworthy sources. The material's reliability was tested by going over it a few times. Where appropriate, non-academic internet articles were utilised.

1.6.4. Relevance of conclusion

Based on the sources read for this study, there is a need to provide a short clarification of the relevance of the conclusions that will be made. The principal problem with section 12(3)(a)-(d) of the current Expropriation Act is that although the specific circumstances under which nil compensation is payable are set out, this list is not

³⁹ K Yilmaz 'Comparison of Quantitative and Qualitative Research Traditions: epistemological, theoretical, and methodological difference' (2013) 48 *European Journal of Education* 315-317.

⁴⁰ DL Shelton 'Soft Law' in *Handbook of International Law* (Routledge Press 2008) at <https://ssrn.com/abstract=1003387> (accessed 25 January 2025) 1.

⁴¹ Shelton (n40) 1-2.

exhaustive and there may be other circumstances under which land is expropriated for nil compensation. The Act, therefore, creates legal uncertainty and the possibility of numerous infringements on fundamental rights, international law, and even the Constitution itself. It also impacts practical lived realities, including sustainability problems and even State abuse and corruption. The retention of the nil compensation clause in the new Expropriation Act can be seen as an attempt to achieve what could not have been achieved through the constitutional amendment processes. However, regarding international law obligations, expropriating states are expected to pay compensation to the individuals from whom the land is expropriated. The Constitution also still demands that expropriations must be accompanied by compensation. This thesis will examine whether South Africa, as a constitutional state and as a member of some international and regional instruments, has the right to use nil compensation if it is in the public interest or for the public purpose. It will also allude to some of the possible issues that may arise as a result of section 12(3)(a)-(d). I argue that expropriations must be closely monitored and carefully managed in order to prevent State abuse and corruption as well as a number of social and economic problems that may arise upon implementation.

Chapter 2: The Expropriation Act 13 of 2024

2.1. Introduction

In this chapter, section 12(3)(a)-(d) of the Expropriation Act 13 of 2024 (new Expropriation Act) will be examined with reference to the suggested Constitution Eighteenth Amendment Bill of 2021 and the Expropriation Act of 1975 (old Expropriation Act).⁴² The chapter will first provide a short description of the Constitution Eighteenth Amendment Bill and the initiative to include 'nil compensation' in section 25. Thereafter, the focus will be on comparing the new Expropriation Act with the old Expropriation Act, focusing specifically on section 12(3)(a)-(d) and the issues of public interest and public purpose, the willing buyer, willing seller and market value. This chapter serves as an introduction to the constitutional analysis of section 12(3)(a)-(d) and nil compensation in the following chapter.

2.2. The Constitution Eighteenth Amendment Bill

Following the ANC's 54th National Conference, the Economic Freedom Fighters (EFF) tabled a motion in Parliament in February 2018 calling for the expropriation of land without compensation to enable the state to become the custodian of all land. However, the ANC substantially amended this motion to align it with the economic qualifications adopted at its conference. The EFF's proposal for state custodianship was ultimately rejected. The final adopted motion reflected the ANC's resolution to review section 25 and any other relevant clauses to make expropriations of land in the public interest without compensation possible.⁴³

An extensive public participation process to assess both the necessity and mechanisms for the expropriation of land without compensation followed. It was found that a majority of participants supported amending the Constitution to enable this form of expropriation and two competing interpretations were formulated: that it was possible, after weighing all the relevant factors, to arrive at nil compensation within the section 25 framework if the expropriations were just and equitable and in the public interest or for the public purpose, and that the Constitution implicitly permits

⁴² See Expropriation Act (n1) and the Expropriation Act (n4). Also see Constitution Eighteenth Amendment Bill B18-2021.

⁴³ Lubbe & Du Plessis (n10) 97.

expropriations without compensation but that it should be made explicit. The first interpretation preserves the constitutional balance of just and equitable with the affected interests of the party being expropriated, while the second interpretation alters the nature of expropriations by potentially removing the owner's right to challenge the lack of compensation.⁴⁴ The Constitutional Eighteenth Amendment Bill was gazetted, and its wording tried to consolidate these positions. The draft used the phrase nil compensation rather than without compensation, reflecting the first interpretation—that in specific cases, compensation may be zero following judicial determination. However, it also explicitly included the possibility that the amount of compensation may be nil which is only implied in section 25(2) and (3). The draft also introduced a new subsection (3A), requiring national legislation to set out when nil compensation would apply.

The Constitution Eighteenth Amendment Bill did not get the required majority votes in the National Assembly and was therefore not adopted; no changes were made to section 25. 204 votes for the amendment and 145 against the Bill ended an almost four-year process.⁴⁵ Alongside the constitutional amendment process, a new Expropriation Bill was introduced to replace the outdated 1975 Expropriation Act. Unlike the constitutional amendment, the Expropriation Bill required only a simple majority. The National Assembly adopted the Expropriation Bill, which has now been signed into law. The Act aims to align with the Constitution and replace the old Expropriation Act with provisions that guide the expropriation of property and allow for certain instances where land expropriation against nil compensation may be appropriately in the public interest.⁴⁶ It outlines how expropriation must be done and guides the 'processes and procedures' for the expropriation of property by organs of state.⁴⁷ The Act explains what may be expropriated, why expropriation may be done, what 'public purpose' and 'in the public interest' entails, and what an urgent expropriation in terms of chapter 7 of the Act means.

⁴⁴ Lubbe & Du Plessis (n10) 97-98.

⁴⁵ Merten (n34).

⁴⁶ Expropriation Act (n1). Also see S Mokoena 'National Assembly fails to pass Constitutional Eighteenth Amendment Bill' (9 December 2021) at <https://www.parliament.gov.za/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill> (accessed 7 July 2023).

⁴⁷ Expropriation Act (n1) chapter 4.

The current legislation, therefore, seeks to modernise the framework by retaining key provisions from previous legislative attempts and incorporating new clauses that provide clear guidelines on when nil compensation might be justified. The Expropriation Act is a big step towards changing expropriations in South Africa. In its current form, the Act not only aims to remedy racially discriminative practices of the past but also to set a standard for how to handle expropriations fairly and equally in a constitutional democracy.

2.3. The Expropriation Act 63 of 1975 versus Expropriation Act 13 of 2024

The old Expropriation Act became outdated and could no longer align with the constitutional imperatives for expropriations. It lacked the necessary framework to handle modern socio-economic issues, especially land reform and equitable access to resources.⁴⁸ The outdated Act predominantly relies on the willing buyer, willing seller principle and on market value for compensation calculations.⁴⁹ This reliance has become ill-aligned with the Constitution, which views market value as just one factor among others and advocates for a more comprehensive approach to achieving just and equitable compensation.⁵⁰

The key changes to the new Act include clarifying property as both movable and immovable, thereby expanding the scope of expropriation beyond the old Act's primary focus on land.⁵¹ The new Act also provides procedures for expropriation, including requirements for notice, consultation, and the opportunity for affected parties to make representations. It also provides mechanisms for dispute resolution and access to courts.⁵² The old Act's procedural provisions were less comprehensive. The main focus of this study is section 12(3)(a)-(d) of the new Act which allows for certain expropriations that may be considered just and equitable to be against nil

⁴⁸ Merten (n34).

⁴⁹ 'New land expropriation laws for South Africa are coming' (15 February 2023) Business Tec at <https://businesstech.co.za/news/government/664969/new-land-expropriation-laws-for-south-africa-are-coming/> (accessed 10 July 2023).

⁵⁰ The Constitution (n2) section 25(3).

⁵¹ See Expropriation Act (n1): the definition of property is similar to that of section 25(4)(b) of the Constitution.

⁵² See the Expropriation Act (n1) chapter 4-6 and 9. Also see L van der Merwe 'Understanding South Africa's New Expropriation Act and Its Impact' (2025) Accounting Weekly at <https://www.accountingweekly.com/trending-news/template-make-a-copy-zzbfl-9jchx-f9cna-gg7h3#:~:text=The%20introduction> (accessed 8 February 2025).

compensation where it is in the public interest. The old Act did not include the concept of just and equitable nor of public interest and, due to its emphasis on market value and willing buyer, willing seller, did not leave room for nil compensation in any event.

In this section, the Expropriation Act 63 of 1975 (the old Expropriation Act) and the Expropriation Act 13 of 2024 (the new Expropriation Act) will be compared regarding public purpose and public interest, market value and the willing buyer, willing seller model.

2.3.1. Public purpose and public interest

The old Act defines the public purpose as ‘any purposes connected with the administration of the provisions of any law by an organ of State’. The new Act defines public purpose in the same way but includes ‘in terms of which the property concerned will be used by or for the benefit of the public’.⁵³ The old Act does not define public interest. In contrast, the new Act includes a definition similar to the explanation in section 25(4)(a) of the Constitution. Public interest is defined as ‘the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources in order to redress the results of past racially discriminatory laws or practices’.

There is a material distinction between public purpose and public interest. Public purpose is usually limited to a narrow function linked with governmental activity. The public interest encapsulates a variety of activities which may also be for public purpose but that include reform, land restitution and access to land resources.⁵⁴ The new Act better aligns with the constitutional commitment to transformation by including a definition of public interest that is the same as the constitutional definition and by explicitly including the ‘benefit of the public’ in the definition of public purpose, which aligns with section 25 (2)(a).

⁵³ See the definitions section of the Expropriation Act (n1) and the Expropriation Act (n4).

⁵⁴ GN 1654 GG 30468 of 13 November 2007 para 24.1.in X Human Nginase ‘The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Final Constitution’ (2009) at <https://scholar.sun.ac.za/server/api/core/bitstreams/ae29271b-36aa-4d76-afa5-f834b1d3bbff/content> (accessed 9 February 2025).

2.3.2. Market value approach

The Courts have repeatedly stated that the compensation provisions in the old Expropriation Act aim to ensure that the person from whom the land is expropriated receives just and equitable compensation.⁵⁵ The old Expropriation Act references a willing buyer, willing seller and a market-value approach.⁵⁶ It is, therefore, clear that the old Expropriation Act is pro-market value. This factor is not aligned with the provisions of Section 25(3) of the Constitution.

The Constitutional Court confirmed the principle of a single system of law under the Constitution in *Pharmaceutical Manufacturers*, wherein the court was clear that ‘all law...derives its force from the Constitution and is subject to constitutional control’. All sources of law must consequently promote the spirit, purport and objects of the Bill of Rights as envisioned by section 39(2) of the Constitution.⁵⁷ In *Du Toit*, the Constitutional Court reiterated that the Constitution, and not legislation, provides the principles applicable when property is expropriated and that the courts must adhere to these.⁵⁸ Section 25(3) presents a number of relevant circumstances and factors that need to be considered when calculating compensation with no specific factor carrying more weight than the others.⁵⁹ Despite the general practice in the courts to emphasise market value when calculating compensation, it is the Constitution that provides the principles that the courts need to adhere to and according to section 25(3) market value is but one of the factors that need to be considered. The object of the Constitution is to ensure that landowners do not carry the burden of something that will benefit the public. The Constitution does this by balancing the interest of the public with the interest of those affected, and this may result in a situation where the market value is not always payable.⁶⁰ Van der Walt suggests that, ‘in the reading of section 25 as a whole, the answer seems to be that one factor, such as the purpose of expropriation, should not be sufficient on its own to justify the absence of

⁵⁵ *Randburg Town Council v Kerksay Investments (Pty) Ltd* (71/96) [1997] 4 All SA 121 (A) and *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) para 22.

⁵⁶ Expropriation Act (n4) section 12(1) and (5).

⁵⁷ *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

⁵⁸ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) paras 31, 33 & 34.

⁵⁹ *Ibid.*

⁶⁰ EW du Plessis ‘Silence is golden: the lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform’ (2014) 17 *Potchefstroom Electronic Law* 812.

compensation, just as one factor (like the market value of the property) should not be sufficient on its own to determine the necessity or amount of compensation'.⁶¹ Market value is only one factor that should be considered; it must, therefore, be considered alongside other factors.⁶² The weighting of these competing interests in the constitutional dispensation calls for the centrality of market value in pre-constitutional expropriation law to be revised.⁶³

The current Expropriation Act still acknowledges the use of market value as one of several factors to consider when calculating suitable compensation for the expropriation of land.⁶⁴ However, it also sets out specific circumstances under which it may be just and equitable for nil compensation.⁶⁵ These include land that is not being used, abandoned land and land where the market value is equivalent or less than the present value of state investment in the acquisition of the land. These hypothetical scenarios seem *prima facie*, rational and reasonable. The principal problem with section 12(3) (a)-(d) of the Act is that although the specific circumstances under which nil compensation is set out, the list is not exhaustive, and there may be other circumstances under which land is expropriated for nil compensation.⁶⁶ The Act, therefore, creates legal uncertainty and the possibility for a number of legal and practical problems to arise. Problems may include the infringement of other fundamental rights relating to homelessness or the best interest of a child, it can create a renewed inequality in terms of access to land, and the actual sustainability of resources can be endangered if the power to expropriate at nil compensation is not managed well and even the possibility of State abuse and corruption must be considered.⁶⁷

⁶¹ AJ van der Walt *Constitutional Property Law* (JUTA 2005) 271.

⁶² Du Plessis (n60) 812.

⁶³ *Ibid.*

⁶⁴ Expropriation Act (n1) section 12(1)(c) and 12(2)(b). It is also important to note that section 12(3) (a)-(d) is restricted to land whereas property under section 25(1)-(4) can include various rights and interest.

⁶⁵ Expropriation Act (n1) section 12(3) (a)-(d) .

⁶⁶ Meyer (n6).

⁶⁷ *Special Investigating Unit Annual Report* (n7).

2.3.3. Willing buyer, willing seller policy

Post 1994, the South African democratic government implemented a land reform strategy, including redistribution, restitution, and tenure security, to address the injustices of the past.⁶⁸ Section 25(2) and (3) of the Constitution allow for lawful expropriations if carried out for a public purpose or in the interest of the public.⁶⁹ What sets an expropriation apart from a mere deprivation is that just and equitable compensation must be paid.⁷⁰ Section 25(3) prescribes that the compensation amount and the time and manner of payment must be just and equitable at the time of expropriation and that an equitable balance between the person whose property is expropriated and the public interest must be reflected. All relevant circumstances must be considered, including the factors listed in section 25(3)(a)–(e). Section 25(2)(b) indicates that compensation entails the amount as agreed upon by those affected or as approved by the court. In order to determine the amount of compensation and the time and manner of the payment, the courts have so far relied on the willing buyer, willing seller principle as set out in the old Expropriation Act.⁷¹ Justice Moseneke confirmed that the willing buyer, willing seller principle is not a constitutional requirement.⁷² The principle of willing buyer, willing seller featured in the discussion on land reform during the period 1993 to 1996.⁷³ It was not part of the 1992 ANC Ready to Govern policy statement, which advocated for expropriation and other non-market mechanisms.⁷⁴ The principle was rather a compromise that was in line with the broader neoliberal (and investor-friendly) macroeconomic strategy adopted by the ANC in 1996.⁷⁵

⁶⁸ Mubecua (n16) 62.

⁶⁹ The Constitution (n2) section 25 (2)(a).

⁷⁰ Lubbe & Du Plessis (n10) 93.

⁷¹ Expropriation Act (n4) section 12(1)(a).

⁷² D Moseneke 'Reflections on South African Constitutional Democracy: Transition and Transformation' (18 February 2015) *Constitutionally Speaking* at <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/> (accessed 20 January 2025): In November 2014, during a keynote address at a UNISA conference titled '20 Years of Democracy: So Where Are We Now?', the former Deputy Chief Justice Moseneke pointed out that the Constitution does not protect property; rather, it safeguards owners against arbitrary deprivation. Moreover, he noted that the property clause does not include a willing-seller, willing-buyer provision, which implies that the state's power to expropriate does not rely on the landowner's willingness, nor does it necessitate securing market value for the property, as market price is merely one of five criteria to be considered in its determination compensation.

⁷³ Lahiff (n15)1580.

⁷⁴ Ibid.

⁷⁵ Ibid.

The end of the white minority government in 1994, saw South Africa adopting a willing buyer, willing seller model according to which the government expropriates land by buying land from willing white landowners and then handing it over to black South Africans. The acquisition of the land by the government for the benefit of the land reform beneficiaries has become dependent on the willingness of the landowners to sell their land. In terms of the willing buyer, willing seller model, the government has no power to force the landowners to sell their land if there is no consensus on the availability of the land and the price thereof.⁷⁶ This is a strange consequence of the seemingly widely adopted model, as expropriation refers to the state's jurisdiction or power to take land without the permission or consent of the owner. The ANC set a target to return 30 per cent of the land dispossessed to beneficiaries by 1999. When this target was not met, the project was extended to 2014 but once again this target was not met.⁷⁷

A number of scholars blame the willing buyer, willing seller principle for this slow rate of land return. They argue that this principle is an inherently flawed model. Some of its loopholes will be briefly highlighted:

Firstly, one of the consequences of the willing buyer, willing seller principle is that landowners have the power to negotiate their own price, which is generally market related.⁷⁸ The payment of the market price has been strongly opposed by organisations representing the landless, but the landowners have declared it non-negotiable.⁷⁹ Prices of land for reform purposes are determined by valuers from the Department of Land Affairs and are based on the recent sales of comparable property in the area. Where a price determined by a valuer is less than the price requested by the landowner, the landowner is free to accept or reject the offer.⁸⁰

Secondly, the validation of the sale can take a long time, and willing sellers are thus expected to wait for an extended period before receiving confirmation of the sale. This may even fail because of technical reasons or the lack of funds to purchase the land.

⁷⁶ Ibid.

⁷⁷ Lahiff and Li (n31) 9.

⁷⁸ Lahiff (n15)1585.

⁷⁹ Ibid.

⁸⁰ Ibid.

For this reason, Lahiff argues that only a few landowners who are committed to the cause of land reform would be willing to sell their land through this model.⁸¹ The willing buyer, willing seller model, therefore, halts the project of transformation by leaving the actual redress of the land injustices of the past in the hands of individuals who are not necessarily committed to the greater project of transformation.

The willing buyer, willing seller principle thus, purports the common-law reasoning that ownership constitutes the most complete real right that a person can have in a thing and that this kind of right demands that the owner must be willing to exercise the *ius abutendi* at full market value compensation.⁸² Lubbe and Du Plessis argue that currently the main justifications for the payment of compensation focus on 'property' instead of the competing claims. In order to achieve an equitable balance between the owner and the public interest, the individual should be compensated, but there should also be an acknowledgement of the democratic ideals of the greater process rather than only the property itself.⁸³ Expropriations are regarded as part of a greater constitutional and democratic goal and should not be dependent on the decision of individual landowners for successful implementation.

2.4. Conclusion

A comparison has been made between the old Expropriation Act, and the current Expropriation Act in terms of the inclusion of the willing buyer, willing seller principle and the importance and place of market value in calculating compensation for expropriated land. It was argued that the old Expropriation Act is no longer in line with the constitutional values of section 25 and that the current Expropriation Act aims to bring expropriations in line with the spirit, object and purport of the Constitution in terms of expropriations at nil compensation. The chapter further demonstrates that following the failure of the Parliament to pass the Constitution Eighteenth Amendment Bill the retention of the nil compensation in the current Expropriation Act may be seen as an attempt to achieve what could not be achieved in the Eighteenth Amendment Bill.

⁸¹ Ibid.

⁸² Lubbe & Du Plessis (n10) 86-87.

⁸³ Lubbe & Du Plessis (n10) 83-84.

Chapter 3: Constitutional scrutiny, the limitation clause and international law.

3.1. Introduction

In the previous chapter, the old Expropriation Act was compared with the new Expropriation Act and focused specifically on the issues of public interest, market value and the willing buyer, willing seller principles. In this chapter, the study will focus on whether nil compensation for the expropriation of land in terms of the current Expropriation Act section 12(3)(a)-(d) passes constitutional scrutiny. I will focus on testing the limitation of nil compensation against section 36, which sets out the guidelines for limiting fundamental rights. Lastly, I will examine whether the concept of nil compensation is consistent with international law standards as the expropriation of property against compensation, or against nil compensation, is not exempt from the precepts of the international law.

3.2. What does constitutionality entail?

Section 1 of the Constitution provides that the Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) human dignity, the achievement of equality and the advancement of human rights and freedoms
- (b) non-racialism and non-sexism
- (c) supremacy of the Constitution and the rule of law
- (d) universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

Section 2 of the Constitution states that the Constitution is the supreme law of the Republic, that law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled. Section 39(2) stipulates that when legislation is interpreted or common and customary laws are developed, they must promote the spirit, purport and objects of the Bill of Rights. In the *Pharmaceutical Manufacturers* case, the Constitutional Court confirmed that all law derives its force and validity from the Constitution.⁸⁴ Sections 1 and 2 of the Constitution thus create the foundation for a constitutional dispensation and section 39 sets the principles for a constitutional interpretation of the other sources of law. Section 25 provides a road map of how

⁸⁴ *Pharmaceutical* (n57) para 44.

deprivations and expropriations must be conducted to remain in line with constitutional values. Section 25(2) explains that expropriations must be in terms of the law of general application, for a public purpose or interest and subject to compensation. It requires that compensation be 'just and equitable', reflecting an equitable balance between the public interest and the interest of those affected and that the relevant factors listed in section 25(3) must be considered. Section 25(4) refers to the nation's commitment to land reform and equitable access and that property is not limited to land, while section 25(5) reiterates the importance of taking legislative steps to foster conditions which will enable citizens to gain access to land on an equitable basis. Section 25(8) of the Constitution also provides that no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform to redress the results of past racial discrimination, provided that any departure from the provisions of this section under section 36(1).

Like other legislations dealing with expropriation, the old Expropriation Act and the current Expropriation Act are only valid where they are consistent with the constitutional ideals and instructions as per sections 1, 2, 25, and 39(2).

3.3. The constitutionality of section 12(3) (a)-(d) of the Expropriation Act 13 of 2024

As explained above, in order for this legislation to be considered constitutional, it needs to be in line with section 2 of the Constitution, which stipulates that law or conduct that is inconsistent with the Constitution will be considered invalid. Section 39(2) requires that when one interprets legislation, the spirit, purport and objects of the Bill of Rights must be promoted. The Bill of Rights does not deny the existence of legislation as long as it is consistent with the Bill.⁸⁵ For the new Expropriation Act to be deemed constitutional, it, therefore, needs to be consistent with the spirit, purport and objects of the Bill of Rights, which include human dignity, equality, and the advancement of human rights and freedoms. Following the failure of the Constitution Eighteenth Amendment Bill to be passed by Parliament and seeing that the old Expropriation Act was no longer in line with the constitutional obligations to land reform and equitable access, there was a need for the new Expropriation Act, which is better aligned with the Constitution, to be enacted,

⁸⁵ The Constitution (n2) section 39.

The Constitutional Eighteenth Amendment Bill aimed to incorporate expropriation without compensation in the Constitution. Had the amendment of section 25 been successful, it would be impossible to argue against the inclusion of nil compensation in certain circumstances, as suggested by the new Expropriation Act as it would be a constitutional directive. The constitutionality of the current Expropriation Act now becomes less certain because the possibility of nil compensation is not expressly mentioned in the Constitution in sections 25(2)-(3). In fact, section 25(2)-(3) still states that expropriations need to be against compensation. If the new Act is interpreted as making 'explicit what is implicit' then the interpretation of the new Act in line with section 25(2) is not problematic.⁸⁶ However, if section 25(2) is interpreted as not providing for an implicit option of nil compensation in certain circumstances, then the constitutionality of section 12(3) will be tested. According to this perspective, the *prima facie* discrepancy between the Constitutional directive and the current legislation may result in expropriations that diametrically oppose just and equitable constitutional values. However, the constitutional obligation to compensate and the requirements that are stipulated in sections 25(2) and (3) are not inviolable rights. Furthermore, section 25(8) demands a more tolerant view in instances where the state takes legislative and other measures to achieve land reform and address the results of past discrimination if it is in accordance with section 36(1).⁸⁷ Fundamental rights may be limited by relying on the section 36 constitutional test to determine whether such a limitation will be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁸⁸

3.4. Scope of Section 36 of the Constitution on the Expropriation Act 13 of 2024

The application of section 36 is critical when analysing the ongoing challenges with regards to the new Act. Section 36 of the Constitution permits rights limitations only under reasonable and justifiable conditions in an open and democratic society, considering the nature of the right and the purpose of the limitation. Within the context of land reform, this involves assessing whether the limitations on the bearers of property rights, through expropriations without compensation as suggested by the new

⁸⁶ Lubbe & Du Plessis (n10) 98.

⁸⁷ Lubbe & Du Plessis (n10) 93.

⁸⁸ The Constitution (n2) section 36(1). Also see section 25(4) which explains that public interest includes a commitment to land reform and access to land on an equitable basis.

Expropriation Act, outweigh the legitimate constitutional goals of redressing historical injustices and rectifying inequalities. The proportionality analysis dictated by section 36 requires that, when limitations are applied, they should not outweigh the broader societal benefits like economic sustainability and social cohesion.⁸⁹

The factors considered under section 36 include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. These factors are integral to the current Expropriation Act, ensuring that each instance of expropriation is justifiable within the constitutional context, thus providing a safety net against arbitrary or unjust actions by the state.

3.4.1. The two-stage approach

In terms of section 36(1) of the Constitution, the requirements for the limitation of any right are that it may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This implies that in order for the expropriation of property for nil compensation to pass constitutional scrutiny, there must be a rational basis upon which the state relies and which does not unnecessarily, unreasonably or unjustifiably infringe any of the fundamental rights set out in the Bill of Rights. If an expropriation against nil compensation then takes place, it must be justifiable and \ reasonable, based on constitutional values and in the public interest. When applying the factors in section 36, the courts will examine whether the expropriation serves a legitimate public purpose, if less restrictive means of achieving the purpose are available, and the nature of the right affected. This ensures that expropriation aligns with the broader constitutional framework and with the legitimate infringement of a fundamental right.

The Constitutional Court followed the Canadian two-stage approach when inquiring into the alleged constitutional invalidity of a statute.⁹⁰ The first stage, in which the

⁸⁹ Mokoena (n46).

⁹⁰ *S v Makwanyane* 1995 3 SA 391 (CC) paras 100-102; *Ferreira v Levin*; *Vryenhoek v Powell No* 1996 1 BCLR 1 (CC) 26H para 44.

applicant bears the onus, involves the question of whether there has been an infringement of a right protected in the Bill of Rights. The case proceeds to the second stage only if the first stage results in an affirmative answer. In the second stage, where the party relying on the statute's validity bears the onus of proof, the question is whether the infringement is justified under the limitation provisions in the Bill of Rights.⁹¹ If this approach is followed, the applicant will have to show during the first stage that there was an infringement of a property right protected by section 25. This involves two separate questions, namely, whether there is proof of property that qualifies for the protection of section 25, and whether there is an indication of an infringement of such property. If the applicant proves the existence of a protected property right and of an infringement, the case proceeds to the second stage. In the second stage, the state, or the party relying on the validity of the relevant act, has to prove that the law is of general application and that the infringement is justified in terms of section 25 read with section 36.⁹²

In terms of the section 36(1) law of general application requirement, the literature indicates that the limitation must be authorised by a law that was 'properly adopted' and that, especially in instances of expropriations where there is no common law authority for expropriation in South African law, the limitation must be carried out in accordance with the legislation.⁹³ Section 12(3) of the Expropriation Act does not specifically refer to general application but section 2(4) indicates that 'an expropriating authority may expropriate property in terms of a power conferred on it by law of general application'.⁹⁴ The new Act also sets out a procedure to be followed for an expropriation to be considered formally valid. One can argue that this contributes significantly towards ensuring that the law is of general application by ensuring that a uniform expropriation procedure will be adopted.⁹⁵

In determining the second part of the general test that refers to the rationality and justifiability of a limitation of the right to be compensated for an expropriation, the

⁹¹ AJ van der Walt 'The limits of constitutional property' (1997) 12 *South African Public Law* 277.

⁹² Van der Walt (n91) 277.

⁹³ Slade (n33) 350-351.

⁹⁴ Expropriation Act (n1) section 2(4).

⁹⁵ Slade (n33) 352.

factors in section 36(1)(a)-(e) must be considered.⁹⁶ The factors will be considered below.

3.4.2. The section 36(1) factors:

3.4.2.1. Section 36(1)(a) the nature of the right

In instances of nil compensation, the nature of the affected right must be determined to ascertain whether the right has been factually limited or not. An evaluation has to be made of the importance of the right relative to other rights for the proportionality analysis.⁹⁷ To be compensated when the State takes property is protected under section 25(2)(b), and the payment of nil compensation constitutes a limitation of this right.

3.4.2.2. Section 36(1)(b) the importance of the purpose of the limitation

The purpose of section 12(3)(a)-(d) of the new Act is to provide for the expropriation of property for a public purpose or in the public interest and to provide for certain instances where expropriation with nil compensation may be appropriate in the public interest. South Africa is characterised by a history of land dispossession which calls for the redress of past injustices through a large-scale project of social change through law which Klare calls transformative constitutionalism. The success of land reform greatly depends on the successful redistribution of the land. As I have indicated before, compensation is held captive by issues of market value and the willing buyer, willing seller principle. It seems that the purpose of the limitation on compensation is to finally allow for a better realisation of the constitutional promise to equitable access to land.

3.4.2.3. Section 36(1)(c) the nature and extent of the limitation

The determination of the nature and extent of the limitation depends on the approach to balancing and proportionality⁹⁸, and there are five factors that a court examines when determining the nature and extent of a limitation.⁹⁹ These factors are:

1. whether the limitation affects the core values underlying a particular right;

⁹⁶ IM Rautenbach 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014)17 *Potchefstroom Electronic Law Journal* 2254.

⁹⁷ Rautenbach (n96) 2254.

⁹⁸ S Woolman & M Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2013) at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap34.pdf> (accessed 24 January 2025) 34-79.

⁹⁹ Woolman & Botha (n98) 34-79–34-83.

2. an assessment of the actual impact of the limitation on those deleteriously affected by it;
3. the social position of individuals or a group concerned;
4. whether the limitation is permanent or temporary, and whether it amounts to a complete or a partial denial of the right in question; and
5. whether the limitation is narrowly tailored to achieve its objective.

Section 36(1)(c) refers to how intrusive the limitation is in terms of the conduct and interests that are protected by the right and the intensity of the limitation. The scope of a restriction may depend on how broad or limited the discretion is.¹⁰⁰ The power to limit rights depends on the nature of the right itself.¹⁰¹ In terms of the two options stated in section 12(3)(b) and (c) where an organ of state holds land that it is not used for its core functions or where the market value of the land is equivalent to, or less than, the present value of direct state investment, the actual impact of the limitation and social position of those who are affected are less of an infringement. In instances where land is not being used, or the owner's main purpose is to benefit from its appreciation in market value or where an owner has abandoned land according to section 12(3)(a) and (d), the social position of the owners and impact of the limitation on them will be more cumbersome. However, one can argue that such an expropriation will achieve its objective as the land is not used or managed to its full capacity and that the benefit of expropriating the land will outweigh the impact of the limitation on the owner.

The list of instances wherein nil compensation may be awarded for expropriations as set out in section 12(3) seems relatively narrow, but because it is not a closed list, the curtailment of the right to be compensated can be too widely tailored to achieve its objective. If the option of nil compensation in instances outside the four categories mentioned in section 12(3)(a)-(d) is tested against the section 36(1) factors, it seems that the limiting of compensation is more likely to affect the core values underlying the right to be compensated for an expropriation; it will affect the social position of mostly individual landowners and can amount to a partial, even a full denial of the right to

¹⁰⁰ Rautenbach (n96) 2256.

¹⁰¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 para 47.

receive compensation. These factors will be discussed in more detail in the following chapter. The calculation of nil compensation must clearly be done with regards to the five factors as stipulated in both sections 25(3) and 12(1) of the new Act. The limitation of the right to be compensated is, therefore, not a blanket limitation but needs to be calculated on a case-by-case basis.

3.4.2.4. Section 36(1)(d) the relation between the limitation and its purpose

This factor refers to whether the means employed is rationally connected to the purpose of limitation.¹⁰² This means that the respondent must present enough evidence to demonstrate that the means chosen can achieve the desired goal.¹⁰³ If the means chosen is unlikely to achieve its purpose, the limitation itself is also unlikely to be justifiable.¹⁰⁴ Expropriation with nil compensation can only be justifiable if executed in line with the constitutional requirements of public purpose and in the public interest. This reiterates the constitutional narrative that no one must be deprived of their property without just cause. The Constitution prohibits arbitrary deprivation. Hence, such a deprivation must be based on justifiable grounds to the effect that the person deprived of the property is not merely stripped of their constitutional rights envisaged in the Bill of Rights or that the limitation of the right (right to be compensated for an expropriation) is rationally connected to the purpose of the limitation: in this instance it is equitable access to natural resources, land reform and the redress of previous racial discrimination as stipulated in section 25(4) of the Constitution.

In order for the section 12(3)(a)-(d) limitation to then be considered justified, it must show a direct causal link between the restriction of property rights and its intended reformative purpose. It must be shown that the provision for no compensation directly helps to end landlessness and injustice without unfairly affecting property owners' rights to fair treatment. When one examines the history of landownership in South Africa, it seems that an essential element to true transformation is the successful restoration of property to the majority of South Africans and that the limitation of private property rights through the current legislation is, therefore, essential. The persistent social and economic inequality and subjugation that prevailed during colonialism and

¹⁰² Woolman & Botha (n98) 34-84.

¹⁰³ Ibid.

¹⁰⁴ *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579.

apartheid demanded a revolution or reform that restores some of the disproportionate distribution of land. The main purpose of the new Expropriation Act is to remedy the deep-seated inequality amongst South Africans due to the racial subjugation of the past and to speed up the distribution of land access and transfer by allowing nil compensation in certain instances.

What is worth considering here is the obligation and responsibility of the government to ensure that each instance of expropriation is conducted with a genuine commitment to achieving equitable access to land and resources, thereby fostering broader socio-economic developments.¹⁰⁵ A tenuous link between the legislative limitations and the envisioned purpose or transformative goals could undermine the legitimacy of the current legislation. This demands rigorous procedural protocols, ensuring that decisions to expropriate without compensation are evidence-based and derive from an objective, transparent assessment.¹⁰⁶ Moreover, participative engagement with affected communities and stakeholders is essential to upholding democratic values and ensuring that reformative actions are inclusive and equitably affecting those most disadvantaged.

3.4.2.5. Section 36(1)(e) less restrictive means to achieve the purpose

This refers to the proportionality requirement stipulating that when there are less restrictive means to achieve the purpose, such less restrictive means must be chosen over the one that causes more harm. Currie and De Waal argue that while all relevant factors must be properly weighed in the limitation analysis, this factor is the one on which most limitation arguments will stand or fall.¹⁰⁷ It is a known fact that expropriations have been few and far between since the advent of democracy and that the realisation of land reform and equal access has not progressed much. It can be argued that there is no less restrictive means to further the constitutional goals of land reform and that section 12(3) is in fact, the less restrictive means as it provides a specific list of expropriations against nil compensation (although not exhaustive) and

¹⁰⁵ Lahiff (n15) 1580.

¹⁰⁶ Lahiff (n15) 1585.

¹⁰⁷ IC Currie & J De Waal *The Bill of Rights Handbook 6th Edition* (JUTA Cape Town 2013) 163.

emphasises the importance of the public interest, compensation that is just and equitable and the relevant circumstances.

The Constitutional Court has found that the mere availability of a less restrictive means does not necessarily result in an unjustified outcome.¹⁰⁸ In expropriating property at nil compensation, the expropriator must utilise the less restrictive means and ensure a balance with the landowner's rights. This balance can only be achieved through the application of the factors used to determine justifiability and recourse to the landowner. It is argued that expropriating in the public interest or for public purpose does not automatically mean that such expropriation is reasonable; the circumstances of the affected landowner must also be considered pre- and post-expropriation. If such expropriation amounts to the infringement of human dignity and other fundamental rights envisaged in the Constitution like equality and freedom, then such expropriation is invalid or unlawful. There are two competing interests here: the rights of private property owners and the interests of those promised land through land reform. These two interests need to be weighed against each other. Allowing nil compensation in certain expropriations may weaken individual property rights and make people less likely to spend and participate in the economy. So, the Act needs to include protections to ensure that the limitation of the right to compensation and property seizure process is open and fair. For example, the courts should carefully watch each case to ensure it is handled fairly and stop anyone from abusing their power.

To conclude, section 36 demands a nuanced approach to expropriation, ensuring the process respects and balances competing societal interests.¹⁰⁹ The new Act seeks justice and equity by recognising that expropriation must serve a public purpose or be in the public interest. It ensures that decisions to expropriate, especially those contemplating nil compensation, are not arbitrary but undergo rigorous assessment in line with the factors of section 36. This involves evaluating the proportionality of expropriation at nil compensation and considering its necessity and the potential impact on property owners. The onus is going to be on the courts to carefully consider the circumstances under which nil compensation may be regarded as constitutional, ensuring it is not a blanket policy but only applicable in extraordinarily justified

¹⁰⁸ *S v Mamabolo* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 49.

¹⁰⁹ Merten (n34). Also see Expropriation Act (n1) Preamble.

cases.¹¹⁰ With such measures, the Act strengthens its alignment with constitutional imperatives, ensuring that it contributes positively to the nation's commitment to fair land reform, equitable access to resources, and redress for past inequities.¹¹¹

3.5. International law

Section 39(1)(b) states that international law must be considered by a court, tribunal or forum. Section 233 further compels the court to prefer 'any reasonable interpretation' of the legislation that is 'consistent with international law' over any interpretation that is inconsistent with international law. Section 39(1)(b) and section 233 of the Constitution, therefore, make it clear that South African law must consider international law and interpret legislation in a way consistent with international law. Almost every provision in the Bill of Rights has a counterpart in an International Human Rights Convention or is governed by general principles of international law, so the Bill of Rights implicitly incorporates international law.¹¹² Expropriations for nil compensation are thus not exempt from the prescripts of international law. There are three main sources that govern expropriations in terms of international law: international minimum standards, Bilateral Investment Treaties and international Human Rights.¹¹³

Traditional international law, colloquially referred to as international minimum standards, governs the treatment of foreign nationals and, specifically, the property they own in host countries. The international law acknowledges that states have sovereignty over their own territory and natural resources. This includes the right to expropriate foreign-owned property if it serves a public purpose or interest, is non-discriminatory and adheres to due procedural standards. Failure to comply will constitute an unlawful expropriation and the state will have to provide reparations, usually in the form of damages. While the duty to compensate, justified by the doctrine of unjust enrichment, is a requirement for expropriations under international law, there seems to be no agreement on whether failing to compensate will make the

¹¹⁰ Lahiff and Li (n31) 9.

¹¹¹ Merten (n34).

¹¹² EB Smith 'South Africa's land reform policy and international human rights law' (2001) 19 *Wisconsin International Law Journal* 283.

¹¹³ Lubbe & Du Plessis (n10) 100-101.

expropriation unlawful. It seems that the Iran-United States Tribunal has clarified that failure to compensate does not necessarily invalidate the expropriation.¹¹⁴

The standard of compensation is also contested. Historically, international law endorsed a standard of compensation that should be 'prompt, adequate and effective'. However, a more flexible standard of 'appropriate compensation' was introduced. Although this standard is not precisely defined, it is generally understood to require a consideration of all the relevant circumstances and often implies compensation amount much lower than that what was required under the older 'prompt, adequate and effective' standard.¹¹⁵ Section 12(3) (a)-(d) of the new Act is in line with the international minimum standards as it expressly stipulates that expropriations must be in the public interest and that all the relevant circumstances must be considered. As far as the international position on nil compensation goes, there is no indication that nil compensation will automatically amount to an invalid expropriation. It may also be argued that nil compensation, under certain circumstances, will be the appropriate compensation.

Bilateral Investment Treaties (BIT's) have substituted most of the traditional international law rules in practice and the growing body of case law has clarified issues such as the conditions under which a state may lawfully expropriate property and the compensation and damages that may arise from expropriations. The impact of nil compensation on BIT's will be discussed in the next chapter.

Property rights are also protected by international human rights law. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, is not a treaty to which states can accede, but it is a statement by the international community of the minimum standards of state practice, as well as an articulation of states' human rights obligations as parties to the United Nations Charter.¹¹⁶ Even though South Africa abstained from voting on the UDHR, it is not absolved from its human rights obligations as a member of the United Nations.

¹¹⁴ Lubbe & Du Plessis (n10) 100-102.

¹¹⁵ Lubbe & Du Plessis (n10) 103-104.

¹¹⁶ Universal Declaration of Human Rights of 1948: South Africa abstained from voting on the UDHR at the time of its adoption.

Internationally, the right to property is enshrined in Article 17 of the UDHR, which provides that:

‘(1) Everyone has the right to own property alone as well as in association with others
(2) No one shall be arbitrarily deprived of his property.’

In terms of Article 17, the state has both negative and positive obligations in terms of the right to own property as well as the right not to be arbitrarily deprived of property.¹¹⁷ In terms of its negative obligation, the state must refrain from arbitrary or illegal expropriation of property. In terms of its positive obligation, the state must fulfil everyone's right to own property by enacting property laws and procedures such as titling.¹¹⁸ Because the provisions of the Universal Declaration are not backed by legal force, they are regarded as non-enforceable moral rights. They impose moral duties on all humanity rather than legal obligations.¹¹⁹ Although not legally binding, the Universal Declaration expresses fundamental values shared by all members of the international community. It has also had an influence on the evolution of international human rights law.¹²⁰

While no binding global treaty explicitly protects private property as a human right, such protection exists under regional human rights instruments. Perhaps the most important instrument for this discussion is the African Charter on Human and Peoples' Rights.¹²¹ Article 14 explicitly guarantees the right to property but allows for it to be encroached upon if it is in the ‘interest of public need or in the general interest of the community’ and in ‘accordance with the provisions of appropriate laws’.¹²² In principles 53-55 of the Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter, the right to property is defined in more detail.¹²³ It is described as a ‘broad right’ that includes the protection of the real rights of individuals and of peoples.

¹¹⁷ RE Howard-Hassmann ‘Reconsidering the Right to Own Property’ (2013) 12 *Journal of Human Rights* 192.

¹¹⁸ Ibid.

¹¹⁹ JG Sprankling *The Global Right to Property* (Oxford University Press New York 2014).4.

¹²⁰ J Gumbis et al ‘Do Human Rights Guarantee Autonomy?’ (2008) 62/63 *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 77.

¹²¹ The African Charter on Human and Peoples' Rights 1981.

¹²² Article 14 of the African Charter (n121).

¹²³ Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011).

It also includes the rights of 'the individual, group or people to peaceful enjoyment of the property'. Principle 53 explains that property rights may be limited by the State in a 'non-arbitrary manner, according to the law and the principle of proportionality'. Principle 55 holds that the State is obliged to 'define by law the terms and conditions for the acquisition or expropriation of property based on acting in the public interest at all times'. Public interest includes 'public need or in the general interest of the community' and includes objectives such as 'economic reform or measures designed to achieve greater social justice'.¹²⁴ Principle 55(e) explains that 'compensation should be reasonably related to the market value of the acquired property'. However, it also stipulates that in certain circumstances, public interest may require 'less than market value compensation or, exceptionally, none at all'.¹²⁵

It becomes clear that the right to property is not absolute, not in national or in international law. South Africa enjoys its sovereignty in exercising legislative, executive, and judicial powers to the exclusion of others. The State can consequently limit ownership rights under certain circumstances and embark on expropriation to achieve its land reform goal if it remains within the relevant national and international legal frameworks. Human rights laws are aimed at protecting the individual against the power of the State and international law, therefore, curbing states from exercising unreasonable limitations and from abusing their sovereignty. It seems that international law requires a fair balance between expropriations and the reasons for it (in public interest) and that compensation must be considered but that the State has the freedom to calculate and distribute.¹²⁶ In terms of the new Expropriation Act, the reasons for nil compensation are clearly stipulated as being in the public interest, the calculation must be made with regard to relevant circumstances, and nil compensation is possible when it is just and equitable. Section 12(3)(a)-(d), therefore, remains in line with the international principles whilst realising the constitutional goals of equitable access and land reforms.

3.7. Conclusion

¹²⁴ Guidelines and Principles (n123) principles 55(b)-(c).

¹²⁵ Guidelines and Principles (n123) 55(e).

¹²⁶ Lubbe & Du Plessis (n10) 110-111.

This chapter has dealt with the founding provisions of the Constitution and shown that the Constitution is the supreme law of the country and that any law or conduct inconsistent with the Constitution is unconstitutional. The chapter has also shown that the Expropriation Act, like any other Act, is only valid if it is consistent with the Constitution. The Constitution protects the right to compensation; thus, expropriation at nil compensation inherently limits this right. Through a careful proportionality analysis as mandated by section 36 (1), courts must weigh the right to compensation against the payment of nil compensation in instances where the broader societal goals, such as to redress historical injustices and advance equitable access to land and transformation, justify nil compensation. The rational connection between the limitation (nil compensation) and its transformative objectives must be established and balanced. The proportionality requirement of section 36 (1) further insists that the least restrictive means to achieve these goals must be pursued. Therefore, rigorous oversight and transparent procedural safeguards are necessary to ensure the legitimacy and constitutionality of nil compensation provisions when implemented. Additionally, section 12(3) was analysed against international law standards. International minimum standards, bilateral investment treaties (BITs), and international human rights law all require appropriate compensation for expropriation. Yet, they acknowledge that compensation standards are flexible and may sometimes legitimately be low or even nil, depending on circumstances. Given the clearly stated public interest purpose and the necessity of evaluating each case individually, the Expropriation Act's nil-compensation provisions can be considered consistent with international law, provided decisions are procedurally fair, proportionate, and based on legitimate public interest or public purpose goals which include land reform and equitable access.

Chapter 4: What are some of the possible consequences of an Act that allows for nil compensation

4.1. Introduction

Chapter 3 dealt with the question of whether section 12(3)(a)-(d) nil compensation will muster constitutional scrutiny and whether it is in line with international law. The chapter argued that the Constitution is the supreme law of the Republic and that any law or conduct inconsistent with it is invalid. Therefore, the new Expropriation Act like other laws, must be consistent with the Constitution for it to be valid. A thorough examination of whether the limitation of nil compensation in section 12(3) (a)-(d) was in line with section 36(1) was done. The chapter also demonstrated that the Constitution adheres to international laws and that international laws have a significant impact on interpreting section 12(3)(a)-(d) of the new Expropriation Act.

This chapter will address some of the possible effects of land expropriation against nil compensation in terms of social and economic affairs in South Africa. Throughout this chapter, the issue of sustainability runs like a golden thread. Sustainability advocates for a type of development that will sustain not only present needs but also the needs of future generations. Therefore, expropriations, especially those in terms of section 12(3)(a)-(d) of the new Expropriation Act, must be done in line with a kind of sustainable development that will ensure future employment opportunities, a dynamic and competitive market, national and international investments. It will illustrate how the inclusion of expropriation of property against nil compensation and seemingly unlimited character of the list outside of sections 12(3)(a)-(d) could render various other property rights weak and deter investors both internationally and locally from investing in South Africa. It will also address issues of food security and sustainability and argue that South Africa will need to administer the consequences of the new Expropriation Act with vigour and frugality to not fall into a socio-economic disaster as so many African countries have done.

4.2. Nil compensation and social affairs

This section will discuss the impact of expropriations against nil compensation on social affairs in South Africa. Social affairs in this context refer to issues regarding food security and rural-urban migration. The main concern remains the open-ended

character of the list provided in section 12(3)(a)-(d) that is 'not limited to' the categories in section 12(3)(a)-(d) and how expropriations, especially outside of this list, can affect food security and urban migration.

4.2.1. Food security

In his 2018 State of the Nation Address (SONA), the President of the Republic of South Africa committed to accelerating the land redistribution programme in order to redress historical injustices of land dispossession and displacement, thereby making more land available for cultivation and contributing to food security, rural development and poverty reduction, while also responding to equitable spatial planning and settlement.¹²⁷ The President reiterated though, that such expropriations cannot at any point threaten food security in the country. However, the President's approach could be viewed more as a political agenda than a real concern for the welfare of the people of South Africa, a concerted effort by the ruling party to gain support during election time from the black majority who are still without land and who live in poverty. Pursuant to the aforementioned SONA, the Expropriation Bill was published, and later the Expropriation Act 13 of 2024 was promulgated.¹²⁸

There are some concerns that, despite the President's insistence on food security, expropriations of land against nil compensation will, in fact, negatively influence food security. The Rome Declaration on World Food Security defines food security as a situation in which all people have physical and economic access to adequate, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life at all times.¹²⁹ Food production requires skill, resources, and support, such as access to markets and financing from either government, private investors or both.¹³⁰

¹²⁷ See: 'President Cyril Ramaphosa: 2018 State of the Nation Address' (16 February 2018) at <https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018> (accessed 26 January 2025).

¹²⁸ Expropriation Act (n1) section 12(3).

¹²⁹ Rome Declaration on World Food Security and World Food Summit Plan of Action: World Food Summit 13-17 November 1996 at <https://digitallibrary.un.org/record/195568?ln=en> (accessed 16 January 2025).

¹³⁰ T Boshoff et al 'Redistribution of Agricultural Land: Expropriation Without Compensation Debate' (2018) *Research Gate* at file:///C:/Users/u01268856/Downloads/EXPROPRIATION_WITHOUT_COMPENSATION_DEBATE.pdf (accessed 26 January 2025) 8.

There is not yet enough information about the economic sustainability of the land allocated through land reform programmes or exact evidence on how previous expropriations against compensation have affected food security in South Africa.¹³¹ We know that over half of South Africans have limited access to food and that South Africa still struggles to ensure food security for all.¹³² Despite a commitment to redress land distribution and the expropriation efforts of the last twenty years which were done against compensation, there has been little improvement in actual access to food for the poor.

Emerging farmers in South Africa, including those who are beneficiaries of expropriated land, face several constraints, including low education levels, lack of access to credit, absence of innovative production implements needed to increase the field of commodities produced, and insufficient entrepreneurial skills required to make the farming effort a success.¹³³ Sebola contends that there are several instances in which beneficiaries failed to use the government-purchased land constructively and instead caused the farms' productive economic operations to collapse.¹³⁴ Up to 73 per cent of farms acquired through expropriation against compensation have quickly become unproductive, which could be linked to a lack of farming experience. So far, the South African government has not provided skills and resources to those who received land through expropriation, particularly to those who were previously disadvantaged.¹³⁵ The government will continue to lose money on unsuccessful agricultural programmes, which could, in turn, jeopardise future food security. Without proper assistance, the agricultural productivity of black South African farmers who received expropriated land remains underdeveloped.¹³⁶

¹³¹ MA Mamabolo and MP Sebola 'Land expropriation model in South Africa: A consequent impact on food security' 2021 (19) *The Business & Management Review* 133.

¹³² Mamabolo and Sebola (n131)134.

¹³³ See PR Celliers & M Khapayi 'Factors limiting and preventing emerging farmers to progress to commercial agricultural farming in the King Williams Town area of the Eastern Cape, South Africa' (2016) 44 *South African Journal of Agricultural Extension* 25-41.

¹³⁴ MP Sebola 'Financing emerging black farmers for agricultural development in South Africa: A wasteful and unworkable model for creating black farmers' (2018) 14 *The Journal for Transdisciplinary Research in Southern Africa* 3.

¹³⁵ Ibid.

¹³⁶ Sebola (n134) 1.

Giving land to inexperienced farmers without assistance is problematic, and without an ongoing investment in both money and knowledge, these farmers are set to fail. If farmers cannot sustain a level of food production that is necessary to provide for not only the immediate community but also the greater country, it will inevitably impact the availability and access to 'adequate, safe, and nutritious food' necessary for establishing food security for everyone living in South Africa.

The President promised that expropriation against nil compensation would not harm food security, yet he has not demonstrated how this will be accomplished. Expropriations with compensation are already putting the agricultural industry at risk. Section 12(3)(a)-(d) potential for other expropriations outside of the four options provided makes the taking of other agricultural land possible. If not properly managed and carefully considered, such takings from people who have the tools and resources to produce food in the name of land reform and distributing the land to people who are not trained and resourceful threaten food security and the overall sustainability of South African agriculture.

4.2.2. Forced rural-urban migration

One of the effects of the expropriation of farmland is rural-urban migration. In certain circumstances, it may be just and equitable to expropriate the farm and also to expropriate the farm against nil compensation, but the farm workers who have resided on the farm may suddenly find themselves in a compromised position.¹³⁷ The farm workers who will be indirectly evicted from the farm because the landowner has lost ownership in the expropriation project will have no choice but to go to urban areas in search of greener pastures. This may cause an unnatural growth in rural-urban migration, possible overcrowding and an increase in the crime rate in the urban area.¹³⁸

¹³⁷ Expropriation Act (n1) section 12(4): when a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act .3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

¹³⁸ V Mlambo 'An overview of rural-urban migration in South Africa: its causes and implications' (2018) 6 *Archives of Business Research* 67.

4.3. The impact of land expropriation with nil compensation on economic affairs in South Africa

This section focuses on the economic impact of expropriation against nil compensation in South Africa. It addresses the loss of employment, especially amongst farm workers, and the creation of a volatile and risky investment landscape, both nationally and internationally.

4.3.1. Employment

The previous section referred to the possible detrimental implications of expropriation against nil compensation on social affairs, which is interconnected with the economic impact that a possible mismanagement of nil compensation can have. Whilst land reform addresses land inequalities, it must not be used to disadvantage the marginalised, including the employees on the land who may find themselves without employment and housing when the farm or land is expropriated. If such an expropriation happens against nil compensation, there is very little that the previous employer can contribute towards assistance for these workers without the additional income of a sale. How expropriations against nil compensation influence the reality of farm workers will have to be seen. The new Expropriation Act does not prescribe specific legal procedures for terminating employment relationships because of an expropriation. Although the basic principles of employment and termination of employment will apply, explicit consideration of how these employment relationships may be protected and/or terminated may contribute towards ensuring that expropriations, also those against nil compensation, remain aligned with the Constitution.

As the uncertainty of expropriations against nil compensation rises internationally, investors will undoubtedly be less likely to invest in agriculture, reducing the number of jobs created in the farming industry. South Africa is a food-producing nation in the Southern African Development Community (SADC) region, and its neighbours, like Zimbabwe and Zambia, rely heavily on food imports because of the commercialisation of the agricultural sector in South Africa. The agro-industrial complex is more labour-intensive than most other industries in South Africa. On average, primary agriculture employs 4.5 additional workers for every R1 million in capital invested (compared to 2.94 for the economy as a whole). At the same time, the food-processing industry is

the most labour-intensive component of South Africa's manufacturing sector.¹³⁹ Generally, employment growth can only occur because of investment growth and not because of land reform. Expropriation of land with nil compensation is likely to result in the loss of employment.¹⁴⁰

4.3.2. Loss of a competitive and dynamic agricultural market

Section 12(3)(a)-(d) of the new Expropriation Act allows land to be taken even if payment is not made or at a cost lower than the market value. Chapter 6 provides for mediation proceedings where the owner and the expropriating authority cannot come to an agreement. However, an owner whose property is targeted for seizure may decide to accept what is offered without any real negotiations around a suitable price.¹⁴¹ This may be detrimental towards fostering a dynamic and competitive market for the acquisition of land. Without secure ownership and clear and protected individual property rights, local commercial farmers will be hesitant to invest in South Africa because they do not know whether the land they have acquired and plan on developing will be subject to expropriation in the future.¹⁴² These uncertainties have the potential to discourage investors and prevent land from being developed to its full potential, which in turn may lead to dire consequences for the labour market associated with agriculture and the manufacturing sector.

Expropriation of land with no compensation has an impact not only on local commercial farming but also on the rest of the economy. Agriculture was identified as a critical sector for economic development in the National Development Plan (NDP), with the potential to create approximately one million jobs by 2030. However, this target may not be met because of the current uncertainty surrounding land.¹⁴³

¹³⁹ Boshoff (n130) 4.

¹⁴⁰ Ibid.

¹⁴¹ Expropriation Act (n1) chapter 6.

¹⁴² T Kepe & R Hall 'Land redistribution in South Africa: Towards decolonisation or recolonisation?' (2018) *Politikon* at

<https://uwcscholar.uwc.ac.za:8443/server/api/core/bitstreams/dd431040-fdd7-404d-b490-fb8e8bfcd199/content> (accessed 24 January 2025) 10-11.

¹⁴³ H Hlomendlini & P Makgolane 'Possible impact on the South African agricultural economy' (2017) *AgriSA* at <https://www.blsa.org.za/assets/Uploads/2017-July-Possible-impact-of-land-expropriation-on-the-agric-sector-27-July2.pdf> (accessed 24 January 2025) 7.

Agriculture is critical to the development of the economy because it is the sector with the strongest backwards and forward links to the rest of the economy. The industry purchases goods such as fertilisers, chemicals, and implements from the manufacturing sector via backwards linkages. A sudden drop in the demand for farming implements and general farming products will result in the agriculture industry suffering great financial losses. Agriculture also provides raw materials to the industry and the food supply chain. Approximately 70 per cent of agricultural output is used as an intermediary product in other sectors, particularly the agri-processing sector, which accounts for nearly 20 per cent of manufacturing employment.¹⁴⁴

It becomes clear that a reluctance to invest in farm land will have a ripple effect on the greater agricultural manufacturing sector and on the labour market associated with agriculture. Problems in the agricultural sector will cause problems for the rest of the economy.

4.4. The impact of land expropriation with nil compensation on foreign investments in South Africa

The South African government terminated all Bilateral Investment Treaties (BITs) it had signed with European countries in 2015 and enacted the Protection of Investment Act 22 of 2015. The Department of Trade and Industry (DTI) made the policy decision to phase out BITs and replace them with the guarantees found in the Protection of Investment Act.¹⁴⁵ The move appears to have been motivated by what South Africa saw as BIT's limitations on the Republic's sovereignty right to regulate public interest and several bilateral investment treaty disputes.¹⁴⁶

The purpose of the Protection of Investment Act is to provide for the protection of investors and their investments; to achieve a balance of rights and obligations that apply to all investors; and to provide for matters connected therewith. In terms of the preamble of the Act, the responsibility of the government is to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations. Section 10 of the Protection of

¹⁴⁴ Ibid.

¹⁴⁵ Lubbe & Du Plessis (n10) 106. Also see Protection of Investment Act 22 of 2015.

¹⁴⁶ Lubbe & Du Plessis (n10) 106.

Investment Act provides that investors have the right to property in terms of section 25 of the Constitution. The latter section of the Act, read together with the preamble of the Act, implies that all investors, including foreign investors, have the right to acquire land in South Africa.¹⁴⁷

In 2019, the DTI was requested to brief the Portfolio Committee on South Africa's international obligations in instances of foreign land expropriation and the obligation to pay compensation when the land was expropriated.¹⁴⁸ The DTI's answer was that treaties recognised host countries' right to expropriate foreign property, subject to specific requirements. In terms of the bilateral investment treaties, lawful expropriation of foreign investment had to be taken for a public purpose, on a non-discriminatory basis, under due process of law, based upon the payment of prompt, adequate, and effective compensation.¹⁴⁹ Private property protection has several roots in international law, including traditional international law rules governing the treatment of foreign nationals, particularly the property they own in host countries. These regulations are colloquially known as the international minimum standard.¹⁵⁰ Failure to comply with these requirements may be regarded as unlawful expropriation, entailing international responsibility for an internationally wrongful act on the part of the expropriating state.¹⁵¹ International laws must be seen as measures to protect rights indiscriminately in order to pursue a sound economic agenda.

The current legislation seems to suggest a different approach to the position by the DTI to provide adequate and sufficient compensation. According to the Protection of Investment Act, new investment treaties will be subject to the South African Constitution and national legislation.¹⁵² This effectively means that the property of an investor may be expropriated without compensation if the Act allows for such kinds of expropriation. The Act also requires that disputes between the state and investors be

¹⁴⁷ Protection of Investment Act (n145).

¹⁴⁸ 'Impact of land expropriation without compensation on international law and treaties to which South Africa is a signatory: DTI briefing' (27 November 2019) at <https://pmg.org.za/committee-meeting/29469/> (accessed 26 January 2025).

¹⁴⁹ Ibid.

¹⁵⁰ Lubbe & Du Plessis (n10) 100. Also see Chapter 3.

¹⁵¹ Ibid.

¹⁵² Protection of Investment Act (n145) section 6.

resolved by South African tribunals rather than through international arbitration.¹⁵³ As a result, foreign investors may feel prejudiced because the arbitration process will take place in South Africa, and the process is at the mercy of the Minister of Trade and Industry.¹⁵⁴ An uncertain regulatory landscape will not inspire confidence in foreign investors, which the South African economy can ill afford.¹⁵⁵ The inclusion of nil compensation in the current legislation may create a climate of uncertainty and greater risk, which may negatively affect the continued willingness of foreign investors to provide such finance under uncertain and economically volatile conditions. This will have negative reputational consequences for South Africa as an investment destination.

4.5. The impact of land expropriation with nil compensation on other rights such as the right to equality, dignity and children's rights

Chapter 2 of the Constitution provides an array of rights, socio-economic, political and civil rights.¹⁵⁶ It is the Bill of Rights that requires the state to use the power that the Constitution gives it in ways that does not violate fundamental rights and that protect and fulfil these rights.¹⁵⁷ The Constitution further describes the Bill of Rights as a cornerstone of democracy in South Africa, a society that is founded on democratic values of human dignity, equality and freedom.¹⁵⁸ However, the protection of the right not to be arbitrarily deprived of property is not viewed, interpreted and read in isolation. It has to be considered in respect of other rights. Consequently, expropriation with nil compensation can also constitute a direct or indirect violation of other constitutional rights, considering the substantive component of rights entrenched in the new constitutional order. Rights relate to each other and are dependent on the property clause when expropriation of land takes place under the guise of transformation. Some rights that may be affected by nil compensation will be examined below.

4.5.1. Section 9(1) - the equality clause

¹⁵³ Protection of Investment Act (n145) section 13.

¹⁵⁴ A Farish 'Protection of Investment Act becomes law and may deter foreign investment' (25 April 2016) *De Rebus* at <https://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/> (accessed 26 January 2025).

¹⁵⁵ *Ibid.*

¹⁵⁶ The Constitution (n2) sections 7-39.

¹⁵⁷ Currie & De Waal (n107) 23.

¹⁵⁸ The Constitution (n2) section 7(1).

Section 9 provides for equality before the law and the right to equal protection and benefit from the law. The provision further requires full and equal enjoyment of rights and protection against unfair discrimination of certain categories of persons. The South African Constitution guarantees that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.¹⁵⁹ Although an argument in favour of nil compensation relates to social justice, expropriation with nil compensation in circumstances set out in section 12(3) (a)-(d) of the current Expropriation Act may, if not administered with the greatest restraint, violate section 9. Viljoen argues that a compensation requirement still places the financial burden of expropriations on the State, thereby internally restricting the power of the State. This burden on the State is justified as expropriations against nil compensation are intended to serve the larger public interest and should not be placed on the shoulders of an individual or a minority group. However, it does not mean that these minority groups' rights should never be encumbered. They are often already vulnerable and should enjoy equal protection under the law according to section 9 and not be disproportionately targeted by the majority.¹⁶⁰

4.5.2. Section 10 - human dignity

Human dignity is a universal right and value according to various domestic and international instruments.¹⁶¹ There seems to be a direct connection between land and dignity. Fanon argues that 'for a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity.'¹⁶² Ramose argues that 'the forceable expropriations of land from its 'rightful owners' meant not only the loss of sovereignty for the Africans but also the loss of access to the 'vital resource to life'. Without land, the Africans could no longer sustain themselves and exercise their right to life. Therefore, the previous infringements and violations of property rights through colonisation and apartheid were an indirect violation not only of their right to make a living or of their 'right to life or

¹⁵⁹ The Constitution (n2) section 25(1).

¹⁶⁰ Viljoen (n12) 43-45.

¹⁶¹ International Instruments: 1948 UDHR; African Charter on Human and Peoples Rights 1981; European Convention of Human Rights 1953; United Nations Charter 1945; and the Treaty of the SADC 1992.

¹⁶² F Fanon *The Wretched of the Earth* (Grove Press New York 2004) 43.

subsistence but also a denial of their human dignity'.¹⁶³ At all material times, human dignity must be respected and protected.¹⁶⁴ The emphasis on dignity in the South African Constitution is, to a great extent, part of the constitutional effort to redress the injustices of the past and to rectify the past where the majority of South Africans were denied access to land and consequently, denied their dignity.¹⁶⁵ This proposition was further advanced in *Makwanyane*, where the court held that human dignity is inherent and must be protected and respected, by the state and its agencies.¹⁶⁶ Property rights have a profound enabling and facilitative effect on human dignity, personal security, and tenure security as explained by Fanon & Ramose, and these values are obviously of public concern.¹⁶⁷ Those in need of land feel that their dignity was violated by the previous regime and by hundreds of years of colonisation. However, the possibility of another similar form of expropriation where previous owners are not compensated and land is taken by the state may result in a similar violation of dignity.

4.5.3. Section 28 - Children's rights

The Constitution is clear that the rights of children are of paramount importance and that the children's best interests are at the centre of the law. This implies that decisions that adversely affect the rights of children must be subjected to constitutional scrutiny. In this study, it is clear that if expropriation with nil compensation against the landowner affects the rights of children, then such expropriation must be subjected to constitutional imperatives and objectives. The rights of children are globalised through the institutionalisation of forums and organisations (government and non-governmental) that deal with matters related to children.¹⁶⁸ In *Grootboom*, the court correctly considered the plight of children during the eviction of their parents.¹⁶⁹ The court emphasised that every child is entitled to socio-economic rights, such as the right to have adequate housing and not to be left destitute and or homeless.¹⁷⁰

¹⁶³ MB Ramose *African Philosophy through Ubuntu* (Mond Books Harare 2002) 6-7.

¹⁶⁴ The Constitution (n2) section 10.

¹⁶⁵ Currie & De Waal (n107) 250.

¹⁶⁶ *Makwanyane* (n90) para 3.

¹⁶⁷ J van der Merwe 'On the relativity of property rights in the Constitution' (29 August 2016) *De Rebus* at <https://www.derebus.org.za/relativity-property-rights-constitution/> (accessed 26 January 2025).

¹⁶⁸ J von Bahr 'International organizations and children's rights'(Doctoral Thesis in Political Science at Stockholm University Sweden 2020) 7-8.

¹⁶⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*) para 19.

¹⁷⁰ *Grootboom* (n169) paras 20-24.

Expropriation of property against the lawful owner without any form of compensation, where children are likely to be affected, fails the constitutionality test. Such expropriation must be justifiable and reasonable, and even if children's rights are violated, there must be recourse to compensate for such violation.¹⁷¹ How such expropriations connect with evictions, section 26, and the Prevention of Illegal Eviction Act remains uncertain. Expropriation of land that has become unproductive, for example, will have to be in line with section 26(3), which provides for no evictions from a home without a court order. It is questionable whether the presence of children on such property will influence the state's decision to expropriate. An interconnected and well-crafted process will have to be constructed to protect children, especially those in expropriations that are not included under the specific list as provided in section 12(3)(a)-(d).

4.6. Conclusion

This chapter has demonstrated some of the effects of land expropriation with nil compensation regarding social and economic affairs. It has posited that expropriation with nil compensation is likely to deter both local and international investors because of uncertainties as to whether such investors' land may be subject to expropriation in the future. In countries with more secure property rights, firms might allocate resources better and consequently grow faster as the returns on different types of assets are more protected against competitors' actions. Secure property rights allow individuals to use their possessions as sources of capital. Thus, nil compensation renders property rights weak and has the potential to deter investors from investing in South Africa. Although President Cyril Ramaphosa, in his 2018 State of the Nation Address committed to accelerating the land redistribution programme to redress historical injustices of land dispossession and displacement, thereby making more land available for cultivation and contributing to food security, it is doubtful that expropriation of land with nil compensation will contribute to food security.¹⁷² This is because the beneficiaries of the land reform programme are the previously

¹⁷¹ Expropriation Act (n1) section 12(3).

¹⁷² State of the Nation Address (n127).

disadvantaged with no training and resources to work on the land. The government has not provided training and resources to the people, in particular the previously disadvantaged. It is, therefore, doubtful that the taking of the land from those who are using it to produce food and give it to the dispossessed will contribute to food security. If anything, an expropriation of land with nil compensation threatens food security.

Chapter 5: Transformative constitutionalism in support of nil compensation

5.1. Introduction

The previous chapter has dealt with the possible economic and social consequences of nil compensation. It highlighted that section 12(3)(a)-(d) of the new Expropriation Act that allows for nil compensation can negatively affect private property rights in that it renders the rights weak and deters potential investors since there is uncertainty about the expropriation of the land in the future. The legal uncertainty poses a major threat to potential investors in the country because the returns of investments cannot be guaranteed.

In this chapter, transformative constitutionalism, as justification for nil compensation in certain instances of expropriations, is explored and interrogated to examine whether expropriations against nil compensation can indeed redress land injustices of the past and restore the land to its rightful owners. Transformative constitutionalism purports large-scale social change through the law and is concerned with remedying the injustices of the past in which rightful owners were deprived of their land, through the implementation of serious reform. The decision to award nil compensation in certain instances will have to be in line with the Constitution, as TC supports a revolution through and inside the law.

5.2. The past colonial and apartheid law around land that affected the need for a project like transformative constitutionalism

South Africa suffered a long history of colonisation, racial domination and land dispossession that resulted in the bulk of the agricultural land being owned by the white minority.¹⁷³ The most devastating effect of colonisation in South Africa was the dispossession of the land.¹⁷⁴ The most systematic land dispossession was the introduction of legal restrictions on black landownership through the Natives Land Act of 1913.¹⁷⁵ In 1948, apartheid marked the start of more explicit, concerted and

¹⁷³ S Rugege 'Land Reform in South Africa: An Overview' (2004) 32 *International Journal of Legal Information* 283-312.

¹⁷⁴ J Dugard 'Unpacking section 25: is South Africa's property clause an obstacle or engine for socio-economic transformation?' (2019) 9 *Constitutional Court Review* 135-160.

¹⁷⁵ Dugard (n174) 135.

sweeping attempts to strip the black population of rights, opportunities and dignity by implementing the policy of apartheid.¹⁷⁶ The implementers of apartheid after 1948 unjustly and heartlessly took land away from Africans.¹⁷⁷ A detailed summary of the colonial conquest and apartheid's land grab is outside the scope of this study. What is being investigated, though, is the use of transformative constitutionalism as a lens to effect socio-economic change through the Constitution and how transformative constitutionalism as an approach may justify the suggested nil compensation in certain instances of expropriations. The new constitutional dispensation seeks to address these colonial and apartheid injustices by implementing transformative constitutionalism as a tool to interpret and support constitutional ideals.

5.3. What is transformative constitutionalism

Transformative constitutionalism implies a commitment to address and transform historical imbalances and inequalities through the Constitution and a commitment to social change through the realisation of socio-economic rights. South Africa has already implemented and experienced the realisation of the principles of transformative constitutionalism in various sectors of the economy, such as labour relations issues, the hiring of black judges, and the removal of race barriers in schools.¹⁷⁸

According to Justice Langa, there is no single definition of transformative constitutionalism, but this is in keeping with the spirit of transformation.¹⁷⁹ He attempts to provide some foundation for transformative constitutionalism by citing the interim Constitution's postamble:

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.¹⁸⁰

¹⁷⁶ DA Sparks 'Land in South Africa: Dispossession, Constitutionalism, Political Expediency'(2019) at <https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1184&context=senproj> (accessed 26 January 2025) 14.

¹⁷⁷ HM Feinberg 'Pre-apartheid African landownership and the implication for the current restitution debate in South Africa' (1995) 40(2) *Historia* 48 63.

¹⁷⁸ *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23.

¹⁷⁹ P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351.

¹⁸⁰ *Ibid.*

Justice Langa explains that there is a need to move away from the past during which black people were denied and refused their fundamental rights, including their dignity, equality and freedom. Part of the refusal to acknowledge black people as the bearers of equal rights was to dispossess them of their land, their source of livelihood and their opportunity to create generational wealth. Essential to the future of development opportunities and recognising human rights, is to transform one of the main reasons for the strife, conflict, suffering and injustice in the country, namely the land.¹⁸¹ Ultimately, transformative constitutionalism demands that society changes. However, true substantive change demands that the sources of inequality and the reasons why the dignity of some are still not realised be investigated.¹⁸² A true commitment to change will also include the deconstruction of previous property systems that were used as a tool to suppress black South Africans.

According to Klare, transformative constitutionalism is a journey that seeks to transform every sector of society to ensure equal access to resources by previously disadvantaged communities:

transformative constitutionalism is a long-term project of constitutional enactment, interpretation and enforcement dedicated to transforming a country's political, legal and social institutions and power relations in a democratic, participatory and egalitarian direction.¹⁸³

Klare makes it clear that the transformation of legal institutions and power relations is essential for this project of transformative constitutionalism. This, of course, includes the transformation of how we view ownership and the distribution of land to effect a true transformation. However, he also warns against land redress that may undo this project of transformation towards 'democracy and peaceful co-existence' and result in violence and strife. According to Klare:

the Constitution is an enterprise that seeks to bring about large-scale social change through nonviolent political processes based on law. There is danger that violence can erupt during the process if adequate compensation is not paid as was witnessed in Zimbabwe.¹⁸⁴

¹⁸¹ T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 132.

¹⁸² Langa (n179) 353-354.

¹⁸³ Klare (n17) 146.

¹⁸⁴ *Ibid.*

The ANC won the first democratic elections in 1994 and had to deliver on its promises around land redistribution.¹⁸⁵ The ANC government has not been successful in achieving land reform to date. This failure has led to the attempt to amend section 25 of the Constitution and eventually the enactment of Expropriation Act 13 of 2024, which seeks to expropriate property with nil compensation, where land and improvements are expropriated for land reform.

5.4. How section 25 of the Constitution addresses land as part of transformation?

Section 25(1) of the Constitution protects property owners from unlawful deprivation of their property, while section 25(2) -(3) sets out the constitutional requirements for an expropriation. Section 25(4)-(9) underlines the need for redress and transformation and that the protection of property as an individual right is not absolute but subject to societal considerations.¹⁸⁶ Land reform includes the restitution of land rights that were lost because of racial policies and laws under apartheid.¹⁸⁷

Although it appears as though there is tension between the protection of existing rights in terms of section 25(1)-(3) and reform of the property regime in terms of section 25(4)-(9) of the Constitution, the Constitutional Court made it clear that:

our Constitution counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account

¹⁸⁵ A Piotrowski 'Colonialism, Apartheid, and Democracy: South Africa's Historical Implications on the Land Reform Debate' (2019) 11 *Journal of Interdisciplinary Undergraduate Research* at <https://knowledge.e.southern.edu/jiur/vol11/iss1/4> (accessed 26 January 2025) 62.

¹⁸⁶ *Haffejee No and others v Ethekwini Municipality and others* (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) para 30.

¹⁸⁷ The Constitution (n2) section 25(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.

of all the interests involved and the specific factors relevant in each particular case.¹⁸⁸

It has been held that the guiding principle in section 25(3) of the Constitution is just and equitable compensation and not a market value compensation:

in this trial, the third and fourth respondents [the affected property owners] were insistent upon the payment of market value for compensation. I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under section 25 of the Constitution where property or land has been acquired by the state in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this court has installed market value as a pre-eminent consideration. Properly understood, the jurisprudence of this court shows that market value is regularly used as an entry point to the analysis because it is the most tangible factor in all of the factors listed in section 25(3). This is not to make market value the most important factor in the analysis of just and equitable compensation; the object is always to determine compensation, which is just and equitable, not to determine the market value of the property.¹⁸⁹

Beyond market value, the other factors included in the mandatory but non-exhaustive list in section 25(3) have a transformative, public interest basis.¹⁹⁰ In interpreting the Constitution, including section 25, one has to consider the history and the object of the Constitution which is to transform the society. If the interpretation is done properly, one would understand that the section 25 right to be compensated for expropriation is not absolute.

5.5. How transformative constitutionalism as an interpretive tool supports the inclusion of nil compensation in the Expropriation Act 13 of 2024

The South African Constitution seeks to transform a society through the construction of a multi-cultural social democracy. Transformative constitutionalism is located in the

¹⁸⁸ *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC para 23.

¹⁸⁹ *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 paras 29-30.

¹⁹⁰ Dugard (n174) 143.

preamble of the Constitution. The preamble to the Constitution provides that it was adopted:

as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations of democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law; improve the quality of life of all citizens and free the potential of each person.¹⁹¹

The above extract is a clear indication that the achievement of an equal society is the central objective of transformative constitutionalism. Black people's land in South Africa was forcefully taken away from them during the colonial and apartheid periods. Section 25(5) of the Constitution provides that 'the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land equitably.' The new constitutional dispensation seeks to address these colonial and apartheid injustices through the implementation of transformative constitutionalism as a tool to interpret and support the constitutional ideals.

Transformative constitutionalism supports nil compensation as set out in the current Expropriation Act in that it seeks to address inequalities created by apartheid laws. It is a project created to disband colonial laws that favoured the few by demanding a different interpretation and a commitment to change. Transformative constitutionalism considers land to be a socio-economic right that must not only be enjoyed by a small minority. Although it drives a commitment to socio-economic change, it does not explicitly suggest nil compensation as the only method to achieve equitable access and land redress. Transformative constitutionalism stipulates that the envisioned socio-economic change must be negotiated through the Constitution and, consequently, in line with the constitutional ideals and values, including the principles that govern a lawful expropriation under section 12(3)(a)-(d) of the new Act.

¹⁹¹ The Constitution (n2) Preamble.

5.6. How can nil compensation be tested against the goals of transformative constitutionalism?

It is clear that both expropriations at nil compensation and transformative constitutionalism have as its core objective to benefit the landless and the poor and to redress the injustices of the past. However, the open-ended possibilities left by section 12(3)(a)-(d) may, in certain instances, be deemed against the principles of transformative constitutionalism as they may leave expropriated owners stranded, have an irreparable impact on employees and even on the rights of children. They may also purport a culture of inequality and discrimination as white landowners may feel targeted and discriminated against. They see the possibility of nil compensation as a violation of their fundamental rights, their dignity and right to equal treatment under the law.

Expropriations outside the section 12(3)(a)-(d) list, open the door to the possibility of State abuse and corruption. Accusations of large-scale corruption, mismanagement, and political oppression of minority groups already compromise South Africa's current socio-economic and political climate. The country remains economically vulnerable and heavily dependent on foreign investment, and uncertainty regarding property ownership and land rights could deter investors and assistance.¹⁹² The large-scale socio-economic change that TC advocates for will not be a viable option without economic stability and growth. The greater impact of expropriations against nil compensation on the public interest, land reform, and access to land may, if not administered with significant oversight and care, hinder the realisation of TC.

The State needs to expropriate land with openness and frugality, furthering the goals of redress and redistribution but also with an awareness of how any mismanagement may lead to food insecurity, sustainability issues, unemployment and a lack of foreign and national investment. Section 12(3)(a)-(d) of the new Act may lead to greater alignment with the objectives of TC but may also result in the opposite, wherein we move away even further from the type of socio-economic change that it envisions.

5.7. Conclusion

This chapter examined South Africa's long history of colonisation, racial domination and land dispossession that resulted in the bulk of land being owned by the white

¹⁹² Viljoen (n12) 47.

minority. As a result of this history, there was a need to address past injustices under the new constitutional order. Transformative constitutionalism was created as a tool to transform a society into one in which people enjoy equal access to resources, including land ownership. Although transformative constitutionalism drives a commitment to socio-economic change, it does not specifically suggest nil compensation as the only method to achieve equitable access and land redress. In fact, TC stipulates that the envisioned socio-economic change must be negotiated through the Constitution and, consequently, in line with the constitutional ideals and values. Section 12(3)(a)-(d) can be a vehicle for this type of change. However, if not managed with oversight and frugality on a case-by-case basis, it can also result in the opposite of what TC envisions for the greater South African public: the improvement of the actual reality of the majority of South Africans. The chapter has argued that failure to pay compensation and the open-ended possibilities left by section 12(3)(a)-(d) may be against the principles of transformative constitutionalism in certain instances where owners and employees are left stranded, where the sustainability of agriculture and food security may be in the balance or in cases where unbridled power in the hands of the State, may lead to corruption.

Chapter 6: Conclusions

6.1. Final Conclusion

The study has compared the old Expropriation Act with the new Act in terms of the willing buyer, willing seller principle and the importance and place of market value in calculating compensation for expropriated land. Although section 12(3)(a)-(d) lists the circumstances under which nil compensation is payable, the list is not exhaustive as there may be other circumstances under which land is expropriated for nil compensation. This vagueness in the practical realisation of the Act creates legal uncertainty that may lead to a number of legal and practical problems in the everyday lives of South Africans.

The study demonstrated that following the failure of Parliament to pass the Constitution Eighteenth Amendment Bill, the retention of the nil compensation in the new Expropriation Act may be seen as an attempt to achieve what could not be achieved in the Eighteenth Amendment Bill.

This study has shown that the Constitution is the supreme law of the country and that any law or conduct inconsistent with the Constitution is unconstitutional. Consequently, the current Expropriation Act, like any other source of law is only valid if it is consistent with the Constitution. Rights, specifically section 25 in the Bill of Rights may be limited in terms of section 36 of the Constitution. Currie & De Waal argue that while all relevant factors in section 36(1)(a)-(e) must be properly weighed in the limitation analysis, the last factor, namely, the less restrictive means to achieve the purpose is the most important factor to consider. I argue that section 12(3)(a)-(d) is in itself the 'less restrictive means' as no other limitation has so far succeeded in the constitutional goals of reform and equal access to land.

Property rights in the South African Constitution are an extension of the property law under international law. The Constitution acknowledges the importance of adhering to international law principles. The Constitution further requires the Courts, when interpreting the Bill of Rights, to consider international law and foreign law when making decisions. In terms of international law, the member states are entitled to

expropriate property against the lawful owner only in circumstances where it is in the interest of the public and for public purpose. This assertion aligns with the constitutional imperatives as envisaged in section 25 of the Constitution and the new Expropriation Act in that nil compensation can only be applied if it is justifiable and reasonable within constitutional objectives. The decision of how and how much to compensate remains within the ambit of the national law of each sovereign state.

The study has further demonstrated that section 12(3)(a)-(d) may also threaten social and economic stability in South Africa. Uncertainty around ownership rights and the possibility of an expropriation of land at nil compensation is likely to deter both local and international investors due to uncertainties as to whether such land may be subject to expropriation in the future. In countries with more secure property rights, firms may allocate resources better and grow faster as the returns on different types of assets are more protected against competitors' actions. Although President Cyril Ramaphosa, in his 2018 State of the Nation Address, committed to accelerating the land redistribution programme to redress historical injustices of land dispossession and displacement, making more land available for cultivation and contributing to food security, it is still uncertain whether the expropriation of land against nil compensation will contribute to food security. This is because the beneficiaries of the land reform programme are often not further supported by the government. The government has not provided training and resources to the people, in particular those who are first generation landowners or previously disadvantaged. It is, therefore, doubtful that making the taking of the land easier through the possibility of nil compensation, will have the envisioned results without compromising food and job security and overall sustainability.

Although transformative constitutionalism drives a commitment to socio-economic change, it does not necessarily suggest nil compensation as the only method to achieve equitable access and land redress. Transformative constitutionalism stipulates that the envisioned socio-economic change must be negotiated through the Constitution. Failure to pay compensation and the legal uncertainty left by the current Expropriation Act in section 12(3)(a)-(d) may very well become against the principles of transformative constitutionalism in instances where socio-economic rights are infringed or social change is halted. The inclusion of nil compensation may even

recreate a culture of inequality and discrimination if not administered with the greatest of administrative responsibility and openness.

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