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Maintaining the *status quo*? An analysis of the reformative potential of section 25

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Submitted in partial fulfilment of the requirements for the degree

MASTER OF LAWS (LLM)

in

HUMAN RIGHTS LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

SUPERVISOR: DR EJ MARAIS

24 JANUARY 2017
Acknowledgements

All praise is due to the Almighty, without whom I would have never accomplished anything.

To my mother and father, thank you for all of your sacrifices in ensuring that I receive the best education possible. Undoubtedly the gift of education is priceless and is more than I could have asked for.

My dear wife Sameera, your love and support throughout these two years has been unwavering. You truly are my better half.

To uncle Yacoob, I have never met a man more generous. I thank you with all my heart.

To my entire family, I love you.

Finally to Professor Bilchitz and Dr. Marais, a pair of excellent scholars, who above all inspire me, thank you both.
Abstract

Land reform has become a hot topic recently. In particular the slow pace at which it is being pursued has prompted calls for an amendment to the property clause. This is due to the rising sentiment that section 25 is a guarantor of the status quo and not a tool for reform. My dissertation examines whether this sentiment holds water by analysing the reformative potential of the property clause. In doing so the constitutional matrix, a single system of law, and a purposive interpretation approach are all considered in detail as elements that illustrate the property clause is a tool for reform. The structure of the property clause is also considered with particular attention given to one of the pillars of land reform, namely land restitution. The conclusion drawn is that the property clause is a tool for reform and not a guarantor of the status quo and that the courts have understood this clearly. Conversely, what has been driving the status quo is in fact political impotency when it comes to pursuing the land reform agenda. In this regard the Restitution of Land Rights Amendment Act is discussed in light of a recent Constitutional Court case. Market-value compensation for expropriation is also an impediment in many cases, and in this regard the recent Msiza judgment is briefly discussed as being the progressive method for calculating the compensation. Finally, the conclusion is that calls for an amendment to the property clause are premature, as the full potential of section 25 to accommodate land reform has not yet been realised.
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1 Introduction

Expropriation without compensation of mainly white owned properties has been increasingly called for by political parties.\(^1\) It can be inferred that these calls go beyond political grandstanding and stem from a real sense of frustration in the country. Frustrations borne by a majority who, after being dispossessed of their land during and prior to apartheid, were promised reform in a post-apartheid constitutional democracy, which has failed to materialise.\(^2\) It would appear as though the vexations have become so pressing that they have prompted the deputy president of the Republic of South Africa to hint at possible amendments to the property clause.\(^3\) Even the President has acknowledged the desperately slow pace of land reform and has promised to accelerate expropriation.\(^4\) The question to ask then is, “what is going wrong in South Africa’s post-apartheid land reform programme, and how can its failings be addressed?”\(^5\)

Drawing inspiration from the question posed by Cousins, this dissertation will revisit the “land reform” question with a specific focus on section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution). My dissertation considers whether section 25 is indeed flexible enough to accommodate social reform or whether it inhibits it. In other words, does section 25 truly promote land reform or does it (overly) protect the status quo (as it has been claimed by some political parties, such as the Economic Freedom Fighters).\(^6\) My initial opinion is that it is flexible enough to accommodate land reform because like any constitutional right the application therein is usually subject to interpretation. However land reform cannot hinge on the generous interpretation of the judiciary.\(^7\) The state through the legislature must apply its mind strongly in order to dismantle the “architectural hierarchy” of

\(^{4}\) Ngeoep “10 Key Points from Jacob Zuma’s Last January 8 Speech” at http://www.huffingtonpost.co.za/2017/01/08/10-key-points-from-jacob-zumas-last-january-8-speech/.
laws that apartheid left behind. This is one aspect of land reform that this dissertation explains, has not been fully realised.

After a brief explanation of the history of the property clause, this dissertation touches on the notion of ownership prior to the Constitution. Thereafter, it discusses what ownership means in terms of the Constitution in the wake of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (Pharmaceutical Manufacturers Association) and the single-system-of-law principle. In this respect the decision in *Port Elizabeth Municipality v Various Occupiers* (Port Elizabeth Municipality) plays an important role and is analysed in the context of there being no hierarchy of rights in constitutional property law. Ancillary to the *Port Elizabeth Municipality* decision is a discussion on how to interpret the property clause. In this regard, I consider the purposive approach to the interpretation of legislation enacted to give effect to the constitutional clauses that promote reform. The next step considers the actual structure of section 25, particularly the latter half which promotes land reform. I conclude by confirming that not only is there enough flexibility to promote reform, but that when read as a whole, the property clause actually is all about equitable land reform.

The dissertation then reverts to the question posed earlier as to what exactly has gone wrong if the property clause is not the problem. In this respect, I consider lack of political will as the root cause. I also consider whether the compensation requirement is a cause for the slow pace of reform. Lastly, I look at whether land reform should be extended to the urban context considering there being limited impact in rural land reform.

2 Background

2.1 History of the Property Clause

With the dawn of constitutionalism in South Africa, questions were raised regarding the nature and extent of wealth redistribution. These types of questions were born out of

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8 Van der Walt (n 7) 13.
9 2000 2 SA 674 (CC).
10 2005 1 SA 217 (CC).
12 The discussion in relation to compensation focuses specifically on the calculation of an amount that is just and equitable. Firstly because the topic of compensation is too broad for this dissertation and secondly because a just and equitable amount can be below market value, thereby facilitating a cheaper land reform programme for the state which should – in theory – be a foundation for a faster land reform programme.
legitimate concerns that constitutionalism in South Africa would result in the reversal of legislation that favoured white racial hegemony in controlling the resources of the country.\textsuperscript{13} The redistribution of wealth and, more specifically, the unequal distribution of land and property under the apartheid regime were prominent topics.\textsuperscript{14} The discussions were vigorous around the debate whether property should be protected in the Bill of Rights and, if so, what protections were to be afforded.\textsuperscript{15} This is particularly due to the fact that the apartheid regime prided itself in the implementation of laws that sought to further the spatial divide between different races.\textsuperscript{16} The effect that segregation on the basis of race had was that it forced black people to be perpetual tenants with very little rights in (especially) land.\textsuperscript{17} The cluster of legislation that laid the foundation for racial segregation was initiated by the Natives Land Act 27 of 1913 and was followed by three other Acts.\textsuperscript{18} Collectively they created an environment where ownership of land or property in an area was predetermined on the basis of skin colour. For example, only white people could own property in a certain area to the exclusion of others. This process resulted in the forced removal of approximately 3.5 million non-whites from their land and property if that land or property was designated as a white area.\textsuperscript{19} It is no surprise that this system could not be sustained by a Constitution that has the promotion of human dignity, equality, and freedom as its core values. It is also important to note that prior to adoption of the Interim Constitution, the National Party had recognised that no progress would be made whilst the laws referred to above were still in existence.\textsuperscript{20}

\textsuperscript{13} Van der Walt (n 7) 1 – 3.
\textsuperscript{14} Van der Walt (n 7) 1 – 3.
\textsuperscript{15} Van der Walt (n 7) 1 – 3.
\textsuperscript{16} See particularly Davenport “Some Reflections on the History of Land Tenure in South Africa, Seen in the Light of Attempts by the State to Impose Political and Economic Control” 1985 \textit{Acta Juridica} 53 for a bird’s eye view on how the Native Land Act came to pass. The discussion by Davenport follows the systemic breakdown of traditional black communal land tenure through the last century in South Africa.
\textsuperscript{17} Kloppers and Pienaar “The Historical Context of Land Reform in South Africa and Early Policies” 2014 \textit{PER} 677 680 for context as to how these laws disenfranchised black people from property rights. See further \textit{Department of Land Affairs and Others v Goedgelegen Tropical Fruits} 2007 6 SA 199 (CC) par 6 - 11 where prior to these policies instances of forced dispossession occurred, the effects of which were felt almost 100 years later. The case will be discussed later under section 2.4 below.
\textsuperscript{18} The Natives Land Act 27 of 1913; The Native Trust and Land Act 18 of 1936; The Group Areas Act 41 of 1950; and The Group Areas Act 36 of 1966; See Pienaar \textit{Land Reform} (2014) 80 – 93 and 106 – 113 for an in-depth discussion of these Acts and the effects that they had on the black majority.
\textsuperscript{19} Kloppers and Pienaar (n 17) 677 686.
\textsuperscript{20} Kloppers and Pienaar (n 17) 677 687.
possibly an inevitable step, towards ensuring that the legacy of apartheid would not live on into a new constitutional order in South Africa.

With respect to the Interim Constitution, the dispute that took place between the National Party and the African National Congress was due to the polarised concerns each party had with regard to what extent a property clause should protect existing owners’ rights on the one hand and a concern that the inclusion of a property clause should not be an impediment to any legislative reform programmes. With the rest of the Interim Bill of Rights finalised the two parties recognised that there would need to be a compromised position by each side in order to move the country forward into a constitutional democracy. Thus we find that section 28 of the Interim Bill of Rights was a compromise. Despite a compromise being reached it soon became apparent that the application of section 28 would be a difficult task for the judiciary. If there was a dispute between private property rights, such as ownership, and legislation that sought to limit ownership, judges would need to balance the protection of private property rights against justified reform. Additionally, judges would be tasked with the financial implications that would need to be addressed in order to establish a system that would render reforms that required expropriations as fair and just. Furthermore, with the wording of section 28 lacking clarity and direction, coupled with the difficulties that the judiciary could be faced with, there was a concern by academics and lawyers, such as Chaskalson, that it would be all too easy for the judiciary to fall back on a long-standing tradition of private property protection. If this were to happen and the judiciary became “overzealous in their protection of property rights comparative legal history suggests that the potential for constitutional conflict between Court and state will be substantial”. Finally the only provisions that the Interim Constitution made for land reform were not even contained in

21 Chaskalson “The Property Clause: Section 28 of the Constitution” 1994 SAJHR 131 132; see further Chaskalson “Stumbling towards section 28: Negotiations over the Protection of Property Rights in the Interim Constitution” 1995 SAJHR 222 224 – 225 where he breaks down how different the policy documents were between the ANC and the National Party. The National Party’s Clause 18 in the Governments Proposal of Property Rights and the ANC’s Articles 12 – 13 in its Bill of Rights were in conflict with Clause 18 protecting private property rights with minimal attention to land reform and Articles 12-13 driving legislative land reforms and rural reconstruction whilst providing minimal protection to existing property rights. See also Skweyiya “Towards a Solution to the Land Question in Post-apartheid South Africa: Problems and Models” 1990 SAJHR 195 203 for a perspective on how the concerns relate to the protection of productive commercial farming on the one hand and restoring the dignity of the majority on the other hand.

22 Chaskalson (n 21) 131.
23 Chaskalson (n 21) 139.
24 Chaskalson (n 21) 139.
25 Chaskalson (n 21) 139.
the property clause. This meant that the wording in section 28 advanced, at least on a *prima facie* reading of the provision, the protection of private property.

2.2 Introducing Section 25 of the Constitution

The structure of section 25 had evolved substantially from its early construction as section 28 in the Interim Constitution. An example of the differences is the inclusion of the caveat that deprivations should not be arbitrary as well as several clauses addressing land reform. The inclusion of the word “arbitrary” meant that the Constitutional Court had more clarity to hand down judgments as it did in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (FNB). As Van der Walt points out in a comparison of the FNB decision with an Interim Constitution decision, the “arbitrary” requirement was missing from section 28(2), which could have had an effect on how Goldstone J arrived at his decision in *Harksen v Lane No and Others*. Besides the inclusion of the word “arbitrary” in section 25(1) of the Constitution, the drafters added several clauses that facilitated land reform specifically. Thus, the composition of section 25 represented a longer and more complex property clause. Importantly and despite the complexity, in the *Certification of the Constitution of the Republic of South Africa, 1996* (First Certification Case) the Constitutional Court did not raise objections against the property clause in the Final Constitution. This is a good indicator that the property clause was correctly drafted despite being the first entrenched constitutional right relating to property in South Africa.

Section 25 is more complex than section 28 because it contains elements which appear to be contradictory. Explained differently, the property clause can be divided into two parts: the first half deals with protecting existing rights in property, such as ownership, whilst the

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27 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).
29 1996 4 SA 744 (CC).
30 Van der Walt *Constitutional Property Clauses* (1999) 323.
31 Van der Walt (n 30) 324.
32 Van der Walt (n 30) 324.
second half fosters land reform. The first half being section 25(1)-(3) and the second half being section 25(4)-(9). In fact the Constitutional Court confirmed the duality of section 25 in *Port Elizabeth Municipality*. In the words of Sachs J, “the purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto and also as striking a proportionate balance between these two functions”.

The justice draws his conclusions from the discussions of academics in property law and constitutional law, especially Van der Walt. In one of Van der Walt’s seminal publications he refers directly to Sachs J’s judgment in *Port Elizabeth Municipality* and agrees with the test set out in that judgment, which essentially prevents a tug-of-war-scenario between protecting existing property rights and realising land reform. The test replaces the tensions of a tug-of-war with a balancing act that relies on a sliding continuum, adjusting itself on a case by case basis between “upholding extant property interests and promoting equitable access to housing, land, wealth and natural resources for those who had been excluded from it”.

The result of relying on a sliding continuum is that in any given case the rights of one party could effectively be limited by the opposing rights of the other party. In the South African context this would mean that ownership, as the paradigmatic property right, could be legitimately limited by the land reform programmes, whose sole purpose is to help create an equal society. According to this interpretation, section 25 of the Constitution allows the

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35 *Port Elizabeth Municipality* (n 10)
36 See Sachs *Protecting Human Rights in a New South Africa* (1990) 119-131 for a discussion by Sachs J prior to the first drafts of the Bill of Rights being drafted, wherein he outlines the fact that land reform is absolutely necessary to restore dignity to black people. Part of the reason is that the current white land owners view their ownership as including “a private kind of control over the lives of others on the land, ignoring or respecting basic rights at their pleasure”. He thereafter sets out a three-stage procedural methodology of ensuring equitable land reform. The stages are represented in some way or another in the current structure of s 25 and 26 of the Constitution and importantly his third stage confirms the difficulty in situations where there is a shared interest in property in ensuring the process is fair and equitable.
37 *Port Elizabeth Municipality* (n 1035) par 16; FNB (n 27) par 50 and Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others 2015 6 SA 125 (CC) par 37.
38 *Port Elizabeth Municipality* (n 10) par 16 and 17.
39 Van der Walt (n 33 (2011) 15.
40 Van der Walt (n 7) 4.
legislature and judiciary the freedom to exercise a great deal of flexibility in enacting laws and adjudicating on them.

2.3 Property and Ownership Prior to the Constitution

A study into the flexibility of section 25 would not be complete without discussing ownership. This is because ownership is a leading principle in the hierarchy of rights in property law and it is ownership which will be most affected by land reform initiatives. All other rights, such as limited real rights and personal rights in the owned property, flow from ownership. In Gien v Gien the Court confirmed that ownership is the most complete real right a person can have in relation to a thing and that because of this, the owner can use the property in any way he or she deems fit. Yet, despite this seemingly boundless right, owners cannot do as they like if the action violates either the objective law or the rights of others, such as a neighbour. Therefore even before constitutionalism the common law recognised that ownership is limited. It is also in line with what Badenhorst, Pienaar and Mostert have said with regard to common-law ownership not being an unencumbered right.

Property interests are given value according to their status as either property rights, personal rights or no rights at all. Property rights and personal rights can be categorised as being strong or weak rights respectively. This is because property rights have third-party effect whereas personal rights operate only *inter partes*. What this does is that it sets up a

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41 In this dissertation I specifically focus on ownership, and not other property rights, when referring to the various impacts land reform has. This is because ownership is affected the most through land reform. Nevertheless, I understand that in *FNB* (n 27) par 51 the Constitutional Court did not exhaustively define what property means in the Constitution. This means that the constitutional property concept is wide and not only includes real rights, like ownership, but also many personal rights which might also be affected by land reform. See further Van der Sijde *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* (LLD-thesis US 2015) 35.


43 Gien v Gien 1979 2 SA 1113 (T).

44 Gien (n 44) 1121.


47 Van der Walt (n 47).

hierarchy of rights wherein you will find that strong rights will usually trump weak (or no) rights.\textsuperscript{50} Bearing this in mind ownership, being the most complete real right, will be the strongest and will therefore usually trump all lesser rights, thereby acquiring the status as being an “absolute” right.\textsuperscript{51} This is particularly so in civil law systems based on Roman law, such as South African private law, where ownership dominates the whole of property law.\textsuperscript{52} In other words, in South African private law all peripheral property rights are afforded status and strength based on their relationship with ownership.\textsuperscript{53} Thus, it is not strange to describe property law as being the law of ownership whereby other property interests depend on ownership for their survival and only assume importance in so far as they exhibit a form of lesser ownership.\textsuperscript{54} This includes land reform because land reform programmes can only be effective or implemented by impacting on ownership.

2.4 The Constitutional Matrix

I now address the concept of non-hierarchical thinking in terms of the \textit{Port Elizabeth Municipality} judgment and unpack its implication on constitutional adjudication of property, bearing in mind the single-system-of-law principle. The facts in \textit{Port Elizabeth Municipality} concerned an eviction dispute between the municipality on the one hand and a small community of unlawful occupiers on the other hand. The neighbouring community had signed a petition requesting the municipality to evict the illegal occupiers, which the municipality took seriously and brought the eviction application in terms of section 6 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{50} Van der Walt (n 47) 27.
\item \textsuperscript{51} Van der Walt (n 47) 27.
\item \textsuperscript{52} Van der Walt (n 47) 29.
\item \textsuperscript{53} Van der Walt (n 47) 29.
\item \textsuperscript{54} Van der Walt (n 47) 29.
\item \textsuperscript{55} Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 s 6 states that:
\begin{enumerate}
\item An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
\begin{enumerate}
\item (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
\item (b) it is in the public interest to grant such an order.
\end{enumerate}
\item For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general.
\item In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
\end{enumerate}
\end{itemize}
In its decision the Constitutional Court highlighted the history of evictions in South Africa under the apartheid regime, specifically highlighting the strong position an owner enjoyed. The owner’s rights were strong only in terms of the common law and were strengthened by the Prevention of Illegal Squatting Act 52 of 1951 (PISA). The Court painted the picture of an apartheid state that sanctioned eviction through legislation and contrasts the politically motivated eviction laws with section 26(3) of the Constitution, as well as PIE, as the counter weight to the apartheid laws.56 In terms of the new constitutional matrix,57 there is a deliberate shift to move away from the recognised common-law principle that ownership will always trump the interests of a non-right holder.58 This shift represents a new logic that pays attention to the parties’ non-property rights, such as dignity, as well as taking into account the historical, social, and political context of each particular case.59

An example of this is the rei vindicatio, a common law remedy permitting owners to reclaim possession of their property from unlawful occupiers. In terms of the rei vindicatio the right to possession vested with the owner, therefore if a non-owner was in possession of the property they would have to prove that they had a right in that property that prevented the owner from reclaming possession.60 This situation no longer exists, as there has been a significant qualification to the rights paradigm since the introduction of PIE to constitutional property law, in the sense that although an owner may satisfy the common law requirements for eviction, the eviction could fail based on the hardships the occupier may suffer.61 Thus the courts must now strike “a balance between the interests of the owner of the land and those of

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; and
(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days’ written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).

56 Van der Walt (n 33 (2011) 521.
57 Port Elizabeth Municipality (n 10) par 14.
58 Van der Walt (n 33 (2011) 522.
59 Van der Walt (n 33 (2011) 522.
60 Chetty v Naidoo 1974 3 SA 13 (A) par 20.
61 Van der Walt (n 47) 151.
the occupiers so as to infuse justice and equity or fairness into the enquiry”.

It follows then that if the court does not do this it could possibly counter the aims of legislation enacted to give effect to the latter part of section 25, and by virtue frustrate land reform.

According to Van der Walt the Court in *Port Elizabeth Municipality* identified three leading features in the constitutional matrix. Firstly, with respect to the right to housing, the legislation does not place a positive obligation on the state to provide housing to South Africans. This is because it is negatively construed, or defensive. Simply stated, PIE does not award property to those who do not have property nor does it create any vested rights in the property for the unlawful occupiers. Secondly, the owner still maintains full ownership and his or her right to evict depends not only on ownership but is dependent on the judiciary’s balancing of the competing non-property rights with ownership. The possibility for eviction is the second feature, and underscores the fact that ownership is still the most complete real right under the Constitution. The third feature is that adjudication in matters where the ownership competes with other non-property rights should occur on a case-by-case basis. This means that in each instance there is specific balancing of the competing rights as per the facts of the case.

These features represent a “shift away from abstract, hierarchical and towards contextualised non-hierarchical thinking”. However the constitutional matrix does not make it impossible to evict someone, because the owner’s right to exclude is still relevant, albeit dependent on several factors. For example the Constitutional Court has recognised that the right of an owner to exclude, is subject to the affordability and/or availability of alternative accommodation for unlawful occupiers. Just to add emphasis to the point of alternative accommodation, it is not sufficient for the provision of alternative accommodation to be

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62 Molusi and Others v Voges NO and Others 2016 3 SA 370 (CC) par 46.
63 Molusi (n 62) par 47.
64 Van der Walt (n 33 (2011) 522.
65 Van der Walt (n 33 (2011) 522.
66 Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC) par 95; Residents of Joe Slovo Community, Western Cape v Thabelisha Homes and Others 2010 3 SA 454 (CC) par 344; Van der Walt (n 33 (2011) 522.
67 Van Der Merwe and Another v Taylor NO and Others 2008 1 SA 1 (CC) par 26.
68 Van der Walt (n 33 (2011) 523.
69 Van der Walt (n 33 (2011) 523.
70 Van der Walt (n 33 (2011) 525.
71 Van der Walt (n 33 (2011) 525.
72 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 2 SA 104 (CC) par 96.
available abstractly in the form of housing policies. Rather, it must be a tangible reality for the unlawful occupiers who must not face a situation of homelessness whilst the owner’s rights are fully protected. The question is therefore whether the eviction would be just and equitable considering the facts of a particular case. Yet, it should be borne in mind that the courts are still entitled to grant an eviction order despite there being no alternative accommodation available, albeit they should be wary of granting such orders.

The core of the argument is that this contextualised balancing principle could be applied to other property matters outside the sphere of eviction. This argument again represents a significant qualification to the rights paradigm in that it is a deconstruction of the logic that the common-law principle of strong rights, weak rights and no rights at all must yield to the superior right of ownership depending on its position in the hierarchy. For example, a conflict between property rights of an owner versus the equality, dignity or even healthy and sustainable environment rights of a non-property holder could weigh in favour of the non-property holder. Therefore, in the constitutional matrix there is an attempt to find amicable solutions and protect the interests of all the parties involved in a just and equitable manner.

3 Constitutional Analysis and Discussion of the Property Clause

3.1 A Single System of Law

Whilst pre-1994 common law may have recognised some instances where ownership could legitimately be limited, these were generally exceptions to the rule that ownership was – at least theoretically – unrestricted and unlimited. This meant that ownership would in most instances outweigh other rights. This system is contrary to the constitutional vision of

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73 Blue Moonlight Properties (n 72) par 92-95.
74 Blue Moonlight Properties (n 72) par 92-95; Port Elizabeth Municipality (n 10) par 55; President of the Republic of South Africa and Another v Modderklip Boerdery (Pry) Ltd 2005 5 SA 3 (CC) par 35-37.
75 Blue Moonlight Properties (n 72) par 41 and 96; Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC) par 46.
76 Port Elizabeth Municipality (n 10) par 28.
77 Van der Walt (n 33 (2011) 524.
78 Van der Walt (n 33 (2011) 524. See further Van der Walt (n 47) 151 and 160 – 161.
79 Van der Walt (n 33 (2011) 524-525.
80 The point that needs to be emphasised here is that ownership has never been absolute, despite the views of authors such as Honore “Ownership” in Smith (ed) The Nature and Process of Law an Introduction to Legal Philosophy (1993) and Miller Acquisition and Protection of Ownership (1986). The decision in Gien states this clearly. Refer to Van der Sijde (n 42) 34 – 40 for further reading on this topic.
property and only serves to stabilise the status quo.\textsuperscript{81} The Constitutional Court in \textit{Port Elizabeth Municipality} has held that:

“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 of all the interests involved and the specific factors relevant in each particular case.”\textsuperscript{82}

What the Court refers to here has been confirmed in later decisions.\textsuperscript{83} It is also important to note that in terms of the new constitutional dispensation the Constitutional Court has said that “powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.”\textsuperscript{84} What the Court refers to here is the single-system-of-law principle, which is the starting point for understanding the subsidiarity principles.\textsuperscript{85}

Chaskalson P makes it clear that “there is only one system of law”.\textsuperscript{86} This one system of law has a cascading effect based on two subsidiarity principles.\textsuperscript{87} The first being that where an individual or group feel that their rights have been violated they may not rely directly on the enshrined right but must use the legislation enacted to give effect to that right.\textsuperscript{88} Secondly, that in the protection of that violated right the individual or group cannot rely on the common law when there is enacted legislation that already exists to protect that right.\textsuperscript{89} The provisos to the two principles are that the enshrined right may be relied on in challenging the validity of the legislation enacted to give effect to the right in the first instance, and in the second instance where the legislation does not cater for a particular circumstance then reliance on the common law may be justified in order to protect that right.\textsuperscript{90}

\textsuperscript{81} Van der Walt (n 47) 30.
\textsuperscript{82} \textit{Port Elizabeth Municipality} (n 35) par 23.
\textsuperscript{83} \textit{Blue Moonlight Properties} (n 72) par 36 and \textit{Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others} 2010 3 SA 454 (CC) par 291.
\textsuperscript{84} \textit{Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others} 2000 2 SA 674 par 41.
\textsuperscript{85} Van der Walt (n 7) 34 and see further Michelman “Constitutional Supremacy and Appellate Jurisdiction” in Woolman and Bishop (eds) \textit{Constitutional Conversations} (2008) ch 4 52.
\textsuperscript{86} \textit{Pharmaceutical Manufacturers Association} (n 84) par 44.
\textsuperscript{87} Van der Walt (n 7) 36.
\textsuperscript{88} Van der Walt (n 7) 36.
\textsuperscript{89} Van der Walt (n 7) 36.
\textsuperscript{90} Van der Walt (n 7) 36.
One may ask, then, what is the position of ownership in the single-system-of-law. The reality is that the first principle is not directly applicable to the right to property because there is not an all-encompassing piece of legislation that aims to give effect to section 25 in its entirety.\textsuperscript{91} Yet, there is some applicability in terms of the reformative provisions of section 25, such as the Restitution of Land Rights Act 22 of 1994, which gives effect to certain parts of the property clause.\textsuperscript{92} By giving effect to reformative provisions this legislation has the effect of limiting ownership for the public benefit. Thus, ownership as the most absolute real right in terms of property law is subject to the limitations that the Constitution provides for.\textsuperscript{93}

The implication of this is that ownership does not carry with it the notoriety of absoluteness as it did in terms of the common law, rather it is subject to the constitutional matrix set out in \textit{Port Elizabeth Municipality}, which is in line with the principle of a single-system-of-law determined in \textit{Pharmaceutical Manufacturers Association}.\textsuperscript{94} Van der Walt refers to this as the “development algorithm of post-apartheid South African law and with it, the central guideline for thinking about the sources of property law in a single system of law.”\textsuperscript{95} This algorithm represents an important part of the constitutional matrix which is explained further below.

Take for example a situation wherein the owner was deprived of the use and enjoyment of his property under the rights paradigm, such as having unlawful occupiers on his land. An owner was previously able to conduct summary evictions, as unlawful occupation of land was a criminal offence.\textsuperscript{96} This power was rooted in the owner’s right to exclude people from his property if they had no permission to be on the land.\textsuperscript{97} This idea, which originates in the

\begin{footnotes}
\item Van der Walt (n 7) 42 and see further Marais and Maree “At the Intersection Between Constitutional Property Law and Administrative Law: Two Critical Views on the Constitutional Court’s \textit{Arun} Judgment” 2016 \textit{PER} 1 23- 29 for a compressed summary of the principles of subsidiarity and an expanded explanation of how a piece of legislation enacted to give effect to a non-property right impacts on the right to property in terms of the principle of subsidiarity.
\item Van der Walt (n 7) 49.
\item Badenhorst, Pienaar and Mostert (n 46) 98.
\item \textit{Pharmaceutical Manufacturers Association} (n 84) par 44.
\item Van der Walt (n 7) 23.
\item \textit{Port Elizabeth Municipality} (n 10) par 8.
\end{footnotes}
common law, was further reinforced by the apartheid state and was amplified by legislation, especially PISA.  

Under the new constitutional framework such an eviction would not be possible without considering the unlawful occupier’s dignity as well as all relevant considerations set out in PIE. The granting of an eviction order no longer entails that an owner merely has to prove ownership and that the occupiers have no permission to be on the land as the sole criteria for eviction. PIE requires that a number of considerations should be taken into account, especially the subjective circumstances of the unlawful occupiers, their dignity as well whether alternative accommodation is available for the occupiers, should they be evicted. Thus, we find that even non-property rights, such as human dignity, have the potential to suspend (temporarily) an owner’s full ownership right, which include the right to exclude, in terms of the constitutional framework. It follows that there is no longer a hierarchy of rights but rather a sliding continuum that adjusts according to the weight of each right depending on the circumstances and facts of a particular case.

3.2 The Interpretation of Section 25

In addition to balancing the rights of all the parties involved in a just and equitable manner, the constitutional matrix envisages a purposive approach to interpretation. Van der Walt is of the opinion that the most important issue with regard to the interpretation of section 25 is that, like the rest of the Constitution, it should be interpreted in a purposive manner. Du Plessis opines that the purposive approach is fast overtaking other weaker methods of interpretation, such as trying to identify the intention of the legislature or following grammatical interpretation. He advocates the purposive interpretation as being the most apt

98 Van der Walt “Towards the development of post-apartheid land law: an exploratory survey” 1990 De Jure 1 29 – 32. See further an example of a piece of legislation that amplified the owner’s right to exclude people from his property in The Prevention of Illegal Squatting Amendment Act 92 of 1976 s 3B(1)(a) which states: Notwithstanding the provisions of any law to the contrary -(a) but subject to any law under which he is compelled to demolish or remove any building or structure, the owner of and may without an order of court demolish any building or structure erected on the land without his consent, and remove the material from the land.

99 Van der Walt (n 97) 45.

100 Blue Moonlight Properties (n 72) par 96; Port Elizabeth Municipality (n 10) par 29.

101 Port Elizabeth Municipality (n 10) par 23.

102 Port Elizabeth Municipality (n 10) par 14 – 24.

103 Van der Walt (n 7) 28-29.

approach in a constitutional democracy and thinks that it is a broader and encompassing approach. The steps that should be followed in carrying out the purposive interpretation are to

“(i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so, (iii) adopt an alternative interpretation of the provision that ‘understands’ (read promotes) its central purpose; and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.”

However, this is too broad, which is why when following the purposive approach there needs to be certain safeguards in place to ensure interpretation is purposive, yet measured. The first is to understand the complexities of constitutional interpretation and avoid a one-stop-shop approach for grouping all the provisions under one interpretive bracket. Secondly, a purposive approach need not be extremely broad, even a narrow interpretation may be purposive. Lastly, the temptation to assume the purpose prior to beginning the exercise of interpretation should be avoided, due to the fact that the legislation’s purpose “can be established only through interpretation. The interpretation of enacted law is by its very nature purpose-seeking”.

At this juncture it would be appropriate to consider the Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Goedgelegen Tropical Fruits) case, as it represents an instance where the courts had to deal with a purposive interpretation of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). This is important because restitution is the one pillar of land reform that this dissertation focuses on. The case concerned the rights of the Popela community to restore labour tenancy rights they lost during apartheid. The Popela community had been labour tenants with varying status on the Boomplaats farm for over a century. Prior to being labour tenants the Popela community’s ancestors, the Maake people, enjoyed uninterrupted family settlement since the early 1800s. Their claim was twofold, the first being an order recognising that they had been dispossessed of their labour

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105 Du Plessis (n 104) 54 quoting a paragraph from Roux ‘Directory Provisions’ (supra) at 386.
106 Du Plessis (n 104) 54.
107 Du Plessis (n 104) 54.
108 Du Plessis (n 104) 54.
109 Du Plessis (n 104) 55.
110 2007 6 SA 199 (CC).
111 Department of Land Affairs and Others v Goedgelegen Tropical Fruits 2007 6 SA 199 (CC) par 20 – 21.
112 Goedgelegen Tropical Fruits (n 111) par 6 – 11.
113 Goedgelegen Tropical Fruits (n 111) par 7.
tenancy rights in 1969 as a result of racially discriminatory laws or practices.\textsuperscript{114} The second part was that the equitable redress they sought was the restitution of their personal homesteads amounting to 800 square metres each as well as the entire shared grazing area.\textsuperscript{115} The claims had failed in the Land Claims Court and the Supreme Court of Appeal primarily due to those courts deciding that the Popela Community was not dispossessed as a result of racially discriminatory laws or practices.\textsuperscript{116} After failing in the Land Claims Court and the Supreme Court of Appeal the Popela community approached the Constitutional Court to decide whether their dispossession was as a result of past racially discriminatory laws or practices. In interpreting whether the community was entitled to restitution the Court adopted a purposive approach.\textsuperscript{117} A purposive approach as mentioned above favours a generous construction over a textual one by identifying the purpose of the legislation and construing that legislation in such a manner as to achieve that purpose.\textsuperscript{118}

The Court held that when interpreting legislation such as the Restitution Act, which is “umbilically” connected to the property clause, it should be done in a manner that promotes the spirit, purport, and objects of the Constitution.\textsuperscript{119} This holding essentially overturned the claim by the respondents that the dispossession was not as a result of racially discriminatory laws or practices but as a result of a business decision.\textsuperscript{120} The Constitutional Court explained that the proclamation in the Government Gazette 2761 GN R1224, 31 July 1970 was a deliberate attempt by the minority apartheid government to eradicate labour tenancy on white-owned farms.\textsuperscript{121} The Court ruled that the proclamation that phased out labour tenants’ rights did not exist in a vacuum, but was encouraged and existed within a grid of discriminatory laws that prevented black people from effectively challenging laws that infringed the already limited rights they did have.\textsuperscript{122} Therefore the Court purposively interpreted the term “as a result of” to mean “no more than ‘as a consequence of’ and not

\textsuperscript{114} Goedgelegen Tropical Fruits (n 111) par 25.
\textsuperscript{115} Goedgelegen Tropical Fruits (n 111) par 25.
\textsuperscript{116} Goedgelegen Tropical Fruits (n 111) par 25.
\textsuperscript{117} Goedgelegen Tropical Fruits (n 111) par 25.
\textsuperscript{118} Du Plessis (n 104) 55 and see Goedgelegen Tropical Fruits (n 111) par 53.
\textsuperscript{119} Goedgelegen Tropical Fruits (n 111) par 53.
\textsuperscript{120} Goedgelegen Tropical Fruits (n 111) par 18 and 19.
\textsuperscript{121} Goedgelegen Tropical Fruits (n 111) par 61 and 62.
\textsuperscript{122} Goedgelegen Tropical Fruits (n 111) par 56 – 63.
solely as a consequence of”123 and found the Popela community had been dispossessed as a result of past racially discriminatory laws or practices.124

In light of the above it is clear that a purposive approach means that we have to read section 25 as a coherent whole.125 In part, this entails that the inherent tension within the clause needs to be embraced, as it is not an uncommon feature in constitutional property clauses.126 It is worth mentioning that the tension in the South African property clause is to a large extent unique, given the Country’s history.127 A history that has placed the majority of land and resources into the hands of an extremely small minority. Thus, in the South African context it is impossible to purposively interpret the constitutional property clause without considering the historical context of dispossession in South Africa.128

It is also unfair to assume that the property clause has only one purpose, i.e. land reform, and that it leaves little consideration for the protection of property. This is incorrect as property enjoys protection both in constitutional law and private law.129 As far as constitutional law is concerned we have seen above that section 25(1)-(3) plays an important role in ensuring that property is protected against unjustified state limitation. This is because the beneficiaries of the land reform programmes must enjoy sufficient protection of their property from further unjustified state limitation.

Despite what has been discussed above, property law must conform to the values of human dignity, equality, and freedom as well as the underlying value of ubuntu.130 These values ensure that individual self-fulfilment in acquiring property is accompanied by a social obligation not to harm the public good.131 Therefore, a purposive approach to interpreting the property clause has to be cognisant of three relationships, two within the property clause – the

123 Goedgelegen Tropical Fruits (n 111) par 69.
124 Goedgelegen Tropical Fruits (n 111) par 81.
125 Van der Walt (n 33 (2011) 29.
126 Van der Walt (n 33 (2011) 29.
127 Van der Walt (n 33 (2011) 30.
128 Van der Walt (n 33 (2011) 30; See further Port Elizabeth Municipality (n 10) par 14.
130 Port Elizabeth Municipality (n 10) par 37; Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others 2015 6 SA 125 (CC) par 43 - 50; Van der Walt (n 33 (2011) 31; See further Himonga, Taylor and Pope “Reflections on Judicial Views of Ubuntu” 2013 PER 371 398 – 399 for a brief discussion on the link between ubuntu and restorative justice.
131 Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others 2015 6 SA 125 (CC) par 50 and see Marais “Expanding the Contours of the Constitutional Property Concept” 2016 TSAR 576 for a discussion of Froneman J’s approach on relying on dignity especially in crafting the judgment.
protection of existing property rights versus reform – and one between the property clause and the values embodied in the Constitution.

Furthermore, to be cognisant of the tensions within the property clause and its relationship with the underlying values of the Constitution, we need to at least be aware of what the property clause actually guarantees. This process involves a theoretical question that has to do with the “phraseology” of section 25.\textsuperscript{132} Section 25 of the Constitution is different from section 28 of the Interim Constitution, in that where section 28 was phrased positively, section 25 is phrased negatively.\textsuperscript{133} In other words the negative structure means that the state must not interfere with the property unjustifiable, whereas the previous positive structure meant that the state had a duty to protect property.\textsuperscript{134} Although the phraseology does not have a fundamental impact on whether property is protected,\textsuperscript{135} positive clauses such as the German article 14.1.1 provide a stronger protection for property than a negative clause.\textsuperscript{136} This could have an undesired impact on land reform, which is part of the reason why the drafters of the Constitution decided to opt for a negatively phrased property clause. Ultimately though it was a negative clause that was adopted which guarantees that property rights will not be limited in a manner that is not constitutionally endorsed, i.e. that the limitation is done through a law of general application for the public interest, is not arbitrary and is accompanied by compensation in instances of expropriation.\textsuperscript{137}

Section 25 should therefore be interpreted purposively according to the \textit{Port Elizabeth Municipality} judgment.\textsuperscript{138} This entails the taking into account of several factors such as the historical context within which section 25 operates, the constitutional matrix, and the constitutional guarantee.\textsuperscript{139}

\begin{itemize}
\item[] \textsuperscript{132} Van der Walt (n 33 (2011) 34.}
\item[] \textsuperscript{133} Van der Walt (n 33 (2011) 34.}
\item[] \textsuperscript{134} Van der Walt (n 7) 57.}
\item[] \textsuperscript{135} Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) par 72. This finding in the First Certification case was confirmed in FNB (n 27) par 48.}
\item[] \textsuperscript{136} Van der Walt (n 30) 129 – 130.}
\item[] \textsuperscript{137} Van der Walt (n 33 (2011) 36. See further Badenhorst, Pienaar and Mosert (n 46) 535. See generally Eisenburg “‘Public Purpose' and Expropriation: Some Comparative Insights and the South African Bill of Rights” 1995 \textit{SAHR} 207 for a discussion on what the public interest means in South Africa.}
\item[] \textsuperscript{138} Van der Walt (n 33 (2011) 34.}
\item[] \textsuperscript{139} Van der Walt (n 33 (2011) 34.}
\end{itemize}
3.3 The Structure of Section 25

Structurally, the property clause is comprised of two seemingly contradictory halves. The first half, as mentioned earlier, deals with the protection of existing property rights, whereas the latter half deals with land reform. Although the two may appear contradictory, they are what the drafters of the Constitution envisaged, i.e. that the property clause should be a tool for securing existing rights as well as promoting reform.\footnote{Badenhorst, Pienaar and Mostert (n 46) 522.} It is no surprise that due to the proximity of the two contradictory provisions there exists the possibility of reading the property clause with scepticism. Specifically that the property clause will result in a tug of war between the competing interests that renders reform static.\footnote{Van der Walt (n 7) 10.} However, this scepticism is unfounded because the provisions represent a commitment and intention to reforms aimed at reversing centuries of racial and economic discrimination.\footnote{Badenhorst, Pienaar and Mostert (n 46) 522.} This is why, when the structure of the clause is considered as a whole, it becomes clear that it is actually aimed at reform.\footnote{Pienaar (n 11) 10.} As mentioned previously, section 25 is divided into provisions dealing with reform (25(4) – 25(9)) and the provisions that protect private property (25(1) – 25(3)).\footnote{Pienaar (n 143) 10.} Thus, the property clause contains all the ingredients necessary for realising transformation.\footnote{Kloppers and Pienaar (n 17) 677.}

It should also be noted that the structural elements of the reformative provisions of section 25 of the Constitution are different from the provisions of section 28 of the Interim Constitution, in that no reformative provisions featured in the property clause of the Interim Constitution. The reformative provisions are referred to as the three pillars of land reform.\footnote{Pienaar (n 143) 10.} Their inclusion represents a commitment by the drafters to land reform. Having land reform embedded in the Constitution means that government must take reform seriously and cannot abandon it.\footnote{Kloppers and Pienaar (n 17) 677.} In addition it does not leave the process open ended; rather, it provides a blueprint for land reform.\footnote{Pienaar (n 143) 14.} In what follows I briefly explain the clauses that form this blueprint.\footnote{Pienaar (n 143) 14.} Thereafter, I will focus specifically on section 25(7) of the Constitution, which is aimed at reversing the wrongs of apartheid and has the potential to achieve meaningful reform through restitution of property.

\footnote{Badenhorst, Pienaar and Mostert (n 46) 522.}
\footnote{Van der Walt (n 7) 10.}
\footnote{Badenhorst, Pienaar and Mostert (n 46) 522.}
\footnote{Pienaar (n 11) 10.}
\footnote{Pienaar (n 143) 10.}
\footnote{Pienaar (n 143) 10.}
\footnote{Kloppers and Pienaar (n 17) 677.}
\footnote{Pienaar (n 143) 14.}
\footnote{Pienaar (n 143) 14.}
\footnote{Pienaar (n 143) 14.}
Section 25(1), the deprivation clause, has two important functions. The first is that it confirms that ownership rights in property law are not absolute, by establishing what Van der Walt refers to as a police power principle.\(^{150}\) This has the effect of making state limitation of the owner’s right to use, enjoy, and exploit his or her property lawful.\(^{151}\) Secondly, the provision ensures that the state limitation is fair by including the requirement that the law authorising limitation may not authorise arbitrary deprivation of property.\(^{152}\)

Essentially, under section 25(1) property may only be limited if two conditions are met. The first being whether the limitation is an actual deprivation of property, which can only take place through the common law, indigenous law or legislation, provided that the depriving law is a law of general application. The definition of a deprivation is the regulatory limitation with the use, enjoyment, and exploitation of property.\(^{153}\) In subsequent decisions this definition has been narrowed to substantial limitation with property.\(^{154}\) The second is that the deprivation must not be arbitrary. The FNB Court held that a law authorising deprivation is arbitrary when it “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.\(^{155}\)

The expropriation clause, section 25(2), provides that an expropriation must be for a public purpose or in the public interest.\(^{156}\) The Constitution does not provide an exhaustive definition for the public interest requirement. Yet, it does explicitly stipulate that a public interest includes the nation’s commitment to land reform.\(^{157}\) The explicit mentioning of land reform is meant to clarify that constitutionalism in South Africa represents a positive intention to achieve redress in the wake of an enduring legacy of racial discrimination based on unequal distribution of land.\(^{158}\)

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\(^{150}\) Van der Walt (n 33 (2011) 17.

\(^{151}\) Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another 2009 6 SA 391 (CC) par 32; Van der Walt (n 33 (2011) 17.

\(^{152}\) Van der Walt (n 33 (2011) 17.

\(^{153}\) FNB (n 27) par 57; National Credit Regulator v Opperman and Others 2013 2 SA 1 (CC) par 66.

\(^{154}\) Mkontswana v Nelson Mandela Metropolitan Municipality 2005 1 SA 530 (CC) par 32. See further Van der Walt and Shay “Constitutional Analysis of Intellectual Property” 2014 PER 51 57.

\(^{155}\) FNB (n 27) par 100.

\(^{156}\) Because the public interest requirement is broader than the public purpose requirement and includes most public purposes, I will refer to the two collectively as the “public interest requirement”. See Van der Walt (n 33 (2011) 242 – 244 for a discussion in this regard.

\(^{157}\) Van der Walt (n 33 (2011) 20.

\(^{158}\) FNB (n 27) par 49.
Section 25(3), the compensation clause, provides that expropriation must be accompanied by just and equitable compensation. One of most recent decisions on this requirement is *Msiza v Director-General for the Department of Rural Development And Land Reform and Others*159 (*Msiza*). The Court made it clear that the Expropriation Act 63 of 1975 (the Expropriation Act) is inconsistent with the Constitution in so far as it places an emphasis on the market value as the main consideration for determining just and equitable compensation.160 This case is a landmark decision, as it paves the way for an alternative approach to determining when compensation is just and equitable.161 This alternative approach is the first where compensation was adjusted downwards from market value in light of all the requirements in section 25(3) in view of the reformative purpose behind the property limitation and has the potential to reignite the nation’s commitment to land reform.

Some authors have referred to section 25(4) as being the interpretation provision.162 This means that despite there being a protective element in section 25(2), section 25(4) provides an interpretation that legitimises the reformative aims of the Constitution.163 Furthermore property is not limited to land, which allows for a broad range of interests and intellectual property to be included in the reform initiatives.164

Section 25(5) places a duty on the state to take legislative measures to foster conditions that encourage fair access to land. Whereas section 25(6) specifically addresses the historical disadvantage of black communities under apartheid. In other words the section obligates the state to pass legislation that has the effect of reversing the ill effects of the past by bolstering existing security of tenure for land/property owners, specifically black land/property owners.165

Section 25(7) is aimed specifically at reversing the past by ensuring that legislation is passed that will allow individuals or communities to submit a claim for property to be given back to

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159 *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* 2016 5 SA 513 (LCC).
160 *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* 2016 5 SA 513 (LCC) par 32.
161 Bearing in mind the *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) which will be discussed under section 4.2 of this dissertation, where the Constitutional Court had to determine just and equitable compensation.
162 Van der Walt (n 33 (2011) 20. See further Badenhorst, Pienaar and Mostert (n 46) 523.
163 Van der Walt (n 33 (2011) 20.
164 Badenhorst, Pienaar, Mostert (n 46) 523 and 593.
165 Van der Walt (n 33 (2011) 21.
them or for another alternative equitable redress to be granted to successful applicants.\textsuperscript{166} In simpler terms the aim of section 25(7) is restitution. Section 25(8) however, sets out an important disclaimer that no provision within section 25 is capable of preventing necessary land reform programmes, provided that the programmes are compliant with section 36(1).\textsuperscript{167} Finally section 25(9) reminds the legislature that they now have a duty to pass the legislation referred to in the above subsections.

From the above it becomes clear that, structurally, the property clause is not a guarantor of the status quo. In what follows a more detailed discussion on restoration of property, as one of the pillars aimed at land reform, is provided to illustrate this point.\textsuperscript{168} Section 25(7) states that:

“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.”\textsuperscript{169}

The Restitution Act was enacted to give effect to section 25(7).\textsuperscript{170} In terms of the Restitution Act “existing rights of ownership do not have precedence over claims for restitution”,\textsuperscript{171} and “the rights of registered owners and other persons with an interest in the land must be balanced against the constitutional injunctions to ensure that restitution be made where this is just and equitable”.\textsuperscript{172} In addition to striking a balance between existing ownership rights and claims against those rights by applicants for restitution of property, the Restitution Act was enacted to give effect to the provisions of section 25(7) confirms the subsidiarity principles referred to above. This is because the legislation now provides a cause of action for pursuing the restitution envisaged in the Constitution. In order to assess the potential of section 25(7) to facilitate reform one must look at the law holistically, including the Restitution Act. Although restitution is a pillar of land reform, there is a degree of overlap that can occur, as the three separate land reform programmes achieve the best results when they function in

\textsuperscript{166}Van der Walt (n 33 (2011) 21.  \\
167Van der Walt (n 33 (2011) 21.  \\
168The limited scope of this dissertation does not allow for a discussion of all the pillars of land reform. For further reading on this topic, see JM Pienaar Land Reform (2014).  \\
170Although initially enacted to give effect to sections 121 – 123 of the Interim Constitution, as confirmed in Transvaal Agricultural Union Transvaal Agricultural Union v Minister of Land Affairs and Another 1997 2 SA 621 (CC), subsequent amendments have confirmed that its purpose is to give effect to section 25(7) of the Constitution.  \\
171Transvaal Agricultural Union v Minister of Land Affairs and Another 1997 2 SA 621 (CC) par 33.  \\
172Transvaal Agricultural Union (n 171) par 36.
correlation with each other.\textsuperscript{173} This dissertation, however, due to its limited scope discusses land reform in relation to restitution primarily with subtle references to other pillars or aspects where appropriate.

The purpose of land restitution is to restore a right in land or, alternatively, provide alternative restitutionary remedies to people who lost these rights after 19 June 2013 as a result of racially discriminatory laws or practices.\textsuperscript{174} Moreover, it is meant to achieve healing by acknowledging the histories of injustice and the impact it has had on the majority of South Africans.\textsuperscript{175} This purpose was confirmed by the Constitutional Court in \textit{Alexkor v The Richtersveld Community and Others}\textsuperscript{176} (\textit{Richtersveld Community}) where the Court held that in addition to the Restitution Act trying to undo years of “spatial apartheid” the broader purpose is to offer redress to individuals and communities who were dispossessed of their rights in the land by “racially discriminatory policies”.\textsuperscript{177} This can only be achieved if a purposive approach to interpreting the Restitution Act is adopted.

A key feature of the restitutionary programme was the establishment of the Commission on Restitution of Land Rights (the Commission) and the Land Claims Court, to investigate and thereafter adjudicate claims respectively.\textsuperscript{178} There are various formal requirements that need to be adhered to when claiming restitution. Of primary importance to this dissertation is that the claims need to have been lodged between 1 May 1995 and 31 December 1998 and that the claimant must have had a right in the land and was forcefully dispossessed of that right by a racially discriminatory law or practice.\textsuperscript{179} It must be emphasised that in respect of a right in land, it is not limited to ownership and any right would suffice for a legitimate claim, such as interests of a labour tenant,\textsuperscript{180} and customary law interests.\textsuperscript{181}

\begin{thebibliography}{9}
\bibitem{173} Badenhorst, Pienaar and Mostert (n 46) 593.
\bibitem{174} The Restitution of Land Rights Act 22 of 1994 at Preamble and Definition of restoration of a right in land.
\bibitem{176} 2004 5 SA 460 (CC).
\bibitem{177} \textit{Alexkor Ltd and Another v Richtersveld Community and Others} 2004 5 SA 460 (CC) par 98.
\bibitem{178} Restitution Act (n 174) s 4 and s 22.
\bibitem{179} See Badenhorst, Pienaar, Mostert (n 46) 630 – 637 for a more comprehensive discussion of these other requirements as well as others such as the dispossession occurring after 19 June 1913 and see further Pienaar \textit{Land Reform} (2014) 538.
\bibitem{180} \textit{Department of Land Affairs and Others v Goedgelegen Tropical Fruits} 2007 6 SA 199 (CC).
\bibitem{181} \textit{Richtersveld Community} (n 177) par 62-64; Badenhorst, Pienaar, Mostert (n 46) 633 - 644 confirms the \textit{Richtersveld Community} decision and discusses it briefly; Pienaar \textit{Land Reform} (2014) 550.
\end{thebibliography}
The Commission was established to receive all claims lodged in terms of the Restitution Act, assist in the preparation and submission by claimants and advise claimants of the progress of their claims.\textsuperscript{182} In addition the Commission must investigate claims made as well as facilitate mediation.\textsuperscript{183} Should mediation fail the Land Claims Commissioner will be entitled to refer the matter to the Land Claims Court.\textsuperscript{184} The reality is that the Commission plays a complex role – it is on the one hand an independent body that assists the public and, on the other hand, it represents the interests of the state.\textsuperscript{185} With such a complex role to play one can assume that the Commission would enjoy much support from the state. This is, unfortunately, not the case, as is evident in the discussion of the \textit{Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others}\textsuperscript{186} (\textit{Land Access Movement}) judgment.\textsuperscript{187}

Lastly, the adjudication of restitutionary matters takes place in the Land Claims Court. The Court is established in terms of the provisions of the Restitution Act and draws its powers directly from it.\textsuperscript{188} It is a specialised court dealing with land reform matters and has to be approached first, especially in restitution matters where there is a deadlock between the Commission and a claimant.\textsuperscript{189} Being the court of first instance it may only be by-passed in favour of the Constitutional Court where justice requires.\textsuperscript{190} It also has the same jurisdiction as a high court.\textsuperscript{191} For purposes of this dissertation it is important to mention that the court has the power to determine the amount of compensation payable in accordance with the Expropriation Act.\textsuperscript{192}

In order to contextualise the above section, for purposes of addressing the research question, a brief recap is appropriate. One area where considerable redress is required in post-apartheid South Africa is in the property sector. The problem, however, is that private property law in

\begin{itemize}
\item \textsuperscript{182} Badenhorst, Pienaar, Mostert (n 46) 637.
\item \textsuperscript{183} Restitution Act (n 174) s 6 and see \textit{Farjas (Pty) Limited and Another v Regional Land Claims Commissioner, Kwazulu-Natal (LCC21/96)} [1998] ZALCC 1 par 19 and 42.
\item \textsuperscript{184} Restitution Act (n 174) s 14.
\item \textsuperscript{185} Pienaar \textit{Land Reform} (2014) 567.
\item \textsuperscript{186} 2016 5 SA 635 (CC).
\item \textsuperscript{187} See section 4.1 of this dissertation.
\item \textsuperscript{188} The Restitution Act (n 174) s 22.
\item \textsuperscript{189} Pienaar (n 185) 582.
\item \textsuperscript{190} Pienaar (n 185) 582 and bearing in mind that it is rare that the Constitutional Court will sit as a court of first and last instance.
\item \textsuperscript{191} The Restitution Act (n 174) s 22(a).
\item \textsuperscript{192} The Land Restitution and Reform Laws Amendment Act 18 of 1999 s35(5A) provided the authority for expropriation in the restitution of land to be calculated in terms of the Expropriation Act.
\end{itemize}
South Africa played an important part in recognising ownership as an absolute right, and also a right that only white people could have. This spatial apartheid meant that approximately 13 percent of the land in South Africa was designated for black occupation.\textsuperscript{193} Despite this, however, the drafters of the Constitution structured section 25 in a way that turned the attention away from the private-law understanding of ownership, which strongly favours protection of property holders, to one wherein ownership would be recognised and respected, yet, could be limited provided the requirements in section 25 are adhered to. The limitation was introduced in order to address the previous era’s unequal distribution of land. This process would be done inter alia by way of expropriation against payment of just and equitable compensation. This dissertation also referred to the duality of section 25 in protecting both existing tenure as well as promoting reform, and has also addressed this duality as being a positive tension that actually lends itself to reform rather than frustrating it.

As a result, the pertinent question arises as to why the land-reform programme has had such limited success during the past 20 years of constitutionalism.\textsuperscript{194} The general view is that the stumbling blocks are the state’s non-commitment to land reform and that compensation at market value makes the cost of reform too high. The following chapter examines these objections and indicates that there seems to be an absence of political will, while also showing that market value is not the only determining factor in calculating compensation.

4 Reasons for the Slow Pace of Land Reform

4.1 The Lack of State Commitment to Land Reform

The Port Elizabeth Municipality decision paved the way for a non-hierarchical constitutional property regime. Despite there being some inconsistency within the judiciary with respect to interpretation, the most pertinent questions are levelled against Parliament. Questions such as why, despite making other amendments to the Expropriation Act, there has been no amendment giving effect to section 25 since the enactment and adoption of the Constitution, which is over 20 years ago. Also why is it that the legislature only pushes through legislation

\textsuperscript{193} Eisenburg A “‘Public Purpose’ and Expropriation: Some Comparative Insights and the South African Bill of Rights” 1995 SAJHR 207.

relating to land when there is political gain to be made? These two questions are interlinked and show that the legislature can be blamed for its failure to enact meaningful land-reform laws. The Land Access Movement judgment shows that the problem is largely procedural when it comes to enacting legislation designed to give effect to section 25. This analysis will also include reference to the Expropriation Bill and why it has not been enacted.

The Land Access Movement judgment dealt with Parliament’s failure to facilitate sufficient public participation in the process of passing the Restitution of Land Rights Amendment Act 15 of 2014 (the Amendment Act). Despite land restitution being a pillar of land reform, the deadline for lodging claims was set on 31 December 1998. Unfortunately, this is one of the major shortcomings of this programme, as only around 80 000 claims were lodged. This, in a country where the majority of the population were affected by the apartheid government’s segregation laws. Subsequently, there have been calls to reopen the lodging of restitution claims. Despite the need to reopen the window for lodging claims, there was a concern by the public that the Amendment Act did not adequately protect claims lodged prior to the 1 December 1998 deadline.

Two particular issues were addressed by the Constitutional Court which has bearing on the current discussion. The first is the concern that if the new window is opened there will be a serious risk that those claims which have been finalised by the Land Claims Court will again be the subject of further land claims by other competing claimants. Secondly, the opening of a new window is likely to severely prejudice already successful land claims or claims that are still to be finalised. Whilst it is appreciated that in the interest of justice there may be a competing claimant who has a stronger rights in the land, the real crux of this matter is that

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195 Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others 2016 5 SA 635 (CC) par 31.
196 Land Access Movement (n 195).
198 Land Access Movement of South Africa (n 195) par 2.
199 Land Access Movement of South Africa (n 195) par 8.
200 Land Access Movement of South Africa (n 195) par 9.
201 Land Access Movement of South Africa (n 195) par 4.
202 Land Access Movement of South Africa (n 195) par 4.
203 Land Access Movement of South Africa (n 195) par 4, 10, 13, 47.
there are still claims that have not been finalised for over a decade.\textsuperscript{204} The Court pointed out that the leading cause for this is the Commission being under capacitated. Furthermore, the fact that the legislature tried to fast track the passing of the Amendment Act despite there being serious concerns about the current capacity of the Commission, shows that Parliament for some reason has failed to apply its mind to restitution as a pillar of land reform.\textsuperscript{205}

With respect to the shortened timeline the Court was highly critical of the legislature for not facilitating public participation. The Court said further that the test for whether Parliament facilitated public participation was that of reasonableness.\textsuperscript{206} The relevant factors in determining reasonableness are inter alia the rules Parliament has adopted for purposes of streamlining the passing of the Amendment Act and, secondly, the nature of the legislation in question as well as any need for its urgent adoption. The Court made it clear that the nature of the right was extremely important, as the deprivation of land historically has led to the denial of dignity of black men and women, and that landlessness has not been redressed.\textsuperscript{207}

Despite the dire need to rectify the historical injustices, urgency on the part of the National Council of the Provinces (NCOP), as a House of Parliament, was lacking and that there seemed to be no apparent reason to fast track the passing of the Amendment Act.\textsuperscript{208} The seriousness of the right did not require the urgency the NCOP claimed was needed. Instead, the right required thoughtful consideration involving the participation of the very people affected by landlessness.\textsuperscript{209}

The fact that the NCOP did not exercise due care meant that Parliament itself erred and therefore the passing of the Amendment Act was unconstitutional on procedural grounds. The Court also expressed a concern that Parliament may decide not to pass the Amendment Act when new members are elected and ordered that should the Amendment Act not be passed within the stipulated time, the Chief Land Claims Commissioner should approach the Court for appropriate relief.\textsuperscript{210} Although this case involved the right to participatory democracy, the underlying message from the Court was that when giving effect to a right in the Bill of

\begin{footnotesize}
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\item \textsuperscript{204} Land Access Movement of South Africa (n 195) par 4, 10, 13, 47.
\item \textsuperscript{205} Land Access Movement of South Africa (n 195) par 67.
\item \textsuperscript{206} Land Access Movement of South Africa (n 195) par 60.
\item \textsuperscript{207} Land Access Movement of South Africa (n 195) par 63-64.
\item \textsuperscript{208} Land Access Movement of South Africa (n 195) par 65-70.
\item \textsuperscript{209} Land Access Movement of South Africa (n 195) par 82.
\item \textsuperscript{210} Land Access Movement of South Africa (n 195) par 90.
\end{itemize}
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Rights, especially those rights that need to redress past discrimination, special care needs to be taken.

A full bench in Land Claims Court has recently had the opportunity to interpret the Constitutional Court’s judgment. Specifically Amaqamu Community Concerning: Various Farms in Camperdown District Municipal Area LCC01/2009; Emakhasaneni Community and another v the Minister of Rural Development and Land Reform and others LCC03/2009; Qwabe Community v Regional Land Claims Commissioner for Kwazulu-Natal and Others (AmaQamu) deals with whether the order given in Land Access Movement interdicting the Land Claims Commission from processing in any manner claims lodged from 1 July 2014, extends to the Land Claims Court. The order in Land Access Movement was silent on this. The key issues regarding the Land Claims Court in Amaqamu was whether, on the one hand, the order in Land Access Movement “preserved new claims lodged with the Commission only to the extent that the receipt of a new claim prior to 28 July 2016 was recorded”. On the other hand whether despite the interdict stopping the Commission from processing new claims, the Land Claims Court “was still at liberty to accord judicial recognition to new claimants and their claims”. The latter issue was advanced by the Land Claims Commission.

In interpreting the Land Access Movement order the Land Claims Court held that it would be impossible to deal with new claims without the assistance of the Commission, which is interdicted from processing new claims. However, the full bench was not shy in pointing out that there is a sizable amount of blame that must be borne by the Land Claims Commission, which have in the past 20 years not finalised the existing claims that were lodged with it due to various reasons, including lack of funding and capacity. The problem herein is that the failure by the state to follow the correct procedure in passing the much needed Restitution Amendment Act, has essentially placed the new claims in limbo.

211 Amaqamu Community Concerning: Various Farms in Camperdown District Municipal Area LCC01/2009; Emakhasaneni Community and another v the Minister of Rural Development and Land Reform and others LCC03/2009; Qwabe Community v Regional Land Claims Commissioner for Kwazulu-Natal and Others LCC173/2014 (Unreported).
212 LCC173/2014 (Unreported)
213 Amaqamu (n 211) par 27.
214 Amaqamu (n 211) par 27.
215 Amaqamu (n 211) par 51.
216 Amaqamu (n 211) par 4.
This problem is exacerbated by the fact that since the passing of the Amendment Act approximately 143 720 or more new claims were lodged.\(^{217}\) This is almost double the amount of old land claims lodged by 31 December 1998. Knowing the numbers of claims involved makes the failure by the state particularly disappointing, and truly frustrates the land reform programme. The only upside is the fact that the *Amaqamu* judgment allows for new claimants to be joined to the proceeding of old claimants if they are able to challenge the right of the old claimants to restitution of the land, in essence acting as *amicus* to assisting the Land Claims Court in determining whether the old claimants have established a case.\(^{218}\)

The Expropriation Bill suffers from many of the shortcomings which plague the Amendment Act. The Presidency has sought legal advice on the validity of the Expropriation Bill in light of what has happened to the Amendment Act and has not signed the Expropriation Bill into law. It has instead sent it back to the NCOP for not having followed the correct procedure once again.\(^{219}\) This is unfortunate, since the Expropriation Bill is the furthest the state has come to enacting a new Expropriation Act since the Constitution came into effect. Which in light of what has been written above means that the Expropriation Act was drafted with the common-law interpretation of ownership in mind and not the constitutional interpretation envisaged in *Port Elizabeth Municipality*. Despite 20 years into a constitutional democracy there has not been legislation enacted to give effect to the expropriation part of the property clause, albeit there being some amendments to the current Expropriation Act. This is undesirable and seems to point to an unwillingness by the state to give land reform the importance it deserves.

### 4.2 Just and Equitable Compensation

Picking up where the previous sub-chapter left, the fact that the Expropriation Act is out dated and not in line with the Constitution means that the courts have had little material to work with. However, despite the lack of legislative material to work with, progressive judgments have nonetheless been handed down, most recently in *Msiza*.\(^{220}\) Here the Land Claims Court was presented with an opportunity to revisit how to calculate just and equitable compensation.

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\(^{218}\) *Amaqamu* (n 211) par 56.

\(^{219}\) See the Expropriation Bill’s history at Parliamentary Monitoring Group’s website at https://pmg.org.za/bill/550/.

\(^{220}\) *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* 2016 5 SA 513 (LCC).
compensation, which, along with the lack of legislative and political will, has been blamed for slowing down land reform. The facts of the case dealt with land restitution generally. More specifically the case concerned the determination of just and equitable compensation that ought to be paid to the respondents, after the Land Claims Court awarded the applicant, Mr Msiza, the property in 2004.\footnote{Msiza (n 220) par 1-4.} The respondents argued that the determination should be based on the market value of the property.\footnote{Msiza (n 220) par 39.} The Land Claims Court rejected the market-value approach as being just and equitable in this matter.\footnote{Msiza (n 220) par 79.} For purposes of this dissertation I will focus on the determination of just and equitable compensation below market value as an indicator that the judgement was both progressive and achieved an equitable balance between the rights of the owner and the need for land reform.

First off, it is important to revisit the Constitutional Court’s reasoning in Du Toit v Minister of Transport\footnote{2006 1 SA 297 (CC).} (Du Toit) and Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others\footnote{Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others (LCC 156/2009) [2012] ZALCC 7 par 35.} (Mala Mala). Both these judgments relied on the Gildenhuys formula\footnote{Ex Parte Former Highland Residents; In Re: Ash and others v Department of Land Affairs [2000] 2 All SA 26 (LCC).} as a starting point for determining just and equitable compensation.

In Du Toit the Constitutional Court had to deal with the disparity between the constitutional requirements for equitable compensation and the Expropriation Act’s requirement for compensation, which places market value at the fore.\footnote{Du Toit (n 224) par 33.} In delivering its judgment the majority echoed the point that this chapter seeks to make i.e. determining just and equitable compensation could have been made easier if the legislature had applied its mind and passed legislation to give effect to the provisions of section 25(3) of the Constitution.\footnote{Du Toit (n 224) par 35.} Nevertheless, the majority dismissed the appeal on the basis that just and equitable compensation had been paid to Mr Du Toit. In arriving at its decision the majority followed the formula in the Expropriation Act which relies primarily on market value, as it is the only known factor that can quantify compensation. The majority thereafter held that to arrive at
the final amount the other factors should be used to increase or decrease the market value.\textsuperscript{229} This is how – the majority explains – in the absence of legislation giving effect to section 25(3), just and equitable compensation should be calculated.

The minority, however, differed and held that the majority’s interpretation is incorrect because it will continue to “privilege market value at the expense of other considerations relevant to justice and equity which are expressly advocated by the Constitution”.\textsuperscript{230} Overall the \textit{Du Toit} judgment missed the mark in developing jurisprudence in respect to determining compensation for expropriation.\textsuperscript{231} The missed opportunity has meant that judgements such as the \textit{Mala Mala} judgement have been handed down.\textsuperscript{232}

In \textit{Mala Mala} the Land Claims Court followed the majority in \textit{Du Toit} in its determination of just and equitable compensation.\textsuperscript{233} In that case the brief facts were the need to determine compensation for the awarding of a massive piece of eco-tourism land that was used as a private game reserve. The award was made in terms of the Restitution Act and was referred to the Land Claims Court after a dispute arose between the state and the owners of the land over the amount of compensation to be paid.\textsuperscript{234}

The disparity between the two party’s figures was well over several hundred million rand with the owners relying on market value and the state relying on other factors. In reaching its conclusion the Court was unable to find that any of the other factors in the Constitution matter enough to lessen the quantum to an amount below market value.\textsuperscript{235}

In \textit{Msiza} the Gildenhuys formula was also followed. Meaning that that the market value provides the starting quantum. However once market value had been ascertained Ngcukaitobi AJ went on to consider the other factors, starting with the current usage of the property, which he determined to be agricultural.\textsuperscript{236} The history of the acquisition of the property and the purpose of the expropriation featured prominently in the judgment compared to that in

\begin{footnotesize}
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  \item \textit{Du Toit} (n 224) par 35, 47-53.
  \item \textit{Du Toit} (n 224) par 84.
  \item \textit{Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others} (LCC 156/2009) [2012] ZALCC 7.
  \item \textit{Mala Mala} (n 232) par 52 and 53.
  \item \textit{Mala Mala} (n 232) par 11, 12, 15.
  \item \textit{Mala Mala} (n 232) par 77.
  \item \textit{Msiza} (n 220) par 52.
\end{itemize}
\end{footnotesize}
Mala Mala. In Msiza it was noted that it should not be forgotten that white South Africans had acquired land below market value, and as such this factor has special bearing when the history of the acquisition points to this situation. This is to ensure that the owner is not compensated by receiving an amount that would lead to him benefiting twice from apartheid. In Msiza the facts did not fall under this category, but did however warrant attention for a reduction in market value. Finally, in determining the purpose of the expropriation, Ngcukaitobi AJ found that the purpose of section 25(3)(e) is to act as a counterweight to market value. Furthermore, he noted that whilst he has followed the approach of Mokgoro J in Du Toit, he has acknowledged the concerns of Langa ACJ and the minority, that market value will be privileged if the two-stage approach is followed, and expressly held that he has not favoured market value in the particular case. I agree with him as all the other relevant factors in section 25(3) were also considered. Therefore the judgment fits the purposive interpretation approach referred to in chapter 3. However if there was criticism that could be levelled against Msiza it would be that it did not divert from the Gildenhuys formula despite acknowledging that the Gildenhuys formula has had the effect of privileging market value. Nevertheless, the judgment in Msiza shows that the structure of section 25 is not a barrier to land reform itself but is a highly flexible tool that can inspire reformative judgments despite there being no expropriation legislation giving effect to section 25

237 This is essentially a generalisation, as this might not have been the case in each and every instance. The compensation inquiry will always therefore be subject to the facts and context of the case in question.

238 Msiza (n 220) par 53.

239 Msiza (n 220) par 53.

240 Msiza (n 220) par 54.

241 Msiza (n 220) par 66.

242 Msiza (n 220) par 73-76.

243 Msiza (n 220) par 38 held that it is easy to determine an alternative quantifiable with respect to market value, such as tracing the history of the acquisition. If it were so easy one would have expected the Land Claims Court would have developed a method for quantifying a non-market value starting point. An alternative could have a positive effect by different approaches that could be used to achieve the best possible land solutions for land reform. Ntsebeza “Land Redistribution in South Africa - the Property Clause Revisited” in Ntsebeza and Hall (eds) The Land Question in South Africa (2007) 123 criticises the Gildenhuys formula for hamstringing reform, since market value works in favour of the owner. It is possible to agree with this because market value should not always be the starting point for the determination of equitable compensation because it places too much emphasis on ensuring the current owner of the property is taken care of despite possibly having obtained the property as a result of racially discriminatory laws. I accept, however, that the Gildenhuys formula is the easiest method for determining a starting point for quantifying compensation and is probably why Ngcukaitobi AJ decided to stick to it. Nevertheless, on an interesting note in Florence v Government of the Republic of South Africa 2014 6 SA 456 (CC) where the Court had to deal with the question of equitable redress in a restitution matter where the method of escalating past loss to present value was in dispute, the majority rejected the use the history of the acquisition of the property by means of Consumer Price Index as a means of determining a starting point for quantifying compensation, which suggests that it may not be as easy to determine an alternative quantifiable approach as it was noted in Msiza at par 38.
The case does, however, appear to be a fitting ode to Port Elizabeth Municipality’s emphasis on achieving a correct balance between competing interests, rather than placing too much emphasis on market value, which can frustrate land reform.\textsuperscript{244} Furthermore, I think that this judgment will go a long way in paving the way for state-led land reform as opposed to market-led land reform, which is the current model prevalent in South Africa.\textsuperscript{245} Authority for state-led reform can be found in Arun Property Development (Pty) Ltd v City of Cape Town which held amongst other things that the state does not require the permission of the land owner to expropriate.\textsuperscript{246} Market-led land reform hinges on the willing-buyer-willing-seller policy. This policy is reform-inhibiting, as it relies on consensual sale between the parties. This is both time consuming and expensive.\textsuperscript{247} The state has since said it wishes to abolish the policy with the passing of the Expropriation Bill.\textsuperscript{248} A sentiment that would be more strongly felt if the state had passed the Expropriation Bill already.

Finally, and in a similar fashion to Land Access Movement the Msiza judgment’s underlying theme, is that the current legislation is out-dated and in need of a revamp. Ngcukaitobi AJ alluded to this when he defended section 25 in a recent media interview wherein he said


dquo;We do not have sufficient consciousness of the possibility of transformation through the Constitution. So much could have been done on land reform within the provisions of section 25… The paradox is that the Constitution gives you the power to transform, but also regulates the exercise of that power. But politicians fixate on the regulation, and forget about the potentiality.\dquo;\textsuperscript{249}

4.3 Academic Criticism of the Legislature and the State

Academics, in conjunction with the judiciary, have also called out the legislature for lack of reformative action. Viljoen has stated that the willing-buyer-willing-seller policy has to a large extent been a failure with the state essentially playing the role of an administrator in

\textsuperscript{245} Silungwe Law, land reform and Responsibilitisation: A Perspective from Malawi’s Land Question (2015) 27.
\textsuperscript{246} 2015 (2) SA 584 (CC) par 58.
\textsuperscript{247} Pienaar (n 185) 343.
land reform. She says that the “decision by the ANC to adopt such a conservative macroeconomic strategy was undoubtedly a policy choice, rather than a constitution-driven commitment, because the property clause allows expropriations for land reform purposes at below-market compensation”.

Viljoen goes on further to say that the Constitution places a mandate on the state to drive land reform for the public benefit, which for (seemingly political) reasons they have not done. Worse still, where the state has expropriated land for land reform, they have limited the expropriation to rural land. Viljoen says that the Constitution is not explicit that expropriation for purposes of land reform must be aimed at rural land, it merely says land, which means that urban land may also be expropriated for land-reform purposes.

Whilst restitution may not be a pillar of land reform so closely related to urban land reform purposes, tenure security is. There have been several cases brought before the courts by people who occupy inner city buildings who have little or no tenure security, despite having lived in the buildings for decades. The state should be taking heed of the plight of these urban poor by questioning whether a free market approach to rental housing provides sufficient tenure security. Especially when section 26(1) of the Constitution, read in conjunction with section 25(6) and (9), places an obligation on the state to enact legislation to give effect to that right to both housing and security of tenure. Whilst the public rental housing and social housing schemes aim to give effect to the housing needs of the urban poor, they fail to provide sufficient tenure security. This is a space which should be exploited by the state in fulfilment of their constitutional obligation to transform the property regime in South Africa. Maass envisages this could occur through the right to perpetually

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251 Viljoen (n 250) 362.
252 Viljoen (n 250) 362. See the remainder of her article for the reasoning and justification behind state-led expropriation of urban land, especially with respect to abandoned buildings. She also proposes that temporary expropriation measures could be put into place to ensure that the rights of all parties are upheld.
254 For example, the 400 occupiers in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC).
255 Maass “Rental Housing as Adequate Housing” in Quinot and Liebenberg (eds) Law and Poverty: Perspectives from South Africa and Beyond (2012) 317.
256 Everyone has the right to have access to adequate housing.
257 Maass (n 255) 332.
258 Maass (n 255) 332.
occupy the property which is administered and maintained by the state.\textsuperscript{259} I agree with this and add that in line with what Viljoen has said above the state should be aggressively expanding into a programme of urban building expropriation for purposes of land reform. Ultimately, though, policy is created and driven by the state. Therefore, the fact that there has been little exploration done in the urban land reform sector by the state is indicative of a failure by the state to utilise section 25 of the Constitution in dynamic ways.

5 Conclusion

Judicial activism around restitution is currently more powerful than policy revision.\textsuperscript{260} Judgments such as Port Elizabeth Municipality, Goedgelegen Tropical Fruits, and Msiza show that the courts are well aware of the reformative potential of the property clause. In particular decisions such as Port Elizabeth Municipality represent a significant move away from the common law property right paradigm towards a constitutional property paradigm, where there is no hierarchy of rights.\textsuperscript{261} Rather there is a sliding continuum that balances competing rights against each other according to the facts of a particular case.\textsuperscript{262} This means that ownership rights can be justifiably limited by non-property rights such as human dignity for example.\textsuperscript{263}

The adoption of a purposive interpretation of the property clause has also shown that it is fundamental to the success of the land reform programme. Indeed, the inherent tension in the property clause can only be understood when the two halves are embraced and read as a coherent whole.\textsuperscript{264} Furthermore a purposive approach must be adopted when interpreting the individual land reform sub clauses such as section 25(7), especially considering that the Restitution Act has been enacted to give effect to it. This result of a purposive approach to the restitution programme apart from ensuring that it is just and equitable is that it becomes possible to include circumstances such as the forced dispossession of labour tenants’ rights into the programme.\textsuperscript{265} If this method is adopted then the property clause can never guarantee the status quo. It becomes a tool with which land reform can be realised, especially

\textsuperscript{259} Maass (n 255) 332.
\textsuperscript{261} See discussion above at ch 2.
\textsuperscript{262} Van der Walt (n 7) 4.
\textsuperscript{263} Van der Walt (n 97) 45 – 51.
\textsuperscript{264} Van der Walt (n 33 (2011) 29.
\textsuperscript{265} See for example the discussion on Goedgelegen Tropical Fruits at ch 3.2 above.
considering it is negatively formulated and is structurally sound. The courts have understood this and have been a driving force behind land reform. This situation, whilst admirable, is insufficient, as there needs to be a coherent effort by government as well as political parties and the public towards realising the potential for land reform, not only through restitution but through tenure reform and redistribution.

It should also be noted that because all laws now flow from the Constitution it is necessary for policy and legislation to be enacted to give effect to the provisions of the Constitution and that pre-apartheid legislation should be viewed with a healthy level of scepticism. The fact that legislation such as the Expropriation Act has not been brought up to speed with the Constitution is testament to the fact that section 25 has not been considered adequately by the legislature. In addition, the restitution programme, which has huge potential to enable reform, has been frustrated by the legislature by failing to apply its mind to the Restitution Act and the Amendment Act. In truth however, failing to apply its mind is not the only short coming of the legislature. An under capacitated Land Claims Commission has hamstrung restitution. In this regard even the Land Claims Court has lambasted the Commission for being understaffed and overwhelmed by land claims. Finally, the emphasis on rural land reform as opposed to urban land reform and the reliance on a market-led land reform programme has further frustrated land reform. In all these instances the property clause has not been the root cause. Thus, calls by politicians for an amendment to the property clause are premature. Some these problems have been discussed above.

The reality is that if we are to truly realise land reform in South Africa the state has to come up with dynamic solutions using the property clause as it stands. Land reform is a move towards equity and fairness, and in a country where there is such a strong legacy of inequality, there should be a stronger leadership which can galvanise all the parties concerned to achieving equity and fairness in land. Sankara once said

“Our revolution is, and should continue to be, the collective effort of revolutionaries to transform reality, to improve the concrete situation of the masses of our country.”

266 Van der Walt (n 7) 34.
267 See ch 4 above.
268 Pienaar (n 185) 12 – 13.
269 Cousins (n 5) 19.
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