The impact of section 25 of the constitution and enabling legislation on human and people's rights

Presentation at the Land, Heritage and Human Rights Symposium, 19th April: Prof. Majola

It is a privilege to speak at today's event. I have been asked to focus my presentation on the impact of section 25 of the Constitution which protects the right to property and other enabling legislation on human rights. In recent times, the focus of social debates in our country has centered on the issue of the right to property in the context of expropriation as a form of deprivation without compensation, particularly, in relation to land reform and the urgent need for socio-economic transformation. These sentiments have indeed been echoed by the President in his State of the nation address and more recently last month, when he stated that if necessary, the Constitution should be amended so that land can be expropriated without compensation. Consequently, I want to frame my presentation today on the considerations for a human rights based approach to expropriation and compensation.

The right to property is a fundamental human right under our Constitution, as well as under regional and international law. The Universal Declaration of Human Rights[1] recognises that 'everyone has the right to own property'[2] and that 'no one shall be arbitrarily deprived of his/her property.'[3] Furthermore, the African Charter on Human and People's Rights provides that the right to property shall be guaranteed and may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[4]

The content of the right to property must be understood in context and the necessity to redress a global history of discrimination. It is for this reason that the right to property is also recognised in the Convention on the Elimination of All Forms of Racial

[1] Universal declaration of human rights. *UN General Assembly 1948*.
[2] Article 17(1) Ibid
[3] Article 17(2) Ibid
[4] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Discrimination which provides that 'everyone has the right to equality before the law without distinction as to race, colour and national or ethnic origin, including the right to own property alone as well as in association with others and the right to inherit.' The right to inherit is indeed important in the context of indigenous practices and the equal treatment of women to property ownership, which the Convention on the Elimination of All Forms of Discrimination against Women also recognises.[5]

While the formulation of the right to property in the South African Constitution is consistent with the legal designs regionally and globally as I have articulated earlier, it is important to understand the origins of the right to property in South Africa and how we arrived at the present formulation in the 1996 Constitution.

The issue of constitutionally protected property rights was one of the most contested areas of deliberation at the multi-party negotiating forum leading up to the Constitutional Assembly in the early 1990s.[6] The ruling party at the time, the National Party, sought to ensure the inclusion of the right to property in the Constitution while the ANC was opposed to the inclusion of this right in the Constitution, arguing that provisions for property rights are best suited in national legislation.

The contestation for what should go into the content of the right to property cannot be separated from the history of South Africa where patterns of land ownership were a direct result of racially discriminatory laws and were heavily skewed in favour of the white minority. Accordingly, it was no surprise that the National Party had a vested interest in ensuring that the right to property was protected in the Constitution, given that such protections would fundamentally safeguard the land rights of existing land holders, regardless of how such rights had been acquired and regardless of whatever laws were later adopted by the new ANC led democratic government.

[5] Article 16, 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
[6] M Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222, 223.

On the other hand, the ANC was concerned that a constitutionally protected right to property would impede legislative reforms aimed at addressing widespread inequality and deprivation resulting from apartheid laws and more importantly, the implementation of a land reform programme.[7]

Consequently, the contestation around the right to property during the period of the development of the Constitution has been described as reflecting 'a tension in the ANC's interest in a constitutional arrangement that would empower a transformational state to address the vast inequalities it would inherit from apartheid, and the white minority regime's wish to promote rights protection as a way of reducing and restricting the state's role in society.[8]

The protection of the right to property is important for the realisation of other rights such as the right to dignity, food, and social security. In written submissions to the Constitutional Assembly, the Land Research Project of the Centre for Applied Legal Studies of Wits University, submitted that the inclusion of property rights in the Constitution was inconsistent with international developments because it would compromise 'even the most basic and uncontroversial land reform measures', and the narrow scope of expropriation of land as provided for in the property clause would constrain land redistribution objectives; and that the legitimacy of property rights as a human rights vehicle aimed at addressing past injustices while simultaneously protecting the rights of existing land owners, may be eroded given that its inclusion effectively protects existing unequal disparities.[9]

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[7] M Chaskalson, 'Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *SAJHR* 222, 223.

[8] H Klug 'Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction' (2000) 85-92 cited in A M Gross 'The dilemma of Constitutional Property in Ethnic Land Regimes: Israel and South Africa Compared' (2004) 121(part 2) *SALJ* 448, 449.

[9] Constitutional Assembly, Theme Committee 4 Fundamental Rights 'Submissions Received as at 3 June 1995' Volume 64: The Land Rights Research Project of the Centre for Applied Legal Studies.

This position was obviously disputed by existing land owner interest groups who argued that expropriation should not be used as a means of achieving land reform.[10]

Consequently, the content of section 25 of the South African Constitution, was the result of a negotiated agreement[11] where the right to property is protected, but nevertheless permits expropriation for a public purpose or in the public interest and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.[12]

It is important to note that the method for compensation is not based solely on market value but on the basis of 'just and equitable' payment which includes five considerations such as the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

The considerations listed under section 25 of the Constitution reflect the intention of the constitutional drafters to ensure that the government is not, for example, restricted or does not find it prohibitively expensive to expropriate land in the interest of land reform due to the need to pay exorbitant compensation.

This position has been affirmed by constitutional law academics who have suggested that 'expropriation' within the current framing of section 25 may be interpreted to mean that the government can, given certain considerations, 'unilaterally terminate (for public use or public purposes) all the entitlements of particular property right holders.'[13]

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[10] Constitutional Assembly, Theme Committee 4 Fundamental Rights 'Submissions Received as at 14 May 1995' Volume 33: East Cape Agricultural Union (ECAU) and Eastern Cape Provincial Agricultural Council (EPAC).
[11] A M Gross 'The dilemma of Constitutional Property in Ethnic Land Regimes: Israel and South Africa Compared' (2004) 121(part 2) SALJ 448, 453.
[12] Ibid, p. 11.
[13] H Mostert 'The Distinction between Deprivations and Expropriations and the Future of the 'Doctrine' of Constructive Expropriation in South Africa' (2003) 19 *SAJHR*, 567, 572.

Section 25 offers a prominent place for the courts to determine the amount, time and manner of payment for expropriation. Consequently, the emerging case law on the right to property in South Africa which I discuss later on in this paper has focused heavily on the question of the appropriate compensation for expropriation.

Constitutional law authors, Currie and De Waal, suggest that the prohibition of arbitrary deprivation of property implies that to be constitutionally valid, a law authorising the limitation of the right to property has to follow due process.[14] They further argue that this due process requirement has both procedural and substantive elements. In order to give effect to section 25 of the Constitution, Parliament passed the Restitution of Land Rights Act (Land Act),[15] which also established the Commission on Restitution of Land Rights (Land Commission) and the Land Claims Court was established under the Land Act. The Land Commission's function is to deal with the administration of land claims and compensation of the present owners and restitution to the claimants while the Land Claims Court is responsible for resolving disputes that are not solved by the Land Commission.[16]

In the constitutional court case of *Agri South Africa v Minister of Mineral Resources,*[17] where the court dealt with the expropriation of minerals in the context of the Mineral and Petroleum Resources Development Act (the MPRDA), the court provided a significant shift on the understanding of expropriation under South African law. According to the Chief Justice, '[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.' The Court held that[18]

> [t]he approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all

[14] Currie, I., & De Waal, J. (2013). *The bill of rights handbook*. Juta and Company Ltd page 539
[15] Restitution of Land Rights Act, 22 of 1994. The Land Act was amended in 1997 to bring it in line with the 1996 Constitution.
[16] <http://www.sahistory.org.za/article/land-restitution-south-africa-1994>
[17] 2013 (4) SA 1 (CC).
[18] Ibid para 60.

> South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africa for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.

The Court also emphasised that under the MPRDA, there is no automatic right to compensation, and under section 25 (4) (a) of the Constitution, 'we must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in the country.'[19]

Furthermore, the Constitutional Court in the case *of Du Toit v Minister of Transport*,[20] held that when determining compensation, the factors listed in the Constitution must be adhered to and balanced, with no one factor weighing more than another.[21] The court further in the *Du Toit* case stated that '[v]iewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.'[22]

These cases imply that the considerations of what compensation is appropriate in cases of expropriation to achieve land reform has been left to the discretion of the state. This discretion is to be exercised taking into account the factors listed in the Constitution which if diligently applied through principles of the rule of law, can in fact legitimately allow the state to expropriate property with limited compensation or without compensation in some cases. Central to the formula in determining compensation is that both the public interest and the interests of those affected must be considered and a just and equitable balance between the two must be struck.

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[19] Ibid para 61.
[20] 2006 (1) SA 297 (CC).
[21] Ibid para 33 – 34.
[22] Ibid para 35.

Accordingly, the court in *Msiza v Director-General, Department of Rural Development and Land Reform*[23], stated that compensation which is below market value can be constitutional, provided it is just and equitable.[24] This is subject to agreement between the parties or based on approval by a court. When interpreting the importance of the history of the acquisition and use of the property the court stated that under certain circumstances it would be unfair to pay the full market value as compensation because an owner could be benefitting twice.[25] According to the court,

> 'The requirement to consider the history of the acquisition and use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates. In such an instance, it would indeed be unfair to pay full market value in compensation as this would enable the owner to benefit twice from apartheid.'[26]

Consequently, South African courts have accepted that the market value of a property being expropriated is not the only consideration in determining compensation. If market value was the primary consideration, land reform would be extremely expensive for the government and would mean the government will be unable to provide equitable redress to the dispossessed black majority in terms of Section 25. As at 31st March 2016, government reported that it had already spent almost R20 billion on the acquisition of land for the purposes of restitution and 94 percent of claimants of the 143 720 new claims that have been lodged since the re-opening of the new claims process in 2014, have indicated a preference for their claims being settled through payment of financial compensation.[27]

[23] 2016 (5) SA 513 (LCC).
[24] Ibid para 32.
[25] Ibid para 53.
[26] Ibid.
[27] Commission for Restitution of Land Rights, Annual Report 2015. p16.

This trend suggests a number of possibilities that need to be backed up with more research. It could suggest that people do not necessarily want access to land because financial compensation is more lucrative. Alternatively, it could also suggest that people do not want access to land because they do not have the skills or financial capital to put land to use for purposes such as farming. Furthermore, as suggested in previous submissions to the SAHRC, some of the land that has been acquired by government in the past have not been viable for farming.[28]

The current Expropriation Bill before Parliament which was finalised in May 2016 but sent back to Parliament by the President citing reservations around the constitutionality of the Bill and the inadequate public participation around the process provides some useful insight into how future legislation can advance the objective of section 25 to safeguard property rights while promoting land reform. The Bill attempts to provide a way for government to purchase property needed for the public purpose or in the public interest and provide guidelines on how to properly do so. The Bill clarifies the decision of the Constitutional Court in *Agri SA* that expropriation must always involve state acquisition and provides that it is not in all cases that the government will be the ultimate beneficiary in expropriation cases. The Bill also requires the government to acquire the property through agreement on reasonable terms, however, failing such agreement just and equitable compensation is payable, striking a balance between the owner’s interests and the public interest.

Parliament has the opportunity in the current consideration of the Expropriation Bill to make concrete proposals that flesh out in more detail how to apply the constitutional factors listed under section 25 in determining just and equitable compensation for expropriation and under what circumstances. It may be possible for the government to expropriate land with limited compensation or arguably, without compensation in certain instances. The groundwork for this has been laid out in section 25 (8) of the Constitution which provides that:

[28] South African Human Rights Commission ‘4th Annual Economic and Social Rights Report: 2000 – 2002’ (2003) p.181.

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

A reasonable interpretation of section 25 (8) suggests that if government were to pass a law that provides for expropriation without compensation, while this will be a departure from the provision for just and equitable compensation, that law will be valid provided it satisfies the requirement in section 36 as a law of general application, and is a reasonable and justifiable limitation of the right to property, taking into account the five factors listed under section 36.[29]

Consequently, it is important for any proposed expropriation law to lay out constitutionally entrenched principles on what should constitute compensation for land reform in order to discard earlier court rulings such as the decision in the *Mhlanganisweni* case where Gildenhuys J has suggested that 'land reform in the public interest does not rank superior to any other legitimate purpose for which property may be expropriated, and the determination of compensation in cases of land reform must not be different.'[30]

However, in some isolated cases, the courts have suggested such as in the case of *Nhlabathi v Fick*[31] that expropriation without compensation might be possible in certain circumstances, if the infringement is minimal to the owner's rights. Also, in *Serole v Pienaar*[32], the court ruled that '[t]here can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public

[29] These factors are the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

[30] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (156/2009) 2012 ZALCC 7 (19 April 2012) para 73; See also J Van Wyk Compensation for land reform expropriation 2017 *TSAR* 21.

[31] 2003 7 BCLR 806 (LCC) paras 32-35.

[32] 2000 1 SA 328 (LCC)

interest (which includes the nation's commitment to land reform).' The court also found this to be justifiable under s 36 of the Constitution. Admittedly, the *Nhlabathi* and *Serole* cases dealt with expropriation in the context of deprivation of land for burial purposes, but it remains to be seen whether this principle can also apply in land reform cases.

To address the challenges of the slow pace of land reform in South Africa, it is important for the government to bear in mind that compensation need not be construed in terms of financial compensation only. The Property Valuation Act 14 of 2014 was enacted to address the valuation of property for land reform purposes. The Act references the constitutional factors to consider in terms of compensation but defines the factor of market value in terms of willing buyer and willing seller. Consequently, the state needs to embark on processes to determine how to satisfy the constitutional imperative of justice and equitability such as offering resettlement in some cases without resorting to financial compensation in all cases. This is important because the slow pace of land reform and redistribution has also been attributed to the State's commitment to the 'willing-seller/willing-buyer' principle and the unwillingness to expropriate land at less than market value compensation.[33]

While some courts may have opened the door for the possibility of expropriation without compensation, it is important to note that at a comparative and international level, just and fair compensation is required for expropriation. In various jurisdictions including in Africa, Asia and North America, expropriation based on the principle of 'just compensation' is recognised.[34]

This is consistent with international law and it is important to note that the expropriation of property should take place in accordance with South Africa's constitutional requirements in order to avoid unintended consequences. The poorly executed land

[33] A J van der Walt 'Reconciling the State's Duties to Promote Land Reform and to Pay Just and Equitable Compensation for Expropriation' (2006) 123 SALJ, 23, 23.
[34] Article 40 of the Kenyan Constitution; *Kimball Laundry Co v US* 338 US 1 5-6; *Hawaii Housing Authority v Midkliff* 1981 L Ed 2d 187; *US v Fort Smith River Development Corporation* 349 F 2d 822; *Monogahela Navigation Co v US* (1892) 148 US 312; *Tanaka v State* (1953) Sup C Rep (Civ) 7-13-1523 (S28,12,23,SC)

reform programme of Zimbabwe is a case in point. In the SADC tribunal case of *Mike Campbell v Zimbabwe,*[35] the lawfulness of the acquisition of agricultural land without compensation by the government of Zimbabwe was challenged. The tribunal held that there is an existing obligation under international law for the payment of compensation.[36] It further held that Zimbabwe cannot rely on its national law including its constitution, to avoid the payment of compensation.[37] The court found Zimbabwe liable for the payment of compensation under international law and also found Zimbabwe's land reform programme to be racially discriminatory for targeting white minorities.[38]

It is important to note that the factors in section 25(3) are aimed at making land reform affordable for government and consequently, we need to interpret section 25 and our expropriation laws with a focus on the justice and equitability element, rather than consider the current framing of the Constitution and applicable legislation as limiting the government's agenda.

The individual right to property should be placed in a social context, as the court in the *Agri SA* decision has ruled to move towards a transformative approach and the government must find a balance in ensuring 'individuals do not unfairly shoulder the burden of expropriation, but society will likewise not be held accountable for compensation at full market value in the instances where it is not justified.'[39]

Consequently, it is not only Parliament that has a responsibility to provide legislative guidance on the application of section 25 but the courts also have a role to play on the appropriate interpretation of section 25 under a constitutional dispensation. Aside from Parliament and the courts, an important burden also lies with the government on how to address bureaucratic bottlenecks that stifle the rapid implementation of land reform.

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[35] SADC (T) Case No. 2/2007
[36] Ibid, p. 7.
[37] Ibid, p. 57.
[38] Ibid, p. 58.
[39] E du Plessis 'Silence is Golden: The lack of direction in compensation for expropriation in the 2011 Green Paper on land reform' PELJ 2014(17)1 p. 822.

In many instances, bureaucratic obstacles have prevented the land reform program of government. In the SAHRC 2013 hearing report to investigate the systemic challenges affecting the land restitution process in South Africa, we noted that the obstacles identified in relation to the slow pace of land reform do not appear to stem to any significant degree from the constitutional provisions and accompanying legal framework.[40] The SAHRC is of the view that in order to address and remedy land restitution processes in South Africa, <u>it is necessary to deal with the challenges identified from the last 23 years and not depend on legislative changes that fail to address issues of bureaucracy</u>.[41]

In general, the SAHRC has been of the view that the Constitution and related legislation, are adequate in providing a human rights based approach to Land Restitution.[42] The SAHRC has also stated in our previous reports arising out of our hearings that 'it is necessary for the government to acquire land and institute approaches that can efficiently redistribute it to the landless. Where ownership is doubtlessly legitimate, the government should compensate landowners for the acquired land.'[43]

Ultimately, the SAHRC believes that systemic challenges affecting the land restitution process may be partly due to political problems that require political solutions.[44]

The land reform issue is a vexed one that will continue to elicit heated debate in South Africa. The SAHRC encourages sustained public dialogue on this issue and to arrive at solutions that are entrenched in our current constitutional values rather than seek a

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[40] South African Human Rights Commission 'Report of the SAHRC Investigative Hearing: Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa' (2013) p.45
[41] Ibid.
[42] Ibid, p.16
[43] South African Human Rights Commission '4th Annual Economic and Social Rights Report: 2000 – 2002' (2003) p.92
[44] South African Human Rights Commission 'Report of the SAHRC Investigative Hearing: Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa' (2013) p.46.

departure from these principles through constitutional reform simply because the Constitution does not suit current political rhetoric.

In conclusion, while the Constitution provides a pathway for the development of a law that can allow expropriation with limited compensation to achieve the objective to redress the results of past racial discrimination, the preamble of the Constitution reminds us that South Africa belongs to all who live in it, united in our diversity. Section 233 of the Constitution also provides that the interpretation of South Africa's laws must be consistent with international law. Given the decision of the SADC tribunal in the *Mike Campbell case*, that there is a duty under international law to pay compensation[45], the SAHRC recommends that the state adheres to our current constitutional values of offering limited compensation in cases of expropriation while achieving the objective of land reform.

Thank you for your attention.

[45] Note Mike Campbell Case, p. 56-57.