Attaining Justice through 'Just and Equitable Compensation': A critique of South African courts' current approach to section 25(3) of The Constitution, and determining whether 'Expropriation without Compensation' may be considered 'Just and Equitable'

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To my parents. Thank you for your endless love, encouragement, sacrifices and support. You have given me something that no one else could have; the opportunity to follow my passion through social upliftment and to do good in this world.

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Abstract

The land debate regarding just and equitable compensation and the potential 'expropriation without compensation' amendment to section 25 of the Constitution of the Republic of South Africa[1] has been a contentious issue in South Africa over the past year. Owing to colonialism and the apartheid regime, secured land rights and control were reserved for the white minority. This resulted in the mass dispossession of land that was owned and/or controlled by black, coloured and Asian people. In light of our country's deplorable history of land dispossession, section 25(1) of the Constitution was included to command that no person be deprived of property except in terms of law of general application. In addition, in accordance with section 25(2), property may be expropriated only in terms of law of general application for a public purpose and subject to compensation. However, despite the inclusion of these transformative provisions, 25 years into our constitutional democracy, a large portion of previously disadvantaged individuals remain disadvantaged owing to socio-economic oppression, their inability to secure land rights and the country's slow-moving land reform process. This dissertation is based on the notion that transformation in the area of land reform has been conducted at a glacial pace, owing to South African courts' market value-centred approach to determining just and equitable compensation amounts that are to be awarded in expropriation cases. By analysing sections 25(2), 25(3) and 25(8) of the Constitution, the courts' constitutional jurisprudence and academic literature, this dissertation aims to investigate whether it is necessary for the courts to re-evaluate the approaches taken during the initial stages of land reform; considering the need for a speedier land reform process. Upon considering the current composition of section 25(3), I contend that if the courts alter their approach to legal interpretation by placing more weight on a purposive approach when interpreting this section's requirement of 'just and equitable compensation', the results of expropriation cases will give effect to the transformative values that underpin section 25 – hence the Constitution need not be amended to allow for expropriation without compensation in order to give effect to land reform as envisioned in section 25(8). This increased purposive approach to interpretation will encourage the courts to adopt an inclusive interpretation of 'just and equitable compensation' which allows for the expropriation of land with compensation, without compensation and with partial compensation.

[1] Constitution of the Republic of South Africa, 1996.

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Chapter 1 – Introduction

1.1 Motivation for the study

The land debate regarding just and equitable compensation and the potential 'expropriation without compensation' amendment to section 25 of the Constitution has been a contentious issue in South Africa over the past year. In light of our country's deplorable history of land dispossession, section 25(1) of the Constitution commands that no person be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. Section 25(2) of the Constitution states that property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; and (b) subject to the various factors listed in section 25 which includes 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]. However, on 25 July 2019, the National Assembly established an Ad Hoc committee which has been tasked with initiating and introducing legislation to amend section 25 of the Constitution to allow for expropriation without compensation.[2] This decision to amend section 25 has given rise to the question of whether current landowners should be compensated when their land is targeted for land reform purposes and consequently, what would constitute just and equitable compensation.[3]

Considering our nation's history of colonialism and apartheid, it is common for black, coloured and Asian people to not hold or have access to secure land rights.[4] Colonialism, followed by apartheid, resulted in the forceful dispossession land. Despite the abolition of the oppressive regime having given rise to our current constitutional democracy, the previously disadvantaged black majority remain subject to the poor socio-economic conditions that existed under colonialism and apartheid. There is thus an urgent need to speed up the land redistribution process in South Africa, as having access to secure land rights is an important step to improving the socio-economic status of indigent, previously disadvantaged people.

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[2] J Gerber 'Land expropriation: Ad Hoc committee to call land experts on amendment on Constitution' *News 24* 11 September 2019, available at *https://www.news24.com/SouthAfrica/News/land-expropriation-ad-hoc-committee-to-call-land-experts-on-amendment-on-constitution-20190911*, accessed on 04 October 2019.
[3] A Crosby 'Compensation: What is fair and equitable in the context of land reform?' (2017) *Agri SA* at 1.
[4] South African Human Rights Commission *Submission to the Joint Constitutional Review Committee regarding Section 25 of the Constitution* (2018) at 3.

There are at least three distinct positions on awarding compensation upon expropriation – no compensation; market value compensation plus losses; and just and equitable compensation. In addition, some argue for a mix of no compensation and just and equitable compensation. At present, the Constitution proposes that just and equitable compensation be awarded, and that such compensation should reflect a balance between the public interest and the interests of those affected by expropriation.[5] However, there are differing views amongst the leading political parties regarding what the amendment should entail. The Economic Freedom Fighters (EFF) hold the position that all land should be state-owned whilst the African National Congress (ANC) argues for expropriation without compensation in some cases.[6] The reasoning behind the argument for expropriation without compensation is that the land was stolen by the ancestors of white landowners and should thus be taken back without compensating the present landowners.[7] However, the state's reluctance to expropriate land against nil or nominal compensation, which can in turn be attributed to the courts being in favour of providing compensation at or above market value, has delayed our country's land reform process. This dissertation is thus based on the notion that transformation in the area of land reform has been conducted at a slow-moving pace and that this delay is owing to the courts' preference for using market-value as a starting point when determining the compensation amounts to be awarded in expropriation cases, and the manner in which existing land restitution and redistribution has been carried out. It is therefore necessary for the courts to embrace the concept of transformative constitutionalism in the property law sector, as this holds the potential to speed up the land reform process.[8]

Section 25(3) of the Constitution states that the amount of the compensation and the time and manner of payment must be just and equitable, thus reflecting an equitable balance between the public interest and the interests of those affected. Furthermore, this section lists various factors to be considered in determining a just and equitable amount which include – the current use of the property; history of the acquisition and use of the property; market value of the property; extent of direct state investment and subsidy in the acquisition and beneficial

[5] Section 25(3) of the Constitution.
[6] T Ngcukaitobi 'The land wars of 2019: Analysing the EFF and ANC manifestos' *Mail & Guardian* 7 February 2019, available at *https://mg.co.za/article/2019-02-07-00-the-land-wars-of-2019-analysing-the-eff-and-anc-manifestos*, accessed on 29 November 2019.
[7] Crosby op cit note 3.
[8] E Du Plessis *Compensation for Expropriation under the Constitution* (published LLD thesis, Stellenbosch University, 2009) at 4.

capital improvement of the property; and the purpose of the expropriation.[9] Given the slow economic growth rate of the South African real estate sector,[10] it is unsurprising that one of the main challenges which arise when determining a just and equitable amount is dealing with the notion that the market value of property should be prioritised above the other factors. This notion was reinforced in 2006 when the Constitutional Court of South Africa (CCSA) gave its interpretation of section 25(3) in the case of *Du Toit v Minister of Transport*,[11] and found that market value should be used as a point of departure when determining the amount payable as compensation.[12]

Considering the position in *Du Toit* was adopted during the first decade of our Constitution's existence i.e. during a period wherein land reform suggestions and discussions were still well underway, it is necessary to re-evaluate the approaches taken during the initial stages of land reform, considering we are twenty-five years into our constitutional democracy and remain subject to a land reform process whereby little land redistribution has taken place. Such re-evaluation requires that the judiciary place increased emphasis on a purposive approach in their interpretation of section 25 and related property laws (especially when interpreting the weight that a factor such as market value should hold) in order to facilitate a speedier land redistribution process, provided that the state carry out its land reform commitments efficiently. Nonetheless, this does not mean that formalities should fall to the wayside. A sound legal and judicial system necessitates the application of legal principles, whilst having due regard for the substantive context. The judiciary has at present, managed to strike a balance (for the most part) between upholding the values enshrined in the Constitution (through a purposive approach to statutory interpretation) and upholding the application of traditional legal principles (through an orthodox text-based/literal approach to statutory interpretation).[13] However, there is a need to extend this mix of a purposive approach and literal approach to the interpretation of property law, with more emphasis being placed on considering the purpose behind property laws, as opposed to merely applying outdated traditional property laws (specifically to expropriation cases concerning the awarding of just and equitable compensation) in order to speed up the land

[9] The Constitution supra note 5.
[10] SA Commercial Prop News 'Property Investors need to be Patient' 24 July 2019, available at *http://www.sacommercialpropnews.co.za/property-investment/9050-sa-property-investors-need-to-be-patient.html*, accessed on 04 October 2019.
[11] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).
[12] Ibid para 37.
[13] T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2008) 7 *Int'l J. Constitutional Law* 106 at 126.

reform process while simultaneously ensuring that the courts maintain institutional competence in our one-party dominant state.[14] Furthermore, having due regard for the formal and substantive elements that underpin property law contributes towards achieving the mandate of transformative constitutionalism.

1.2 Research question, hypothesis and aim of the study

Upon critically evaluating the courts' interpretation of 'just and equitable compensation' as per section 25(3) of the Constitution, I aim to answer the following research question: Have judges utilised an orthodox text-based (literal) approach or a purposive approach to legal interpretation in their reasoning when dealing with expropriation cases which concern the awarding of just and equitable compensation? Consequently, I aim to assess whether a literal approach or purposive approach to legal interpretation should be utilised to allow for the expropriation of land without compensation under section 25(3) of the Constitution (in its current composition), on the basis that land restitution and redistribution is necessary to speed up the land reform process. However, to do so, it is required that section 25 be interpreted in a specific manner. Through considering the current composition of section 25(3), I will argue that if the courts place more weight on a purposive approach when interpreting this section (and section 25 as a whole), the results of expropriation cases will give direct effect to the transformative values that underpin section 25(3). Hence, the Constitution need not be amended to allow for expropriation without compensation in order to facilitate and speed up the land reform process as envisioned in section 25(8).

My argument can thus be construed as an alternative, in the event that Parliament decides against the proposed amendment of section 25 (which would allow for expropriation without compensation). Finally, I will consider whether expropriation against nil compensation and expropriation against nominal compensation constitute just and equitable compensation. After establishing that sections 25(2)-(3) read with section 25(8) provide the requisite justification to expropriate property in order to facilitate and speed up the land reform process, and that expropriation against nil or nominal compensation may constitute just and equitable compensation in some cases, I will argue in favour of adopting a flexible approach to awarding just and equitable compensation. By utilising an increased purposive approach to interpretation,

[14] Ibid.

this flexible approach will ensure that both private and public interests are upheld through the state's ability to award compensation at or above market value in cases where it is deemed fit; to award nil compensation in cases where it is deemed fit; and to award nominal/partial compensation in cases where compensation is required, but where it is deemed fit for the state to award a compensation amount that is significantly below market value (owing to national budgetary constraints).

The basic assumption underlying this study is the notion that under our constitutional dispensation, the courts have employed a mix of a literal approach and a purposive approach to the interpretation of statutes in its judgments.[15] This was established in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[16] whereby Ngcobo J stated that:

> 'The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the "spirit, purport and objects of the Bill of Rights."'[17]

In addition, a purposive reading of a statute 'must of course remain faithful to the actual wording of the statute'.[18] However, despite the requirement that the courts employ a mix of both a literal and purposive approach to interpretation, the courts have maintained a preference for a literal, formalistic approach to interpretation (in being market value-centred) when adjudicating expropriation cases concerning just and equitable compensation. As a result, this has stunted the growth of expropriation-centred land reform. Despite the establishment of our constitutional democracy, the courts' preference for a literal approach to interpretation has maintained a conservative, formalistic approach to property law that was prevalent in its pre-constitutional jurisprudence on expropriation. This is evident in the face cases of my dissertation i.e. *Du Toit v Minister of Transport* (CCSA), *Msiza v Uys*[19] (LCC), *Msiza v Director General for the*

[15] *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) paras 21-22.
[16] *Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).
[17] Ibid para 91.
[18] *Bertie van Zyl* supra note 15 para 22.
[19] *Msiza and Others v Uys and Others* (LCC39/01) [2004] ZALCC.

Department of Rural Development and Land Reform[20] (LCC) and *Uys NO v Msiza*[21] (SCA), whereby the courts, at various judicial levels, placed a larger emphasis on the literal meaning of the text under section 25(3) in holding that market value should be the starting point when determining a just and equitable compensation amount.

The consequence of upholding the notion that market value should be the starting point in compensation amount determinations is that it tends to become the determining factor in compensation amount determinations. As a result, land is expropriated against seemingly just and equitable compensation amounts that are of high market value/above market value, thus burdening the already scarce availability of state resources. In addition, owing to corruption, it is common for compensation amounts that are above market value to be paid.[22] This was confirmed by the High-Level Panel on Land Reform and Rural Development, led by former president Kgalema Motlanthe, which drafted a report and concluded that 'corruption, nepotism and incompetence are to blame for failed land reform'.[23] Following the release of this report, the Special Investigating Unit found that 148 land reform projects between 2011 and 2017 have been flagged for suspicious or fraudulent activity, thus confirming the report's corruption related findings. Consequently, having a considerable number of 'above market value' compensation related expropriation cases produces precedent that does not reflect an equitable balance between the public interest and the interests of those affected (i.e. private property ownership interests) and is thus not in favour of previously disadvantaged individuals. Hence, the large emphasis placed on a literal approach to interpreting section 25 in our constitutional democracy does not give effect to the section's underlying transformative values.

In light of South Africa's socio-economic history with regards to land adjudication, I deduce that the courts, as agents of social transformation, should always add more weight when considering the purpose of land rights and in discussing the constitutional values underpinning section 25 in the legal reasoning of expropriation cases, so as to best understand the need to give effect to the rights of previously disadvantaged people and ultimately, further the land

[20] *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC).
[21] *Uys NO and Another v Msiza and Others* 2018 (3) SA 440 (SCA).
[22] T de Jager 'It's not the willing seller, but the corrupt buyer sabotaging land reform' *News 24* 24 June 2019, available at *https://www.news24.com/Columnists/GuestColumn/its-not-the-willing-seller-but-the-corrupt-buyer-sabotaging-land-reform-20190624*, accessed on 28 January 2020.
[23] Ibid.

reform agenda. The reasons for this are owing to the undeniable link between black individuals' right to property and their right to human dignity, and the need to eradicate the formalistic approach to interpretation that is prevalent in the courts' post-apartheid property jurisprudence (which has been reinforced by neo-institutionalism). Considering the *Du Toit* case was decided during the early years of the CCSA's establishment, it is necessary for a case concerning expropriation against just and equitable compensation to be tested in present years, as it is likely that the Court would depart from its market value-centred approach when determining compensation amounts, since the progressive socio-political climate that has developed over the years would likely have an influence on the Court's reasoning in property law cases today.

Considering there has been much debate around the courts' determination of the section 25(3) meaning of 'just and equitable compensation',[24] my analysis is important as it will assess whether the courts have adequately determined the meaning of 'just and equitable' and whether it should continue to uphold market value as the determining factor in expropriation against compensation related cases. I will do this by critiquing the interpretative approaches taken in the relevant cases and then deducing that the courts should place larger emphasis on a purposive approach, so as to give effect to the transformative values underpinning the requirement of just and equitable compensation. Following my deduction that the courts' preference for using market value as the starting point when determining compensation amounts constitutes an inadequate approach to interpreting the meaning of 'just and equitable compensation', I will explore what 'expropriation without compensation' could entail by considering whether it is constitutionally permissible to award nil or nominal compensation as 'just and equitable compensation' in expropriation cases which aim to further land reform, thus eradicating the need to amend section 25 of the Constitution. This will provide clarity on whether the CCSA needs to reconsider its determination of the meaning of 'just and equitable compensation'.

1.3 The history of land dispossession which gave rise to the current land rights dispensation in South Africa

The fundamental reasoning behind the inclusion of the property clause was to extend property rights to the previously disadvantaged black majority who were deprived from owning

[24] M Bishop & T Ngcukaitobi *The Constitutionality of Expropriation Without Compensation* (2018).

property and obtaining various property rights in our pre-constitutional era. As noted in *Port Elizabeth v Various Occupiers:*[25]

> 'The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.'[26]

South Africa's history of land dispossession includes black South Africans being subjected to the oppressive regimes of colonialism and apartheid. These regimes centred on racial segregation and as a result, black South Africans were forcefully removed by the state from land that they occupied/owned for many years.[27] The colonial conquest and the apartheid regime which followed it effectively restructured the ownership and control of South African land and resources.[28] The legislative measures enacted to govern this restructuring of ownership entrenched deep disparities between the minority white population who gained ownership of majority of the land, and the majority black population who were impoverished due to landlessness.[29]

Owing to the colonial conquest, white settlers appropriated large portions of South African land for themselves, obtained supremacy of the land, and reserved the remaining land for indigenous African people (black South Africans who lived communally under the leadership of chiefs). However, despite obtaining supremacy of the land, settlers feared that the African chiefdoms who occupied all land prior to the settlers would later fight to regain their land. [30] Hence the settlers' decision to undermine chiefdoms and their power. Settlers determined that chiefdoms could be undermined by removing the communal tenure of land. The settlers thus sought to exercise full control over black South Africans' ability to hold land

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[25] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[26] Ibid para 15.
[27] R T Ally 'The Development of the System of Individual Tenure Special Reference for Africans, with Special Reference to the Glen Grey Act. C 1894 – 1922' (1985) *Rhodes University, Grahamstown* 78.
[28] H Mostert 'Land restitution, social justice and development in South Africa' (2002) 119 *SALJ* at 403.
[29] Ibid at 401.
[30] M Weideman *Land Reform, Equity and Growth in South Africa: A Comparative Analysis* (unpublished PhD thesis, University of the Witwatersrand, 2003) 10.

rights by introducing a Western model of individual tenure of land which was regulated through title deeds.[31] Consequently, many chiefs and villagers resisted the new individualistic tenure system as it opposed their customary beliefs which embodied group tenure systems.[32] However, this resistance proved to be unsuccessful, considering individual tenure increased in rural areas.[33]

Individual tenure, together with a labour shortage during the 1890s, gave rise to the implementation of additional laws which aimed to breakdown communal tenure. Hence, the enactment of the Glen Grey Act,[34] which aimed to replace communal tenure with individual tenure and implemented a labour tax in attempt to force Xhosa men into employment on commercial farms. However, despite its attempt to breakdown communal tenure, the Glen Grey Act was unsuccessful in practice, hence the enactment of the Natives Land Act[35] which enforced racial segregation by means of regulating and restricting land acquisition, and ultimately ratifying the ongoing practice of land dispossession.

The Natives Land Act was the first Act under the Union government of South Africa. This Act prevented white people from buying land from black South Africans and vice versa. Hence, it prevented white farmers from buying more land occupied by black South Africans. However, it also bound the movement of black South Africans to scheduled reserve areas and limited their ability to hold land rights.[36] As a result, the land allocated to them as per the Act remained state-controlled entities. Hereafter, the Native Trust and Land Act[37] was established to hold the land which was set aside for black South Africans. The Trust was tasked with purchasing land to be used for black settlements in each of the South African provinces.[38] Tenure could thereafter only be held by black South Africans through rights and land ownership remained reserved for the white population.[39]

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[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Glen Grey Act of 1894.
[35] Natives Land Act 27 of 1913.
[36] Alan Paton Centre and Struggle Archives 'Land issues: Blackspots, forced removals and resettlement' available at *http://paton.ukzn.ac.za/Collections/blackspotsandforcedremovals.aspx*, accessed on 11 September 2019.
[37] Native Trust and Land Act 18 of 1936.
[38] Ibid.
[39] Ibid.

The main reasoning behind colonial land dispossession was to cause an imbalance in the power relations between black South Africans and colonial settlers.[40] If black South Africans were banned from owning land, they could not reap the fruits of the land and utilise it for commercial purposes. These respective laws set the foundation for the impending apartheid state's control of land which aimed to institutionalise racial and class segregation by developing a hierarchy of land ownership in terms of private law.[41]

The problem of land dispossession worsened following the coming to power of the apartheid regime. The enactment of the Group Areas Act[42] under this regime prohibited individuals from certain racial groups from using, occupying and owning land in areas that later became designated for the white population and was used as the main tool to redefine 'black spots'[43] (which were known to possess fertile land for cultivation) and to remove black South Africans from their land.[44] Approximately 7,5 million people were dispossessed from their land between 1960 and 1983 under the pretence that this land would be used to 'benefit the general public'.[45] However, the purpose underpinning these laws was the removal of land as a resource from other racial groups so as to secure the most economically viable portions of land for the white minority. The result of the enactment of these laws was the development of a legal institution of property law which became an 'effective vehicle' used to ensure that the white minority were protected against infringements of their land rights.[46]

Pending the fall of the apartheid regime, the negotiation period between liberation groups and the National Party sought to reform the old property regime so as to develop a constitutional order based on transformative constitutionalism. The negotiations concerning land reform aimed to establish a just property regime which aimed to reverse the effects of land

[40] G Muller 'The Legal-Historical Context of Urban Forced Evictions in South Africa' (2013) *Unisa Press* 381.
[41] AJ Van der Walt 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in the Constitutional State' (2001) 118 *SALJ* at 261-263.
[42] Group Areas Act 36 of 1966.
[43] An area of land that was designated for the white population but occupied by black Africans. See J Van Wyk & M Oranje 'The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?' (2014) 13(4) *Planning Theory* at 349-369.
[44] S Rugege 'Land Reform in South Africa: An Overview' (2004) 32 *International Journal of Legal Information* at 285.
[45] Ibid.
[46] AN Basajjasubi *Deconstructing section 25 of the Constitution: Has the inclusion of property rights in section 25 of the Constitution helped or hindered the transformation purpose of the Constitution, and specifically, the state's commitment to land reform?* (published LLM thesis, University of Cape Town, 2017) at 10.

dispossession by facilitating land restitution and redistribution to ensure equitable access to land and to alleviate poverty.[47] Following these negotiations, section 25 of the Final Constitution was drafted to state that:

25 Property

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

(2) Property may be expropriated only in terms of law of general application-

(a) For a public purpose or in the public interest; and

(b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) The current use of the property;

(b) The history of the acquisition and use of the property;

(c) The market value of the property;

(d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) The purpose of the expropriation.

(4) For the purposes of this section-

(a) The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to land on all South Africa's natural resources: and

(b) Property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available

resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

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

[47] Ibid at 11.

(7) A person or community dispossessed of property after 19 June 19213 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state form taking legislative and other

measurers to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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

The eradication of the apartheid regime and the inclusion of section 25 in the Final Constitution instilled hope for socio-economic freedom amongst previously disadvantaged South Africans. However, despite being twenty-five years into our constitutional democracy, majority of the South Africans who were affected by land dispossession were not compensated for the loss of their land and continue to live in a cycle of poverty.[48] Considering the spatial and socio-economic effects of our dismal past, it is imperative that South African courts extend its due regard for human dignity in related cases to expropriation cases concerning the awarding of just and equitable compensation. Having due regard for our nation's historical context will encourage a shift in the courts' approach to expropriation and related property laws from one that is literal and formalistic to one that is largely purposive. This will contribute towards achieving our country's constitutional mandate which embodies transformative constitutionalism (to be illustrated in Chapter 3).

Furthermore, the inclusion of section 25 in the Final Constitution was an important step in transforming our pre-constitutional legal system's attitude towards securing land rights for previously disadvantaged South Africans and eradicating the deplorable socio-economic effects of the oppressive property laws that governed the lives of non-white people during the colonial and apartheid periods. Owing to the effects that our history of land dispossession has had on black South Africans, it is imperative for the courts to emphasise that section 25 must be interpreted in light of the historical context within which it was enacted under our constitutional dispensation. The reasoning behind the need to consider our country's historical context when

[48] Rugege op cit note 44 at 286.

dealing with property related cases (especially expropriation cases) was aptly captured in *Shoprite Checkers v Member of the Executive Council for Economic Development:*[49]

> 'The pre-constitutional conception of property … entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.'[50]

The Court's acknowledgment of our history of land dispossession in this case illustrates its awareness of the urgent need for land reform and the need to interpret section 25 'with due regard to the gross inequality in relation to wealth and land distribution in this country'.[51] In addition, it reinforces that section 25, under our constitutional democracy, should not only protect private property rights, but also protect the public aspect that comes with it. Having due regard for the social elements that underpin private property rights will contribute towards the state's ability to meet its social obligations regarding land reform. Given that the consideration of our country's historical context forms the basis of considering the purpose underpinning section 25 and related property laws, it is imperative that the courts adopt an increased purposive approach to interpreting these laws in order to give effect to the reform aims of section 25 and the Constitution as a whole. Consequently, utilising an increased purposive approach when interpreting 'just and equitable compensation' under section 25(3) such that it allows for expropriation against nil or nominal compensation, will encourage expropriation for land reform purposes and speed up the process of land redistribution that is needed to reverse the harsh effects of the land dispossession that took place under the colonial and apartheid periods.

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[49] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 34.
[50] Ibid.
[51] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 61.

Chapter 2 – An overview of the purposes of sections 25 (2)-(3) and section 25(8)

For the purposes of this dissertation, I will be focusing on sections 25(2), 25(3) and 25(8), insofar as they are most relevant in my discussion relating to expropriating land against just and equitable compensation for the purposes of land reform. I will now provide a brief overview of what each section entails before discussing section 25's underlying transformative commitment to achieving land reform (against just and equitable compensation in some cases) in Chapter 3.

Section 25 of the Constitution comprises eight subsections, all of which are inter-related and should be considered both separately and together. Sections 25(1), (2) and (3) entrench the negative elements of property rights and can be considered the defensive subsections whereas sections 25(4) – (9) reflect the positive elements of these rights and can thus be considered the reformist subsections.[52] Following the enactment of the Final Constitution, it was clear that the defensive subsections would act in favour of white previously advantaged property owners whereas the reformist subsections would act in favour of previously disadvantaged black individuals who were yet to become property owners, in order to level the playing fields by redressing and transforming 'the legacy of a grossly unequal distribution of land in this country'.[53] However, as time has passed, it has become apparent through case law that the defensive subsections are increasingly being used to serve all property owners; owing to the increase in black property owners. For the purposes of this dissertation, in order to achieve the underlying transformative goals of the reformist subsections [when considering section 25(8) in particular], it is necessary to first consider the relevant defensive subsections [sections 25(2)-(3)] which allow for expropriation against compensation and how these subsections have been interpreted. Following this consideration, we are then able to develop the alternative, flexible approach which allows for expropriation against nil or nominal compensation.

[52] J Dugard 'Unpacking Section 25: Is South Africa's property clause an obstacle or engine for socio-economic transformation?' (2018) *Constitutional Court Review – Wits University* at 4.
[53] *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC) para 30.

2.1 Section 25(2) – Property may be expropriated only in terms of law of general application

Section 25(2) concerns the state's expropriation of private property for public benefit. The state's power to expropriate is set out in section 25(2), which establishes that property can be expropriated only in terms of law of general application –

a) for a public purpose; and

b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

This section sets up the three requirements for an expropriation. First, it must be in terms of a law of general application, which includes legislation or regulations. Second, it must be for a public purpose or in the public interest. Considering this dissertation is limited to the constitutionality of expropriation against nil or nominal compensation for the purposes of land reform, I will not consider the constitutionality of expropriation for other purposes. Third, the compensation amount must either be determined by agreement or be decided or approved by a court. This final requirement plays a central role in allowing an attempt to expropriate land against nil or nominal compensation,[54] and is essential in that it gives rise to the constitutional right encapsulated in section 34 whereby 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'.

The third requirement i.e. that the compensation amount be decided or approved by a court, means that the court can either play an original (deciding) role or a reviewing (approving) role in expropriation cases.[55] However, with this discretion comes the more difficult question i.e. should the court be granted the unfettered right to approve the compensation amount or would it be acceptable to limit the court's reviewing power such that it is only allowed to review whether the initial compensation determination was rational or reasonable.[56] Owing to the urgent need to speed up the land redistribution process, I deduce that it is imperative for the courts to be granted the discretion to develop a flexible approach to determining compensation amounts. Such flexibility will grant the courts the discretion to decide whether expropriation

[54] Bishop and Ngcukaitobi op cit note 24 at 6.
[55] Ibid at 7.
[56] Ibid.

against compensation; against nil compensation or against nominal compensation is deemed fit on a case by case basis. However, in order to develop this flexible approach to determining compensation amounts, it is necessary for the courts to adopt an increased purposive approach to interpreting section 25 and related property laws, as this will encourage the courts to determine compensation amounts that take historical and substantive context into account and consequently give effect to expropriation for land reform purposes under section 25(8). This requirement for an increased purposive approach to interpretation will be illustrated in Chapter 3.

2.2 Section 25(3) – The amount of the compensation and the time and manner of payment must be 'just and equitable'

Section 25(3) includes the factors that should be considered when determining a compensation amount. The awarding of just and equitable compensation is to be calculated in terms of section 25(3), which states that:

> The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
>
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.

The CCSA has emphasised that while section 25(3) should be used as a starting point when determining a compensation amount, it does not consider market value above the other listed factors. This was decided in *Du Toit* wherein the CCSA held that:

> 'Section 25(3) indeed does not give market value a central role. Viewed 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.'[57]

Despite the superiority of this decision, in practice, the Supreme Court of Appeal (SCA) in *Uys NO v Msiza*[58] undermined the principle in *Du Toit* by adopting two methods that make market value the primary factor when determining a compensation amount i.e. the two-stage approach and the prohibition on double counting.[59] Considering section 25(3) forms the basis of my dissertation, I will discuss the details of the requirement of just and equitable compensation, and the approach to interpretation that the courts have adopted when dealing with expropriation against just and equitable compensation for the purposes of land reform later on in this dissertation.

2.2.1 Defining 'just and equitable' compensation

Section 25(3) provides for the determination of compensation in a just and equitable manner that reflects an equitable balance between the public interest and the interests of those affected by the expropriation.[60] This requirement of a compensation determination and a balancing inquiry empowers the courts and consequently, the state, with flexibility to adopt a compensation formula that has due regard for the need to advance expropriation-centred land reform subject to budgetary constraints.[61] Flexibility is required in order to balance the opposing rights when determining a compensation amount so as to give effect to land reform within the national budget and simultaneously protect private property rights where necessary.[62] Entrenching such flexibility will ensure that our historical context and founding values of the Constitution are taken into account when determining a compensation amount.

When determining a compensation amount, it is necessary to consider all the factors listed in section 25(3)(a)-(e). As established in *Du Toit*, the language of this section does not

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[57] *Du Toit* supra note 11 para 36.
[58] *Uys NO v Msiza* supra note 21 paras 11-13.
[59] Ibid.
[60] Section 25(3) of the Constitution.
[61] J Zimmerman 'Property on the line: Is an expropriation centred land reform constitutionally permissible?' (2005) 122 *SALJ* 378 at 407.
[62] *PE Municipality* supra note 25 paras 19-23.

favour market value above the other factors. Rather, it implies that all relevant circumstances outlined in these factors be considered together in determining a just and equitable compensation amount that is against nil or nominal compensation in cases where land is expropriated for reform purposes. It can thus be argued that expropriation against nil or nominal compensation are constitutionally permissible where such compensation amounts are determined to be just and equitable, following a balance inquiry between the public interest and related private interests.[63] Such an interpretation attempts to reconcile the state's duty to promote land reform and its duty to pay just and equitable compensation when required,[64] and gives effect to the need to place a larger emphasis on purposive interpretation when dealing with land reform cases (to be illustrated in Chapter 3).

The Constitution's position on expropriation and just and equitable compensation under section 25(3) differs from the state's current expropriation-centred land reform in practice. This is evident when examining section 25(3) which lists market value as one of the factors to be considered in a compensation determination, against section 12 of the Expropriation Act[65] which prescribes the calculation of compensation in accordance with market value that is informed by the willing seller/willing buyer principle. This difference is exhibited through the way in which the Constitution envisions the state's duty to take reasonable legislative measures to foster conditions that enable citizens to gain access to land as per section 25(5), versus the way in which the state actually perceives this duty.[66]

The current reality of expropriation against compensation under our constitutional dispensation is that the pre-constitutional Expropriation Act's approach to market value has influenced the courts' approach to determining compensation amounts under section 25(3).[67] This approach was displayed in *Du Toit* whereby the CCSA first established the market value of the land, then determined how market value should fair against the other factors listed in section 25(3). This preference to expropriate land against market value and only thereafter determine whether it should be reduced in light of the other factors listed in section 25(3) has

[63] AJ Van der Walt 'Reconciling the state's duties to promote land reform and to pay an equitable compensation for expropriation' (2006) 123 *SALJ* 23 at 38.
[64] Basajjasubi op cit note 46 at 51.
[65] Expropriation Act 63 of 1975.
[66] Basajjasubi op cit note 46 at 52.
[67] Van der Walt op cit note 63 at 39.

resulted in cases where scales were tipped in favour of the interests of the private property owners rather than in the public interest.[68] Consequently, this has affected the state's ability to implement land reform in that it often fails to comply with the balance inquiry as was applied by the CCSA in *Du Toit*. I thus contend that considering the values of section 12 of the pre-constitutionally entrenched Expropriation Act are not in line with the constitutional values underpinning section 25, this section of the Act should be amended to facilitate constitutionally mandated land redistribution, which will in turn influence the courts' approach to determining compensation amounts by eradicating its market value-centred approach to expropriation. Continuing to use a market value-centred approach to expropriate land for reform purposes may restrict the state from carrying out an effective land reform programme, owing to the possibility that expropriation taken in terms of the market value-centred approach, may not reflect a just and equitable balance between opposing parties as required by section 25(3). In addition, this may result in the state's unwillingness to advance expropriation-centred land reform programmes as being expected to expropriate land on a large-scale basis against market value/above market value may be too expensive for the state.[69] The Expropriation Act's adoption of the willing seller/willing buyer compensation formula contributes towards the state extending greater protection to private property rights as per section 25(1) and thus entrenches the pre-constitutional (formalistic) approach towards expropriation which is based on the belief that if a person is deprived of their land, they must be compensated for the worth of their land. A shift from this approach would thus speed up the land reform process as it would foster the state's realisation that expropriating land against nil or nominal compensation to advance the socio-economic status of previously disadvantaged individuals is constitutionally permissible, when section 25(3) is read with section 25(8). I contend that the reading together of these sections envisions a flexible approach towards determining compensation amounts that are based on the notion that expropriation against nil or nominal compensation may be considered just and equitable. This flexible approach will assist the state in reducing the expense and delay of needing to develop a redistribution programme based on expropriation.[70] The reading together of these sections needs to be tested at CCSA level in order for this progressive mode of constitutional application to be accepted by lower courts. However, such constitutional application depends on the courts' willingness to place a larger emphasis on purposive interpretation when dealing with expropriation cases for land reform purposes.

[68] Basajjasubi op cit note 46 at 48.
[69] G Budlender 'The right to equitable access to land' (1992) 8 *SAJHR* 295 at 303.
[70] Basajjasubi op cit note 46 at 52.

2.3 Section 25(8) – No provision of section 25 may impede the state from taking legislative and other measures to achieve land reform

Section 25(8) gives rise to the possibility that the state may pursue a more assertive approach to land reform. I contend that this includes allowing land redistribution through expropriation against nil or nominal compensation. In addition, I contend that expropriating land against nil or nominal compensation is possible without needing to amend the Constitution, provided that the rationale behind such expropriation is to uphold the land reform aspirations of section 25(8). The requirement of just and equitable compensation according to section 25(3) provides a transformative method which, if interpreted purposively to balance property rights, may require the awarding of nil or nominal compensation. However, section 25(8) can also be interpreted to allow for expropriation against nil or nominal compensation for land reform purposes. Section 25(8) states that:

> 'No provision of this section [25] 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).'

While this argument is yet to be explored through litigation, the wording of section 25(8) suggests that it is possible, should action be pursued, for laws to be enacted which allows the state to expropriate land against nil or nominal compensation for the purposes of land reform, provided that such expropriation is found to be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[71] The ability to use section 25(8) to expropriate land against nil or nominal compensation for land reform purposes, provided that this section is interpreted purposively, will be illustrated in Chapter 5.

[71] Dugard op cit note 52 at 16.

Chapter 3 – Transformative constitutionalism and a legal culture that is committed to achieving land reform and socio-economic progression through a purposive approach to interpretation

Following the period of land dispossession and extreme injustice resulting from discriminatory laws, emerged a new democratic system of laws governed by the Constitution and underpinned by a transformative mandate. I understand this mandate to be one that seeks to establish and give effect to a legal system that allows all citizens equal access to resources and services to be provided by the state. Hence, the Constitution's aim is to commit the state to transforming our society into one which allows citizens access to social and economic resources that enables them to realise their self-worth and dignity,[72] as opposed to merely declaring that a new system of democratic rights exists. This transformation can however only be achieved following the continuous commitment of all legal actors (especially the courts) in the legal system towards realising substantive and redistributive equality and justice, which entails a commitment to achieving equality which takes into account the lived socio-economic circumstances of all previously-disadvantaged people in South Africa.[73] I contend that a solid starting point for achieving this transformation is through litigation (regarding the promotion of land reform in this case) and a shift in the courts' approach to expropriation against compensation. The transformative mandate concerning property can only be fully achieved when the courts shift from a literal, formalist approach to interpreting the meaning of 'just and equitable compensation', to an increased purposive approach to interpreting the meaning of 'just and equitable compensation'. Utilising an increased purposive approach to interpreting section 25 and the requirement of just and equitable compensation will encourage the courts to adopt a flexible approach which allows for expropriation against nil or nominal compensation. Hence the need to commit to sustaining an on-going process of transformative constitutionalism. Such constitutionalism requires the adoption of a purposive interpretative approach that takes into account the underlying values of the Constitution when interpreting section 25 and related property laws.

[72] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 132.
[73] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 154.

3.1 South Africa's transformative mandate

Transformative constitutionalism provides a legitimate platform that could enlighten legal actors on how to negotiate the tensions (which arise from the property clause) between the rights and interests of current and aspiring property owners. This notion of transformative constitutionalism was developed by Klare and refers to a type of constitutionalism which constitutes 'a long-term project of constitutional enactment, interpretation and enforcement…that aims to induce large-scale social change through non-violent political processes grounded in law'.[74] He deduces that in some cases, mainstream legal culture acts as a restraint which resists transformation. Legal culture in this instance refers to 'professional sensibilities, habits of mind and intellectual reflexes'[75] 'which are embedded in more or less uncritical acceptance of doing things the way they are usually done; the way they have been done for a long time'.[76] The legal culture prior to the enactment of the Constitution encompassed a formalistic vision of law which ignored the interplay between law and politics upon applying the law.[77] In the course of this dissertation, I aim to show that the courts' literal approach to interpreting the Expropriation Act has influenced its approach to interpreting section 25 of the Constitution, and that this is a manifestation of the formalistic legal culture that Klare discusses. Legal actors have been trained to accept the intellectual reflexes of mainstream legal culture as the norm[78] and thus do not realise that both their spoken and unspoken assumptions regarding legal problems, arguments and sources of authority are culturally determined.[79] Klare discusses how this can act against transformative aspirations:

> 'This property of legal culture – that participants are often unaware of how it shapes their professional beliefs and practices – affects the substantive development of law. If cultural coding sets limits (however implicit or unconscious) on the types of questions lawyers ask and the types of evidence and argument they deem persuasive, surely this in turn sets limits on the kinds of answers the legal culture can generate … Un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise

[74] Ibid at 150.
[75] Ibid at 166.
[76] AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1 at 8.
[77] JC Froneman 'Legal Reasoning and Legal Culture: Our "Vision of Law"' (2005) 1 *Stell LR* 3.
[78] Klare op cit note 73 at 167.
[79] Van der Walt op cit note 76 at 17.

> a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation.'[80]

It is challenging to develop a transformed legal culture while making use of the tools, training and habits which frequented the pre-constitutional era.[81] Transformation of the legal sector can only be attained if legal actors (especially the courts) acknowledge that legal culture restrains their ability to utilise law so as to produce effective change. Considering lawyers were trained to adopt a literal approach to interpretation under apartheid, it is not unusual for experienced lawyers to consciously or subconsciously employ a literal interpretative approach when drafting legal arguments. It is thus imperative for all legal actors (especially the courts) to develop their skills in utilising a purposive approach to interpretation, as considering substantive context and the purpose of section 25 will encourage the courts to adopt a flexible interpretation which allows for expropriation against compensation; against nil compensation or against nominal compensation (to be illustrated later on in Chapter 3). Similarly, the judiciary should constantly question how to achieve socio-economic transformation (in the form of land redistribution in this case) through using section 25, when the legal culture and the tools for implementing law as an agent of change have not completely evolved since the advent of constitutional democracy'.[82]

In addition to transforming the legal culture, the transformative constitutional mandate requires that the Constitution be interpreted in a manner that advances its transformative goals. The constitutional principles which formed the foundation of the Final Constitution included the presumption that the Final Constitution would establish a system of governance that is committed to achieving equality before the law, and would thus make provision for laws designed specifically to enhance the deplorable conditions that majority of previously advantaged individuals still live in, despite the end of the apartheid era.[83] From this, I deduce that the Constitution obliges the state to combat poverty and promote social welfare, through 'promoting the values that underpin a democratic society based on human dignity and equality,'[84] and consequently, this obligation is extended to land reform (considering being

[80] Klare op cit note 73 at 168.
[81] Ibid at 171.
[82] Du Plessis op cit note 8 at 6.
[83] Klare op cit note 73 at 154.
[84] Sections 1(a) and 39(1)(a) of the Constitution.

awarded land that you/your ancestors were stripped from is inherently linked to your human dignity). The transformative constitutional mandate, in recognising this obligation, thus promotes the realisation of substantive and redistributive equality in attempt to reduce the effects that apartheid had on previously disadvantaged individuals. This can be attained through implementing methods such as expropriation against nil or nominal compensation for land reform purposes in order to facilitate and speed up the redistribution of land process and ultimately, to improve the socio-economic conditions of previously disadvantaged individuals. This method of expropriating land manifests the Constitution's transformative goal to implement reasonable measures to redress the land dispossession caused by past racial discrimination; and to enable citizens to gain access to land on an equitable basis as set out in section 25.

Klare acknowledged that transformative constitutionalism can be restricted by the static legal culture that still reflects some remnants of the land-related apartheid laws and thus resists transformation.[85] He argues that by committing to the ongoing project of transformative constitutionalism, the goal of utilising the Constitution such that it produces positive effects on the lives of previously disadvantaged and disadvantaged individuals can be realised.[86] Upon examining the courts' interpretation of just and equitable compensation in our constitutional democracy, it is clear that the literal, formalistic approach that was utilised to interpret property law under apartheid has influenced the interpretation and application of section 25. Consequently, this has influenced how section 25 and its purpose has in turn influenced the progression of socio-economic development in land reform to the extent that it differs from the ideals of transformative constitutionalism, considering the formalistic legal culture behind interpreting property law which obstructs the transformative aspirations for land reform.[87] However, despite this formalistic approach towards the constitutional interpretation and application of property law, section 25 establishes the necessary framework to be used to develop a legal culture that promotes and facilitates land and related socio-economic reform.[88] This can be done by using section 25 as a mechanism to facilitate the transformation of existing property law which still depends largely on traditional rules that often require a literal

[85] Klare op cit note 73 at 150.
[86] Ibid.
[87] Basajjasubi op cit note 46 at 5.
[88] Ibid.

interpretation to protect private ownership; thus perpetuating a formalistic legal culture.[89] The transformed legal culture that Klare envisions can best be developed through the use of a purposive judicial interpretative approach, as taking our nation's history of land dispossession into account will encourage legal actors to draft arguments that are in favour of previously disadvantaged individuals; thus giving effect to the transformative aims of the Constitution i.e. land restitution and redistribution.[90]

The fundamental question to be asked from a transformative constitutional perspective with regards to awarding compensation for expropriation is how to invoke the property clause in such a manner that it transforms the property relations between existing and aspiring property owners in attempt to level the economic playing field between them.[91] Property law can be used not only to reform the existing spatial planning but also to foster economic growth. It is thus imperative that all legal actors (especially the courts) abandon a strict reliance on the traditional rules of property law without considering the substantive elements that come with it. The constitutional democracy requires the development of sufficient guidelines on how to make the tension between vested property rights and reform and redistribution work innovatively.[92] Such innovation requires that courts promote the egalitarian values enshrined in the Constitution through adopting an increased purposive interpretative approach to determining compensation amounts, as this will allow for the expropriation of land against compensation; against nil compensation or against nominal compensation.

3.2 A purposive approach to legal interpretation

3.2.1 The Constitutional Court's adoption of a purposive approach to interpretation

The CCSA in *FNB v Minister of Finance*[93] confirmed that the South African Constitution is committed to an on-going process of transformation by referring to Van der Walt in that '[w]hen considering the purpose and content of the property clause it is necessary to move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the status quo to a dynamic, typically public-law view of the Constitution as an

[89] AJ Van der Walt *Constitutional Property Law* (2005) at 402.
[90] Basajjasubi op cit note 46 at 6.
[91] Ibid.
[92] Van der Walt op cit note 89 at 408.
[93] *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

instrument for social change and transformation under the auspices of entrenched constitutional values'.[94] The CCSA's endorsement of using the Constitution as 'an instrument for social change and transformation' indicates that the Court should take South Africa's context into account in its approach to interpretation. Utilising a purposive approach to interpretation would be the most effective way to achieve the type of transformation envisioned by the Constitution, as such an approach considers the purpose behind why laws were enacted. Considering South African legislation is centred on recognising past injustices and attempting to correct the wrongs of the past, evaluating the purpose of section 25 and related property laws will encourage legal actors (especially the courts) to draft legal arguments that promote land reform. The commitment to transformation through a purposive approach to interpretation was further entrenched by the CCSA in *Soobramoney v Minister of Health*[95] whereby the Court held that the Constitution aspires to transform our society into one in which human dignity, freedom and equality are realised.[96] Hence the need for a purposive approach to interpreting 'just and equitable compensation' such that it recognises the link between land and human dignity by allowing for expropriation against nil or nominal compensation for land reform purposes. The CCSA's decision to develop such an approach to interpretation indicates its understanding of the Constitution's foundational values.

A purposive approach to interpretation entails a process whereby a court considers the underlying links between the Constitution and its historical context, so as to infer unambiguous meanings from the text.[97] Such an interpretation allows a court to identify the underlying values of the Bill of Rights and use these values to inform its analysis of the text in a manner that upholds the Constitution's aim of ensuring an effective transition to democracy that fosters equal opportunities for all citizens,[98] and is thus the most appropriate mode of constitutional interpretation, considering it aims to give effect to the foundational aims of the Constitution as set out in the Preamble.

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[94] Ibid at 794. The CCSA referred to AJ Van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 11.
[95] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).
[96] Ibid paras 770I-771A.
[97] Zimmerman op cit note 61 at 390.
[98] *S v Makwanyane* 1995 (3) SA 391 (CC).

In comparison, following my contention in favour of an increased purposive approach to interpreting section 25 and related property laws, I feel it necessary to refer to the literal approach to interpretation in order to evaluate the formalistic effects that this approach can have when dealing with the determination of just and equitable compensation. A literal approach to interpretation requires the interpreter to focus on the plain meaning that can be deduced from the language used in a provision, and only allows him to deviate from the literal meaning in cases where the meaning is ambiguous or vague.[99] Utilising this narrow interpretation in the determination of 'just and equitable compensation' has resulted in the courts attaching market value to the term 'just and equitable'.[100] Our pre-constitutional era saw legal actors foster the notion that the sale or transfer of land ownership could only be considered a 'just' transaction provided that the landowner was compensated down to the last cent that the land was worth in economic terms. This narrow view of what was considered just and equitable compensation for land meant that any other aids to interpretation that were used to establish contextual meaning were overlooked. In using this approach, judges were thus afforded the opportunity to hide behind the law in that they became mechanical interpreters of the law who merely equated the literal meaning of 'just and equitable compensation' with monetary value and applied this law in related property law cases. Considering the mechanical interpretation that takes place when using a literal interpretative approach, the courts' ability to consider context and thus interpret and apply property laws on a case by case basis is reduced. This in turn reduces the courts' capacity to develop a precedent that gives effect to the transformative values of the Constitution. This literal approach to interpreting the term 'just and equitable compensation' should therefore not be relied on in our post-constitutional era. Owing to the historical interpretation of the term, it is more likely to produce favourable outcomes for previously and presently advantaged landowners through the awarding of compensation amounts that are at or above market value. Finally, considering the historical interpretation of the term 'just and equitable compensation' equated just compensation with monetary value, utilising a literal interpretation of the term is more likely to stunt the possibility of interpreting section 25 to include expropriation against nil or nominal compensation.

[99] L Du Plessis 'Theoretical (Dis-)Position and Strategic Leitmotivs in Constitutional Interpretation in South Africa' (2018) *PER/PELJ* 1332 at 1335.
[100] *Du Toit* supra note 11.

3.2.2 A purposive approach to interpreting section 25 of the Constitution – an academic perspective

The Final Constitution possesses socio-economic and cultural transformative ideals that underpin its aim to implement institutional transformation within our democratic state by making decisions that uphold its founding values, namely, human dignity, equality, advancing human rights and freedoms, non-racialism and non-sexism.[101] Such transformation extends to the requirement for a major shift in the land ownership regime; transformation which is provided for in the reformist sections of the Constitution. However, despite room for land reform through expropriation, the courts have been reluctant to decide in favour of this pathway to transformation. This is owing to the courts' preference for a literal approach to interpretation when determining just and equitable compensation amounts, which consequently restrains the above mentioned sections from carrying out their reformist jobs.

The text of section 25 indicates that the Constitution aims to implement land reform by providing a normative framework that aims to provide access to land on an equitable basis,[102] redress those whose tenure of land is legally insecure owing to past racial discriminatory laws,[103] provide restitution to those who were dispossessed of property owing to past racial discriminatory laws,[104] and to prevent any provision of this section from impeding the state from taking measures to achieve land reform to redress the results of past racial discrimination.[105] Section 25(8) is particularly important, as it insulates land reform from constitutional attack by providing that '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 previous section is in accordance with the provisions of section 36(1)'. This provision ensures that the structuring process of land reform programmes are prevented from being influenced by legal and political culture.[106] In addition, the reformist sections 25(5)-(8) guide the CCSA in its interpretation and reading of the values that underpin the substantive aspects of the property clause.[107] The inclusion of these substantive sections indicate that the property clause, in its

[101] Sections 1(a)-(b) of the Constitution.
[102] Section 25(5) of the Constitution.
[103] Section 25(6) of the Constitution.
[104] Section 25(7) of the Constitution.
[105] Section 25(8) of the Constitution.
[106] Basajjasubi op cit note 46 at 26-27.
[107] Ibid at 27.

entirety, should be interpreted in a manner that takes constitutional values and historical context into account. Hence, the Court becomes empowered to adopt a purposive interpretation of section 25 which allows it to interpret private property rights such that it does not prevent the state from carrying out land reform.[108]

Klare and Zimmerman have published literature whereby they address the role of sections 25(2), 25(3) and 25(8) in implementing expropriation for land reform purposes, while respecting the rights of individuals to not be deprived of their property. Their literature centres on the transformative elements of section 25 and reflects on the effects that the current legal culture has had on the ability to use section 25 as an agent of transformation.[109] Furthermore, it unpacks the need to develop alternative modes of interpreting property law in light of the constitutional obligation to promote land reform.[110] Their literature is imperative to acknowledge when considering my argument as they discuss the need for the state to widen its scope in its approach to land reform i.e. by expropriating land against compensation below market value for the purposes of land reform.

Klare's literature forms a solid foundation for understanding why legal culture plays a vital role in whether transformative constitutionalism is pursued in our constitutional democracy. [111] Consequently, his argument provides the base upon which an analytical framework can be built, and whereby the processes of law-making, adjudication and legal culture can be analysed critically to determine how effectively these processes work as modes in developing alternative methods of land reform such as expropriation against nil or nominal compensation. Furthermore, he emphasises that the relationship between legal culture and the three branches of government often influences the way in which section 25 is interpreted and thus how the reformist sections are applied. Under our constitutional dispensation, property law remains largely defined by the traditional rules of property which aim to give effect to private ownership at the expense of land reform.[112]

[108] Zimmerman op cit note 61 at 392.
[109] Basajjasubi op cit note 46 at 16.
[110] Van der Walt op cit note 63 at 31-32.
[111] Klare op cit note 73 at 147.
[112] Basajjasubi op cit note 46 at 18.

As witnessed in *Du Toit*, this has a deterring effect on the transformative potential of section 25 insofar as land reform is concerned. Hence the need for the courts to embrace an increased purposive interpretation of just and equitable compensation, as having due regard for historical context will lead them down the path of expropriating land against nil or nominal compensation for land reform purposes. In favouring a purposive interpretation of the term 'just and equitable' compensation, the courts should link the transformative values underpinning section 25 directly with the reformist sections of section 25 in their legal reasoning of expropriation cases, as this will encourage the courts to realise the transformative potential of section 25. In addition, this will produce 'a legal framework through which socio-economic transformation (in relation to land) receives constitutional justification through law and policy'[113] and lead to the adoption of laws that entrench a more equitable system of land reform rights.[114] Consequently, this will break down the literal, formalist approach that the courts have maintained (through a preference for market value-centred expropriation) and allow the courts to determine nil or nominal compensation amounts as 'just and equitable', thus speeding up the land reform process in South Africa

Upon considering Klare's position on transformative constitutionalism and legal culture, Zimmerman analyses whether expropriation for land reform purposes may be constitutionally permissible.[115] Zimmerman concurs with Klare in that section 25 of the Constitution 'possesses a principal characteristic that fundamentally expands and reinforces the ideals of a commitment to transformation within the legal realities of society'.[116] These include, reference to the legal realities surrounding restructuring an equitable system of land rights through expropriation and land redistribution.[117]

Zimmerman deduces that the Constitution was created to ensure that the limits concerning land reform are flexible, in attempt to give effect to the constitutional aim to achieve social justice and transformation in stating that 'the flexible limits of constitutionally permissible land reform forms the normative basis upon which the property clause can facilitate

[113] Ibid.
[114] Ibid.
[115] Zimmerman op cit note 61.
[116] Basajjasubi op cit note 46 at 19.
[117] Zimmerman op cit note 61 at 383.

a substantive period of resource redistribution'.[118] In using the term 'flexibility', she is referring to section 25's ability to maintain a balance between protecting private property interests and what she calls the 'special constitutional priority' of promoting land reform in the public interest. She thus extends the substantive language used in the reformist subsections 25(5)-(8) to the defensive subsections 25(2)-(3) by arguing that the textual synergy between the subsections can be understood as 'providing a springboard for a more substantive form of redistribution'.[119] It is thus imperative that the courts read the requirement of just and equitable compensation under section 25(3) together with the need to achieve land reform under section 25(8) through a purposive lens, as this will result in the realisation (based on substantive context) that expropriating land against nil or nominal compensation where necessary will speed up the land reform process, as the state will have no budgetary restraints holding it back from expropriating land for public benefit. Hence, land can be transferred quickly and easily.

Upon establishing that section 25 bears transformative undertones which allow for expropriation for land reform purposes, it is important to enquire how sections 25(2)-(3) and 25(8) can be utilised to give effect to its transformative aims. In making this enquiry, Zimmerman goes further than Klare in arguing that the transformative aims of the abovementioned sections are capable of being interpreted by the CCSA as characterising appropriate mechanisms for land reform related expropriation, owing to its special constitutional priority which justifies the state expropriating land against compensation that is below market value.[120] It is fundamental for the courts to tap into the transformative potential of section 25 by allowing expropriation against nil or nominal compensation for land reform purposes, considering the lack of programmes concerning expropriation for land redistribution, as this will deter the courts from using market value as a starting point when determining compensation amounts for expropriation. The take home point from Zimmerman's literature is the importance that purposive interpretation plays in giving effect to the transformative aims of the Constitution and ensuring that land related legislation and policies are underpinned by transformative constitutional values.[121]

[118] Ibid.
[119] Basajjasubi op cit note 46 at 19.
[120] Zimmerman op cit note 61 at 383.
[121] Ibid.

Following the competent analyses conducted by these academics, I contend that while the courts do aim to strike a balance between using both a purposive and literal approach to interpretation, it is necessary for the courts to place more weight on a purposive approach when interpreting the law in expropriation cases. Matters concerning land are so intrinsically linked with dignity in South Africa, owing to our deplorable history of land dispossession. It is thus crucial for the courts to take active steps towards ensuring that land reform is implemented, and the best way to achieve outcomes which promote a speedier land reform process is through using an interpretative approach that takes active steps to guard against repeating the mistakes of the past. In addition, consistently taking into account the purpose of property laws and section 25 will reinforce a precedent that our historical context must always be taken into account by the courts when dealing with expropriation cases, as the courts are the most effective mechanism to be used as agents of social change who act in favour of the public interest in ensuring favourable outcomes for disadvantaged people in expropriation cases. This will reinforce the notion that substantive equality must be realised in our constitutional era and that favourable outcomes which promote substantive equality can only be achieved if we constantly remind ourselves of the wrongs of the past that need to be corrected. Adopting this approach is the starting point to breaking down the formalistic market value-centred approach to interpreting section 25 and related property laws. Consequently, this will give direct effect to the transformative aims of the Constitution; one of the most fundamental aims being the need to facilitate restorative justice.

Chapter 4 – South African courts' approach to expropriation cases when determining 'just and equitable' compensation under section 25(3)

Following on from Chapter 2 and my discussion on the courts' position regarding 'just and equitable compensation', I will now further this discussion by analysing the courts' inapt approach to interpreting section 25 by considering the various levels of courts' approach to determining compensation amounts in the *Msiza* cases. As previously discussed, I deduce that the courts' interpretative approach in these cases harbour a formalistic approach towards expropriating land for reform purposes owing to its market value-centred approach to determining compensation amounts. This has resulted in a stagnant land reform process which needs to change in order to give effect to the underlying values of section 25 and to produce more expropriated land for reform purposes.

4.1 The Land Claims Court and Supreme Court of Appeal's jurisprudence on determining just and equitable compensation with regards to land reform in the *Msiza* cases

4.1.1 The Land Claims Court's legal interpretative approach in the Msiza cases

The Land Claims Court (LCC) has, similarly to the CCSA, adopted a market value-centred approach to determining compensation amounts upon the expropriation of land.[122] Considering the LCC was established in 1996 under the Restitution Act[123] for the sole purpose of dealing with cases concerning land restitution, it is expected that this Court would promote a transformative ethos. However, the outcomes of the LCC's decisions are generally characterised as 'un-transformative'.[124] In his commentary on land reform, academics such as Roux have concluded that the LCC, while pro-poor in nature, provides little comfort to the poor

[122] University of the Witwatersrand 'Jurisprudence of the Land Claims Court in land reform against the backdrop of the current calls for the amendment of section 25 of the Constitution' *Constitutional Court Review* (2018) 1 at 2.

[123] Restitution of Land Rights Act 22 of 1994.

[124] University of the Witwatersrand op cit note 123 at note 2 – T Roux 'Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511 notes that ten years after the Land Claims Courts' establishment it plays no meaningful role in the restitution process. Fast forward to 2019, the land reform process remains slow-moving, hence the need to give effect to expropriation without compensation (as monetary implications are generally the cause for delays in our economic system). Roux makes reference to R Hall, who expresses his disappointment on the performance of the Land Claims Court and points out that this Court's conservative outcomes defy the very reason for its existence in that *"There was a need for a specialist court with people who had a specialist understanding and knowledge and that it would have to function in a different way from normal courts. So we are talking about a specialist court that was set up to deal with the complex and highly contested political issue and to not behave in an ordinary way. This is an important context."*

majority whom it is meant to assist.[125] While the CCSA can be commended for its commitment to producing pro-poor outcomes, the South African legal culture and formalism have negatively influenced the LCC's interpretation of land reform legislation which has consequently stunted the land reform process. Hence the need for the courts, at all levels, to adopt an increased purposive approach to interpreting section 25(3), as utilising this interpretative approach will encourage allowing for expropriation against nil or nominal compensation and thus foster the need to give effect to this section's socio-economic transformative ideals.

Roux's critique of the LCC's performance during the first decade of its existence concludes that a formalistic legal culture explains the jurisprudence of this court.[126] His argument is based on the transformative role of the judiciary in new democracies through assessing the courts' performance in being agents of social transformation.[127] For the purposes of this dissertation, social transformation refers to 'the altering of structural inequalities and power relations in society in ways that reduces the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation'.[128] Considering the LCC is expected to play a direct role in ensuring land reform through land restitution, this court is expected to be an agent of social transformation. It is my contention that the LCC is a pro-poor court whose judgments have not generally benefitted the poor. In relying on Roux, I contend that there are a number of institutional indicators which further determine whether a court is an agent of transformation and these include, 'the legislative framework enabling the courts to transform and the social composition of the judiciary that should ensure this social transformation; the resource indicators reflected in the ability of the litigants to approach the courts; the location of the court; the access to courts as informed by the cost of litigation; and the pro-poor voice representation flowing from the extent to which poor people's voices are represented in the matters brought before the courts'.[129] Upon considering these institutional indicators, the LCC can be considered an agent of social change theoretically, as the cases that appear before it include mostly poor people, represented by experienced public interest litigation organisations, who approach the courts for a remedy under

[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] S Gloppen 'Courts and Social Transformation: An Analytical Framework' (2006) *Courts and Social Transformation in New Democracies* 35 at 37-38.
[129] Roux op cit note 124.

transformative legislation [including the Restitution of Land Rights Act of 1994, Land Reform (Labour Tenants) Act of 1996 and the Extension of Security of Tenure Act of 1997].[130]

Despite the existence of these pro-poor instruments which can be utilised to ensure social transformation, the recent *Msiza* cases illustrate that the LCC has a long way to go before it can be considered fully transformative. However, before analysing the LCC's decisions in the *Msiza* cases, it is necessary to consider how neo-institutionalism has reinforced the ever-persistent formalistic legal culture in this court's post-apartheid jurisprudence. Neo-institutionalism falls under the discipline of Sociology and refers to the study of institutions, their development and the ways in which they gain legitimacy within the environment in which they operate.[131] Considering the LCC was established to perform a specific function within the limits of its empowering legislation, this court can be categorised as an institution which, as a specialist court, needs to maintain legitimacy in our judicial system. A neo-institutional assessment of the LCC views this institution as a reflection of the socio-political values that surrounds it.[132] Hence, the outcomes of the LCC's decisions reflect South Africa's socio-political approach to land reform and 'the impact of this court's jurisprudence on land reform should [thus] be viewed from the perspective of the larger socio-political climate in which land reform plays out'.[133] Consequently, the socio-political climate in which the LCC operates, including the influence of superior courts, has shaped the LCC's approach to determining compensation amounts in expropriation cases and shaped the outcomes of its decisions.

The *Msiza* case involved a land dispute between two parties, the Msiza family being the applicant (represented by Msindo Msiza) and Johannes Uys being the respondent. The applicant's father lodged a land claim in 1996 in terms of the Labour Reform (Labour Tenants) Act. The owner at the time received notice of the claim in terms of section 17 of the Act but argued that the deceased (Msindo's father, Amos) fell into the category of 'labour tenant'. This case was disputed for the first time at the LCC in 2001 and the court held in 2004 that Amos Msiza was in fact a labour tenant and awarded the land and servitudes to the Msiza family.[134] Following the handing down of this judgment, the state told Msindo that they were awaiting a

[130] Extension of Security of Tenure Act 62 of 1997.
[131] P DiMaggio & W Powell *The New Institutionalism in Organisational Analysis* (1991).
[132] University of the Witwatersrand op cit note 122 at 14.
[133] Ibid at 15.
[134] *Msiza v Uys* supra note 19.

market evaluation of the farm in order to make an offer to purchase. However, this did not take place for 12 years.[135]

In 2004, the state made offers to purchase the land at market value at both R400 000 and R550 000, both of which were rejected. Msindo thus went to court for the second time in the LCC in 2016 to request an order to determine the compensation amount in terms of sections 22 and 23 of the Labour Reform Act.[136] The LCC determined that the market value of the property was R1 800 000 and that just and equitable compensation amounted to R1 500 000. This judgment was however overturned by the SCA in *Uys NO v Msiza*, wherein the full market value of R 1 800 000 was awarded.[137]

Despite the land being transferred to the Msiza family and the owner of the land being awarded its full market value compensation amount, there are several issues that were not addressed by the courts in their respective decisions. First, pre-constitutional expropriation law used market value as the determining factor when calculating the compensation amounts in the expropriation cases. This perpetuated the belief that awarding landowners the market value of their property was the most just and equitable form of compensation. However, this notion of just and equitable compensation placed white landowners' private property interests at the frontline of their compensation calculations and disregarded the need to compensate the black majority of South Africa from whom the land was initially stolen. It is thus crucial that we move away from this formalistic notion of using market value as the starting point or determining factor when determining compensation amounts. Continuing to use this approach when determining compensation amounts does not give effect to the intention of all the factors listed in section 25(3), which are to be considered equally together, hence one factor should not be considered above the rest. Second, using market value as a determining factor when determining just and equitable compensation amounts reinforces commercialisation and adds capitalist undertones to section 25. This does not fit well with the Constitution as a whole, which is restorative in nature. I acknowledge the importance of having a well-oiled economy in our country. However, as confirmed in *Florence v Government of the Republic of South Africa,*[138]

[135] E Du Plessis 'The Msiza case: "The perpetuation of injustices by the miscalculation of "just and equitable" compensation' (2018) *Conference Paper: North West University* 2.
[136] *Msiza v Director-General* supra note 20.
[137] *Uys NO v Msiza* supra note 21.
[138] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 50.

using returns on investment when dealing with cases concerning the historical loss of land is likely to result in overcompensation. Hence, market value should not be used as the determining factor when determining just and equitable compensation amounts to be awarded in expropriation cases.

The socio-political climate in recent years favours a more robust approach to land reform; that being the need for expropriation without compensation. Considering this status quo, and the fact that the LCC's mandate is to act in favour of land restitution, it was inappropriate for the court to utilise a literal, formalist approach when interpreting just and equitable compensation in the *Msiza* cases. However, given the precedent set by the CCSA in *Du Toit*, I understand why the LCC felt restricted by the reasoning set out by the superior court. The LCC's decision not to stray from the CCSA's judgment in *Du Toit*, despite its transformative mandate, hints at issues of legitimacy. It is probable that the LCC, in being a specialist court, feels the need to limit its decisions from being 'too progressive' in order to maintain institutional capacity in the eyes of public. However, considering the LCC aims to serve the poor majority of South Africa, it is necessary for the court to consider that limiting itself from making progressive decisions would not only have a negative socio-economic impact on the lives of poor people, but could also reinforce a negative perception of the judicial system in that it does the bare minimum to assist the destitute and is thus not doing what it was established to do. Ultimately, 'the success trajectory of the LCC is influenced by the goals of the transition, that will inevitably play out in the outcomes and the direct impact on the litigants before the Court.'[139]

4.1.2 The Supreme Court of Appeal's interpretative approach in Uys NO v Msiza

In *Uys NO v Msiza*, the SCA on appeal adopted two methods which, in practice, makes market value the determining factor when calculating just and equitable compensation amounts, thus undermining the CCSA's principle in *Du Toit* that 'section 25(3) does not give market value a central role'.[140] These methods include: (a) the two-stage approach; and (b) the prohibition on double counting.[141]

[139] University of the Witwatersrand op cit note 122 at 16.
[140] *Du Toit* supra note 11 para 36.
[141] Bishop and Ngcukaitobi op cit note 24 at 8.

Method 1: The two-stage approach

The SCA held that courts must adopt a two-stage approach to determining just and equitable compensation. In the first step, the court should determine the market value of the property. In the second step, the court should determine whether that value should be adjusted up or down, in light of the other factors listed in section 25(3). The justification for this approach is that market value is the only factor which can be objectively quantified.[142]

I concur with the reasoning of Bishop and Ngcukaitobi in that the two-stage approach is mistaken and that if the case is taken on appeal to the CCSA, the Court is likely to reject it.[143] First, market value is not the only factor that can produce a numerical value. In addition, the amount of state subsidy may also be determined and produces a concrete value.[144] Second, this two-stage approach is inconsistent with the written text of section 25(3) in that it can lead to the courts' disregard for other equally important factors. This in turn disregards that the goal is not 'market value' but 'just and equitable' compensation.[145] Third, the notion that market value can be objectively determined is false, as it is often the case that valuers disagree on the value of land.[146] Fourth, in cases where there is a dispute regarding the market value, it will usually be more difficult to detach the other factors listed in section 25(3) from a market value determination.[147] 'Assessing market value requires the court to consider not only the current, actual value of the land, but also what the value would have been but for the expropriation.'[148] This therefore requires an assessment that is inextricably linked to 'the current use of the property' [s 25(3)(a)], 'the history of the acquisition and use of the property' [s 25(3)(b)], and 'the purpose of the expropriation' [s 25(3)(e)].

Method 2: Double Counting

The SCA overturned the LCC's decision and held that the various factors considered by the LCC to justify the reduction had initially been considered by the valuer, and that it was thus inappropriate to consider these factors again (in determining a just and equitable compensation

[142] Ibid at 9.
[143] Ibid.
[144] *City of Cape Town v Helderberg Park Development (Pty)* 2007 (1) SA 1 (SCA) para 19.
[145] J Van Wyk 'Compensation for land reform expropriation' (2017) *TSAR* 21 at 27.
[146] Bishop and Ngcukaitobi op cit note 24 at 9.
[147] Ibid.
[148] Ibid at 9-10.

amount).[149] While this approach was considered plausible by the SCA, I concur with Bishop and Ngcukaitobi in that this decision is likely to be overturned at CCSA level for three reasons. First, section 25(3) explicitly states that the listed factors should be considered, knowing that some of these factors would obviously be relevant in determining the market value.[150] Second, the weight that each of these factors should hold must be determined by the Court in its determination of a just and equitable compensation amount, not by the valuer in her market valuer determination.[151] Even if both the Court and the valuer consider the same factors, the purpose underlying their respective considerations will vary. Third, owing to our country's history of land dispossession and the purpose of section 25(3), the factors which look at history of the acquisition and use of the property and the purpose of expropriation should hold a heavier weight than market value. However, the SCA made no mention of South Africa's historical context in its judgment, which indicates its reluctance to stray from a market value-centred approach and illustrates that the Court had no intention of using its authority to pave the way, through its reasoning, for a property law regime that fosters the transformative values underpinning section 25(3).

4.1.3 Uys NO v Msiza should be overturned

The judgment by the SCA in *Uys NO v Msiza* reflects the Court's reluctance to let go of its hegemonic view on the central role that market value should play when determining just and equitable compensation amounts. This judgment was controversial, considering it reinforced that market value should be used as the starting point when determining a just and equitable compensation amount during a period where the socio-political climate is critical of using market value as the determining factor. This differs from the socio-political climate during the period of the *Du Toit* judgment where it was deemed acceptable to use market value as the starting point when determining a just and equitable compensation amount.

The effect of a decision like *Uys NO v Msiza*, in using market value as not only a starting point but as the determining factor, is the precedent it has set that just and equitable compensation merely amounts to compensation at market value. Should this decision not be overturned, it will be almost insurmountable to convince the courts that just and equitable

[149] *Uys NO v Msiza* supra note 21 para 25.
[150] Bishop and Ngcukaitobi op cit note 24 at 10.
[151] Ibid.

compensation could amount to nil or nominal compensation.[152] Where the aim of expropriation is land reform, the awarding of a compensation amount at less than market value should be allowed. The fact that *Uys NO v Msiza* allows just and equitable compensation against market value will provide additional hurdles for the land reform process. Bishop and Ngcukaitobi have suggested three mechanisms which can be used to address the problems following this decision:

> '**The state or civil society could provide the Constitutional Court with an opportunity to overrule *Msiza***. Unfortunately, the Department of Rural Development and Land Reform elected not to appeal the *Msiza* judgment. Mr Msiza, too, will not lodge an appeal in the Constitutional Court. If the Constitutional Court does not hear it, the Government or civil society should find an alternative test case to bring before the Constitutional Court. *Alternatively*, **Parliament could pass legislation that expressly provides for an alternative mechanism to calculate just and equitable compensation at below market value** (we suggest some possibilities below). The Government could then defend that legislation on the grounds that: (a) *Msiza* was wrongly decided and the legislation is consistent with s 25(3); or (b) if it limits s 25(3), the limitation is justifiable under s 25(8). *Lastly*, **Parliament could amend the Constitution to rewrite s 25(3) to allow for compensation significantly below market value in certain instances**.'[153]

Since the process to amend the Constitution such that it allows for expropriation without compensation is underway, it is uncertain whether this amendment will be made. In Chapter 5, I will discuss what these three mechanisms entail. I will then elaborate on why the third mechanism [which opts for the amendment of section 25(3) to allow for compensation significantly below market value/nominal compensation], can achieve the desired results through the existing wording of section 25(3), hence this section need not be amended. In order to give effect to expropriation against nominal compensation, the courts must place a larger emphasis on a purposive interpretation of section 25(3) and the meaning of 'just and equitable'. Should the courts foster the transformative values underpinning section 25 as a whole, and more willingly develop the undeniable link between sections 25(2)-(3) and 25(8), it will realise that the underlying purpose of section 25 is to take the required reasonable measures to implement an effective land reform programme. Hence, expropriation against nil and nominal compensation is constitutionally permissible. While Bishop and Ngcukaitobi contend that

[152] Ibid.
[153] Ibid at 10-11.

Parliament should amend section 25(3) to allow for compensation significantly below market value, I argue that the Constitution need not be amended to allow for expropriation against nil or nominal compensation, provided that the courts place more weight on a purposive approach to interpretation when adjudicating expropriation cases for land reform purposes.

The tension between these competing interests presented in the cases at LCC level versus at SCA level affects the jurisprudence of the LCC. Neo-institutionalism thus provides a differing perspective on this jurisprudence which assesses not only the legal culture of the LCC but also the socio-political climate within which the Court's jurisprudence prevails. Once the LCC makes decisions in accordance with the current socio-political climate and acknowledges its privilege in being a specialist court and its ability to transform property law in South Africa, the LCC will strengthen its institutional capacity and could persuade superior courts to leave behind the notion of using market value as the determining factor in expropriation cases. It is thus imperative for a case concerning expropriation against just and equitable compensation to be tested at CCSA level under our current socio-political climate as *Du Toit* was decided at an early stage in the CCSA's existence, hence the likelihood of the Court progressing and deciding in favour of expropriation against nil or nominal compensation is considerable. Once such a case is tested at CCSA level, it is likely that the LCC and SCA will follow suit when determining just and equitable compensation amounts in expropriation cases so as to further land reform.

Chapter 5 – Can 'expropriation without compensation' or 'expropriation with nominal compensation' be considered 'just and equitable' under the current structure of section 25?

In this dissertation, I have deduced that based on the existing wording of section 25 it is constitutionally permissible for the state to expropriate land against nil or nominal compensation. I have considered a formalistic, market value-centred approach to determining just and equitable compensation amounts and deduced that such an approach does not further the land reform aims of section 25. Hence, in order to give effect to the land reform aims of this section, and to speed up the land redistribution process, it is necessary for the state to expropriate land against nil or nominal compensation through an increased purposive approach to interpreting section 25. In this Chapter, I will illustrate how the requirement of 'just and equitable compensation' can include expropriation against nil or nominal compensation. I contend that just and equitable compensation can be interpreted to include whichever compensation amount the court deems fit and will argue in favour of adopting a flexible approach to awarding just and equitable compensation, which allows for expropriation against nil compensation, expropriation against nominal compensation, expropriation at market value and expropriation at above market value.

5.1 What does 'expropriation without compensation' mean?

The Draft Constitution Eighteenth Amendment Bill which aims to allow for the expropriation of land without compensation was gazetted on 13 December 2019.[154] This Amendment Bill states that its purpose is 'to amend section 25 of the Constitution so as to provide that the right to property may be limited in such a way that where land is expropriated for land reform, the amount of compensation may be nil'.[155] The proposed amendment of section 25 is set up as follows:[156]

(a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

[154] D Erasmus 'Land reform: speak up now!' *Farmer's Weekly* 10 January 2020, available at *https://www.farmersweekly.co.za/opinion/blog/letter-from-the-editor/land-reform-speak-up-now/*, accessed on 14 January 2020.
[155] Ibid.
[156] Constitution Eighteenth Amendment Bill, 13 December 2019.

''(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: *Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.*'';

(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words: ''(3) The amount of the compensation *as contemplated in subsection (2)(b)*, and the time and manner of any payment, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—''; and

(c) by the insertion after subsection (3) of the following subsection:
''(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.''

5.2 Using section 25(8) of the Constitution to expropriate land for reform purposes

Owing to the principle of subsidiarity, someone who wishes to exercise a constitutional right must rely on legislation that purports to give effect to the right before relying directly on the constitutional provision.[157] Subsections 25(5)-(9) states that the government must adopt legislation and other reasonable measures to achieve land reform, hence land reform should be facilitated in accordance with legislative measures prior to invoking the Constitution directly.

However, section 25(8) authorises a departure from the rest of the provisions in section 25, provided that the departure is in accordance with section 36(1) of the Constitution. Section 25(8) states that:

'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).'

I contend that 'section 25(8) clearly envisions categories of expropriated land for which "market value" should not factor into the compensation analysis'.[158] However, where a

[157] SAHRC op cit note 4 at 11.
[158] Zimmerman op cit note 61 at 415-416.

departure is made for the purpose of land redistribution in accordance with section 36(1), proportionality requires that the court take into account the welfare of the expropriatees.[159] It may very well be justifiable to waive the consideration of market value where the family that is subject to the expropriation holds a significant amount of land wealth. [160] Ultimately, it is important to remember that the fundamental purpose of the Constitution is to redress the harsh socio-economic effects that our deplorable past has had on majority of South Africans; hence the need to interpret section 25(8) purposively such that expropriation at nil or nominal compensation, with the aim of producing a speedier land reform process, can be achieved.

In analysing the construction of section 25(8), Budlender et al have raised an interesting argument.[161] They contend that the juxtaposition of the first and second sentences of the section renders the provision inadequate, considering the provision is a product of compromise during the negotiation period whereby the ANC's aim was to ensure that individual property rights did not restrict land reform, versus the NP's goal which was to protect white individual property rights from unfair expropriation.[162] While this argument appears to be plausible in its taking of context into account, I contend that the objectives set out in section 25(8) are clear. First, section 25(8) must influence the interpretation of sections 25(2)-(3). Hence, deprivations that are conducted for land reform purposes will not be arbitrary and the limitations placed on the courts in section 25(2)(b) must be more considerate when dealing with land reform issues. Second, section 25(8) should influence the outcome of a determination for just and equitable compensation and should do so by reinforcing the purpose of expropriation for land reform purposes.

Section 25(8) thus makes it possible for the state to depart from the requirements for compensation as set out in section 25(2)-(3) for land reform purposes. Considering no law of general application exists which allows the state to expropriate land without compensation for the purposes of land reform, I contend that the use of reasonable other measures to achieve land reform, as required by section 25(8) includes the courts' ability to make use of their authoritative powers to interpret section 25(3) more purposively and interpret 'just and

[159] Ibid.
[160] Ibid.
[161] Budlender et al *Juta's New Land Law* (1998) at 1-73.
[162] Bishop and Ngcukaitobi op cit note 24 at 12.

equitable' compensation to include compensation amounts against nil or nominal amounts which can result in expropriation without compensation. This will speed up the land reform process which has been delayed for 25 years, owing to the state's failure to implement effective land reform related legislative measures.

5.3 Expropriation against nil compensation versus expropriation against nominal compensation?

At present, there are two potential approaches that can be employed when interpreting section 25 of the Constitution to allow for expropriation for land reform purposes; the expropriation of land against nil compensation or the expropriation of land against nominal compensation. It is difficult to predict how the CCSA will react towards the proposed approaches. There are three important aspects that will determine whether any of the proposed approaches will survive constitutional attack.[163] First, the Court will consider the evidence that the state produces i.e. that adherence to the current section 25(3) precedent will impede land reform. Second, whether the legal system seeks to balance the loss with the compensation amount based on justiciable factors. Third, whether the proposed approach holds an element of flexibility that allows for deviation in certain instances.

5.3.1 Analysing the two different approaches to expropriation

Expropriation against nil compensation

The first approach entails the expropriation of property without awarding compensation. There are three pathways in which this can be realised under section 25.[164] First, legislation can be developed such that the loss of property amounts to a deprivation in terms of section 25(1) instead of an expropriation. This can be achieved by transferring the land directly from the current landowners to the new landowners. Second, the state could hold that expropriation without compensation is just and equitable in certain circumstances in terms of section 25(3). Third, the state could argue that expropriation without compensation justifies the limitation in terms of section 25(8).[165]

[163] Ibid at 17.
[164] Ibid at 20.
[165] Ibid.

Regardless of which pathway is used to justify expropriation without compensation, the fundamental questions to be answered remain the same: [166]

(a)Are the categories narrowly defined to cover situations where the ordinary justifications for compensation do not apply?

(b)Is expropriation without compensation reasonably necessary to further land reform?

(c)Is provision made for exceptions where expropriation without compensation would cause especially harsh results?

There are four potential circumstances wherein property could be expropriated without compensation for the purposes of land reform – (a) the land is abandoned or unused; (b) the land is held purely for speculative purposes; (c) the land is under-utilised and owned by public entities; or (d) the land is actively farmed by labour tenants in the absence of a title deed holder.[167] These categories of land are capable of being expropriated as 'the landowner will suffer, at worst, pure economic loss,' considering the land is not being used productively.[168] Considering one of the reasons for land reform is to ensure not only racial redress in property ownership but also equitable access to land, the fact that there are large portions of land that remain unused despite the large number of underprivileged people who are landless and homeless does not promote equitable access to land. It is thus imperative for the courts to adopt an increased purposive approach to interpreting section 25 as such an interpretation is likely to justify expropriation against nil compensation as 'just and equitable compensation' under section 25(3) so as to further the land reform aims under section 25(8).

Expropriation against nominal compensation

Considering it is difficult to predict whether the courts will decide in favour of expropriation against nil compensation, it is plausible to assume that expropriation against nil compensation could potentially only occur in limited circumstances. Hence, allowing expropriation at a nominal compensation amount (i.e. that which is below market value), in

[166] Ibid.
[167] Ibid.
[168] Ibid.

addition to allowing expropriation without compensation in certain circumstances, could speed up the land reform process.

While both methods hold advantages and disadvantages, it is important that the state use the method which balances competing interests most effectively. The chosen method must ensure consistency between expropriation cases, subject to a degree of flexibility, should cases with special circumstances need to be taken into account. Considering some cases could require the use of market value as a determining factor, one of the methods that Bishop and Ngcukaitobi argue for is the payment of a flat rate per hectare so as to ensure consistency (subject to flexibility) between cases and to give effect to the principle of certainty as envisioned in section 1(c) of the Constitution.[169] However, I propose the development of a new and more flexible compensation regime which will include expropriation without compensation but will not be limited to this form of expropriation.

While an amendment of section 25 to allow for expropriation without compensation will be beneficial, it is not required in order to give effect to land reform. I contend that the debates surrounding compensation amount to a policy issue as opposed to a constitutional issue, considering the constitution in its current structure can be interpreted to allow for expropriation without compensation. This policy issue is rooted in capitalism and the notion that the willing buyer/willing seller method of trade, or at the very least, being compensated upon being deprived of your property, is the key to individual economic freedom. While an amendment of section 25 may not be required, giving effect to this section's vision of land reform does require new legislation, a new policy process, and a progressive judiciary that is willing to interpret this section and related property laws more purposively and in favour of land reform.

5.4 A new and more flexible compensation regime – what should this include?

A flexible compensation regime will be founded in the section 25(3) requirement of 'just and equitable' compensation, which acknowledges that such compensation may amount to no or a nominal compensation amount in certain cases. Furthermore, such a compensation regime requires a revised compensation policy framework that makes provision for all possible

[169] Ibid at 21-22.

cases of expropriation. The compensation policy framework proposed by the Institute for Poverty, Land and Agrarian Studies (PLAAS) aptly captures a flexible compensation regime that is needed to fulfil the Constitution's land reform aims.[170] These include four categories of compensation:

1. *Nil compensation*

The requirement of zero compensation in some cases is due to a holder of a title deed having no effective occupation and use of land; thus failing to perform the function of property owner and failing to uphold the social function and utility of land. In the interests of property transformation, poor long-term tenants should be recognised as the de facto owners of property that they occupy. PLAAS identifies four cases where property should be expropriated without compensation:[171]

(i) Inner-city buildings with absent landlords – There is an urgent need to address the issue of people who occupy abandoned inner-city buildings that are not maintained by the title holder. In such cases, the occupiers should be acknowledged as de facto property owners, hence expropriation without compensation should take place. This will give direct effect to land reform as envisioned by the Constitution by providing poor individuals with secure land rights.

(ii) Informal settlements – A large portion of South Africa's poverty-stricken individuals occupy informal settlements which consist of informal structures built on open land. Considering these individuals usually occupy informal settlements on a long-term basis, their property rights should be acknowledged. Hence, once their long-term occupation has been established, the state should expropriate this land to secure the rights of people who live in informal settlements.

(iii) Labour tenants – Labour tenants refer to farm dwellers who have occupied land and grazed cattle on commercial farms on a long-term basis. These black labour tenants evaded eviction during the enactment of the Natives Land Act and thus have a historical right to

[170] PLAAS *Submission to the Constitutional Review Committee* (2018) 1 at 15.
[171] Ibid at 15-17.

continue occupying this land. The state should expropriate farms that are occupied by labour tenants in accordance with the Land Reform Act to secure these land rights.

(iv) Public-owned land – The state should instruct public entities who are custodians of centrally located but under-used land to dispose of such land to encourage urban transformation by relocating poor people from the outskirts of cities to more central locations.

(v) Land donation – The state should promote a land donations programme which will allow landowners the option of offering portions of land which will ultimately be expropriated without compensation. In doing so, donors such as churches 'will have played the vital role of good corporate citizens by contributing meaningfully to land reform; one of the most patriotic and nation-building imperatives of the new democratic dispensation'.[172] There would be an 'exemption from donations tax of any land donated to land reform' in terms of this programme and once beneficiaries are identified, 'the state should carry the conveyancing costs of the land transfers'.[173]

2. Partial/nominal compensation

The state should award partial/nominal compensation in cases where properties were acquired prior to 1994 and benefitted from subsidies under the apartheid-era or where properties were acquired post-1994 but are under-used or held for speculative purposes. A compensation policy should be created to determine how different cases should be treated. Such a policy would undoubtedly be contested in courts and would in turn provide clarity on the accuracy of the policy, which could be beneficial for the land reform process provided that the courts adopt an increased purposive interpretation of what is considered 'just and equitable' compensation in expropriation cases. The aim with such an approach should be to create certainty such that when the state offers partial compensation in future, property owners will accept this as law without attempting to litigate to contest the matter. Consequently, this will speed up the land

[172] E Mabuza '"Donations" of land and tax penalties for large landowners mooted' *Timeslive* 28 July 2019, available at *https://www.timeslive.co.za/news/south-africa/2019-07-28-donations-of-land-and-tax-penalties-for-large-landowners-mooted/*, accessed on 01 January 2020.
[173] Ibid.

reform process, considering the state would not have to defend its award of partial/nominal compensation.

3. *Market-related compensation*

The state should compensate properties at market value in cases where these properties were acquired post-1994 and did not benefit from below-market value or from subsidies under the apartheid-era. This should apply to properties with landowners from all races, classes and nationalities. This will be in accordance with the section 25(1) requirement that a person may not be deprived of property in terms of law of general application.

4. *A premium above market compensation*

Land dispossession has extended from the colonial and apartheid eras into the democratic era, considering the large portion of poor, black South Africans who occupy informal settlements owing to having lost their property rights. In addition, individuals from communal areas have been evicted to make way for commercial operations that seemingly aim to benefit the economy. The compensation policy must therefore account for poor people who have lost property rights. This can be done by extending affirmative action to land reform in order to ensure that the poor, black majority of our population are able to benefit from prior land dispossessions. Considering merely awarding compensation at market value to these individuals would not benefit them financially, it should thus be proposed that the state award 150% of the market price to individuals evicted from informal settlements, labour tenants and communal areas. This will give effect to the need to redress racial discrimination through land reform as envisioned in section 25(8), and section 25 as a whole.

Chapter 6 – Conclusion

This dissertation has set out to evaluate the courts' approach to the interpretation of 'just and equitable compensation' as per section 25(3). I considered the research question of whether the courts have utilised an orthodox text-based (literal) approach or purposive approach to legal interpretation in their legal reasoning when deciding expropriation cases concerning the awarding of just and equitable compensation. Consequently, I assessed whether a literal approach or purposive approach to legal interpretation should be utilised to allow for the expropriation of land without compensation under section 25(3) of the Constitution (in its current composition), on the basis that land restitution and redistribution is necessary to speed up the land reform process. I contended that in order to give effect to the transformative values that underpin the Constitution, the courts should place more weight on a purposive approach when interpreting section 25 as a whole [and in the context of this dissertation, section 25(3) in particular]. Should the courts utilise this approach when interpreting section 25, the Constitution would not need to be amended to allow for expropriation without compensation in order to facilitate and speed up the land reform process as envisioned in section 25(8). Finally, I have considered whether expropriation without compensation constitutes just and equitable compensation. After establishing that sections 25(2)-(3) read with section 25(8) provide the requisite justification to expropriate property to facilitate and speed up the land reform process, and that expropriation without compensation may constitute just and equitable compensation in some cases, I have argued in favour of the adoption of a flexible approach to awarding just and equitable compensation. In utilising an increased purposive approach to interpretation, this flexible approach will ensure that both private and public interests are upheld through the state's ability to award compensation at or above market value in cases where it is deemed fit; to award nil compensation in cases where it is deemed fit; and to award nominal compensation in cases where partial compensation is required, but where it is deemed fit for the state to award a compensation amount that is significantly below market value (owing to budgetary constraints).

After considering the current composition of section 25(3), I have argued that the courts should place more weight on a purposive approach when interpreting this section (and section 25 as a whole). Utilising a purposive approach means that the courts will increase the weight placed on its analysis of South Africa's history of land dispossession. This will produce more positive outcomes in expropriation cases, as making arguments which consider the purpose of property laws (i.e. to facilitate land reform in order to correct the wrongs of the past), will give

direct effect to the transformative values that underpin section 25(3). I have argued that the construction of section 25 is transformative. However, the courts' interpretation of the section has contributed towards the state continuously basing their approach to expropriation on the willing seller/willing buyer principle, which has in turn restricted the pace of the land reform process.

In this dissertation, I have considered South Africa's transformative constitutional mandate in relation to land reform and have illustrated that this mandate is informed by the Constitution's commitment to transforming our society into one that affords all citizens equitable access to socio-economic resources which in turn informs their right to dignity. This includes the Constitution's transformative aim to eradicate the socio-economic effects of the land dispossession which took place under colonialism and apartheid through not only enacting legislation and programmes which facilitate land restitution and redistribution, but also through a progressive interpretation of all property laws, including traditional rules and section 25 of the Constitution. The requirement for a transformative interpretation can best be given effect to through using a purposive approach to interpretation which strongly considers the effects of our history of land dispossession when interpreting the law. This consideration of our history will lead legal actors to apply property laws such that they decrease or completely eradicate the deplorable effects that land dispossession has had on the lives of previously disadvantaged South Africans; thus giving effect to the transformative aims of the Constitution.

My analysis on legal culture has shown that it has had an impact on the interpretation of law and on the application of section 25 in relation to improving and speeding up the land reform process. This impact includes the courts' inclination to utilising a formalistic approach to interpreting section 25, despite the underlying egalitarian nature of the section and the general transformative nature of the Constitution. Such formalism has resulted in the courts overlooking the potential that section 25(8) possesses to speed up the land reform process. In considering the legal culture pertaining to the interpretation and application of section 25, I have referred to the academic dialogue surrounding section 25 and whether expropriation for land reform purposes (which may include expropriation against nil or nominal compensation) complies with the constitutional duty to promote land reform and ultimately, whether such expropriation is constitutionally permissible. I have illustrated that the analyses of the transformative potential

of section 25 that was explored by the various academics has shown that section 25 should be read as a whole. Hence, the state's right to expropriate under sections 25(2)-(3) may be reconciled with the section 25(8) duty to facilitate land reform, even where such land reform requires that 'other measures', such as expropriating land against nil or nominal compensation, be taken.

In order to facilitate expropriation for land reform purposes as envisioned in the aforementioned paragraph, I considered the Constitutional Court's interpretation of section 25 by looking at the *First National Bank* decision. The enactment of the Constitution required a newfound need for the courts to interpret its provisions (i.e. section 25 in this instance) such that it promotes the transformative values of a democratic and open society that recognises the injustices of its past and aims to improve the quality of life of all citizens by ensuring that all citizens are equally protected by law.[174] In order to promote these transformative values, it is thus required that courts utilise a purposive interpretation. By looking at the Constitutional Court's use of a purposive interpretation, I contended that section 25 does provide the justification for the state's expropriation of land against nil or nominal compensation to facilitate land reform at a faster pace. However, owing to the formalistic approach that the courts have utilised when interpreting the section 25(3) factors set out to determine just and equitable compensation amounts to be awarded upon expropriation, the courts have inaptly placed too much weight on their consideration of market value when determining compensation amounts. This has consequently resulted in a delayed land reform process and has not given effect to the transformative aims of section 25 and the Constitution as a whole. Favouring a market value-centred approach to determining compensation amounts reinforce the socio-economic disparities that were created under colonialism and apartheid; the effects of which are still felt today.

Given that the courts' market value-centred approach to determining compensation amounts is inapt, this has led to the determination of compensation amounts that are mostly at or above market value and thus requires the state to spend even more of its already constrained budget. This increased pressure on the national budget can impede land reform, especially if the courts continue to employ a formalistic, market value-centred approach to interpreting just

[174] Preamble of the Constitution.

and equitable compensation. In order to give effect to section 25 and its aim to protect both private and public rights to property, I have argued in favour of adopting a flexible approach to awarding just and equitable compensation. This flexible approach will allow for expropriation against nil compensation, expropriation against partial compensation, expropriation at market value and expropriation at above market value; the appropriate compensation of which will be determined by the courts. Considering the courts provide the appropriate platform to determining compensation amounts at present, this approach can be fulfilled through the adoption of an increased purposive interpretation of law which reinforces that judges are to recognise our history of land dispossession and the need to correct the wrongs of the past and promote land reform, one judgment at a time. In adopting this approach to interpretation, expropriation against nil or nominal compensation can be achieved. This ultimately eradicates the need to amend the Constitution to provide for expropriation without compensation.

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