

# **THE CHALLENGES TO VALUERS WITH REGARD TO COMPENSATION FOR EXPROPRIATION AND RESTITUTION IN SOUTH AFRICAN STATUTES.**

## **1 INTRODUCTION**

The issues of expropriation and restitution and the challenges to determine appropriate compensation in any given case are not only complex because of their very nature, but there is also an emotional side to these issues to complicate them even more. The primary purpose of this assignment is to find communalities in South African legislation dealing with expropriation and restitution that could be of use when issues of expropriation and restitution have to be attended to. To that end this assignment is divided as follows :

An explanation of the differences between expropriation and regulation/deprivation of property

A brief exposition of South African legislation dealing with expropriation and restitution  
Highlighting the circumstances to be considered in terms of section 25(3) of the constitution

Attending to the differences in the wordings of compensation payable under the various statutes

Presenting different views on just and equitable compensation and market value

A discussion of the factors to be considered in terms of section 33 of the Restitution of Land Rights Act 22 of 1994.

## **2 DIFFERENCE BETWEEN EXPROPRIATION AND REGULATION / DEPRIVATION OF PROPERTY**

For purposes of clarity it is necessary to draw a distinction between expropriation and deprivation/regulation of property. There are several significant differences between regulatory exercises of the police power and eminent-domain expropriation of property. The most obvious general difference is that regulation does not acquire or appropriate the property for the state, while expropriation does. Van der Walt mentions a further significant difference namely that regulation is imposed generally and not individually, while expropriation typically applies to an individual owner or a small group of owners

(“Compensation for excessive or unfair regulation : A comparative overview of constitutional practice relating to regulatory takings” 1997 *South African Public Law* 273-331 at 279-280). The most important difference for the purposes of this assignment is that compensation is usually required for expropriation, but not for regulation. The distinction between expropriation and regulation of property is not new to South African expropriation law. Regulatory or control measures can also be described as those measures which the state takes to fulfill its obligation to facilitate public health, public safety and so on. Expropriation involves the loss of the core constituent right of disposal (*ius abutendi*). According to Carey Miller & Pope this distinction is also to be found in the United States, German, Dutch, Malaysian, Zimbabwean and European law (the supra-national system of law of the European Union) and guidance may thus be sought from these jurisdictions as well (*Land title in South Africa* (Juta, Cape Town 2000), 299).

### **3 SOUTH AFRICAN LEGISLATION DEALING WITH EXPROPRIATION AND RESTITUTION**

The Expropriation Act 63 of 1975 deals with compensation that is to be paid for expropriated property and the assessment of such compensation. The Restitution of Land Rights Act 22 of 1994 provides for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. The Constitution of 1996, in particular section 25, provides for the State to expropriate property and the constraints that any expropriation is subject to.

#### **3.1 The Constitution of 1996**

Section 25, the so-called property clause in the 1996 Constitution reads as follows:

- “(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
  - (a) for a public purpose or in the public interest, and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest 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 all South Africa’s natural resources, and
  - b. property is not limited to land
- (5) The state must take reasonable legislative and other measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

The property clause has two characteristics that need mentioning here. In the first instance it is a negative guarantee (Van der Walt, *The constitutional property clause* (Juta, Cape Town, 1997) 22-24). The second characteristic is the application of the property clause. Section 8 (the application of the Bill of Rights provision) makes it clear that the Bill of Rights applies to all law and binds all branches of government and organs of state, i.e. the Bill of Rights applies vertically in that the relationship between individuals and the state is governed by

the Bill of Rights. Provision is also made for horizontal application of the Bill of Rights in particular circumstances, i.e. in appropriate situations, individuals can assert their rights against other individuals (Carey Miller & Pope, *Land title in South Africa*, 290). Thus section 8(2) provides: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

Section 36(1) of the Constitution provides for the limitation of the rights in the Bill of Rights and reads as follows : “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

Section 25 requires compensation for an expropriation to be fair and equitable in amount, timing and manner of payment. Compensation not meeting this requirement will be unfair and inequitable and can hardly be considered reasonable and justifiable. Two contrasting views prevail on the issue whether section 36 also applies to section 25. On the surface it seems that section 36 can have no meaningful application to section 25. The rights in section 25 have been qualified to such an extent that it is unlikely that any violation of those rights can be justified. Put another way, if an applicant is able to discharge the difficult burden of showing that the rights in s 25(1)-(3) have been violated, the state will be unable to justify the violation in terms of section 36 (De Waal, Currie & Erasmus *The Bill of Rights handbook* (Juta, Cape Town, 2001) 427). The alternative view, as propagated by Van der Walt (*The constitutional property clause*, 1997, 95; *Constitutional property clauses* (Juta, Cape Town, 1999), 24-26) states that it is necessary to determine whether the specific limitation provisions apply cumulatively or exclusively. It is also necessary to apply the constitutional proportionality test to judge the constitutional suitability of a limitation. In the context of the South African constitution, the test might be whether or how strongly a particular right protects the values of constitutionalism, democracy, and above all human

dignity, the promotion of equality and freedom in an open and democratic society. As far as property is concerned, this might mean that property interests that are narrowly and directly involved in the establishment and protection of personal dignity and security, like the family home, will require a higher level of scrutiny than property interests that are of a more general, commercial nature. This can be particularly important when different property interests conflict, for example in the case of land reform.

Van der Walt states that in conclusion it is suggested that there is nothing in section 25 to indicate that the general provisions of section 36 do not also apply to the property clause (*The constitutional property clause*, 95). Those specific limitation provisions that can be identified in section 25 do not explicitly exclude the general validity of section 36, nor do they conflict with any of the elements of section 36 in such a manner as to exclude or limit its general validity for purposes of section 25. If anything, the limitation provisions in section 25 merely repeat, explain or (in the case of expropriation) extend and clarify the elements of the general limitation clause. This leads to the conclusion that the specific and general limitation provisions in sections 25 and 36 respectively apply cumulatively.

Section 39 of the Constitution provides for wide consideration of international and foreign law when interpreting the clauses of the Bill of Rights. The relevant section, section 1 of Section 39 states that “when interpreting the Bill of Rights, a court, tribunal or forum-

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

For purposes of interpreting and applying the South African property clause one may (and should) make extensive use of examples from a wide range of foreign law (Van der Walt, *The constitutional property clause*, 6). The purpose of extensive reference to foreign law should be, firstly, to take note of the problems of interpretation and application that have already been uncovered there and, secondly, to observe and analyse different approaches, arguments, tendencies and trends in the solution of those problems, while obviously remaining careful to suit the eventual interpretation and application of section 25 to current, local needs and demands.

### 3.2 The Expropriation Act 63 of 1975

Section 12(1) provides that the amount of compensation to be paid for expropriated property, or the taking of a right to use property, must not exceed in the case of any property other than a right, excepting a registered right to minerals, the aggregate of the market value plus an amount to make good any actual financial loss caused by the expropriation or, in the case of a right, excepting a registered right to minerals, an amount to make good any financial loss caused by the expropriation or the taking of the right. This is subject to the proviso that where the property expropriated is of such a nature that there is no open market for it, compensation may be determined on the basis of the amount that it would cost to replace the improvements on the property expropriated having regard to their depreciation for any reason, as at the date of notice. Section 12(2) provides for the so-called *solatium* which has to be added to the amount established in section 12(1). The *solatium* to be added is ten percent of the amount up to R100 000, plus five per cent of the amount by which it exceeds R100 000 up to R500 000, plus three per cent of the amount by which it exceeds R500 000 up to R1 000 000, plus one per cent (with a maximum of R10 000) of the amount by which it exceeds R1 000 000.

Subsection 12(5) sets out rules to be applied in determining the amount of compensation. These rules include for instance that :

- (i) no allowances must be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;
- (ii) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, must not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;
- (iii) if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;
- (iv) improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) must not be taken into account, et cetera.

### 3.3 The Restitution of Land Rights Act 22 of 1994

Section 2 deals with the persons entitled to restitution in terms of the act. Section 2(1) states that a person is entitled to restitution of a right in land if-

- “(a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
- (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
- (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-
  - a. is a direct descendant of a person referred to in paragraph (a); and
  - b. has lodged a claim for the restitution of a right in land; or
- (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
- (e) the claim for such restitution is lodged not later than 31 December 1998.”

Section 2(2) provides that no person shall be entitled to restitution of a right in land if just and equitable compensation as contemplated in section 25(3) of the Constitution; or any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.

Section 33 of the Act provides that in considering its decision in any particular matter the Court must have regard to the following factors:

- “(a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance

- persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress results of past racial discrimination;
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession;
  - (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
  - (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
  - (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.”

#### **4 THE CIRCUMSTANCES TO BE CONSIDERED IN TERMS OF SECTION 25(3) OF THE CONSTITUTION**

##### **4.1 General**

Southwood (*The compulsory acquisition of rights* (Juta, Cape Town, 2000), 79-92 ) as well as Budlender (“The constitutional protection of property rights” in Budlender, Latsky & Roux *Juta’s new land law* (Juta, Cape Town, 1998), 1-57 to 1-66) provides a comprehensive discussion of all the circumstances to be considered in terms of Section 25(3) of the Constitution. For the purposes of this assignment, each of the circumstances will be dealt with briefly below.

##### **4.2 The use of the property**

Section 28(3) of the Interim Constitution requires that a court determining compensation should take into account “the use to which the property is being put”. Section 25(3)(a) of the 1996 Constitution requires the court to have regard to ‘the current use of the property’. It is suggested that these requirements are identical (Southwood, *The compulsory acquisition of rights*, 79). The consideration of use is inherent in the market valuation exercise, the mechanics of which are well settled and well known. It is therefore suggested that section 25(3) direct that the use of the property be taken account of not for the purposes of setting the market value, but, in conjunction with the market value, for the purposes of an

assessment of the just and equitable compensation package. It is submitted that it is the history of the expropriatee's acquisition which is relevant, rather than his predecessors. This requires consideration of evidence showing when the property was acquired, from whom, for what price, on what terms and how the acquisition was financed. Bearing in mind that 'property' means the rights belonging to or owned by someone, and that the rights comprised by ownership can be distributed amongst several persons, each holder of expropriated rights will have to have the history of the acquisition of his rights examined. The history will be relevant in striking the equitable balance between the public's and the expropriatee's interests. For example, if the history reveals that the land was acquired at a corrupt knock-down price from the State, this could be a factor which could cause a downward adjustment of compensation. There are many instances where, after forced removals of black people, land they had occupied was sold to white people at reduced prices. If such land is expropriated from the white beneficiaries, this benefit will have to be considered in the assessment of compensation.

### **4.3 The history of the use**

It is impossible to predict generally how this will affect compensation, as there are too many possible uses. However, for example, where the property has been used to the owner's disbenefit for philanthropic purposes, this will be a factor which could cause an upward adjustment of compensation and *vice versa*.

The classic case in which this factor may be applied arises from forced removals, where restitution is to take the form of restoration of the land to those dispossessed (Budlender, *Juta's new land law*, 1-59 to 1-60). In many cases, after black people had been removed from their land, it was sold to white people at reduced prices, often through the Agricultural Credit Board. The mechanism was often that the land was sold at productive value, which has generally been substantially lower than market value. In such cases, the expropriator will be in a strong position to argue that the present owner should not benefit twice through apartheid: in the first instance through obtaining the ownership and use of land at well below market value, and then through having the land bought back according to a formula which results in a much higher price than the formula which was previously used. The history of acquisition will in some circumstances result in the payment of compensation in excess of the market value. There are cases in which the market value of land has dropped

greatly, for example because landless people have occupied the land. In such a case, the market value will be greatly depressed, sometimes to the point where there is no market value at all, because there is no market for the land. People who buy land do so knowing that there is a risk attached to it, just as do people who buy shares on the stock exchange. There is no justification for creating a fictitious market value based on the value per hectare of other land in the district, which is sometimes the route followed by valuers. If there is little or no market for the land, there is little or no market value. That does not, however, mean that the land has no value, or that it would be just and equitable to expropriate it for a purely nominal amount. In such cases, the history of acquisition will usually have the effect of increasing compensation to above the true market value.

#### **4.4 The market value of the property**

Section 25(3)(c) of the Constitution demands that the property's market value be regarded. Market value is dealt comprehensively in a later paragraph.

#### **4.5 The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property**

The section talks of 'the acquisition' rather than indicating more than one acquisition, it is therefore suggested that it is the expropriatee's acquisition that is intended, rather than all his predecessors' (Southwood, *The compulsory acquisition of rights*, 88-89). For the reason that 'beneficial capital improvement' is coupled with 'the acquisition', it is also submitted that it is the extent of the financial assistance during the expropriatee's ownership which is to be regarded. Since it is the State, either directly or indirectly which must bear the burden of paying the compensation to the expropriatee, it is plain that the object of the subsection is that it is the extent of the State's direct input into the acquisition or beneficial capital improvement of the property to which regard must be had. If the capital improvement has not been beneficial, the extent of the investment or subsidy which has produced it is not a factor to which regard must be had. However, it is possible to produce a capital improvement which does not increase the market value of property, but is beneficial only for its owner. It is submitted that the value of investment and subsidy in such capital improvements must be regarded if they are thus beneficial, even if they do not raise the property's market value, since the word 'beneficial' can only apply to the owner of the right

and there is no restriction on the word ‘beneficial’. These investments etc must be ‘direct’, so that indirect ones, like tax incentives, need not be considered.

Owners of land may receive many different sorts of subsidies from the state. This formulation makes it clear that only certain sorts of subsidies are to be taken into account: those which are “direct” and which are related to the acquisition and beneficial capital improvement of the property (Budlender, *Juta’s new land law*, 1-65). “Direct” subsidies would presumably exclude subsidies such as tax incentives which are generally applicable, and which have an indirect impact on the acquisition or improvement of the property. The linking of the subsidy to the acquisition or beneficial capital improvement appears to exclude (for example) drought subsidies or marketing subsidies .

The reference in this subsection to beneficial capital improvements is puzzling, and may have been in error. During the constitutional negotiations, those wishing to promote the effective protection of property interests generally urged that the investments in the property should be a relevant factor in the calculation of just and equitable compensation. This would, of course, be consistent with the formulation in the interim Constitution. But investment somehow disappeared as an independent factor, and appeared only as an element in determining whether compensation should be *reduced* as a result of prior state subsidy. However, the wording seems quite clear in this regard. It would, of course, be possible for a court to have regard to investments in the property through the general rubric of “all relevant circumstances”.

#### **4.6 The purpose of expropriation**

Section 25(3)(e) requires that regard must be had to the purpose of the expropriation. The requirement that the purpose of the expropriation must be regarded does not define clearly what must be regarded. Bearing in mind that the word ‘purpose’ must be given a generous and purposive interpretation, giving expression to the underlying values of the Constitution, in its context, including the history and background to the Constitution’s adoption, and in a way which secures for individuals the full measure of its protection, it is submitted that the word was intended to cover the immediate purpose for which the property is taken. This will, of course, be determined by the expropriator, who will expropriate it to use it in a particular way, thus making the purpose of the expropriation the use of the property in that

way. It is suggested that this could bear on the equitable balance between the interests of the public and the expropriatee in the following ways. First, it may be felt that the purpose of the expropriation is so important in the public interest that the expropriatee should have less compensation or should be paid over a longer period. Secondly, where the purpose for which the property has been taken has itself increased the property's market value or decreased it, it may be felt that the increase or decrease in value due to action taken by the expropriator should neither increase nor decrease the compensation. This equitable principle is embodied in the inapplicable s 12(5)(f) of the Expropriation Act and is known as the *Pointe Gourde* principle. Thirdly, it might be felt that the special suitability or usefulness of the property for the purpose for which it is expropriated should be discounted in the assessment of compensation if it would not have been purchased in the open market for that purpose. This principle is embodied in the inapplicable s 12(5)(b) of the Expropriation Act, but is clearly relevant in striking an equitable balance between the public interest and the expropriatee's interest.

As for the factors other than market value listed in section 25(3), there is obviously no precise method for calculating values that are based on considerations of equity and justice or of weighing the various factors against each other, and the facts and circumstances of each case will determine the method and outcome of this process (De Waal et al, *The Bill of Rights handbook*, 425). For example, factor (a) (current use of the property) may be decisive where property is not currently utilized by its owners or which is held simply for speculative purposes. In such a case, compensation calculated at less than market value (perhaps even at nil value) may be just and equitable. This is particularly likely to be the case where the property in question is a scarce and needed resource, such as land or water rights (Budlender, *Juta's new land law*, 1-58 & 1-59).

## **5. DIFFERENCES IN THE WORDING OF CLAUSES DEALING WITH COMPENSATION PAYABLE UNDER THE VARIOUS STATUTES**

The various statutes referred to above, namely the 1996 Constitution, the Expropriation Act 63 of 1975 and the Restitution of Land Rights Act 22 of 1994, all have a different wording in respect of the compensation payable in respect of expropriation. These range from market value in the Expropriation Act to just and equitable compensation in the Constitution and

the Restitution of Land Rights Act. It is therefore advisable to take a closer look at these different definitions and try to establish the reasoning underlying these differences.

### 5.1 Just and equitable compensation

The Constitutional Court, in the 1996 Constitution Certification case (*In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA &44 (CC); 1996 (10) BCLR 1253 (CC)) held: “An examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists. Often the criteria for determining the amount of compensation are not mentioned in the constitutions at all. Where the nature of the compensation is mentioned, a variety of adjectives is used including “fair”, “adequate”, “full”, “equitable and appropriate” and “just”. Another approach adopted is to provide that the amount of compensation should seek to obtain an equitable balance between the public interest and the interests of those affected.”

Although guidance can be sought from formulations in other jurisdictions, Eisenberg has stated that, “an analysis of the international case law and the literature indicates that the meaning of different formulae can’t be predicted with absolute certainty. However this does not mean that the formulae are totally arbitrary and one can anticipate which terms are likely to be interpreted as relating exclusively to market value or ‘full’ value and which terms are capable of more flexible interpretations” (“Different Constitutional Formulations of Compensation Clauses” (1993) 9 *SA Journal of Human Rights* 412-421 at 412). It is clear that one single method of evaluating compensation will not always be appropriate. Therefore one would want to ensure that a particular formulation will accommodate the contingencies of a particular situation. While one cannot be certain how a particular formulation will be interpreted, a clause providing for the payment of appropriate compensation and requiring a balance between public and private interests would be most likely to satisfy such a requirement (“Different Constitutional Formulations of Compensation Clauses” (1993) 9 *SA Journal of Human Rights* 412-421 at 419).

In *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 37-39 the court examined how criteria for the determination of compensation in countries which have constitutional prerequisites for the

expropriation of property that are similar to that of South Africa, have been developed and applied. For this purpose the formulations in jurisdictions of the countries mentioned below were examined.

## 5.2 Foreign law as a guide to determine compensation

The Fifth Amendment of the Constitution of the United States of America provides that “No person shall be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use without just compensation”(“Van der Walt, *Constitutional Property Clauses*, 398). Sullivan states that the following rules for interpreting “just compensation” in relation to expropriations by the Federal Government have been laid down by the Supreme Court of the United States of America (“Eminent domain in the United States: An overview of Federal Condemnation” in Erasmus (ed) *Compensation for expropriation : a comparative study* (Jason Reese in association with the United Kingdom National Committee of Comparative Law, Oxford, 1990) Vol 1, 168 :

- “1. There is no rigid rule for determining what compensation is just under all circumstances and in all cases, nor any fixed rule requiring payment in any particular way.
2. Fair market value is normally accepted as a just standard.
3. The ascertainment of what compensation is “just”, is a judicial function that can not be pre-empted by Congress.
4. Just compensation relates to the value of the property on the date of taking; and if that value reflects the price that could have been obtained in a negotiated sale, it does not matter if the owner paid more or less for the property.....”

In Switzerland, the Constitution provides that “In cases of expropriation and restriction of ownership equivalent to expropriation, fair compensation shall be paid.” (Article 22ter(3) of the Federal Constitution of the Swiss Confederation 1874 (*Bundesverfassung der Schweizerischen Eidgenossenschaft 29 Mai 1874*). Article 22ter was inserted in 1969 (Van der Walt, *Constitutional property clauses*, 359). Van der Walt explains this to mean that :“Article 22(3) requires full compensation (*volle Entschädigung*) for expropriation, and consequently the general principle is that the compensation has to place the expropriatee in the same position in which she would have been in the absence of expropriation. The

compensation sum is made up of the market value of the expropriated property, and any possible loss of value resulting from a partial or from a material expropriation, and compensation for consequential damage and losses”(Van der Walt, *Constitutional property clauses*, 373)

Article 13(2) of the *Federal Malaysian Constitution of 1957* provides that “No law shall provide for compulsory acquisition or use of property without adequate compensation” (Khublall, “Compulsory Purchase and Compensation in Singapore and Malaysia” *Compensation for expropriation : a comparative study* in Erasmus (ed), Vol 2, 2&11). Laws in Malaysia dealing with expropriation refer to “market value” as the basic compensation norm.

The Commonwealth of Australia Constitution provides that “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ... acquisition of property on just terms from any State or persons for any purpose in respect of which the Parliament has the power to make laws” (Van der Walt, *Constitutional property clauses*, 39). The Constitution aims to ensure that statutes authorizing expropriations provide fair and just standards of compensation ”(Brown and Fogg, “The Law of Resumption in Australia” *Compensation for expropriation : a comparative study* in Erasmus (ed), Vol 1, 291). According to Brown “The compensation provisions in each of the resumption statutes reflect a legislative intention to provide for the payment of fair and just compensation to a dispossessed landowner” (*Land Acquisition* 3 ed (Butterworths, Australia, 1991), 7). Brown goes further to explain that “The underlying theme in the compensating provisions of the land acquisition statutes is to ensure that a dispossessed landowner is no worse off and no better off as a result of his eviction. The current statutes recognize that the estimated sale value of the land may not be sufficient to ensure that the owner does not incur other losses” (Brown, *Land acquisition*, 81).

The Basic Law for the Federal Republic of Germany 1949 requires the compensation which becomes payable upon expropriation: “... reflect a fair balance between the public interest and the interest of those affected ” (Article 14.3 of the “Grundgesetz für die Bundes Republik Deutschland”. The translation appears in Van der Walt, *Constitutional property clauses*, 121).

The courts interpretation of “just terms”, according to Van der Walt, is as follows (*Constitutional property clauses*, 58-59): “According to case law, ‘just terms’ is not synonymous with full compensation, but a measure that has to be determined probably for each case individually, with reference to fairness in view of both the interest of the individual affected and the community interest. The market value of the property, described as the price which a reasonably willing purchaser would be prepared to pay rather than lose the purchase, or which a reasonably willing vendor would be willing to accept and a reasonably willing purchaser would be prepared to pay at the date of purchase is still regarded as an underlying principle for the determination of just terms, but factors such as the value of the property for the owner and the results of the loss must also be taken into account.”

In *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 40 the court, after analysis of the position in other countries, identified the central role that market value plays in the determination of compensation. Market value and factor (d) (which deals with the extent of State investment and subsidy), are the only factors listed in section 25(3) of the Constitution which are readily quantifiable. Market value is therefore pivotal to the determination of compensation. The interests of an expropriatee require a full indemnity, which may lift the compensation to above market value by also redressing items such as financial loss which is provided for in the Expropriation Act 63 of 1975. On the other hand, the public interest may reduce the compensation to an amount which is less than market value.

The court in *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 40 stated that the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require. The court started off by determining the market value of the dispossessed erven and thereafter considered whether, on the evidence or in law, the amount of market value must be adjusted upwards or downwards in order to determine just and equitable compensation.

## 6 THE CONCEPT OF MARKET VALUE

### 6.1 Market value in South African legislation and case law

The Expropriation Act 63 of 1975 links the payment of compensation to be paid for expropriation to market value. Market value is described in Section 12(1)(a)(i) of the Expropriation Act as “the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer”.

The definition of market value in terms of South African case law is the value that a property will fetch if sold by a willing seller to a willing buyer on usual terms and conditions (*Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 & *Bonnett v The Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) 747H.)

### 6.2 Market value as defined and applied by the property valuer’s profession

The International Valuation Standards Committee defines market value as “The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compensation” (*International valuation standards: principles, standards, and applications and performance guidance* (London, 1997), 7). The authoritative American Institute of Real Estate Appraisers states that the most widely accepted definitions of market value include:

1. The highest price in terms of money that a property would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably and assuming the price is not affected by undue stimulus.
2. The price at which a willing seller would sell and a willing buyer would buy, neither being under abnormal pressure.
3. The price expectable if a reasonable time is allowed to find a purchaser and if both seller and prospective buyer are fully informed (*The appraisal of real estate*, (Chicago, 1978), 23-24.)

Certain conditions or assumptions implicit in the market value definition are noted in *Real Appraisal Terminology* (Boyce 1975 171-172) as follows:

1. Buyer and seller are typically motivated
2. Both parties are well informed or well advised, and each acting in what he considers his own best interest.
3. A reasonable time is allowed for exposure in the open market.
4. Payment is made in cash or its equivalent.
5. Financing, if any, is on terms generally available in the community at the specified date and typical for the property type in its locale.
6. The price represents a normal consideration for the property sold unaffected by special financing amounts and/or terms, services, fees, costs, or credits incurred in the transaction.

### **6.3 Criticism of market value as a basis for compensation at expropriation**

Claassens (“Compensation for expropriation: The political and economic parameters of market value compensation” 1993 *South African Journal on Human Rights*, 422-427) is of the opinion that if existing property rights are entrenched in a Constitution and compensation for expropriation is equal to ‘market value’, there is an inherent danger of entrenching the results of past apartheid land policies and racial dispossession. This is because such a compensation formula exacerbates the inherent tension between protecting existing (thereby white) rights at the expense of restoring or compensating for the loss of past (thereby black) property rights. If market value is the determinant, the cost of restoration will be prohibitively expensive, running into many billions of Rands. Once the budget for historical land restitution is finished, all unmet claims for forced removal would be locked out of the court and restoration process and thereby deprived of any possible redress. However, to argue against market value as the formula for determining compensation is not to say that compensation should not be paid when land is expropriated. Nor is it to say that market value is always an inappropriate quantum of compensation. Obviously there are instances where to pay less than market value would be inequitable. However to bind the compensation formula to market value in all cases would have bizarre and inequitable results. It would unnecessarily make the process of restitution so prohibitively expensive as to threaten its political and economic viability. A suggestion as an alternative to fixed market value compensation formulation is a proportional formula

which takes into account not just the interests of past and present owners of the land, but specifically, the affordability of the award in terms of state resources. Such a formulation would be neither arbitrary nor exclude market value compensation in straightforward cases.

Section 25(3) of the Constitution requires that specific factors must be taken into account when different interests are balanced, including what the market value is. Market value is thus one of the factors to be considered, rather than the prime factor. It follows, therefore, that compensation may be, but need not be, equal to market value; it could even, in theory at least, be above market value. This approach to the calculation of compensation is in line with other jurisdictions, for example Germany, Sweden, the United Kingdom, Ireland, Australia and Japan (Carey Miller & Pope, *Land title in South Africa*, 302).

#### **6.4 Market value as yardstick for just and equitable compensation**

As indicated earlier the court in *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 40 stated that the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require. Once market value has been determined, the court can then attempt to strike an equitable balance between private and public interests. The interests of the expropriatee may, for example, lift the compensation to above market value. Similarly, the public interest may reduce the compensation to an amount which is less than market value (De Waal et al, *The Bill of Rights handbook*, 424).

In the *Ex Parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 55 case the court did not find any relevant factor that could have been taken into account to assess just and equitable compensation. So, despite the court's willingness to compensate for factors other than market value, the court found that market value constituted just and equitable compensation in this case as no other factors were put forward for consideration.

Kleyn ("The constitutional protection of property : A comparison between the German and the South African approach" 1996 *South African Public Law*, 402-445) argues that

compensation being higher than market value is always a possibility. Despite the factor of “the interests of those affected” contained in the Interim Constitution not being listed again, Kleyn maintains that it is indirectly contained in the balancing principle of section 25(3), which states that the compensation must reflect a balance between the public interest and the interests of those affected. According to Kleyn the list of factors do not set the ceiling at market value because it does not encompass a closed list. Factors apart from those mentioned in section 25(3), may also be considered. Thus, Kleyn concludes that compensation higher than market value can also be justified in terms of section 25.

In Badenhorst’s view, the following formula can be used to give effect to the formulation of just and equitable compensation (“Compensation for purposes of the property clause in the new South African Constitution” 1998 *De Jure*, 264) :

**Just and equitable compensation is the sum total of the value of the interest of those affected by expropriation, minus the value of the public’s interest.**

For purposes of the application of such a formula, the various factors mentioned in section 25(3) of the Constitution, can be classified under the following heads of interests, namely-

**The interests of those affected (or so-called positive factors):**

- (a) current use of the property;
- (b) market value of the property;
- (c) own contributions of the affected party;
- (d) other interests of the affected party; and
- (e) other positive factors which are deemed to be relevant to the court.

**The public’s interest (or so-called negative factors):**

- (a) history of acquisition;
- (b) historical use;
- (c) direct state investment and subsidy;
- (d) purpose of expropriation; and
- (e) other negative factors which are deemed to be relevant to the court.

Budlender analyses section 25(3) of the South African Constitution and with reference to the European Convention on Human Rights states: “Article 1 of Protocol 1 to the European Convention on Human Rights does not expressly require compensation for expropriation. However, the European Court of Human Rights has held that the taking of property without payment of an amount ‘reasonably related to its value’ would normally constitute a disproportionate interference with property rights, which could not be considered justifiable under Article 1. However, Article 1 ‘does not guarantee a right to full compensation in all circumstances.’ Legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full economic value.” Budlender concludes that: “Section 25(3) requires that the compensation and the time and manner of payment must reflect ‘an equitable balance between the public interest and the interests of those affected’. This makes it clear that the calculation of ‘just and equitable’ compensation involves a balancing of interests. Regard must be had to ‘all relevant circumstances’, including those specified” (Budlender et al, *Juta’s new land law*, 1-57 & 1-65).

## **6.5 The Pointe Gourde principle**

As to market value, in the *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 40 the Land Claims adopted a test known to Commonwealth expropriation jurisprudence as the *Point Gourde* principle (De Waal et al, *The Bill of Rights handbook*, 424-425). The decision of the Privy Council in *Pointe Gourde Quarrying & Transport Co Ltd v Sub-intendent of Crown Lands (Trinidad)* [1947] AC 565 (PC) was followed where it was stated that market value at the time of expropriation must be determined by disregarding any increase or decrease in the market value of the expropriated property arising from the carrying out, or the proposal to carry out, the expropriating scheme. This is necessary because a scheme of expropriation often has the effect of distorting the market. In the case of a township expropriated in terms of the Group Areas Act, this would require thinking away the negative effects of the Group Areas scheme on the market value of the expropriated land. The Court accepted expert valuations that were based on a comparison with voluntary sales of land in a nearby township that had not been influenced or impeded by Group Areas legislation. The *Pointe Gourde* principle will therefore always have to be applied where it is relevant.

The manner in which the *Pointe Gourde* principle must be applied, has been described by Lord Denning MR in the case of *Myers v Malton Ceynes Development Corporation* (1974) 230 EG 1275; 27 (1974) Property and Compensation Reports (CA, England) 518 at 527 as follows: “In assessing the value, it is important to consider what would have happened if there had been no scheme the valuer must cast aside his knowledge of what has in fact happened due to the scheme. He must ignore the developments which will in all probability take place in the future owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town, but where there is to be supposed the old order of things continuing.”

## **7 FACTORS TO BE CONSIDERED IN TERMS OF SECTION 33 OF THE RESTITUTION ACT**

Section 33 of the Restitution Act lists the factors that a court shall have regard to when considering its decision. In the *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, *Goodwood* 2001 (1) SA 1030 (LCC) at 1037-1038 Gildehuys AJ pointed out that the history of dispossession and lordship caused by the dispossession also apply to the determination of compensation and must guide the court towards establishing suitable heads.

### **7.1 South African case law**

In the *Hermanus v Department of Land Affairs : In Re Erven 3535 and 3536*, *Goodwood* 2001 (1) SA 1030 (LCC) case the court found that in determining compensation for purposes of equitable redress, a Court must have regard to the history of the dispossession and to the hardship caused by the dispossession. These two factors are not on the list of factors to be considered for determining compensation under section 25 (3) of the Constitution. Regard to them may well result in a higher award than would have been the case if cognisance had to be taken only of the factors listed in the Constitution. It was stated that non-financial deprivation can be compensated by the add-on of a fixed percentage to the awards under other heads of claim, or by a separate award under the label of inconvenience, or under any other descriptive label. An award for non-financial deprivation, irrespective of what form it takes, is sometimes referred to as *solatium* or, in Afrikaans,

*troosgeld*. The South African expropriation law, for many years, recognized a claim for inconvenience as a component of compensation for expropriation.

It also survived in the 1975 Expropriation Act for a while, although only in respect of a right (as distinct from the expropriation from land). It was abolished in 1992. Instead of a claim for inconvenience, the 1975 Expropriation Act allows the add-on of a fixed percentage to the compensation moneys awarded under the other heads of claim (Section 12(2) of the 1975 Expropriation Act). The ambit of inconvenience is wide enough to include mental distress. It was said by Addleson J (*Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 163 (E)) albeit *obiter* that “It seems to me probable that the intention was to allow “inconvenience” to include such “intangible” matters as mental distress. The amount of compensation awarded for such an element might of course be nominal or minimal where the inconvenience is minor or highly subjective; but it is possible to conceive of situations where the subjective distress is very great and difficulty in assessing the *quantum* of compensation does not in my view detract from the validity of the concept that inconvenience of this type may form a proper subject for compensation”.

The factor of hardship caused by the dispossession can also relate to emotional suffering. The requirement that the history of the dispossession must be taken into account, support the view that “hardship” must be interpreted broadly to encompass emotional suffering. The history of dispossessions is an integral part of the history of apartheid and all dispossessions were embedded in the degrading and repressive policies of apartheid. The emotional suffering of those dispossessed is well known. An award of a *solatium* could provide some solace for the emotional suffering of the claimant. “It is a kind of sweetener, reflecting some kind of apology” (Brown, *Land acquisition*, 133).

## **7.2 Foreign law and cases considered for purposes of section 33 of the Restitution Act**

In an Australian case (*Robertson v Commissioner for Main Roads* (1987) 63 LGRA 420 at 426) it was held that *solatium* refers to factors such as nuisance, annoyance, inconvenience and distress. Even where the authorizing statute makes no provision for the payment of a *solatium*, the courts in some Australian states were ready to imply a right to do so in appropriate but limited circumstances (Brown, *Land acquisition*, 134). The award can be a

percentage of the amounts awarded under other heads of claim, or it could be an amount fixed at the discretion of the court.

In India, under section 23(2) of the Land Acquisition Act of 1894, a *solatium* of 30% of the value of the expropriated land is payable to the owner in consideration of the compulsory nature of the acquisition. It was described in *Narain Das Jain v Agra Nagar Mahapalika* (1991) 4 SCC 212 as follows: “*Solatium* is money comfort, quantified by the statute, and given as a conciliatory measure for the compulsory acquisition of the land of the citizen.” This percentage for *solatium* is ‘amongst the most generous in the world today’ (Singh, “Expropriation in India *Compensation for expropriation : a comparative study* in Erasmus (ed), Vol II, 46).

In the United States of America, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides, in the case of home losses through federal expropriation, for:

- (i) payment to the owner of up to \$22 000 more than the fair market value of a comparable replacement dwelling;
- (ii) payment of up to \$400 to help tenants find comparable housing; and
- (iii) the assurance that no one will be forced to move from their dwelling unless there is other comparable housing available’ (Sullivan, “Eminent domain in the United States: An overview of Federal Condemnation” *Compensation for expropriation : a comparative study* in Erasmus (ed), Vol 1, 169).

In Belgium compensation is sometimes awarded for the severance through expropriation of the sentimental relationship between the owner and the expropriated land. “De diverse uitspraken in verband met de toekenning van een vergoeding wegens sentimentele bindingen met het onteigende goed wijzen erop dat deze vergoeding moet toegekend worden wegens de lange duur van bewoning door de onteigende, de bijzondere zorg die hij eraan heft besteed en de leeftijd van die onteigende. Onvermijdelijk komt men dan ook tot de conclusie dat de vergoeding wegens sentimentele waarde een zaak is voor bejaarden aan wie het recht ontnomen wordt de oude dag te slijten in hun vertrouwde omgeving”(Denys *Uw Rechten bij Onteigening* (Mys & Breesch, 1997) 71). The awards are relatively low – around 50 000 Belgian Francs per person. (Denys, *Uw Rechten bij Onteigening*, 39).

In Germany, the effect which the expropriation may have on the personal position of an expropriatee may be taken into account on the grounds of equity (Schmidt-Assmann, “Expropriation in the Federal Republic of Germany” *Compensation for expropriation : a comparative study* in Erasmus (ed), Vol 2, 91). A special payment (Ausgleichanspruch) may be made over and above the compensation for the expropriation (Van der Walt, *Constitutional property clauses*, 150).

The reason for awarding an additional amount of compensation by way of solatium has been described in an Irish decision as being ‘for the annoyance of being disturbed in the possession, and the difficulty and delay in procuring other suitable premises’ (*In re The Secretary for War and Henry Percy, and Defence Acts and Athlone Rifle Range* (1902) 1 IR 433).

In Canada it was described as being for *eventualites inappréciables et incertaines, impossibles à évaluer au moment de procès* (*The King v Lavaie*, unreported, quoted in *The Queen v Sisters of Charity* (1952) 3 DLR 358, p. 388). Although solatium awards are made in several other jurisdictions, they are by no means automatic.

### **7.3 Factors considered in *Hermanus v Department of Land Affairs : In Re Erven 3535 and 3536, Goodwood 2001 (1) SA 1030 (LCC)***

In this case the decision on the ambit of compensation to be awarded to the claimant, the court took the following into consideration :

- (a) On ordinary principles of justice, a person who, under compulsion of law, has his property taken from him, should be compensated in full.
- (b) Full compensation not only includes land value, but also other damage, loss or expense directly attributable to the taking of the land.
- (c) Compensation for emotional distress is not foreign to the principles of compensation in other jurisdictions and also in South Africa.
- (d) The dictates of section 33 (eB) of the Restitution Act to have regard to the history of the dispossession and to the hardship caused by the dispossession, read with paragraphs (b) and (c) of section 33 indicates that compensation under the Restitution Act should, over and above land value, also include redress for the

financial loss suffered by a claimant as a direct result of the dispossession, and for the mental agony and distress directly caused by the dispossession.

- (e) The statutory heads of claim for expropriation in South Africa usually included, and still includes, a claim for *solatium*, either by adding on a fixed percentage to the amounts awarded under other heads of claim, or by an award under the heading of inconvenience. If the compensation in this matter had to be determined under the 1975 Expropriation Act, the claimant would have been entitled to the percentage add-on provided for in section 12(2).
- (f) It is morally correct that the mental suffering caused by racially motivated dispossessions should be acknowledged.

In conclusion one cannot but support the payment of *solatium* to victims of previous degrading and repressive racially based policies and their accompanying activities. Even if *solatium* is only of symbolic significance, it should be paid. It will never make good for what has happened, but the mere acknowledgement of some reward for hardship, inconvenience, humiliation and suffering will be, as Brown states “... a kind of sweetener, reflecting some kind of apology” (*Land acquisition*, 133). It also signals the importance that is attached to the rectification of past mistakes and the prevention of such atrocities happening again in the future.

## **8 THE STIPULATIONS OF THE EXPROPRIATION ACT AND THE CONSTITUTION WITH REGARD TO THE DETERMINATION OF COMPENSATION**

This process for the determination of compensation in terms of the Constitution postulates an entirely different approach to the contained in sections 12(1) and (5) of the Expropriation Act. There the court is enjoined to pay an exact amount of compensation, regardless of whether it reflects an equitable balance between the public interest and the interests of those affected. While the factors referred to in section 12(5) may to a large extent be the same as those to which the court must have regard by virtue of the constitutional provisions, they are nevertheless designed to be used to produce the amount of compensation payable under section 12(1). They cannot be separated from it and applied to the formulation of the package of compensation laid down by section 25(3) of the Constitution. Over and above this the *solatium* provided for in section 12(2) of the Expropriation Act is certainly

something not contemplated by sections 25(2) (b) and (3) of the Constitution. For these reasons, it seems clear that sections 12(1), (2) and (5) of the Expropriation Act are inconsistent with the Constitution and fall away (Southwood, *The compulsory acquisition of rights*, 77).

Budlender states that the Expropriation Act is inconsistent with the Constitution in four important respects (*Juta's new land law*, 1-66 to 1-67). "Firstly, the Act does not provide for compensation for all expropriations of rights in property. As far as land is concerned, compensation is payable to the owner, the holders of all registered rights, and the holders of certain specified unregistered rights. Other interests in land, such as leases, do not give rise to a statutory right to compensation. As pointed out above, the right to compensation now arises from the act of expropriation, whether or not the authorizing statute provides for compensation. A lessee's right to compensation therefore exists despite the fact that it is not provided for in the Act. However, the Act should be amended to provide for compensation for the expropriation of all rights in property.

Secondly, the compensation formula in the Act is inconsistent with that in s 28 and s 25. Where land is expropriated, the Act gives the owner the right to the market value of the land, plus an amount to make good the "actual financial" loss caused by the expropriation, plus a *solatium* which is paid on a sliding scale. In most cases, this will result in higher compensation than compensation calculated in terms of s 28 or s 25. As Chaskalson and Lewis point out, a bill of rights "sets minimum standards which the state must observe. It is always open to the state to extend greater protection to rights than is required by the bill of rights." The result is that where the Act provides higher compensation than the Constitution, the formula in the Act will apply. Where the Constitution provides higher compensation than the Act, "just and equitable" compensation in terms of the Constitution must be paid. There is no rational justification for this inconsistency in the main statutory authorization for expropriation. The Act should therefore be amended to bring it into line with the Constitution. The inconsistency can be avoided in post-constitution statutes by specifying that compensation shall be just and equitable as provided in the Constitution. However, the inconsistency will continue to arise in expropriations carried out under pre-constitution statutes, until the Expropriation Act is amended.

Thirdly, the Act does not create a procedure for a hearing before the decision to expropriate is made. In the past, the courts have held that the rules of natural justice do not require a hearing before the decision is made. More recent decisions suggest that this is no longer the South African common law. Section 24 of the interim Constitution and s 33 of the final Constitution make it clear that the rules of natural justice do now apply, by requiring “procedurally fair administrative action” when any person’s rights or legitimate expectations are affected or threatened. It remains possible for the state to carry out valid expropriations under the Act, by following fair procedures. However, it is plainly desirable that the Act should set out what procedure is to be followed.

Fourthly, the constitutional authority for expropriation (“for a public purpose or in the public interest”) is now broader than the statutory authority (“for public purposes”). The difference may not be material in practice. However, a good deal of potential dispute could be avoided by bringing the statutory authority into line with the Constitutional authority.”

## **9 PRELIMINARY CONCLUSIONS**

As Eisenberg stated, it is clear that one single method of evaluating compensation will not always be appropriate to accommodate all the requirements of the different statutes dealing with compensation for expropriation. It is therefore important that one should ensure that a particular formulation will accommodate the contingencies of a particular situation. This would also be in line with De Waal who, for instance, mentioned that as for the factors other than market value listed in section 25(3), there is obviously no precise method for calculating values that are based on considerations of equity and justice or of weighing the various factors against each other, and the facts and circumstances of each case will determine the method and outcome of this process.

It appears as if the suggestion made in by the court in *Ex parte Former Highlands Residents; In Re: Ash and Others v Department of Land Affairs* (2000) 2 All SA 26 (LCC) 40, namely that the equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require. Once market value has been determined, the court can then attempt to strike an equitable balance between private and

public interests. The interests of the expropriatee may, for example, lift the compensation to above market value. Similarly, the public interest may reduce the compensation to an amount which is less than market value. Badenhorst has made some practical proposals in terms of positive, negative and neutral factors that can impact on value in this respect.

For a country such as South Africa it is important that the international investment community see legislation and practices in respect expropriation as investment-friendly. Van der Walt mentions that, generally speaking, a comparative analysis shows that the presence of an entrenched constitutional provision (which can only be amended by special procedures and majorities) that guarantees compensation for expropriation (acquisition or appropriation for public use) of private property not only avoids political risks (confiscation or nationalization), but also creates opportunities to alleviate certain regulatory risks (regulatory limitations that cause excessive and unfair loss for investors) involved in investment. Although compensation for regulatory loss can often be obtained on the basis of the investment agreement, or be based on administrative law, or according to private law, or through international arbitration, or on the basis of normal state legislation, a compensation claim that is entrenched in a constitutional framework is more secure because it cannot be revoked or amended easily through changes in ordinary legislation or administrative policy. A sound constitutional framework is therefore an important aspect of an investment-friendly regulatory framework.

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