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**VALUATION IN THE CONSTITUTIONAL ERA**

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**eISSN 1727-3781**

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**2015 VOLUME 18 No 5**

<http://dx.doi.org/10.4314/pelj.v18i5.16>

## VALUATION IN THE CONSTITUTIONAL ERA

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Which way you ought to go depends on where you want to get to...

- Lewis Carroll, *Alice in Wonderland*<sup>1</sup>

### 1 Introduction

The *Constitution* established a single system of law shaped by the *Constitution* itself.<sup>2</sup> It protected certain existing rights but it also initiated certain reform measures. In laying the foundation for transformation, the *Constitution* requires that both the existing rights and the reforms must promote the spirit, purport and objects of the Bill of Rights in line with section 39(2). However, existing rights can be protected only insofar as they are consistent with the Bill of Rights.<sup>3</sup> If the existing rights conflict with reform measures, then the *Constitution* requires a balancing of these rights and measures.

The protection of vested rights and transformation-orientated reforms do not have to stand opposed to each other, but are interlinked and "form part of one single legal constitutional goal".<sup>4</sup> Pre-1994 legislation such as the *Expropriation Act* 63 of 1975 (hereafter the *Expropriation Act*) and common law protecting vested rights are still valid, but only insofar as they are reconcilable with the *Constitution*.<sup>5</sup> This is also true for the calculation of compensation for expropriation: the assessment

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<sup>1</sup> Carroll *Alice's Adventures* 89.

<sup>2</sup> Van der Walt *Property and Constitution* 20.

<sup>3</sup> Van der Walt *Property and Constitution* 21.

<sup>4</sup> Van der Walt *Property and Constitution* 22.

<sup>5</sup> Van der Walt *Property and Constitution* 121.

methods employed before the adoption of the *Constitution* are valid only in so far as they are not in conflict with the *Constitution*.

In an effort to bring the legislation in line with the *Constitution*, the *Expropriation Bill* B4-2015 (hereafter the *Expropriation Bill*)<sup>6</sup> is currently before parliament, bringing the issue *inter alia* of the calculation of compensation into consideration. The *Expropriation Bill* has been met with opposition in parliament on the grounds that it threatens property rights in South Africa and would allow for compensation at lower than market value.<sup>7</sup>

Where pre-constitutional expropriation law aimed at compensating at market value, the new constitutional order aims for "just and equitable" compensation. The call has been made for a "transformative, constitutional legal culture of expropriation",<sup>8</sup> but there was a further call for providing specific tools for judges to use in order for them to be able to come to an acceptable conclusion in specific cases.<sup>9</sup>

This article will firstly provide a critique of the notion that market value is objective, the be-all and end-all of calculating compensation, and will secondly provide guidelines to use when calculating compensation. In doing this it is necessary to look at the rationale offered by courts for paying compensation upon expropriation, before looking at the centrality of the market value, pre-constitution. It will be argued that under the *Constitution*, market value still occupies a central space. Thereafter different compensation methods will be discussed to show how the choice of valuation method can influence the substantive property goal

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<sup>6</sup> Also see the *Property Valuation Act* 17 of 2014 that aims "[t]o provide for the establishment, functions and powers of the Office of the Valuer-General" to help with the regulation of the valuation of property in the context of land reform, as well as property that the Department (of Rural Development and Land Reform) wants to acquire or dispose of. The Act provides a framework for "fair and consistent land values", and aims to set norms, standards and guidelines for the validation of the integrity of valuation data by shifting the focus from "market value" to "fair compensation". See National Assembly 2014 <https://pmg.org.za/hansard/18525/>. It does not, however, deal with the methods of calculating compensation and due to space restrictions will not be discussed in this article.

<sup>7</sup> See National Assembly 2014 <https://pmg.org.za/hansard/18525/>.

<sup>8</sup> Du Plessis *Compensation for Expropriation* 300.

<sup>9</sup> Sluysmans, Verbist and De Graaff 2014 *EPLJ* 29.

compensation wishes to reach, where after the conclusion will provide for a different framework.

## **2 Calculation of compensation before the Constitution**

### **2.1 *The rationale for paying compensation***

Before the adoption of the *Constitution*, the assessment of compensation was based on the assumption that the legislator did not intend to take away rights without compensation, and in cases where there was doubt whether or not compensation was payable, that assumption tipped the balance in favour of payment.<sup>10</sup> A single individual or small group could not be required without compensation to sacrifice her or their property for something that would benefit the broad public. Therefore, if an individual was forced to contribute unequally to something that was of public benefit, compensation was due.<sup>11</sup> Compensation was meant to place the individual in the position she would have been in, had the expropriation not occurred.

### **2.2 *The centrality of market value***

Section 12(1) of the *Expropriation Act* sets out how compensation should be calculated, namely through the determination of the value that property would fetch in the open market. This amount is commonly referred to as the market value. The determination of market value as the compensation norm is based on the assumption that in the property market there will always be a free interchange between supply and demand. The rationale is that the market price will be determined by the economic principles of supply and demand, thereby determining

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<sup>10</sup> *Krause v SAR&H* 1948 4 SA 554 (O) 562-563; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1986 4 SA 576 (W) 579; *Oosthuizen v SAR&H* 1928 WLD 52 62.

<sup>11</sup> This links with what the French refer to as "*égalité devant les charges publiques*" and the Germans as "*Aufopferung*", implying that every member of the public should contribute to society's burdens according to that person's abilities. See Gildenhuys *Onteieningsreg* 3.

the "equivalent in value ... of the property loss".<sup>12</sup> This method of calculation was adopted in South African case law.<sup>13</sup>

### 2.2.1 *The problem with market value*

Market value is a problematic concept because in transactions of sale the market is a relatively unrestrained phenomenon where sellers and buyers bargain until they reach an acceptable price level, and such bargaining is usually done without many artificial constraints. The problem thus lies in the fact that one must imagine compensating a compulsory purchase in terms of exactly the opposite, namely a free market transaction where the price level is determined by the relatively free will of the buyer and the seller. The determination of market value is therefore an informed guess.<sup>14</sup>

Further, market price is not static. Changes over time can influence the price, and inflation can play a big role. Events that lead to a sudden increase in the market price are often ignored, especially in cases where the comparative method<sup>15</sup> is used to determine the market value and the properties used in comparison were sold before such rapid fluctuations took place.<sup>16</sup> Such a determination of market value does not attempt to consider or capture the value of the properties to the owners themselves.<sup>17</sup>

Notwithstanding the problems with this approach, the courts have usually found a way to apply the open market test, even where it has been very difficult to do so.<sup>18</sup>

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<sup>12</sup> *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 254.

<sup>13</sup> *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 254.

<sup>14</sup> *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 3 SA 376 (A); *Minister of Lands and Natural Resources v Moresby-White* 1978 2 SA 898 (RAD); *Krause v SAR&H* 1948 4 SA 554 (O).

<sup>15</sup> See para 0.

<sup>16</sup> See the arguments made in *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

<sup>17</sup> For instance, if the owner is disabled and made renovations to accommodate this disability, this will not be taken into account when determining market value.

<sup>18</sup> *Todd v Administrator Transvaal* 1972 2 SA 874 (AD) 881-882; *May v Reserve Bank of Zimbabwe*; *Thomas Family v Reserve Bank of Zimbabwe*; *Cairns Family Trust v Reserve Bank*

The market value test plays a central role in South African expropriation law, and in order to determine the market value one has to hypothesise what the property would have realised if sold on an open market by a willing seller to a willing buyer.

But the willing buyer willing seller method of determining market value has also been described as illusory, since the bargaining process is constrained by a compulsory sale, and the seller is more often than not unwilling to sell.<sup>19</sup> As King J stated in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*:<sup>20</sup>

Notwithstanding, the law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation. This is so because I must ignore any enhancement or diminution in value flowing from the expropriation or the scheme causing the expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuers make the task of the super valuator seemingly "curiouser and curiouser".

Despite the *Constitution* requiring "just and equitable" compensation, not much has changed.

### **3 The influence of the Constitution on the calculation of compensation**

#### **3.1 Introduction**

The *Constitution* now provides a new framework in which the *Expropriation Act* should be interpreted. Section 25(2)(b) sets out the requirement that compensation is due upon expropriation. Section 25(3) determines that at the time of expropriation the amount of the compensation and the time and manner of

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*of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 4 SA 185 (ZH); *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 953; *Minister of Agriculture v Estate Randeree* 1979 1 SA 145 (A) 183.

<sup>19</sup> Jacobs *Law of Expropriation* 61.

<sup>20</sup> *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 955-956.

payment must be just and equitable, striking an equitable balance between the person whose property is expropriated and the public interest. All relevant circumstances must be taken into account, including the factors listed in section 25(3)(a)-(e).<sup>21</sup>

### **3.2 The rationale of paying compensation**

The aim of compensation under the constitutional dispensation is, as in pre-constitutional expropriation, not to oblige the individual on his or her own to carry the burden of something that is in the public benefit. However, the *Constitution* aims to do this by balancing the interest of the public with the interest of those affected (the individuals), and this might not always mean paying market value.

Case law, however, seems to return to the pre-constitutional rationale for the payment of compensation. In *Du Toit v Minister van Transport*<sup>22</sup> it was held that the expropriatee must be put in the same position he would have been in, but for the expropriation. In *City of Cape Town v Helderberg Park Development (Pty) Ltd*<sup>23</sup> it was held that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the *status quo ante*. *Khumalo v Potgieter*<sup>24</sup> stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss, while *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood*<sup>25</sup> ruled that the expropriatee is compensated for the loss of the property. This sentiment was echoed in *Ex Parte Former Highlands Residents*,<sup>26</sup> where it was found that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay *more* than market value. In *Haakdoornbult Boerdery*

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<sup>21</sup> See para 0.

<sup>22</sup> *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 22.

<sup>23</sup> *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 1 SA 1 (SCA) para 21.

<sup>24</sup> *Khumalo v Potgieter* 2000 2 All SA 456 (LCC) para 22.

<sup>25</sup> *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 1 SA 1030 (LCC) para 15.

<sup>26</sup> *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

*CC v Mphela*<sup>27</sup> the court ruled that for compensation to be fair it must recompense. In other words, it must put the dispossessed, insofar as money can do it, in the same position the person would have been in had the land not been taken. This compensation might not always be market value, and it seems as if the court accepts that it can be something more than market value:

[b]ecause of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.<sup>28</sup>

More recently, the court in *Mhlanganisweni Community v Minister of Rural Development and Land Reform*<sup>29</sup> relied on several foreign dicta to show that the purpose of compensation is to recompense. The court regarded market value as an important circumstance to take into account when determining compensation.

In *Florence v Government of the Republic of South Africa*<sup>30</sup> the Constitutional Court, in the context of a restitution claim, opted for the "generous construction [rather than] a merely textual or legalistic one to afford claimants the fullest possible protection of their constitutional guarantees".<sup>31</sup> However, when calculating compensation the court warned that the burden on the fiscus was an important consideration, as compensation claims are paid from taxpayer's money and therefore need to advance a public purpose.<sup>32</sup> The court thus acknowledged the proportionality, or the balance, that is required between the interest of the individual and that of the public.

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<sup>27</sup> *Haakdoornbult Boerdery CC v Mphela* 2007 5 SA 596 (SCA) para 48.

<sup>28</sup> *Haakdoornbult Boerdery CC v Mphela* 2007 5 SA 596 (SCA) para 48.

<sup>29</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

<sup>30</sup> *Florence v Government of the RSA* 2014 6 SA 456 (CC).

<sup>31</sup> *Florence v Government of the RSA* 2014 6 SA 456 (CC) para 48.

<sup>32</sup> *Florence v Government of the RSA* 2014 6 SA 456 (CC) para 71.



Despite the focus on recompensing the individual, the central principle should remain that the amount of compensation should reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances. This requires looking at each case individually with regard to the individual property interest that might stem from the pre-constitutional era, and the constitutional framework and its legitimate reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation, but should take into account the broader scheme of the *Constitution*.<sup>33</sup>

### ***3.3 Factors that must be taken into account to determine "just and equitable" compensation***

#### *3.3.1 Application of the factors*

The *Constitution* directs a valuer to consider a list of factors that must be taken into account when considering what is "just and equitable" compensation. Subsections 25(3)(a)-(e) may not be applicable in all cases, and it might be that in certain circumstances a particular subsection is more relevant than others are. However, it is important that *all* relevant circumstances be taken into account in every case, including those circumstances or factors that might be relevant but not listed in section 25(3).

The courts are left to interpret how these factors interact with one another, and in *Ex Parte Former Highlands Residents*,<sup>34</sup> Gildenhuys J formulated a two-step approach when calculating compensation. The court concluded that market value plays a central role.<sup>35</sup> Therefore, when calculating compensation the courts should

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<sup>33</sup> Van der Walt *Constitutional Property Law* 509.

<sup>34</sup> *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

<sup>35</sup> This is not entirely true. Many jurisdictions acknowledge that compensation need not be market value. This is particularly so in Germany, where what is required is an equitable balance between the public interest and the interests of those affected. See for example *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

first determine the market value of the property (since it is easily quantifiable),<sup>36</sup> and then, based on the list in section 25(3), adjust the amount either upwards or downwards.<sup>37</sup> Market value is to be elevated to a central or starting position in determining compensation, with the factors in the discretion of the judge determining by how much the compensation should be increased or decreased. The Constitutional Court in *Du Toit v Minister of Transport*<sup>38</sup> adopted this approach:

The approach of beginning with the consideration of market value [...] and thereafter deciding whether the amounts are just and equitable is not novel. [...] Nevertheless, the judge pointed out that the market value of the expropriated property could become the starting point in the application of section 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an amount may be added or subtracted as the relevant circumstances in section 25(3) may require. [...] For this reason, the approach adopted here which applies the Act as a starting point and proceeds to apply section 25(3) of the Constitution may not be suitable in all cases. It is, however, the most practicable one in the circumstances of this case where there is no challenge to the constitutionality of the Act.

The factors in the list can play a significant role in the valuation of "just and equitable" compensation, and will be discussed briefly below.<sup>39</sup>

### 3.3.2 *Current use of the property*

The first factor in section 25(3)(a) provides that the current use of the property could be a relevant circumstance that could influence the amount of the compensation. This cannot be used as a merely punitive measure as to do so would be against the public purpose.<sup>40</sup> This means that the owner cannot be punished for not using the land in a certain way.<sup>41</sup> It remains necessary to balance the interest

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<sup>36</sup> Budlender "Constitutional Protection of Property Rights" 1-60 rightly notes that market value is preferred because it is seen as "objective", but yet it is difficult to determine the exact market value because there are many variables that need to be considered when determining it.

<sup>37</sup> *Ex parte former Highland Residents: In Re Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) paras 34-35.

<sup>38</sup> *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 37.

<sup>39</sup> A more detailed account can be found at Du Plessis *Compensation for Expropriation* 105.

<sup>40</sup> Van der Walt *Constitutional Property Law* 512-513.

<sup>41</sup> For example: if an owner is not using agricultural land for agricultural purposes, this cannot be a reason for a downward adjustment.

of those affected with the public interest. The use of the property could be applicable in cases such as *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*.<sup>42</sup> when land is occupied unlawfully, and the market value is depressed because of it, the court could adjust compensation upwards to counter the negative effect of the unlawful occupation.<sup>43</sup>

### 3.3.3 *The history of the acquisition and use of the property*

It is not only the current use of the property but also the history of the acquisition of the property that can influence the compensation amount. Section 25(3)(b) includes cases where the apartheid state expropriated property and sold it well below market value.<sup>44</sup> In many of these cases the state made land available to white farmers at well below market value.<sup>45</sup> If such an owner were now expropriated for land reform purposes, it would be unfair to offer full market value compensation. Such an owner should not be allowed to benefit twice from apartheid.<sup>46</sup>

In *Mhlanganisweni*<sup>47</sup> the claimants argued that the owners do not need "full compensation" and that an owner can be required to make some compromises due to the historic benefits the owner had received. This was rejected by Gildenhuys J, as "one should not distinguish between 'rich' landowners and others in the determination of compensation".<sup>48</sup> The court held that as a matter of equity, rich people should not be considered as second-rate citizens when it comes to expropriation.

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<sup>42</sup> *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

<sup>43</sup> Budlender "Constitutional Protection of Property Rights" 1-60; Van der Walt 2005 *SAJHR* 144-161.

<sup>44</sup> Du Plessis and Olivier 1997 *BPLD* 11.

<sup>45</sup> Budlender "Constitutional Protection of Property Rights" 1-59.

<sup>46</sup> Budlender "Constitutional Protection of Property Rights" 1-59; Badenhorst 1998 *De Jure* 261.

<sup>47</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

<sup>48</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012) para 61.

### 3.3.4 *Market value*

Section 25(3)(c) lists market value as a factor to take into account when calculating just and equitable compensation. Market value in section 25(3)(c) probably has the same meaning as market value in section 12 of the *Expropriation Act*, although market value is not the main consideration in section 25(3).

### 3.3.5 *Direct state investment / subsidy*

Section 25(3)(d) refers to instances where the acquisition by the person expropriated and the capital improvement made to such property was made to the land with the assistance of the (apartheid) state.<sup>49</sup> The rationale underlying this subsection is that the (current) state should not compensate an owner for improvements that the owner made with (apartheid) state subsidies, as it would not be just and equitable to do so.<sup>50</sup>

### 3.3.6 *The purpose of the expropriation*

Section 25(3)(e) requires the valuer to have regard to the purpose of the expropriation. In this regard section 25(3)(e) is complemented by section 25(4), which states that public interest includes the nation's commitment to land reform. Section 25(4) therefore circumscribes the content of public interest, while section 25(3)(e) is about the role that public purpose plays in compensation. This should also be distinguished from the requirement in section 25(2)(a)<sup>51</sup> that expropriation must be for a public purpose.

These five factors should be taken into account when determining the amount of compensation to be paid, but the valuer is not restricted to these factors alone.

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<sup>49</sup> This applies only to direct subsidies in respect to the property.

<sup>50</sup> Van der Walt *Constitutional Property Law* 512.

<sup>51</sup> See Du Plessis "Public Purpose Requirement" for a more detailed discussion on the purpose of the expropriation factor.

## **4 The valuation of the land**

### **4.1 Introduction**

Valuers must estimate an amount of compensation based on established practical reasoning.<sup>52</sup> These lines of reasoning are not rules of law but rules of valuation.<sup>53</sup> In South Africa the *Property Valuers Profession Act* 47 of 2000 regulates valuers. They serve as expert witnesses and make use of certain valuation methods to calculate "value".<sup>54</sup> Valuers must provide the court with evidence of what a hypothetical willing buyer would pay for the expropriated property and what a hypothetical willing seller would accept.

Within the confines of section 12 of the *Expropriation Act*, courts use mainly three methods to determine market value. They are the comparative approach, the economic approach and the land residual technique. These methods present the court with evidence relating to the estimation of the market value of the property.

The methods discussed below are the most common methods used in pre-constitutional case law, but are the methods still being used to evaluate property for various purposes, including expropriation. Note how all of these methods aim at calculating the "objective" market value of the property.

### **4.2 The comparative sales or market data approach**

According to Jacobs,<sup>55</sup> the definition of this approach is "the consideration of actual sales of like lands in a like area and a determination from such comparison of the going market value of the lands in question at the date of expropriation". The

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<sup>52</sup> Gildenhuys "Valuations, Valuers and Appraisers" para 177.

<sup>53</sup> Valuers play a central role in determining the value of the property. Therefore, their reputation and competence are often subjected to questioning. See *Minister van Waters v Theron* 1856 52 ER 1219 1223.

<sup>54</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012) para 26. If a judge does not accept expert testimony, the judge must make clear in the judgment why it is rejected. See *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 252-253.

<sup>55</sup> Jacobs *Law of Expropriation* 101; *Minister van Waterwese v Von During* 1971 1 SA 858 (A).

method is based on the idea that a willing buyer would not pay more for land if he could get comparable land elsewhere more cheaply.<sup>56</sup> This approach has been imported into South African case law and is regarded as the most effective way of determining value.<sup>57</sup>

This method is used to determine market value, "rather than upon [speculating] as to the prices notional willing sellers and notional willing buyers would have agreed upon had they entered into contracts of sale".<sup>58</sup> It is generally regarded as a method that reduces speculation about prices.<sup>59</sup>

The most relevant and least technical principle that is applicable when determining what must be included in or excluded from such a calculation is that the price the owner paid for the property may be referred to, especially if the property was bought just before expropriation.<sup>60</sup> Only transactions at arm's length can be regarded as indicators of the market value.<sup>61</sup> The expropriation price paid for comparable land can also be used as a factor to help determine the amount, but the expropriation cannot be elevated to a sales transaction.<sup>62</sup>

The properties used for comparison must be sufficiently similar to the property being expropriated to justify the comparison. Where there are discrepancies, the

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<sup>56</sup> Gildenhuys 1977 TSAR 1, 7.

<sup>57</sup> *Todd v Minister of Public Works* 1958 1 SA 328 (A) 380; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 3 SA 376 (A) 390; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W) 956; *Van Zyl v Stadsraad van Ermelo* 1979 3 SA 549 (AD) 568; *Thanam v Minister of Lands* 1970 4 SA 85 (D). See *Minister van Waterwese v Von During* 1971 1 SA 858 (A) 872, where the court states that no two properties are the same, not even those adjacent to each other, but that this method is nonetheless the most reliable method of determining market value. The difference in property is merely a factor that should be taken into account when determining market value.

<sup>58</sup> In *Minister of Lands and Natural Resources v Moresby-White* 1978 2 SA 898 (RAD) the court per Macdonald CJ states that the property used for comparison must be property sold on the open market, and not some form of compulsory sale.

<sup>59</sup> Jacobs *Law of Expropriation* 102. *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (C) 667; *Minister van Waterwese v Von During* 1971 1 SA 858 (A) 872.

<sup>60</sup> Jacobs *Law of Expropriation* 103.

<sup>61</sup> Jacobs *Law of Expropriation* 104, 107.

<sup>62</sup> *Minister van Waterwese v Von During* 1971 1 SA 858 (A).

valuator is expected to be creative and to take into account any facts that might influence the mind of the (hypothetical) purchaser.<sup>63</sup> Employing his/her "skill and experience in deciding what a purchaser, if one were to appear, would be likely to give" would do this.<sup>64</sup>

The obvious problem with this approach is that there may be no comparable properties, or the property standing to be expropriated may have a unique feature.<sup>65</sup> In *Durban Corporation v Lewis*<sup>66</sup> the court ruled that in cases where "the land to be valued possesses some unusual, and it may be, unique features" the arbitrator has to consider all the material in front of him and determine "what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities".<sup>67</sup> Similarly, in *Minister of Agriculture v Davey*<sup>68</sup> the court noted that adjustments often need to be made to allow for dissimilarities between properties, that this requires a judge to meddle with the evidence, and that these adjustments are often difficult to convert to monetary terms. In *Sher v Administrator, Transvaal*<sup>69</sup> the court stated that the valuation before it did not account for the property's unique characteristics. In *Minister of Agriculture v Davey*<sup>70</sup> the court found that although the comparative method was the best method to employ, the evidence on which it rests must be considered with care. One has to take into account that property is acquired in different circumstances, and that no two properties are exactly similar. In *Minister van Waterwese v Von During*<sup>71</sup> the fact that there was no other comparable land

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<sup>63</sup> *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 516.

<sup>64</sup> *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 516. Also see *Estate Marks v Pretoria City Council* 1969 3 SA 227 (AD) 254.

<sup>65</sup> If one compares thoroughly, certain properties will always have a unique feature that cannot be included in such a simple comparison. Arumăe and Kein 2014 *Journal of Management and Change* 17.

<sup>66</sup> *Durban Corporation v Lewis* 1942 NPD 24.

<sup>67</sup> *Durban Corporation v Lewis* 1942 NPD 24 49.

<sup>68</sup> *Minister of Agriculture v Davey* 1981 3 SA 877 (A) 903A-B.

<sup>69</sup> *Sher v Administrator, Transvaal* 1990 4 SA 545 (A) 565.

<sup>70</sup> *Minister of Agriculture v Davey* 1981 3 SA 877 (A) 903.

<sup>71</sup> *Minister van Waterwese v Von During* 1971 1 SA 858 (A) 904.

did not mean that the property was without value. In such cases, reasons for the inactivity in an area should be treated as opinion evidence and with caution.

While the comparative sales method can help a great deal, especially where there are similar properties available with enough sales data, the data should always be treated with caution, and it should be noted that valuers in this instance at best make an informed guess as to what a willing buyer might pay and a willing seller might accept.

### **4.3 The economic or income capitalisation approach**

This approach requires the valuator to value the expropriated property by capitalising its *net* rental income.<sup>72</sup> This approach assumes that a buyer would not pay more for land providing a certain income if he could get a similar income elsewhere for less.<sup>73</sup> This method is used mostly to determine the value of investment properties.

When valuing property this way, it is only the income from the property and not the income that the management or the specific use of the property generates that is taken into account.<sup>74</sup> There are also two ways of determining the income. Direct capitalisation uses an estimate of expected income to indicate value.<sup>75</sup> The yield capitalisation method, a very complex method, discounts future benefits to present value on the assumption that the investor will recover the capital investment plus a rate of return over the course of the investment period.<sup>76</sup> The court in *Bonnet v Department of Agricultural Credit and Land Tenure*<sup>77</sup> noted that this is "a system whereby you discount six uncertainties to the fifth decimal point". In general, courts are reluctant to use it due to its complexities.

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<sup>72</sup> Jacobs *Law of Expropriation* 121-123.

<sup>73</sup> Gildenhuys 1977 *TSAR* 7.

<sup>74</sup> *White v Union Government* 1937 CPD 225 228.

<sup>75</sup> Gildenhuys "Valuations, Valuers and Appraisers" para 222.

<sup>76</sup> Gildenhuys "Valuations, Valuers and Appraisers" para 223.

<sup>77</sup> *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 1 All SA 18 (T).



It has been stated that the land residual technique is a form of this method.<sup>78</sup> This valuation method first looks at the purpose for which the land was purchased by the expropriatee. Thereafter the cost of improvements to get the land suitable for such a purpose is deducted. Revenue is estimated by putting a sales value on the property, and added to the total. The total is discounted against the time it will take to develop the land.<sup>79</sup> In *Estate Marks v Pretoria City Council*<sup>80</sup> the court explained:

The residual land value method is a complicated exercise involving specialised skills in several spheres. The first step is to determine the optimum development of which the land proposed to be purchased is capable. If it is to be properly done, that entails the preparation of a comprehensive building project, complete with plans and specifications, which complies with all relevant building regulations and town-planning provisions. Thereupon the cost of erecting such a building has to be calculated, as also the estimated nett rentals to be derived from the building. Such nett income is then capitalised at the rate of interest which the prospective purchaser expects from his or her investment. From this capitalised value, the total cost of the project is deducted, and the residual figure represents the amount which a purchaser would probably be prepared to pay for the site in question.

This method is extremely complicated, and in applying it the court will have to give careful thought to what variables should or should not be included. While this might seem very arithmetic and objective, such choices are informed by an adjudicator's perception of what a hypothetical purchaser on a non-existent open market would consider.

#### **4.4 The cost approach**

This technique rests on the assumption that a person would not pay more for renovating or upgrading property than s/he would spend on similar renovations elsewhere.<sup>81</sup> When the valuer determines the value of the land plus improvements,

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<sup>78</sup> Gildenhuys "Valuations, Valuers and Appraisers" para 223. This is often also referred to as the developer's residual approach.

<sup>79</sup> *Southern Transvaal Buildings v Johannesburg City Council* 1979 1 SA 949 (W); *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (C) 677; Jacobs *Law of Expropriation* 130.

<sup>80</sup> *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) 248G-H.

<sup>81</sup> Gildenhuys 1977 *TSAR* 7.

the valuer must also keep in mind the depreciation of the improvements on the property.<sup>82</sup>

This is seen as a less desirable method of determining market value,<sup>83</sup> since taking into account more variables means that there is greater uncertainty. Not only must the valuer try to ascertain the value of the empty stand, plus the construction costs, but depreciation also has to be taken into account. The land and the buildings often need to be assessed separately.<sup>84</sup>

This method was employed in *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs*,<sup>85</sup> where the Land Claims Court had to determine retrospectively if just and equitable compensation had been paid for properties expropriated during apartheid, and found that<sup>86</sup>

... the value of the dispossessed properties ... [is] ... the aggregate of the vacant land and the depreciated replacement cost of the improvements. This is not always what happens in practice. In this case, it is the only practical method. I am satisfied that the agreement on the contributory value of improvements, as reached between the valuers, is fair and equitable, and that the Court may act upon it in determining the market value of the dispossessed properties.

To determine the value of the empty stand the court used the comparative sales method, but not without difficulty, because the various valuers gave the court different values. Ironically, the court still insisted that market value had to be objectively determined.<sup>87</sup>

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<sup>82</sup> *Bay View (Pty) Ltd v Director of Valuations* 1982 4 All SA 366 (C).

<sup>83</sup> It is not a popular method and was rejected in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 2 SA 670 (C) 677 but was used in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 1 SA 949 (W).

<sup>84</sup> *Bouwer v Stadsraad van Johannesburg* 1978 2 All SA 63 (W).

<sup>85</sup> *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC).

<sup>86</sup> *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 51.

<sup>87</sup> *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) para 76.

## **4.5 Alternative methods of determining market value**

### *4.5.1 Introduction*

There are also methods of calculating market value not readily looked at in South African courts but employed in American courts. Such courts seem to make definite choices about what interests to protect when calculating market value, and know how different methods can bring about different results, depending on the interests that the adjudicator chooses to protect. This raises the question: if market value can have such a diverse range of possibilities, why is it still the central focus, and why is it believed to be the only sure way of determining value? But also: why is the "just and equitable" measure perceived to be less sure than market value?

### *4.5.2 Harm v benefit*

In the harm/gain methods the courts must choose to focus either on the expropriatee's harms or on the government's benefit. When focusing on harm, the court assesses compensation by looking at the expropriatee,<sup>88</sup> which focus may lead to higher compensation if the owner has a special use of the property that would not be reflected in the market value, for instance where the owner's other property is next to the property that is taken.

The focus on government gain can also lead to higher compensation.<sup>89</sup> Where government gains are difficult to determine, such as where the government regulates for environmental gains, the courts tend to focus on the owner's loss. The government's gain will therefore be considered mostly when the government expropriates property to facilitate a commercial enterprise.<sup>90</sup>

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<sup>88</sup> This seems to be the case in *Du Toit v Minister of Transport* 2003 1 SA 586 (C); *Minister of Transport v Du Toit* 2005 1 SA 16 (SCA); *Du Toit v Minister of Transport* 2006 1 SA 297 (CC), where the courts focused on the purpose of the expropriation, as listed in s 25(3) of the *Constitution of the Republic of South Africa*, 1996, and confused that with s 25(2) public purpose.

<sup>89</sup> Serkin 2004-2005 *NWULR* 688 for a list of United States cases.

<sup>90</sup> Serkin 2004-2005 *NWULR* 689.

#### 4.5.3 *The highest and best use*

The courts often determine compensation by looking at the highest / best use of the property. In the United States of America it is argued that this would be the value that is attached to the property in the market, based on the willing buyer willing seller principle.<sup>91</sup> The compensation amount will therefore involve a determination of what the highest / best use of the property is by assuming that a seller will sell the property based on the highest / best use, even if the buyer will not use the property for such a purpose.

Highest and best use allocates the financial risk of developing the property from its current condition to its highest and best use.<sup>92</sup> The risks of the development (permit denial, environmental regulations etc) and the question of who is to bear these risks are reflected in the property's market value and thus influence the calculation of compensation.<sup>93</sup>

Because there are many factors that the court chooses from when determining the value in this case, coupled with all the variables such as the risk of permit denial, insurance costs etc, it is debatable whether such a method is really dependable and can really determine what a willing buyer would pay a willing seller. And since the court does not need to give reasons for the choice of factors to include when determining the amount, it cannot be said to be an objective method of calculating market value.<sup>94</sup>

While not directly employed as a value method in *Mhlanganisweni*,<sup>95</sup> the court did make extensive mention of the use of the land as a luxury game lodge. In this context the court had to determine if the land should be restored to the claimants,

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<sup>91</sup> Serkin 2004-2005 *NWULR* 690.

<sup>92</sup> Serkin 2004-2005 *NWULR* 690.

<sup>93</sup> Serkin 2004-2005 *NWULR* 691.

<sup>94</sup> Serkin 2004-2005 *NWULR* 692.

<sup>95</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

which restoration, according to the court, would require the state to expropriate the property at its full market value for reform purposes.<sup>96</sup> The court warned that the restoration of the land by expropriating the current owner at market value should not place a great cost on the state, as this would lead to overcompensation of the claimants at the public expense.<sup>97</sup>

#### *4.5.4 Permissible but unenacted regulations*

Under this valuation mechanism the courts decide where they will draw the line in offsetting the value for permissible regulations. For existing regulations this is simple, but property is of course also subject to unenacted regulations. These are restrictions that the government can still validly impose. What is required here is to imagine our willing buyers and sellers discounting the impact of potential regulation.<sup>98</sup>

In the South African context this will play a role in land reform policies. A good example of this is the *Draft Preservation and Development of Agricultural Land and Framework Bill*,<sup>99</sup> which states that land may be taken at below market value if it is not used at its highest potential for food production. The possible under-utilisation would influence the price that the state would offer if the land were not used in accordance with the Bill, once enacted.

#### *4.5.5 Benefit offset and the average reciprocity of advantage*

Sometimes regulations can benefit a property owner. Where there is only a partial taking, the remaining property might benefit from it. The argument is, if an owner

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<sup>96</sup> See Du Plessis "Public Purpose Requirement" for criticism of this interpretation.

<sup>97</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012) para 79.

<sup>98</sup> Serkin 2004-2005 *NWULR*. In America the problem is often found in cases that deal with "takings" (not expropriation) of farmlands. The courts often ignore the enhanced value of such property because of its location. What they would do instead is to compare it with sales of non-riparian lands (which are worth less).

<sup>99</sup> Gen N 210 in GG 38545 of 13 March 2015 (*Draft Preservation and Development of Agricultural Land Framework Bill*).

benefits from a governmental action, the owner should not be compensated for such benefit.<sup>100</sup> Of course, the problem is how broadly the court should interpret the term "benefit". The broader the benefit (i.e. only specific benefits or the more abstract benefit to the community), the less the compensation.<sup>101</sup>

#### 4.5.6 *External factors that can influence the amount*

##### 4.5.6.1 The timing of the valuation

Properties are generally evaluated on the date of the expropriation.<sup>102</sup> The problem might be that the prospect of expropriation might influence value.<sup>103</sup> How should courts respond to this? Should they insist that compensation should be calculated at the date of expropriation, or determine where the *de facto* expropriation started, and determine the value of the property then? Clearly this could have an impact on the property value.<sup>104</sup>

The Constitutional Court in *Florence v Government of the Republic of South Africa*<sup>105</sup> had to decide if the compensation payable should be calculated at the date of dispossession or the date that actual compensation is paid. The court stated that<sup>106</sup>

Measuring the position at the time that actual compensation takes place allows the dispossessed person to benefit from the appreciation of the land, or the interest that would likely have accrued on the monetary value of the property, had they received just compensation, in the intervening years. The claimant ought to receive this benefit because she was deprived of a low-risk, interest-accruing, long-term asset, namely property. It seems unjust to strip someone of such an asset and to replace it with the present-day equivalent of a non-interest-accruing amount 44 years later.

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<sup>100</sup> Serkin 2004-2005 *NWULR* 695.

<sup>101</sup> Serkin 2004-2005 *NWULR* 696.

<sup>102</sup> Note that this is the valuation date, and not the "time and manner of payment".

<sup>103</sup> Referred to as "condemnation blight". Serkin 2004-2005 *NWULR* 677.

<sup>104</sup> Serkin 2004-2005 *NWULR* 699.

<sup>105</sup> *Florence v Government of the RSA* 2014 6 SA 456 (CC).

<sup>106</sup> *Florence v Government of the RSA* 2014 6 SA 456 (CC) para 49.

In restitution cases such as *Florence*, where claimants cannot get actual restoration of land but must opt for monetary compensation instead, timing can make a big difference.<sup>107</sup>

#### 4.5.6.2 Fees and expenses

A factor that is often overlooked is the impact of litigation expenses on the compensation claim. When costs are awarded in litigation about compensation, this can effectively mean either that the State is paying more than the market value for the property or that the property owner is not in a better position than he would have been but for the expropriation.<sup>108</sup> Spoor<sup>109</sup> warns that this may be a big unintended consequence of the *Property Valuation Act* 17 of 2014, since the Act restricts the government to expropriations, and no longer allows the possibility of settlement based on negotiations. This also means that while the landowner possibly litigates on the compensation offered, the land claimants will be without land until the issue is settled. Mention of the litigation cost in the calculation of compensation was acknowledged in *Haakdoornbult Boerdery CC v Mphela*.<sup>110</sup>

#### 4.5.6.3 Re-characterising the property expropriated

In general, the subjective value of property to the owner is excluded when calculating compensation.<sup>111</sup> It could be argued that courts do have some discretion (especially in the South African context under section 25(3)) to consider some of the subjective values. What the court therefore chooses to ignore or include will ultimately affect the market value of the property.<sup>112</sup>

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<sup>107</sup> Note that the court also made it clear that if compensation were calculated at the time of the payment of compensation only, and not at the time of the expropriation, claimants who got the actual restoration of property would unduly benefit, while claimants who had to be satisfied with monetary compensation would be left behind. *Florence v Government of the RSA* 2014 6 SA 456 (CC) para 50.

<sup>108</sup> Serkin 2004-2005 *NWULR* 700.

<sup>109</sup> Spoor 2014 <http://goo.gl/mCFUYY>.

<sup>110</sup> *Haakdoornbult Boerdery CC v Mphela* 2007 5 SA 596 (SCA) para 58.

<sup>111</sup> Serkin 2004-2005 *NWULR* 701.

<sup>112</sup> A very good example of this is *Florence v Government of the RSA* 2014 6 SA 456 (CC).

#### **4.6 *Some comments on the valuation methods***

It is evident that the choice of valuation mechanism can influence the so-called market value of property. In some cases it *is* possible to ascertain the market value of a certain property, but what this section has shown is that assumptions about the objectivity of the mechanisms chosen to ascertain market value are false. These are choices made by the courts, and the mechanisms are not as objective or clear as the courts would like to believe. Choosing a valuation mechanism necessarily entails making background decisions about the extent to which private property will be protected, thereby advancing substantive property interests.

Why is this relevant? By synchronising the underlying goals a person wishes to achieve with a property clause with the valuation mechanisms, compensation can be used to support substantive goals. As Serkin puts it, "at least ensure that valuation decisions are not at odds with the results they are trying to achieve".<sup>113</sup>

For instance, if the goal of compensation for expropriation is to ensure that the government internalises the costs of expropriation by expropriating only if the gain is more than the costs, then compensation should be paid to make an owner whole.<sup>114</sup> If government interference in private property is regarded as suspect, it should pay the highest possible price.<sup>115</sup> When there is hostility towards government regulation of property, parties will try to force the government to pay the full market value and make it as expensive as possible for the government to expropriate property. This will limit government's interference with private property.<sup>116</sup> To do this, courts might try to shift the litigation expenses to the government.<sup>117</sup> That would deter the government from expropriating property.

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<sup>113</sup> Serkin 2004-2005 *NWULR* 704.

<sup>114</sup> Serkin 2004-2005 *NWULR* 706.

<sup>115</sup> Serkin 2004-2005 *NWULR* 706.

<sup>116</sup> Serkin 2004-2005 *NWULR* 709.

<sup>117</sup> See 0.



On the other hand, some people might accept that the government tries to act in the best interest of the community. Public problems can be solved with legislative decision-making, and lower compensation would allow economically effective legislating.<sup>118</sup> This would mean that a mechanism that allows for unenacted regulations to impact on value<sup>119</sup> and that places all the risks of the highest and best use of the property on the owner<sup>120</sup> would lead to the award of lower compensation. Compensation would in this case not be a barrier to the implementation of transformation through legislation.

A redistributive approach to compensation situates property rights in a social space that facilitates the existence of different levels of wealth in society. In this context, government protection of private property has certain consequences for the distribution of wealth. If property rights are protected rigidly, then the status quo will be protected. If we have a more flexible approach to property, greater redistribution is possible.<sup>121</sup> Such a regime will favour people with less wealth and power, and courts will try to make it less expensive for government to impose restrictions on the property rights of the wealthy and powerful.<sup>122</sup> In this instance the award of compensation would be the outcome of a contextual inquiry and a normative determination of whether a particular person deserves more or less protection. Compensation might vary, depending on the wealth of the owner. The use of this mechanism could be accompanied by the use of the benefit-offset mechanism,<sup>123</sup> for instance.

While all of these mechanisms have the goal of calculating fair market value in the United States, as opposed to just and equitable compensation, they do illustrate the possibility of choosing different methods and placing emphasis on different

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<sup>118</sup> Serkin 2004-2005 *NWULR* 713.

<sup>119</sup> See 0.

<sup>120</sup> See 0.

<sup>121</sup> Serkin 2004-2005 *NWULR* 718. See Du Plessis 2013 *Stell LR* for a utilitarian approach to compensation in South Africa.

<sup>122</sup> Serkin 2004-2005 *NWULR* 718.

<sup>123</sup> See 4.5.5.

factors to achieve different results. Serkin<sup>124</sup> also successfully shows how the courts sometimes employ such mechanisms mechanically, without introspection or attempting to establish exactly what substantive interest they are protecting when choosing method x rather than method y.

In South Africa our goal is set out clearly in the *Constitution*. Compensation must be "just and equitable", and it must reflect a balance between the interest of the holder of the property rights and the interest of the public. Especially in the context of land reform, this necessitates taking a contextual approach in which courts will have to make decisions on when the owner's interest will be advanced at the public's cost. A blanket acceptance of market value as the value to be awarded is therefore problematic. It has been successfully argued that a progressive expropriation regime will provide better protection for the economically and politically marginalised by allowing the government to burden the property of the wealthy and the powerful somewhat more during expropriation.<sup>125</sup> This would mean that in the *Mhlanganisweni Community v Minister of Rural Development and Land Reform*<sup>126</sup> it would have been acceptable for the Land Claims Court to burden the property rights of the owners by choosing to deviate from the strict market value and thus discriminating against them due to their wealth.

## 5 Conclusion

Since owners can seldom resist expropriation, most expropriation cases focus on the compensation element. It should be noted from the outset that neither the *Constitution of the United States of America* (on which most of the literature discussed in this article is based) nor the South African *Constitution* demands the award of full market value: both demand just and equitable compensation.<sup>127</sup> Since

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<sup>124</sup> Serkin 2004-2005 *NWULR* 677.

<sup>125</sup> Dagan 1999 *Va L Rev* 788.

<sup>126</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

<sup>127</sup> Historically just compensation was seen as something that is judicially determined and that cannot be constitutionally controlled by either the legislature or the executive. Dunham 1962

the *Constitution* has brought about a single system of law, it is in this context that compensation for expropriation should be calculated. This means that the centrality of market value and of the pre-constitutional valuation methods used to calculate it can no longer be accepted. Market value is just *one* factor to be taken into consideration when evaluating just compensation.<sup>128</sup> The protection of existing rights in the determination of compensation does not need to stand opposed to the goal of transformation. Both goals should be taken into account in calculating the extent of "just and equitable" compensation.

Pre-constitutional compensation was aimed at placing the individual in the position she would have been in, had the expropriation not occurred. Compensation was interpreted as meaning "full compensation", and market value was the measure used to determine this compensation. But market value is not unproblematic. The fiction that the "willing-buyer willing-seller" system creates, and the supposed objectivity of the methods employed could fool a person into accepting that the system is objective. However, as has been shown above, when valuers and judges as super valuers make choices on what factors, properties or figures to include in the determination of compensation, they often do so with the aim of protecting a substantive property interest. In pre-constitutional case law the aim was often to compensate the owner fully, thereby choosing to protect ownership. In pre-constitutional expropriation law this was acceptable.

This, of course, places not only a stringent duty on the valuers that are called as expert witnesses in cases to determine value, but it also requires a judge to consciously analyse the valuation reports in front of her. No method, no matter how reasonable it seems to be, can be utterly conclusive. The courts, however, must yet

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*Sup Ct Rev* 95 examines three cases where World War II regulations dealt with the issue of just compensation. These cases did not make it clear whether the issue of just compensation was a legislative judgment. Dunham restricts the question of legislative control over just compensation in the constitutional context to the minimum amount payable, since the legislature seems to have the power to order that more than just compensation be paid.

<sup>128</sup> Serkin 2004-2005 *NWULR* 677.

consider the best evidence presented and arrive at a conclusion based on it. The courts have acknowledged this much,<sup>129</sup> and often accept market value to be a mere estimate.

But the *Constitution* as a single system of law now requires a balancing of the interest of the individual with that of the public. In that sense, we have moved more towards the German position, where the owner's rights are balanced with the obligations that ownership entails in a social context. The *Constitution* requires that a balance be struck between protecting individual rights and advancing societal goals, especially in the context of land reform, which is specifically provided for in section 25. This means that a compensation practice that favours the individual owner can no longer be the norm, and a re-consideration of how compensation should be calculated is needed.

What is important is that judges as valuers should realise that their decisions have implications for the property order. Choosing to ignore the contexts of the expropriation (such as land reform) means that the judge wilfully disregards the transformation oriented goals of the *Constitution*. Emphasis on full compensation at market value makes a definite choice for the protection of property that may be at the cost of the public. It might not balance the interest of the owner against the public, as the *Constitution* requires. Judges as valuers should constantly be mindful what interest they are protecting when they determine compensation. If judges are restricting government power, the focus will be on compensating the individual as fully as possible. This means employing strict market value compensation. This might be "just and equitable" in certain circumstances, but would probably not be so in land reform cases, where the implementation of legislation promulgated specifically in terms of section 25 of the *Constitution* should not be hampered by

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<sup>129</sup> *Sher v Administrator, Transvaal* 1990 4 SA 545 (A) 565; *Dormehl v Gemeenskapsontwikkelingsraad* 1979 1 SA 900 (T) 909G-H.

an insistence on the award of full market value compensation, as happened in *Mhlanganisweni Community v Minister of Rural Development and Land Reform*.<sup>130</sup>

So what is the solution? What are the tools that a judge must use to arrive at "just and equitable" compensation, if the only quantifiable factor is market value? The two-step approach that was developed in the courts is not ideal. A better starting point would be accepting that the goal is not "market value" but "just and equitable" compensation. This would enable a judge at times to consider including evidence on or considerations such as the economic standing of an owner in determining what an equitable amount of compensation would be. It might encourage a judge to consider discounting compensation, if the goal that the expropriating legislation wishes to achieve requires the owner's rights to give way to the bigger public purpose. In short: it requires a contextual determination of compensation that aims at the "just and equitable" rather than at market value compensation. The use of more rigid or precise tools is not feasible and would hamper a contextual determination of just and equitable compensation. The tool we have is the *Constitution*, which tells us where we ought to go. It is up to valuers to get us there.

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<sup>130</sup> *Mhlanganisweni Community v Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 April 2012).

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**LIST OF ABBREVIATIONS**

BPLD	Butterworths Property Law Digest
EPLJ	Environmental and Planning Law Journal
Harv L Rev	Harvard Law Review
NWULR	Northwestern University Law Review
SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review
Sup Ct Rev	Supreme Court Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Va L Rev	Virginia Law Review

## VALUATION IN THE CONSTITUTIONAL ERA

WJ du Plessis \*

### SUMMARY

The Constitution brought about a new compensation regime for expropriations. Compensation for expropriation must now be "just and equitable". Whereas before the Constitution came into force market value played a central role in compensation for expropriation, market value is now only one factor or aspect of compensation that the court needs to take into account. Yet we find that courts tend to focus on market value and to still employ the valuation methods used to calculate market value. This article argues that the methods used to calculate the market value, once thought to be objective, are not as objective as was believed. While it is impossible to give judges specific tools for the assessment of market value, this article provides guidelines on how the calculation of compensation should be approached.

**KEYWORDS:** property clause; expropriation; compensation; valuation; market value.

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