

Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation? *Haffajee NO and Others v Ethekwini Municipality and Others*

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1. INTRODUCTION

Section 25 of the Constitution of the Republic of South Africa,¹ which is commonly referred to as the property clause, aims to protect the property rights of landowners whilst at the same time looking to safeguard the interests of society.² Section 25 is said to contain a negative property guarantee in that it safeguards the individual property rights of the landowner on one hand whilst allowing state interference with the very same property rights on the other.³ It is not only about property rights but about land rights as well.⁴ Section 25 specifically provides for the taking away of property from the owner if it is for a public purpose or in the public interest subject to the owner being compensated (expropriation).⁵

The Constitution authorises expropriations in lieu of the state's obligation to redress land issues brought about by past racial discrimination as well as utilising the said property for the benefit of the public at large.⁶ Compensation is central to the entire expropriation process.⁷ The confusion surrounding the calculation of compensation against the backdrop of the "willing buyer – willing seller" principle has been blamed largely for the sporadic rate of land redistribution and there

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¹ 1996.

² Mostert, Badenhorst, Pienaar et al. *The Principles of the Law of Property in South Africa* (2010) 126.

³ Van der Walt and Pienaar *Introduction to the Law of Property* 6 ed (2009) 307. Section 25(1) provides that South Africans may not be deprived of property "except in terms of the law of general application". The various pieces of legislation passed by Parliament such as the Constitution and the Expropriation Act of 1975 are laws of general application which provide for a due process to be followed when depriving a landowner of their land rights.

⁴ Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378.

⁵ See S 25(2) of the Constitution which provides that:

"Property may be expropriated only in terms of law of general application –

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

(b) subject to 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."

⁶ Section 25(4)(a) of the Constitution provides that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to South Africa's natural resources."

⁷ Section 25(2)(b) of the Constitution. See Zimmerman "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" 2005 *SALJ* 378 where the author states that the calculation of compensation can either make or break the expropriation-driven programme of land reform.

have been calls in recent times for an amendment to the Constitution as well as to the Expropriation Act.⁸ The Constitution, it must be said, clearly states that any expropriation of land is subject to just and equitable compensation being paid to the landowner.⁹ At the outset it is important to distinguish between two contentious aspects of compensation for expropriation, namely the determination of the amount of compensation and the manner and time of payment. Despite the former coming under constitutional scrutiny in recent times, this note touches on determination of compensation in a fleeting manner with the focus being on the timing of payment where until recently, there have been very few guidelines on the subject. The note deals with the crucial issue of whether payment of compensation can take place after expropriation. The landmark case of *Haffjee NO and Others v Ethekwini Municipality and Others*¹⁰ dealt with this very same matter and the Constitutional Court had to decide on whether the provisions of the Section 25 of the Constitution¹¹ require that the amount, time and manner of payment of compensation must always be determined before expropriation.

Facts

The salient facts in *Haffjee*¹² were that the trustees of the YGM Haffjee Family Trust (Trust) rejected an offer made by the eThekweni Municipality (Municipality) to expropriate the Haffjee property at a market related price. The Municipality had some years back designated the said property for the implementation of a canalisation programme, which was crucial to reducing the effects of flooding to the Umgeni area. The expropriation notice was sent to the Trust by

⁸ See article titled “ Expropriation Act Must Be Amended, says DG” (accessed 23 -05- 2012) at www.sabinetlaw.co.za/land-reform/articles. The Director-General of Rural Development and Land Reform, Mdu Shabane suggested at a parliamentary portfolio committee meeting that the Expropriation Act of 1975 must be amended so that “it can be used as an effective tool for reigning in land prices”. The committee chair, Stone Sizane called for the amendment of the Constitution so as to “enshrine land a socio-economic right”. He also suggested that the process of redistribution should be informed by land use.

⁹ See S 25(3) of the Constitution which provides that:

“The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the 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.

¹⁰ 2011 6 SA 134 (CC)

¹¹ Act 105 of 1996

¹² 2011 6 SA 134 (CC).

registered post on the 30th June 2005. It set out the date of expropriation to be the 31st July 2005. Initially, the notice contained no offer of compensation but on the 31st July 2006, the Municipality offered eighty percent of the assessed market value of the said property as compensation. The offer was rejected by the Trust.

Eviction proceedings were instituted by the Municipality on the 11th September 2006 and some time later the Municipality offered the full assessed market value amount which was once again rejected by the Trust. On rejection of the offer, the Trust was evicted from the property without being compensated for the property. The Trust applied to the Constitutional Court for leave to appeal against the eviction order granted by the Kwazulu-Natal High Court, Durban, following the expropriation of the property. Their action stemmed from an unsuccessful challenge in the Kwazulu-Natal High Court on the issue of pre-determined compensation being mandatory in expropriation proceedings. The Trust was unsuccessful in their leave to appeal application both in the High Court and the Supreme Court of Appeal. It was left to the Constitutional Court to decide on the matter.

The Constitutional Court had to decide whether the fixing of compensation was a pre-condition for expropriation. The Trust challenged several provisions of the Expropriation Act which allowed for expropriation to take place before the amount of compensation, and the time and manner of its payment are determined. The Trust argued that these provisions of the Expropriation Act are in direct conflict with Section 25 of the Constitution, which required a determination of compensation as a constitutional prerequisite for expropriation. In a nutshell, the court had to decide whether Section 25(2)(b) of the Constitution required that the amount of compensation and the time and manner of payment must always be determined before expropriation.

2. FINDINGS OF THE CONSTITUTIONAL COURT

2.1 The Determination of Compensation under Section 12 of the Expropriation Act

The Expropriation Act reads as follows:

- “ (1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed-
 - (a) in the case of any property other than a right, excepting a registered right to

- minerals, the aggregate of-
- (i) 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; and
 - (ii) an amount to make good any actual financial loss caused by the expropriation; and
- [Para. (a) amended by s. 11 (a) of Act 45 of 1992.]
- (b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:
- [Para. (b) substituted by s. 11 (b) of Act 45 of 1992.]
- Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined-
- (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or
 - (bb) in any other suitable manner.
- [Sub-s. (1) amended by s. 11 (c) of Act 45 of 1992.]”

Section 12(1) (a) of the Expropriation Act looks at the determination of the amount of compensation based on factors such as the aggregate of the market value and actual financial loss whereas Section 12(1)(b) focuses on compensation only in respect of actual loss suffered where some right in land has been expropriated.¹³ Section 25(3) of the Constitution requires that compensation must be “just and equitable” and lists factors such as the market value, use of the property, history, reason for expropriation and the extent of state investment as crucial when determining the amount of compensation.

The Trust argued that Section 12(1) of the Expropriation Act does not enable an award in respect of compensation that is just and equitable as contemplated by Section 25 of the Constitution. It was further argued that a determination of compensation under Section 12 was in direct conflict with Section 25(3) of the Constitution. The contention of the Trust that Section 25(2)(b) of the Constitution which reads, “subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to [...] or decided or approved by a court” clearly required that the amount of compensation must be determined before expropriation took place. In respect of the Trust’s broad constitutional challenge Froneman J went on to say that it must fail as the Trust’s challenge was restricted to unconstitutionality of Section 12 of the Expropriation Act, which they averred was, in conflict with Section 25(3) of the Constitution. The Court was of the view that the Trust had belatedly introduced this ground of alleged

¹³ See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) at para 46-53 where the court held that Section 12(1) of the Expropriation Act “must be applied in conformity with the fundamental values of the Constitution whenever possible.”

constitutional invalidity, which had not been introduced in the High Court or the Supreme Court of Appeal. The Constitutional Court decided not to entertain the challenge for this reason coupled with the fact that the amount of compensation never formed part of the dispute between the parties. It is unfortunate that the Trust did not raise their constitutional challenge at the outset of proceedings as the constitutionality of the Expropriation Act remains an important issue that has not really been settled by our Courts.¹⁴

2.2 A Constitutional Analysis of Section 25

The Constitutional Court had to decide whether the provisions of Section 25(2) (b) of the Constitution require that the amount of compensation and the time and manner of payment must always be determined by agreement or by the Court before expropriation under Section 25(2). In deciding on the issue the Court applied the constitutional analysis of Section 25 as set out in the case of *First National Bank*¹⁵ and arrived at the following conclusions. The property in question fell within the ambit of Section 25(1) and the expropriation was valid and for a public purpose or in the public interest as contemplated by Section 25(2)(a). In determining whether the expropriation fell within the requirements of Section 25(2)(b), the Court looked at the general approach to the purpose and meaning of Section 25 as set out in *First National Bank*. The Court stressed that Sections 25(4)-(9) underlined the need for transformation and that, “the protection of property as an individual right is not absolute but subject to societal considerations”.¹⁶ The Court held that the wording of Section 25(2)(b) clearly indicated that the “determination of compensation is a condition, not a condition precedent, for expropriation.”¹⁷ The Court held that the words, “just and equitable” set out in Section 25(3) of the Constitution provided a sound reason for looking at a flexible approach to compensation for expropriation. The Court had to weigh two scenarios: where expropriation without the determination of compensation may be “unjust” especially where the property owner may lose their homes and where the insistence of the determination of compensation before expropriation may be “inequitable” especially where urgent expropriations in the wake of natural disasters may need to occur. The Court held that in

¹⁴ See Du Toit above where the Court held that the question of the relationship between Section 12 of the Expropriation Act and Section 25(3) of the Constitution should be reserved for another day.

¹⁵ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 4 SA 768 (CC) at para 46.

¹⁶ Haffajee 142.

¹⁷ Haffajee 143.

both scenarios there were sufficient safeguards in the form of Section 26(3) and Section 34 of the Constitution to ensure proper relief. The Court held that determining compensation as a pre-requisite for expropriation is not compatible with the Constitution and would burden the State unduly.

2.3 A Comparative Analysis

The Court indicated that as a way forward it had sought answers from foreign jurisdictions but they had proven to be inconclusive.¹⁸ Through the Venice Commission¹⁹ of which the Court is a member an investigation into the issue of compensation and expropriation was conducted. It emerged that the Portuguese, Spanish and Croatian Constitutions were silent on the timing of payment of compensation.²⁰ The Georgian as well as Estonian Constitutions referred to “fair, appropriate and fair” compensation but also failed to discuss the timing of compensation. In the same light the Nigerian, Ghanaian and Namibian Constitutions all referred to “prompt” and “just” payment of compensation without going into the timing of payment.²¹ The Court mentioned that the research indicated that some foreign jurisdictions required that the determination of compensation should precede expropriation whilst others do not.²² It must be said that the Court chose only to list those jurisdictions which are silent on the timing of payment of compensation, which merely highlights the problem at hand rather than provide solutions. An in-depth analysis of how the various jurisdictions interpreted the relevant clauses may have resulted in a more functional comparative study.²³ From the comparative study, it is clear that most jurisdictions require prompt payment of compensation where expropriation precedes the determination of compensation.

¹⁸ Hafajee 143.

¹⁹ The Commission comprises 46 member states of the Council of Europe and 15 other countries from Africa, America, Asia and Europe.

²⁰ Hafajee 143.

²¹ Ibid.

²² Ibid.

²³ See Boggenpoel “Compliance with Section 25(2) of the constitution: When should compensation for expropriation be determined?” 2012 *SALJ* 605 where the author indicates that the type of

comparative analysis that may have been useful is one where the jurisdictions are silent on the timing of compensation and an assessment of how these jurisdictions deal with the issue at hand. The author also suggests that the Malaysian position could have been a useful study as Malaysia has property legislation that is similar to the South African Expropriation Act. The author also felt that the comparative analysis would have been more beneficial if the Court look at the specified jurisdictions against the backdrop of when compensation should be paid rather than when compensation should be determined. This approach may have yielded better results.

3. CRITICAL MATTERS ARISING FROM *HAFFAJEE*

Section 25 of the Constitution clearly provides for the protection of property rights but allows for ownership rights to be limited where such limitation would be in the public interest or for a public purpose. An important requirement of this limitation is the payment of compensation for expropriation. The Expropriation Act²⁴ as well as the Constitution²⁵ makes payment of compensation for expropriation peremptory. Haffajee's case recognised the important constitutional obligation to pay compensation for lawful expropriation. However, the court in deciding on the issue of the time and manner of payment of compensation felt that a rigid application of the determination of compensation prior to the expropriation process would unduly burden the State.

Froneman J, on behalf of the majority court, clearly indicated that "the text of Section 25 does not exclude an interpretation that compensation must precede expropriation."²⁶ That being said Section 25 of the Constitution also does not exclude an interpretation that allows for expropriation as a condition preceding a valid expropriation. The court, whilst recognising that expropriation without determination of compensation may be unjust and that the determination of compensation after expropriation may be inequitable, chose to view these conflicting factual situations in light of the "socioeconomic developmental purposes" of the Constitution.²⁷ It is clear that the court had to consider the "historical context in which the property clause came into existence" and therefore leaned in favour of an interpretation that would serve the interests of the public and one that would not unduly frustrate the process of equitable redress and transformation. Haffajee's case correctly points out that an inflexible application of the requirement of compensation in lieu of the factors set out in Section 25(3) of the Constitution would make it difficult to determine just and equitable compensation before expropriation. A determination of compensation after expropriation would be just and equitable and in line with Section 25(3) of the Constitution especially in circumstances where a property owner refuses to accept a reasonable offer or seeks to deliberately frustrate the expropriation process.

²⁴ 63 of 1965

²⁵ Section 25(3)

²⁶ Haffajee 143.

²⁷ Haffajee 144.

4. THE HAFFAJEE CASE IN A BROADER PERSPECTIVE

Haffajee's case correctly demonstrated that a landowner cannot frustrate the process of expropriation by refusing to accept a reasonable offer of compensation for the said property. The case highlights a departure from the willing-buyer willing-seller principle that has sparked controversy over the years and it can now be accepted that the State may expropriate property even when the seller is refusing to accept a reasonable offer of compensation. However, in exceptional cases where the determination of compensation takes place after expropriation, it must be done as soon as reasonably possible in accordance with Section 25(3). This directive, stipulating that the landowner must be compensated as soon as reasonably possible after expropriation could lead to numerous difficulties especially on the part of the landowner. Even though the Court intended to create a safety net in terms of preventing long delays in respect of payment of compensation after expropriation, there exists the possibility of the landowner being frustrated by delays. The Court could have been more specific in terms of the time-frame for compensation or could have gone on to define "as soon as reasonably possible".

Despite the landowner being guaranteed access to Courts in terms of Section 34 of the Constitution and just and equitable outcomes in terms of Section 25(3) and Section 26 (3) of the Constitution, post-expropriation compensation could unduly burden the landowner in terms of financial difficulties and exorbitant litigation costs that may arise if payment of compensation is unduly delayed.

The Constitutional Court also missed an ideal opportunity in dealing with the discrepancies that exist between Section 12 of the Expropriation Act and Section 25(3) of the Constitution. This discrepancy goes to the root of the problem in calculating just and equitable compensation. Section 25(3) of the Constitution sets out a range of factors that must be taken into account when calculating just and equitable compensation and these factors differ markedly from the factors set out in Section 12 of the Expropriation Act which refers to only two factors, market value and actual financial loss.

It is trite law that the provisions of the Constitution are peremptory and that any other pieces of legislation, in this case the Expropriation Act must give effect to the Constitution and be consistent with it. Even though it has been argued that Section 12 can be reconciled with Section 25(3), it appears that the Constitution expressly insists on a different approach to the calculation of compensation where justice and equity are key factors in the calculation test.²⁸ The Expropriation Act appears on the face of it to prefer market value over other important considerations. However, despite *Haffajee* not deeming it necessary to dwell on the relationship between Section 12 and Section 25(3), there is no doubt that the issue will be raised in the not too distant future.

5. CONCLUSION AND WAY FORWARD

On a positive and perhaps heartening note, this landmark decision helps in speeding up of the land reform process and suggests that the calls in the media to amend the Constitution may have been pre-mature. The ruling gives weight to the State's constitutional obligation to redress land inequalities whilst also ensuring that the rights of the landowner are taken into account and safeguarded. The key principle that can be derived from *Haffajee* is that compensation remains a requirement for expropriation but not a prerequisite. The Constitutional Court has clearly emphasised that in most instances compensation will be determined before expropriation but exceptional cases may warrant a deviation from the common practice where compensation is determined after expropriation. In such cases all circumstances must be considered in line with a flexible approach to interpreting and applying Section 25(2)(b). *Haffajee* correctly illustrates that Section 25 must be interpreted and applied against the backdrop of our history, our circumstances and most of all our unique South African roots.

²⁸ See *See Du Toit v Minister of Transport* 2006 (1) SA 297 CC at para 46-53 where the court in the majority held that Section 12(1) of the Expropriation Act "must be applied in conformity with the fundamental values of the Constitution whenever possible." However Langa J in the minority suggests that Section 12 cannot be reconciled with Section 25(3) of the Constitution because the factors in calculating compensation differ markedly. Langa J submits that the Constitution expressly provides for a different approach to the Expropriation Act in terms of calculation of compensation – one which makes justice and equity key factors.