

"PUBLIC PURPOSE OR PUBLIC INTEREST" AND THIRD PARTY TRANSFERS**BV Slade*****SUMMARY**

In this article the difference between public purpose and public interest in section 25(2) of the 1996 *Constitution* is considered. It is generally accepted that public purpose is a narrower category than public interest and that the distinction between public purpose and public interest does not make any practical difference. However, in this contribution it is suggested that the difference between public purpose and public interest makes no practical difference *only* in cases where expropriated property is used by the state for the realisation of a particular purpose.

The difference between public purpose and public interest becomes more important when a particular expropriation also involves a third party transfer, since it indicates the level of scrutiny that the courts should apply in determining the lawfulness of the expropriation. When property is expropriated and transferred to a third party for the realisation of a public purpose, such as building and managing electricity plants, the lawfulness of the expropriation is not easily questioned. As such, the application of a rationality test to determine the legitimacy of the expropriation is generally easy to accept. However, this lenient approach cannot be as easily accepted where an expropriation and third party transfer takes place in the public interest. Examples of third party transfers in the public interest include land reform, slum clearance and economic development. In the examples of land reform and slum clearance the expropriation and third party transfer is usually authorised in legislation or, as is the case with land reform in South Africa, the 1996 *Constitution*. Because (as in the land reform example) the expropriation and third party transfer is authorised by the

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Constitution and regulated by legislation, the application of a rationality test to determine the legitimacy is acceptable.

However, the application of a rationality test where property is expropriated and transferred to third parties for broader purposes such as economic development is problematic, especially if there is no specific legislation authorising such expropriation. Although an expropriation involving a third party transfer for purposes of economic development may well be in the public interest because it can lead to the creation of employment opportunities, it is argued that in the absence of specific legislation that authorises both the expropriation and the transfer of the property to third parties, the justification for the expropriation and the transfer is not entirely clear. Therefore, in the absence of a clear legislative scheme authorising the expropriation and transfer of property to third parties for the purpose of economic development, which can be said to fall within a very broad interpretation of the public interest requirement in section 25(2), the courts should apply a stricter scrutiny in evaluating its legitimacy.

KEYWORDS: Constitution; Economic development; Expropriation; Property; Public interest; Public purpose; Third party transfers