WHEN DOES STATE INTERFERENCE WITH PROPERTY (NOW) AMOUNT TO EXPROPRIATION? AN ANALYSIS OF THE Agri SA COURT’S STATE ACQUISITION REQUIREMENT (PART II)*

EJ Marais**

SUMMARY

Section 25 of the Constitution provides two ways in which the state may interfere with property rights, namely deprivation (section 25(1)) and expropriation (section 25(2)). As only the latter requires compensation, there is an incentive for property holders to label any infringement with their property as expropriation in the hope of being compensated for their losses. It is therefore essential to have a principled distinction between deprivation and expropriation, especially given the danger that uncertainty in this regard can hold for legitimate land reform initiatives, which often entail severe limitations on property.

This contribution attends to Agri South Africa v Minister for Minerals and Energy 2013 4 SA 1 (CC), where the Constitutional Court recently revisited this distinction and held that the distinguishing feature of expropriation is that it entails state acquisition of property. Without state acquisition the interference can (at most) amount to deprivation. Unfortunately, viewing state acquisition as the "key requirement" for expropriation is problematic. Firstly, it ignores the true nature of this feature in that it is only a consequence of a valid expropriation rather than a pre-requisite for it – at least in terms of pre-constitutional law. It is therefore inaccurate, concerning both pre- and post-constitutional expropriation case law, to regard acquisition as an indispensable requirement for expropriation. Secondly, limiting the constitutional property inquiry to whether or not the state acquired property appears inadequate as a means of solving difficult cases where the state acquires property pursuant to

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** Ernst Jacobus Marais. BA LLB LLD (Stellenbosch University). Post-doctoral research fellow, University of Cape Town. E-mail: ejmarais@uj.ac.za. I would like to thank Profs André van der Walt, Hanri Mostert and Brendan Edgeworth for invaluable discussions and comments concerning various aspects of both parts of this article. I would also like to thank the two anonymous peer reviewers for their helpful comments and suggestions. Any remaining errors are my own.
infringements like taxation and criminal forfeiture. As both these examples result in state acquisition, there must be another explanation of why they do not amount to expropriation.

**KEYWORDS:** expropriation; deprivation; section 25; property clause; state acquisition; constitutional property law; *Agri SA* case.