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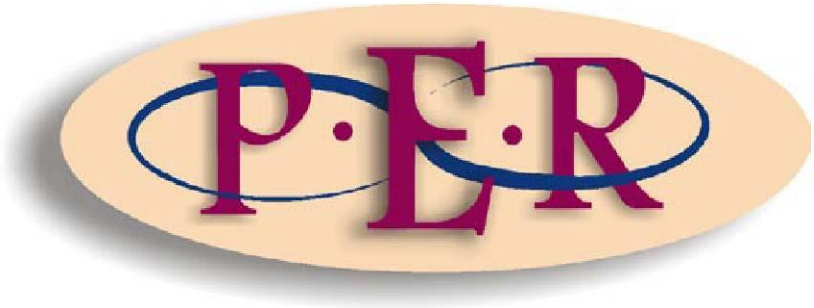
ISSN 1727-3781



2014 VOLUME 17 No 1

http://dx.doi.org/10.4314/pelj.v17i1.04

"PUBLIC PURPOSE OR PUBLIC INTEREST" AND THIRD PARTY TRANSFERS

BV Slade*

1 Introduction

The Fifth Amendment read with the Fourteenth Amendment to the *Constitution of the United States* of 1787 (hereafter *US Constitution*) embodies the property clause, which consists of two parts, namely the "Due Process Clause" and the "Takings Clause". The Due Process Clause provides that no one may be deprived of property without due process of law, while the Takings Clause provides that property shall not be taken for public use without just compensation.[1] The Takings Clause has two requirements that apply to both formal takings and regulatory takings.[2] The taking has to be for a public use and just compensation must be paid.

Much has been written in academic literature about the understanding of the public use requirement in the *US Constitution*, especially with regard to third party transfer cases such as *Berman v Parker*,[3] *Midkiff v Hawaii Housing Authority*[4] and *Kelo v City of New London*.[5] A third party transfer occurs when the state expropriates property

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1 See Van der Walt *Constitutional Property Clauses* 398-399.

2 Formal expropriation or compulsory acquisition is exercised in terms of the power of eminent domain, while regulatory takings come about when a state action in terms of the regulatory police power of the state is in effect regarded as a taking, because it goes too far. Therefore, "taking" in terms of the Fifth Amendment includes the narrower concept of (formal) expropriation as well as the wider category of regulatory takings: Van der Walt *Constitutional Property Clauses* 423, read with *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 415 [9].

3 *Berman v Parker* 348 US 26 (1954).

4 *Midkiff v Hawaii Housing Authority* 267 US 229 (1984).

5 *Kelo v City of New London* 545 US 469 (2005) (hereafter the *Kelo* case). To list but a few of these sources: Berger 1978 *Oregon LR* 203-246; Cohen 2006 *Harv JL & Pub Pol'y* 491-568; Goodin 2007 *NYU LR* 177-208; Mansnerus 1983 *NYU LR* 409-456; Merrill 1986 *Cornell LR* 61-116; Somin 2004 *Mich State LR* 1005-1039; Gray 2007 *Journal of South Pacific Law* 73-88.

from one party and transfers it to a different party and is also known as a private to private transfer.[6] In principle, the public use requirement in terms of the *US Constitution* can be understood in two ways. First, a very literal interpretation would require that the property must be used by the public.[7] A general example would be where property is expropriated in order to build a road.[8] The second, broader understanding of the public use requirement requires the taking to be for a public purpose in the wider sense, meaning that a public advantage or public benefit would justify the taking.[9] It is accepted that the second, broader understanding of the public use requirement currently prevails.[10] In terms of this broad or wider understanding of the public use requirement property may be taken "for future use by the public"[11] or taken and transferred to another private party, provided the taking still satisfies a public purpose.[12] While it has been stated that the government is not allowed to take the property of X to give it to Y,[13] the US Supreme Court usually upholds such takings if they are for a public purpose.[14] Furthermore, the court generally defers to the legislature in condemnation cases.[15]

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6 Gray "Recreational Property" 10.

7 Singer *Introduction to Property* 743; Berger 1978 *Oregon LR* 205; Merrill 1986 *Cornell LR* 67-68. Rubenfield 1993 *Yale LJ* 1077-1163 advocates an extreme version of this narrow interpretation of the public use clause, but this view is not supported by the US Supreme Court or by the majority of academic commentators.

8 Singer *Introduction to Property* 743.

9 Berger 1978 *Oregon LR* 205; Schultz 2006 *UCLA Journal of Environmental Law and Policy* 199.

10 In *Midkiff v Hawaii Housing Authority* 267 US 229 (1984) (hereafter the *Midkiff* case) 244 Justice O'Connor stated that "[t]he [Supreme] Court long ago rejected any literal requirement that condemned property be put into use for the general public". More than two decades later, the US Supreme Court again confirmed in *Kelo* 478 that it embraces "the broader and more natural interpretation of public use as 'public purpose'". See also Merril 1986 *Cornell LR* 67; Schultz 2006 *UCLA Journal of Environmental Law and Policy* 199; Cohen 2006 *Harv JL & Pub Pol'y* 494, 500.

11 Goodin 2007 *NYU LR* 180.

12 Goodin 2007 *NYU LR* 180.

13 See Justice Thomas' dissenting opinion in *Kelo* 510-511 where he states, with reference to *Calder v Bull* 3 Dall US 386 (1798), that it could not have been the constitutional drafter's intention that the taking of property from X to give it to Y would constitute a public use. See further Cohen 2006 *Harv JL & Pub Pol'y* 494.

14 See *Berman v Parker* 348 US 26 (1954); Singer *Introduction to Property* 743.

15 In *Midkiff* 241 the US Supreme Court stated that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause". See Merrill 1986 *Cornell LR* 63; Goodin 2007 *NYU LR* 180.

Section 25(2) of the *Constitution of the Republic of South Africa,* 1996, (hereafter 1996 *Constitution*) states that property may be expropriated in terms of a law of general application only for a public purpose or in the public interest and that compensation must be paid. Numerous court cases have surfaced recently in South Africa that touch upon certain interesting aspects of the public purpose or public interest requirement.[16] Some of these issues have also been addressed in the literature.[17] While South African courts do not clearly distinguish between the public purpose and public interest requirement, it is said that "public purpose" is a narrower concept than "public interest."[18] It was recently confirmed that the public purpose or public interest requirement serves as the justification for an expropriation.[19] Since an expropriation is justified by either the public purpose *or* public interest, the meaning that can possibly be attributed to the different requirements may become more important.

Compared to the vast amount of literature on the meaning, interpretation and application of the public use requirement in US law in relation to third party transfers, the literature in South Africa on the public purpose or public interest requirement and third party transfers is limited to a general discussion in the

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16 On the less invasive means argument, see *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2010 ZAGPPHC 154; *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2011 ZASCA 246; *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality* 2010 ZAFSHC 11 (hereafter the *Bartsch* case). On the re-transfer of property on the non-realisation of the public purpose, see *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) (hereafter the *Harvey* case). On third party transfers for economic development see *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2009 5 SA 661 (SE) (hereafter the *Offit (SE)* case); *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2010 4 SA 242 (SCA) (hereafter the *Offit (SCA)* case); *Bartsch*.

17 Van der Walt *Constitutional Property Law* 458-503; Du Plessis 2011 *TSAR* 579-592; Van der Walt and Slade 2012 *SALJ* 219-235; Sonnekus and Pleysier 2011 *TSAR* 601-625; Slade 2013 *TSAR* 199-216.

18 In *Offit (SE)*, the high court stated that "[i]t is clear that an expropriation for a public purpose which would also benefit a third party would be valid under the requirement of 'public purposes'. An expropriation that would benefit a third party would also be valid if it is in the public interest, even if it cannot be said to be for a public purpose". If an expropriation that also benefits a third party is valid if it is in the public interest even though it is not for a public purpose, the only logical conclusion is that public interest is a broader category than public purpose. See the argument below concerning the relevance of the difference.

19 *Harvey* para 82.

standard works on property law.[20] The relatively sparse amount of literature on the public purpose or public interest requirement with regard to third party transfers outside the area of land reform is probably due to the limited number of court decisions on this issue compared to the case law from the US, which is also more complex than the South African decisions. The cases where the courts considered whether the expropriation and third party transfer for purposes of economic development is for a public purpose or in the public interest includes the high court and Supreme Court of Appeal decisions in *Offit* as well as *Bartsch* and *Harvey.*[21] However, it was only in the high court decision in *Offit* that the applicant specifically argued that the intended expropriation and transfer of their property to a different private party for economic development purposes was not for a valid public purpose or in the public interest.[22] Although the court discussed the justifiability of third party transfers in South African law with reference to foreign decisions such as *Kelo*, there was no live dispute between the parties since the respondents that wanted to expropriate the property did not have the authority to expropriate. In both *Bartsh* and *Harvey* the issue of third party transfers was addressed ancillary to the main issues raised.[23]

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20 Van der Walt *Constitutional Property Law* 458-503; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 566-568.

21 The question whether the expropriation of a lease over immovable property for economic development purposes (that does not involve a third party transfer) would be for a public purpose or in the public interest came up in *eThekwini Municipality v Sotirios Spetsiotis* 2009 ZAKZDHC 51.

22 *Offit (SE).* On appeal in *Offit (SCA),* the applicant raised three arguments regarding the unlawfulness of the expropriation. Firstly, the applicant argued that the operator permit that allowed the Coega Development Corporation to operate in the Coega Industrial Development Zone was unlawfully issued and extended. Secondly, the applicant argued that the expropriation fell outside the ambit of the authorising legislation. The third argument was that any expropriation of his land would be in conflict with his right to just administrative action. The Constitutional Court (*Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC)) directed the parties to address the following issues: whether the applicants were deprived of their property and if so, by whom, and what would the appropriate relief be: Constitutional Court 2010 www.constitutionalcourt.org.za/Archimages/15016.PDF.

23 In *Bartsch* the applicant argued that the expropriation of his entire parcel of property was unlawful, since strictly speaking only part of the property was required for the primary purpose of the expropriation, namely building a road. There was evidence that the remainder of the property would be turned over to another party for the purpose of building a shopping complex. In *Harvey*, the court had to consider whether or not it was competent to order the re-transfer of expropriated property to the previous owner if the purpose for which the property was originally

The 1996 *Constitution* does not define what is meant by "public purpose," but the *Expropriation Act* 63 of 1975 (hereafter the 1975 *Expropriation Act*) states that "public purpose includes any purpose connected with the administration of the provisions of any law by an organ of state."[24] The 1996 *Constitution* does not define public interest either, but in section 25(4)(a) it states that "the public interest includes the nation's commitment to land reform, and to bring about the equitable access to all South Africa's natural resources". The *Draft Expropriation Bill*[25] defines both the public purpose and the public interest. Unfortunately, the definition of the public purpose is the same as the definition in the 1975 *Expropriation Act* and the definition of the public interest corresponds exactly with section 25(4)(a) of the 1996 *Constitution*.[26] As a result, no clearer indication is given as to what would qualify as an expropriation for a public purpose or an expropriation in the public interest, especially when it involves a third party transfer.

This article firstly considers the phrase "public purpose" in the context of case law that predates the 1996 *Constitution*. Once the public purpose requirement is understood in terms of pre-1996 law, it might be easier to understand the meaning of the "public purpose or public interest" requirement in section 25(2) of the 1996 *Constitution*. This article also considers the important question concerning the extent to which the two phrases are able to justify an expropriation that involves a third party transfer. It is accepted that property may not be expropriated for the sole

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expropriated could not be realised. When the original purpose was abandoned the municipality awarded the property, on tender, to a third party for the purpose of establishing a medium-density residential area. Therefore, when the court addressed the issue of re-transfer it also considered if an expropriation that benefits a third party because the property is transferred to that party for economic development could be for a public purpose if the development did not form part of a land reform programme.

24 S 1 of the *Expropriation Act* 63 of 1975.

25 GN 234 in GG 36269 of 20 March 2013.

26 This position is similar to the position in the *Expropriation Bill* of 2008 [B16-2008] (GN 440 in GG 30963 of 11 April 2008). The *Expropriation Bill* of 2008, which was tabled in parliament on 16 April 2008, was to replace the 1975 *Expropriation Act,* but it was so heavily criticised that the government decided to withdraw it. See Van der Walt 2008 *ASSAL* 231-240; Pienaar 2009 *TSAR* 344-352; Du Plessis 2011 *Stell LR* 352-275.

benefit of third parties.[27] However, in certain instances the state is justified to transfer expropriated property to third parties, and these expropriations may be for a valid public purpose or in the public interest. Whether the expropriation and third party transfer is classified as being either for a public purpose or in the public interest may play an important role in signalling the level of scrutiny that the courts should apply in their evaluation of whether the expropriation is justified or not.

2 Public purpose before the *Interim Constitution* of 1993

2.1 Introduction

Before South Africa became a Union in 1910, the two colonies (the Cape Colony and the Natal Colony) and the two republics (the South African Republic and the Republic of the Orange Free State) each had their own expropriation legislation.[28] When the Union of South Africa was established in 1910 the expropriation legislation that applied in the different areas remained in force. It is said that English law had a notable impact on the development of South African expropriation law, especially in the two former British colonies,[29] and that the influence of English law continued even after the Union of South Africa was established.[30] It has also been stated that the English law of expropriation, or compulsory acquisition as it is more commonly known in English law jurisdictions, is a highly practical subject and more attention is paid to the payment of compensation than the public purpose requirement.[31] This is evident from the general expropriation acts that were applicable in the various jurisdictions in Southern Africa, such as the *Cape Lands and Arbitration Clauses Act* 6

27 See Gray and Gray *Elements of Land Law* 1388-1389; Gray "Recreational Property" 10.
28 See Gildenhuys *Onteieningsreg* 39-43; Davis *Comparative Study* 16-20.
29 Davis *Comparative Study* 13. See generally Gildenhuys *Onteieningsreg* 39-43.
30 Davis *Comparative Study* 14; Gildenhuys *Onteieningsreg* 33.
31 Taggart "Expropriation, Public Purpose and the Constitution" 91.

of 1882[32] and the *Natal Lands Clauses and Consolidation Law* of 1872.[33] These acts did not confer expropriation powers but regulated the expropriation process and contained extensive provisions regarding the calculation of compensation.

In accordance with the principle of parliamentary supremacy, the notion of the public purpose served by a compulsory acquisition is established during debates in parliament and not in the courts.[34] In this regard the legislature indicates the purposes for which the property may be taken. Therefore, even before the Union of South Africa was established, specific legislation was enacted by the legislature to expropriate property for a specific public purpose, such as the construction of railway lines.[35] For instance, the *Cape Act* 16 of 1833 authorised a company, The Cape Central Railways, to construct a railway line from Worcester to Roodewal via Robertson and to use expropriation powers to construct the railway line.[36]

As a result of the influence of English law, parliament promulgated legislation specifically aimed at expropriating property for a specific public purpose. For this reason, it is arguable that there was no need for the acts that authorised the expropriation of property for these purposes to refer to a general public purpose requirement. The adoption of the principle of parliamentary supremacy and the influence of English law on the expropriation law of South Africa also meant that South African courts were rather deferential to the decisions of parliament. However, now that parliamentary supremacy has been replaced by constitutional supremacy the courts may no longer be able to continue applying a mere rationality test when considering the public purpose requirement. The exact meaning of phrases like

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32 This Act also provided that disputes concerning the calculation of compensation could be settled by arbitration and therefore contained wide-ranging arbitration provisions. See Gildenhuys *Onteieningsreg* 40.

33 This Act was heavily influenced by the English *Land Clauses Consolidation Act* 16 of 1845. See Gildenhuys *Onteieningsreg* 40; Davis *Comparative Study* 16.

34 Allen *Right to Property* 201.

35 See Jacobs *Law of Expropriation* 3.

36 Similarly, in the Orange Free State the *Railway Expropriation of Lands Ordinance* 46 of 1903 was promulgated to specifically allow for the expropriation of the property for the construction of railway lines. See Jacobs *Law of Expropriation* 4-5; Gildenhuys *Onteieningsreg* 39-40, 43.

"public purpose" and "public interest" therefore becomes more important than it used to be.

2.2 Public purpose before the 1965 Expropriation Act

The first general and comprehensive expropriation act applicable throughout the Republic of South Africa, namely the *Expropriation Act* 55 of 1965 (hereafter 1965 *Expropriation Act*), required an expropriation to be for a public purpose. This Act did not define public purpose and it was up to the courts to give meaning to this phrase. In *Fourie v Minister van Lande*,[37] an important decision that specifically dealt with the public purpose requirement in terms of the 1965 *Expropriation Act*, the court accepted the interpretation attributed to this phrase in earlier decisions. The earlier decisions referred to include *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*,[38] *Minister of Lands v Rudolph*,[39] *African Farms and Townships Ltd v Cape Town Municipality*[40] and *Slabbert v Minister van Lande*.[41]

Both *Rondebosch* and *Rudolph* dealt with the interpretation of the phrase "public purpose," but not with reference to expropriation legislation or expropriation proceedings. In *Rondebosch* the court had to interpret the phrase "public purpose" to determine if the respondent was exempt from paying municipal tax in terms of the *Municipal Act* 45 of 1882. The Appellate Division (as it was then known) stated that the word "public" is one of wide significance, despite its common origin.[42] For instance, in the broad sense "public" can include things that affect or pertain to the whole public or a local community, such as public opinion, public place or hall. In the narrower sense it may not include things that affect or pertain to the public, but only

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37 *Fourie v Minister van Lande* 1970 4 SA 165 (O) (hereafter the *Fourie* case).

38 *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271 (hereafter the *Rondebosch* case).

39 *Minister of Lands v Rudolph* 1940 SR 126 (hereafter the *Rudolph* case).

40 *African Farms and Townships Ltd v Cape Town Municipality* 1961 3 SA 392 (C) (hereafter the *African Farms* case).

41 *Slabbert v Minister van Lande* 1963 3 SA 620 (T) (hereafter the *Slabbert* case).

42 *Rondebosch* 283.

things related to the state, such as public revenue and public lands. Therefore, public purpose can mean all purposes benefitting the public in contradistinction to private individuals, or it can mean only purposes that relate to the state, which the court termed "government purposes". The court effectively distinguished between a narrow and a broad meaning of the phrase "public purpose" and although the court interpreted the phrase narrowly in the specific context, subsequent cases acknowledged and applied the distinction between the broad and narrow meaning of the phrase "public purpose" as it was described in this case.[43] The distinction between the broad and narrow meaning of the public purpose phrase as explained by the court in *Rondebosch* was accepted in the later decision of *Rudolph*,[44] *African Farms and Townships*[45] and *Slabbert*.

Slabbert dealt with the *Transvaal Expropriation of Land and Arbitration Clauses Proclamation* 5 of 1902, making this the first decision where the phrase "public purpose" was interpreted specifically in terms of expropriation legislation.[46] In this decision the applicant's property was expropriated to provide better security and

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43 Mostert *Constitutional Protection and Regulation of Property* 235. See also *Slabbert* and *Fourie*.

44 In *Rudolph*, the high court of the then Southern Rhodesia had to decide whether or not the expropriation of a right of way was for a public purpose. The court confirmed the position concerning the narrow and broad interpretations of the phrase "public purpose" as explained in *Rondebosch*. Therefore, the court stated that "'public purposes' may either be all purposes that pertain to and benefit the public in contradistinction to private individuals or they may be more restricted purposes relating to the State": *Rudolph* 129.

45 In *African Farms* the court accepted that the phrase "public purpose," as discussed in the *Rondebosch* decision, is one of very wide significance and that public purposes can affect either the whole or the local public. In this decision the court held that expropriation of the applicant's property for purposes of implementing a town-planning scheme, which included the transfer of a section of the property to a private party, was legitimate in terms of the over-all purpose of town planning as authorised in the legislation.

46 S 2 of the *Expropriation of Land and Arbitration Clauses Proclamation* 5 of 1902 as amended by s 1 of the *Expropriation Amendment Act* 31 of 1958 states that "[t]he governor may for public purpose acquire by voluntary or compulsory sale any land the property of private persons situated in the Colony. The expression 'public purposes' shall include, *without limiting in any manner the general meaning of such expression*:
(1) The construction and maintenance of works for the defence of this Colony and the erection of buildings for the use of any Police or Defence Force therein.
(2) The construction and maintenance of railways, tramways, telegraphs, telephones, public roads, streets…"
The words emphasised words inserted by s 1 of the *Expropriation Amendment Act* 31 of 1958.

privacy to the prime minister. Relying on the decisions in *Rondebosch* and *Rudolph*, the court stated that public purpose can have a broad as well as a narrow meaning and the interpretation would depend on the context of each case. According to the court the safety of the prime minister was a public matter, which means that the improvement of any security measure relating to the safety of the prime minister was also a public matter and that the expropriation of the applicant's property was therefore not for a private or personal purpose. The court found that the public purpose for which the property was expropriated fell within the ambit of what was meant by public purposes in terms of the authorising legislation.

As a result, before the passing of the *1965 Expropriation Act* the public purpose requirement could either be interpreted broadly or narrowly. The broad interpretation would include all things that affect or benefit the public at large, while the narrow interpretation would be limited to government purposes. The decisions discussed above established the principle that the choice between the wide and the narrow interpretation would depend on the legislation involved and the facts of each case. Therefore, it can be deduced that for an expropriation to be justified by its purpose it is not necessarily so that the property has to be used by the state for a purely government purpose, but that the public purpose is also served when the public derives a benefit from the expropriation. Furthermore, on the basis of the *African Farms* decision it is clear that the public purpose requirement does not oblige the expropriating authority to use all of the expropriated property. It can be used by or transferred to third parties.[47] However, whether or not this is justified depends on the specific context of each case.

2.3 The Expropriation Act 55 of 1965

The 1965 *Expropriation Act* was promulgated in an attempt to centralise expropriation by conferring expropriation powers on the minister of lands, who was

[47] See Eisenberg 1995 *SAJHR* 219-220.

forthwith responsible for the expropriation of property on behalf of the national government.[48] In terms of section 2 of the Act the minister of lands may expropriate property for a public purpose and is subject to the payment of compensation. This Act did not define public purpose and it was therefore up to the courts to determine the meaning of this requirement in terms of the Act. In *Fourie* the court had to decide if the expropriation of the applicant's property to enable the Department of Post and Telegram Services to provide housing for its technicians was for a public purpose. The applicant argued that the expropriation of his property was not for a valid public purpose since the provision of housing for the technicians of the department was a private matter. Deciding whether the expropriation was for a valid public purpose or not, the court had recourse to the earlier decisions discussed above. According to the court, the term "public purpose" had been interpreted by courts in terms of previous legislation and that interpretation was still in force. The court held that since the maintenance and expansion of the communication network was not only a government purpose but also a public purpose in terms of the broad understanding of the phrase, the expropriation of the applicant's property to provide housing for the technicians of the department responsible for the expansion and maintenance of the communication network was a public purpose as meant in section 2(1) of the *1965 Expropriation Act*.

The *Fourie* decision is therefore the first decision in which a court interpreted the phrase "public purpose" in terms of a general expropriation act applicable throughout the Republic of South Africa. The court accepted the distinction between the broad and the narrow interpretation of the phrase "public purpose" as established in previous case law. Furthermore, the court held that the broad

48 This Act also gave the administrator of each province and local authorities the power to expropriate property. Since this Act did not repeal all expropriation legislation that existed at the time it was promulgated, other state organs were still able to expropriate property in terms of different legislation. Therefore, expropriation continued to be carried out in terms of different pieces of legislation. See Gildenhuys *Onteieningsreg* 44.

meaning of the public purpose requirement (purposes which affect the whole public) includes the narrow meaning of the public purpose (governmental purposes).

2.4 The Expropriation Act 63 of 1975

Since the 1965 *Expropriation Act* did not repeal all other expropriation legislation, ministers other than the minister of lands were still able to expropriate property in terms of other expropriation legislation that remained in force.[49] This position was untenable[50] and the need arose for a uniform expropriation act that could streamline both the procedure of expropriation and the calculation of compensation.[51] Therefore, the 1975 *Expropriation Act* was promulgated.[52] In terms of section 2(1) of the 1975 *Expropriation Act*, the minister of public works has the power to expropriate immovable and movable property for public purposes. Unlike the 1965 *Expropriation Act*, the 1975 *Expropriation Act* defines public purpose. In terms of section 1 of the 1975 *Expropriation Act*, "'public purposes' includes any purpose connected with the administration of the provisions of any law by an organ of State". It is unclear as to why this vague formulation of the public purpose requirement was included in this Act, but it is possible to argue that since this Act is regarded as the primary act conferring expropriation power and has to be able to justify the expropriation of property for various purposes, the legislature did not want to limit the scope of purposes in the act.

Case law heard in terms of this Act before the commencement of the constitutional era indicates the continued application of the interpretation of the phrase "public purpose" as laid down in previous case law. For instance, in *White Rocks Farm (Pty)*

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49 See Gildenhuys *Onteieningsreg* 44.

50 According to Gildenhuys *Onteieningsreg* 44, this situation was unsatisfactory because the procedures and methods of calculating compensation differed in the various pieces of legislation, which affected legal certainty negatively.

51 Jacobs *Law of Expropriation* 4.

52 Due to initial flaws in the 1975 *Expropriation Act*, it has been subjected to numerous amendments. See Jacobs *Law of Expropriation* 4. The 1975 *Expropriation Act* was substantially amended by the *Expropriation Amendment Act* 45 of 1992.

Ltd v Minister of Community Development,[53] the Minister expropriated the applicant's property in terms of the 1975 *Expropriation Act* for the purpose of establishing a mountain catchment area.[54] The plaintiff argued that the expropriation was not for a public purpose as contemplated in the 1975 *Expropriation Act,* because the establishment of such areas is specifically provided for in the *Mountain Catchment Areas Act* 63 of 1970.

The court considered if the expropriation of the plaintiff's properties was for a public purpose in accordance with section 2(1) of the 1975 *Expropriation Act*. The court stated that the term "public purpose" had already been interpreted judicially in cases such as *Slabbert* and *Fourie*. The court in *White Rocks* held as follows:

> There is no difference between the power to expropriate for public purposes granted to the Minister in the Expropriation Act 55 of 1965 and the powers to expropriate granted to the Minister in the Expropriation Act 63 of 1975.[55]

Accordingly, the legislature must have had the established interpretation of "public purposes" in mind when drafting the 1975 *Expropriation Act* and intended the present act to bear the same established meaning. As a result, the court accepted that the public purpose can be understood broadly or narrowly as explained in the earlier decisions and therefore the public purpose requirement in section 2(1) of the 1975 *Expropriation Act* has the same meaning as that which had already been established in earlier case law.

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53 *White Rocks Farm (Pty) Ltd v Minster of Community Development* 1984 3 SA 785 (N) (hereafter the *White Rocks* case).

54 The purposes of the establishment of the mountain catchment area included the protection of the upper catchment of a number of rivers flowing from the Drakensberg; protecting the national plant communities within the area; and guaranteeing the flow of silt-free water in and from such areas.

55 *White Rocks* 794.

3 Public interest before the *Interim Constitution* of 1993

3.1 Introduction

It is clear that the public interest requirement did not play a role in the earlier expropriation decisions. Legislation did not make mention of a public interest requirement either. However, the public interest requirement was introduced into South African expropriation jurisprudence in the decision of *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*.[56] Although this decision of the Appellate Division of the Supreme Court did not concern an interpretation of the public purpose requirement in section 2(1) of the *1975 Expropriation Act* but rather a provision in the *Transvaal Road Ordinance* 27 of 1957 (hereafter *Road Ordinance of 1957*), this decision is important for understanding the public purpose and public interest requirement in terms of the *Interim Constitution* of 1993,[57] and ultimately the 1996 *Constitution*.

3.2 Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) Ltd

In this decision the Administrator of Transvaal expropriated the respondent's property in terms of section 7(1) of the *1957 Road Ordinance*. The administrator had to ease traffic congestion in the Kempton Park area, but this was proven to be problematic since there was a private railway line running parallel to one of the roads earmarked for widening. This railway line was operated by the private company Sentrachem (the second respondent) and ran over the property of one of its subsidiaries. Sentrachem had secure title to make use of the land on which the railway line was originally situated. In order to alleviate the congestion by widening the relevant roads, the railway line had to be relocated and this relocation traversed a substantial portion of the respondent's property. By virtue of section 5(1)(b) of the

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[56] *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty)* Ltd 1990 4 SA 644 (A) (hereafter the *Van Streepen* case).

[57] *Constitution of the Republic of South Africa* 200 of 1993 (hereafter *Interim Constitution*).

Road Ordinance of 1957 and Notice 2161[58] the administrator commenced constructing the new road and railway line.[59]

The administrator was informed that the respondent intended to challenge his authority to declare a public road, which included the widening of the road reserve and the relocation of the railway line. The administrator realised that if the respondent succeeded in its intended challenge, the administration would suffer serious financial loss due to the delay in construction. At the same time Sentrachem became concerned about its security of title to use the new railway line. Therefore, in terms of *Notice 1909*[60] the administrator decided to expropriate Van Streepen's property in order to transfer it to Sentrachem.

The respondent challenged the decisions of the administrator and the matter for consideration in the Appellate Division was if the expropriation of the respondent's land fell within the administrator's powers in terms of section 7(1) of the *Road Ordinance of 1957*.[61] Section 7(1) of the *Road Ordinance of 1957* authorises the administrator to acquire any land "for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road".[62]

The respondent argued that section 7(1) of the *Road Ordinance of 1957* does not grant the administrator the authority to expropriate his property and transfer it to another third party "for the latter's use and benefit".[63] The court rejected this argument, stating that because section 7(1) of the *Road Ordinance of 1957* permits

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58 Administrator's Notice 2161 of 18 December 1983.

59 S 5(1)(b) of the *Transvaal Road Ordinance* 27 of 1957 authorises the administrator to declare that a public road shall exist on any land when certain procedures have been followed.

60 Administrator's Notice 1909 of 4 September 1985.

61 The second, but for purposes of this article less important, matter that the court had to consider was if the Administrator's Notice 1909 of 4 September 1985 was valid "for want of an adequate description of the expropriated land".

62 S 7(1) of the 1957 *Road Ordinance*.

63 *Van Streepen* 661.

the state to acquire property, it does not necessarily mean that it should be acquired to be used by the state. Interpreting the *Road Ordinance of 1957* strictly, the court stated that the fundamental problem was whether or not section 7(1) of the *Road Ordinance of 1957* permitted the administrator to acquire the property of one person for the benefit of another. According to the court, an expropriation must "generally speaking" be for a public purpose or in the public interest.[64] This was the first clear reference to the phrase "public interest" in modern South African expropriation case law. Furthermore, with regard to third party transfers the court stated the following:

> The acquisition of land by expropriation for the benefit of a third party cannot conceivably be for a public purpose. *Non constat* that it cannot be in the public interest.[65]

On the facts of the case the court accepted that Sentrachem's activities were of national importance and that the loss of the railway line that transported the necessary raw materials would disrupt Sentrachem's "production of strategically important products".[66] Therefore, the court held that the power of the administrator in terms of section 7(1) of the *Road Ordinance of 1957* can include the acquisition of land for the benefit of a third party.[67] The power to expropriate property and transfer it to another private party existed, but the manner in which it was exercised may be open to challenge. Such a challenge may be brought if the administrator acted in bad faith or not in the public interest.

3.3 Distinguishing public purpose from public interest

In *Van Streepen* the court stated that an expropriation must generally be for a public purpose or in the public interest. In earlier case law a distinction was made between the narrow and broad understanding of the public purpose requirement. The narrow

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64 *Van Streepen* 662.
65 *Van Streepen* 662.
66 *Van Streepen* 661.
67 *Van Streepen* 661.

understanding was said to relate to government purposes, while the broad understanding related to a purpose that benefitted the public at large. Since the court in *Van Streepen* stated that the expropriation of property for the benefit of another private party can never by for a public purpose, it is possible to argue that when it referred to the public purpose it referred only to the narrow understanding of the public purpose requirement, namely government purposes. However, since the expropriation of the property and the transfer of it to a third party benefitted the public at large, it could be said that it fell within the broad understanding of the public purpose requirement. Since the court did not refer to the broad and narrow understanding of the public purpose requirement, but to the public purpose and the public interest, it is arguable that the court equated the broad understanding of the public purpose requirement with the public interest, while the reference to the public purpose was limited to the narrow understanding of the public purpose requirement as it was understood in earlier case law.

4 Public purpose and public interest in the constitutional era

4.1 Interim Constitution

Although the 1975 *Expropriation Act* is still valid, both the *Interim Constitution* and the 1996 *Constitution* had an effect on the understanding of the public purpose requirement in the Act. Like expropriation legislation such as the 1975 *Expropriation Act*, section 28 of the *Interim Constitution* required only that an expropriation be for a public purpose, but it has been indicated above that prior to 1994 an expropriation could be justified if it was for a public purpose or in the public interest. Section 28(3) stated that "[w]here any rights in property are expropriated … such expropriation shall be permissible for public purposes only". It has been suggested that when the multi-party negotiating forum decided to include public purpose, they were under the impression (created by the Technical Committee) that public purpose was a

broader category than public interest.[68] Budlender argues that the advice given to the multi-party negotiating forum was wrong and that if the constitutional drafters wanted to make their intention clear they should have used the term "public interest."[69]

Therefore, during the time that the *Interim Constitution* was in force it was unclear that expropriation for land reform would be constitutional, since the beneficiaries of such an expropriation were private individuals.[70] The underlying issue was therefore whether or not the expropriation of private property in order to transfer it to another private party would satisfy the public purpose requirement, especially in the light of the *Van Streepen* decision, where it was held that an expropriation for the benefit of a third party (which would include land reform) would not be justifiable in terms of the public purpose requirement. Furthermore, since the *Interim Constitution* abolished parliament supremacy it is conceivable that expropriation for land reform purposes would have been struck down by the courts, since it would not have complied with the constitutional provisions.[71]

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68 Chaskalson 1995 *SAJHR* 237.

69 Budlender "Constitutional Protection of Property Rights" 7-8.

70 Budlender "Constitutional Protection of Property Rights" 48.

71 In relation to the issue of third party transfers and land reform in view of s 28 of the *Interim Constitution*, various authors relied on the *Van Streepen* decision to explain the public purpose requirement. Budlender "Constitutional Protection of Property Rights" 48-49 argues that, in the light of the specific facts and circumstances of the case, it is understandable that the expropriation was not regarded as being for a public purpose. With reference to Chaskalson 1994 *SAJHR* 131-139, Budlender adds that the negotiators and drafters of the *Interim Constitution* intended that there should be a broad constitutional authorisation for expropriation and concludes that land reform would constitute a public purpose in terms of s 28 of the *Interim Constitution*. Eisenberg 1995 *SAJHR* 221 states that the public purpose has not been interpreted literally to mean use by the public and argued that expropriation for land reform programmes has been held to fall within the definition of public purpose. Chaskalson 1994 *SAJHR* 137 argues that interpreting s 28(3) as a prohibition against land reform would run counter to ch 8 of the *Interim Constitution* (which made provision for land reform) and the principles of restitution and reconstruction.

4.2 The 1996 Constitution

Due to the uncertainty regarding the constitutional validity of the expropriation of property for land reform purposes, the drafters of the 1996 *Constitution* included a reference to the public interest in section 25(2).[72] Section 25(2) now states that "[p]roperty may be expropriated … for a public purpose or in the public interest". The question that arises is if there is a difference between these two phrases in the light of the 1996 *Constitution*, and if so, what the relevance of the difference may be.

It could be said that the public interest is a broader category than public purpose.[73] Given the historical analysis above, the public purpose probably refers to government purposes while public interest probably refers to purposes that benefit the public. It is accepted that these two terms may be used interchangeably with regard to expropriation.[74] In other words, an expropriation that satisfies either the public purpose or the public interest requirement would be a valid expropriation in terms of the constitutional requirements.

It is also suggested that the difference between the two phrases in justifying an expropriation does not matter much in practice. Van der Walt argues that "the distinction between the two phrases should generally no longer make any difference in principle."[75] He argues that a lenient approach, in view of the 1996 *Constitution* authorising expropriation for both a public purpose or in the public interest, should prevail when legislation authorises expropriation for a public purpose or in the public

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72 According to Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 591-592, the issue regarding expropriation for land reform was solved in two ways: firstly by reformulating the purposes for which property can be expropriated, and secondly by inserting a new subsection to ensure that land reform would not be hindered unduly. See also Van der Walt *Constitutional Property Law* 462-463.

73 See *Offit (SE)* 674; Van der Walt 2008 *ASSAL* 260.

74 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 567.

75 Van der Walt *Constitutional Property Law* 462.

interest.[76] While this is true in cases where the property is expropriated and used by the state for fulfilment of a particular public purpose (so called "straight-forward expropriations"), the same cannot be said when property is expropriated and transferred to third parties. When property is transferred to third parties, whether or not the expropriation is for a public purpose or in the public interest is relevant in so far as it indicates the level of scrutiny the courts should apply in evaluating the expropriation and the third party transfer.

Given that it is not the practice in South African law to have detailed expropriation legislation, but rather to grant the relevant authorities the power to expropriate for a variety of purposes as long as it is for a public purpose or in the public interest, it is probably better to have the public purpose and public interest requirements open-ended than to have them clearly defined. However, an expropriation must still comply with the constitutional provisions, and it remains the duty of the courts to ensure that expropriation takes place for a public purpose or in the public interest.

5 Public purpose, public interest and third party transfers

It can be accepted that the public interest, the broader category, includes the narrower category of public purpose.[77] Although section 25(4) of the 1996 *Constitution* indicates what would constitute an expropriation in the public interest, it remains unclear precisely what would qualify as an expropriation in the public interest.[78] Furthermore, with regard to third party transfers it seems unclear how the

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76 Van der Walt *Constitutional Property Law* 462 also states that it is possible for a statute to specifically provide for expropriation in the narrow sense, in which case expropriation for a wider purpose in terms of that particular statute would not be permissible.

77 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 591-592. See also Chaskalson 1995 *SAJHR* 237.

78 The phrase "public interest" also appears in other areas of the law: Du Plessis *Re-Interpretation of Statutes* 167-138; Du Plessis 1987 *THRHR* 290-298. Although this term seems to be indeterminable, Du Plessis 1987 *THRHR* 293-294 identifies certain aspects that can be used to determine the public interest. These include state security, economic interests, individual interests as collective interests, legal interests, administrative interests and strategic interests. Du Plessis 1987 *THRHR* 298 comes to the conclusion that "public interest" is a generic term used

notions of public purpose and public interest are to be distinguished, since in some instances it seems as if these two notions overlap.

In *Van Streepen* the court held that the expropriation of property for the benefit of a third party cannot be for a public purpose, but because the third party's business enterprise in that decision was important for the public as a whole it was accepted that it was in the public interest and consequently valid. This was also accepted in *Bartsch*. In *Bartsch* the court accepted that the expropriation of property for the benefit of a third party cannot be for a public purpose, but "it could qualify as a valid act of expropriation if it could be brought within the realm of an act performed in the public interest."[79] As a result, it is arguable that the public purpose is not able to justify an expropriation that is undertaken for the benefit of a third party. However, this should be distinguished from situations where the expropriated property is transferred to a third party to enable the third party to realise a public purpose.

In *Offit (SCA)* the Supreme Court of Appeal stated that:

> There is no apparent reason why the identity of the party undertaking the relevant development as opposed to the character and purpose of the development should determine whether it is undertaken for a public purpose.[80]

Therefore, in cases where the property is transferred to a third party for the fulfilment of a public purpose - such as the building of roads or railways - the expropriation and subsequent transfer would be for a public purpose. The mere fact that the property is transferred to a third party does not automatically invalidate the expropriation.[81]

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to describe interests worthy of protection, that have crystallised over time and that are determined both objectively and subjectively to ensure that the proper balance is struck between the interest of the community and the interest of the individual who is part of the community.

79 *Bartsch* para 5 2.

80 *Offit (SCA)* para 15.

81 This approach is also adopted by the German Federal Constitutional Court; see *BVerfGE* 74, 264 [1986] (*Boxberg*).

As a result, certain expropriations that also involve a third party transfer are deemed to be for a public purpose. The purpose of the expropriation is for the fulfilment of a public purpose and the fact that the purpose is to be realised by a third party does not detract from the legitimacy of the expropriation. In this regard, the third party may also receive a benefit, but because the benefit is merely incidental to the fulfilment of the public purpose it is irrelevant. The purpose of the expropriation is not to benefit the third party but to allow the third party to fulfil an obligation, usually in terms of a legislative scheme, on behalf of the state. In these cases the purpose of the expropriation would qualify as an expropriation in terms of the narrow understanding of the public purpose requirement.

Provision is made in South African law for the expropriation of property on behalf of third parties. Section 3 of the 1975 *Expropriation Act* authorises the minister of public works to expropriate immovable property on behalf of a juristic person.[82] The juristic person has to prove that the immovable property is needed for an objective of public importance, in which case the minister will expropriate the property. If the minister expropriates property in terms of this section, it is deemed to have been expropriated for a public purpose. The juristic person will have to pay all the charges, fees and duties as if it had purchased the property itself. On the date of expropriation the juristic person will become the owner of the property.

In terms of the Act such a juristic person includes educational institutions such as universities, colleges and technikons as well as any other juristic person "established by or under any law for the promotion of any matter of public importance".[83] In the *Offit (SCA)* decision, the applicants argued that the Coega Development Corporation is not a juristic person for the purposes of promoting a matter of public importance. The Supreme Court of Appeal stated that it is irrelevant whether the company was incorporated for the specific objective of public importance or whether it was a

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82 An expanded version of this article is found in a 4 of the *Draft Expropriation Bill*, 2013.
83 S 3(2)(h) of the 1975 *Expropriation Act*.

dormant company whose purposes changed to include a matter of public importance. According to the court, the industrial development that brings about benefits such as increased employment opportunities and economic stimulation is a matter of public importance and therefore also constitutes a public purpose. The expropriation of the property to realise this objective was therefore permissible in terms of section 3(2)(h) of the Act.

In terms of section 3 of the 1975 *Expropriation Act*, the minister can expropriate property on behalf of a juristic person for the achievement of a public objective. The juristic person to whom the Act specifically refers is usually, but not limited to, educational institutions whose purpose is undoubtedly a public purpose. Furthermore, legislation such as the *Higher Education Act* 101 of 1997 sets out certain regulations with regard to the management of higher education institutions. The expropriation of property for purposes of an objective of public importance is therefore lawful, irrespective of whether or not the property is expropriated in favour of a third party. This can also be distinguished from the transfer of expropriated property to third parties for economic development purposes in that the primary aim of the third parties in terms of section 3 is a matter of public importance, such as education, and not to generate profit.

In order to meet its constitutional obligations the state may expropriate property for the purposes of building public utilities such as hospitals and schools.[84] Therefore, if the state expropriates property for purposes of these public utilities, the justification is not questioned. However, it often occurs that a third party is responsible for constructing, providing for, or managing the utilities on behalf of the state. In the event that property is expropriated to enable the third party to build the necessary

[84] See Van Wyk *Planning Law* 219.

infrastructure it is deemed to be for a public purpose, provided that the third party fulfils a public function on behalf of the state.[85]

It is also accepted that the state must rely on private or semi-private companies to aid in the building of infrastructure.[86] In *Offit (SCA)*, the Supreme Court of Appeal stated that the

> ... expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or provincial authorities had undertaken the task itself …[87]

As a result, if the expropriation is for a public purpose the expropriation would be valid regardless of the fact that a third party is responsible for fulfilling the purpose. However, even if the expropriation does not serve a public purpose (as defined narrowly) but benefits a third party, the expropriation can still be valid if it can be "brought within the realm of an act performed in the public interest."[88] An expropriation that involves a third party transfer has also been upheld on the basis that it is in the public interest.[89] In other words, the property is not expropriated for government purposes and not necessarily for use by the public, but for a purpose that is nevertheless deemed to be in the public interest. It should therefore be evaluated whether the expropriation of the property is valid in terms of the broad understanding of the public purpose requirement, or in the public interest as it was termed in *Van Streepen,* and to which section 25(2) of the 1996 *Constitution* refers.

Third party transfers for land reform purposes would generally satisfy the public interest requirement. The purpose of certain land reform legislation, such as the *Restitution of Land Rights Act* 22 of 1994, is specifically aimed at authorising the

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85 See Van der Walt *Constitutional Property Law* 491; Van der Walt *Constitutional Property Clauses* 148.
86 *Offit (SCA)* para 15.
87 *Offit (SCA)* para 15.
88 *Bartsch* para 5 2.
89 See Van der Walt *Constitutional Property Law* 490.

expropriation of land for land restitution purposes - in other words transferring expropriated land to third parties. Section 42E(1) of the Act[90] states that "[t]he minister may purchase, acquire in any other matter or, … expropriate land, a portion of land or a right in land" in respect of a claim that has been lodged in terms of this Act. The property expropriated in terms of this Act is to be transferred to the private parties who lodged a claim for restitution in terms of this Act.

There is explicit authority in section 25(2), read with section 25(4)(a), of the 1996 *Constitution* for the expropriation of property for the purpose of transferring it to other private parties in terms of the land reform programme.[91] Therefore, in South African law it is accepted that land may be expropriated from one private party and transferred to another private party in terms of the restitution process, since it is authorised by the 1996 *Constitution*.[92] The fact that the expropriation and transfer of property is legitimised by the 1996 *Constitution* and regulated by statute is therefore an important consideration in the determination of whether or not the transfer of expropriated property is justified in land reform cases. To date there have been no challenges against the constitutionality of transferring expropriated property to third parties for land reform purposes.[93]

Another example that involves a third party transfer that is not for a narrow public purpose but that can be considered to be in the public interest is the expropriation of property for the purpose of slum clearance. In the United Stated various programmes aimed at eliminating slum neighbourhoods were set in motion during the Great Depression with the purpose of promoting commercial development.[94]

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90 S 42E was inserted into the *Restitution of Land Rights Act* 22 of 1994 by s 5 of the *Restitution of Land Rights Amendment Act* 48 of 2003.

91 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 567.

92 Van der Walt *Constitutional Property Law* 307. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 567; Carey Miller and Pope *Land Title in South Africa* 301-302.

93 The taking and transfer of expropriated property for land reform purposes has also been upheld by the US Supreme Court in *Midkiff*.

94 Cohen 2006 *Harv JL & Pub Pol'y* 510.

Some courts were reluctant to allow the state to use the power of eminent domain for these purposes, since the projects led to the condemned property being transferred to or occupied by different private parties.[95] However, it was argued that the removal of blighted areas, which led to the improvement of public health, welfare and safety, fell within the government's police power.[96] As a result, the US Supreme Court held in *Berman* that because the object fell within the authority of the legislature, the use of the power of eminent domain to achieve the purpose was acceptable.

The expropriation and transfer of property to third parties can therefore be valid in situations where the property is not needed for a narrow public purpose such as state or public use or even for the provision of public services, but for a purpose that serves a wider public interest. In this regard the property is expropriated for neither government nor public use, or for allowing a third party to fulfil a public function. Instead, the property is expropriated and transferred to a third party for the third party's own use and benefit, but the expropriation and transfer are still deemed to be in the public interest because they serve some other valid state goal that is in the public interest. In the slum clearance examples the public interest that is served relates to the removal of blighted areas with all their concomitant social problems, such as health and safety concerns. In the area of land reform the public interest is to allow designated groups the opportunity to reclaim property that they originally lost through unfair, discriminatory practices during apartheid. In both the slum clearance and land reform programmes the relevant legislation specifically authorises the expropriation and transfer of property for the relevant purposes, or at least foresees that the property will be used by different parties after it has been expropriated.

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95 Cohen 2006 *Harv JL & Pub Pol'y* 510.

96 *Berman v Parker* 348 US 26 (1954) 32. See also Cohen 2006 *Harv JL & Pub Pol'y* 512.

6 Third party transfers for economic development purposes

The justification of third party transfers for narrow public purposes, such as a third party constructing and managing railway lines or electricity plants, is generally unproblematic. There is usually a clear, identifiable public use or benefit which justifies the expropriation, and the fact that the property is transferred to a third party does not detract from its legitimacy. The third party usually performs the service based on a contract with the state, or there is legislation in place to regulate the third party' activities. Similarly, the expropriation and transfer of property to third parties in the public interest (for purposes of land reform or slum clearance) generally takes place in terms of a legislative scheme, or there is constitutional authority to justify the expropriation and the transfer. In this regard the courts' low level of scrutiny, based on a rationality test, is acceptable.

However, in recent decisions the question was if economic development constitutes a public interest so as to legitimise both the expropriation and the transfer of the property to another third party. The expropriation of property for purposes of economic development would exclude instances where the property is needed for a government or a public use or for the primary benefit of the public. In other words, the property should not be needed by the state (or a third party) to construct necessary infrastructure such as roads, administration buildings and schools. It should also not be needed for the primary benefit of the public, such as establishing water catchment areas to ensure the sustainability of safe water reserves or to secure the safety of the President either.

This issue has been the subject of court decisions in foreign jurisdictions.[97] For instance, in *Kelo* the US Supreme Court had to decide if the taking of private

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97 In the United Kingdom, see *Alliance Spring Co Ltd v The First Secretary of State* 2007 EWHC 1527 (Admin); *Regina (Sainsbury's Supermarket Ltd) v Wolverhampton City Council* 2010 UKSC 20. In Ireland, see *Central Dublin Development Association v Attorney General* 1975 109 ILTR 69; *Crosbie v Custom House Docks Development Authority* 1996 2 IR 53 (HC); *Clinton v An Bord*

property, not for the purposes of land reform or slum clearance but for the economic benefit of a private company could be said to be for a public use as required by the *US Constitution*. The majority of the Supreme Court held that the development plan of the City of New London warranted deference on its part. The city implemented the integrated development plan to rejuvenate a distressed area by creating new jobs and thereby increasing the tax base, among other things. Accordingly, the US Supreme Court held that the plan served a public purpose and the taking of property for these purposes satisfied the public use requirement of the Fifth Amendment.[98] The *Kelo* decision generated a fair amount of criticism,[99] probably due to the fact that the Supreme Court's confirmation of the taking of the petitioners' property for economic development purposes meant that the government can take any private property and transfer it to another private party for private use as long as the latter uses the property in a manner that generates secondary benefits, such as increased tax revenue or more job opportunities.[100]

In South African law the courts considered an increase in employment opportunities,[101] increased revenue,[102] "strategic economic advantages,"[103] and development regarding a major sporting event[104] as constituting economic development that might justify an expropriation that involves a third party transfer.

Pleanála 2005 IEHC 84, 2007 IESC 19. In Germany, see *BVerfGE* 56, 249 [1981] (*Dürkheimer Gondelbahn*); *BVerfGE* 74, 264 [1986] (*Boxberg*).

98 Schultz 2006 *UCLA Journal of Environmental Law and Policy* 220-221 argues that the Supreme Court regarded the existence of a comprehensive regeneration plan as a determining factor in upholding the taking.

99 See Wolf "Hysteria versus History" 15-33 for an overview of the reaction to the *Kelo* decision in the popular media. See also Gray 2005 *Stell LR* 398-412; Cohen 2006 *Harv JL & Pub Pol'y* 491-568; Gray 2007 *Journal of South Pacific Law* 73-86; Somin 2007 *Supreme Court Economic Review* 183-271. However, some authors argue that the *Kelo* decision was decided correctly: Bell and Parchomovsky 2006 *Col LR* 1415 argue that *Kelo* was decided correctly and that the criticism against this decision was "ill conceived and misguided". Cohen 2006 *Harv JL & Pub Pol'y* 496 states the "*Kelo* decision was correct as a matter of law … and consistent with American judicial and legislative approaches to the public use question … ".

100 Justice O'Connor's dissenting opinion in *Kelo* 501.

101 *Offit (SE)*; Offit (SCA).

102 *Offit (SE)*; *Offit* (SCA).

103 *Bartsch* para 5 2.

104 *eThekwini Municipality v Sotirios Spetsiotis* 2009 ZAKZDHC 51.

There may be instances where purposes such as job creation and stimulating the economy may justify the expropriation of private property for the purpose of transferring it to third parties. However, 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.[105] In that regard, the courts cannot merely accept the possible advantages that the expropriation and transfer of the property might bring at face value. Commentaries on foreign case law where third party transfers for economic development have been upheld suggest that expropriations of this kind are not well received.[106]

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. This issue needs further investigation, but for the time being the following may be said. South African courts should first consider if the purpose, namely economic development, is specifically authorised in terms of legislation.[107] If the legislation does not provide for the expropriation of property for the purpose of economic development the expropriation could be declared unlawful for lack of statutory authority. If the legislation does provide for the expropriation of property for economic development purposes, the courts should still consider whether it is a valid public purpose and whether expropriating property is strictly required for the

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105 In s 5(1) of the *Infrastructure Development Bill* of 2013 [B49-2013] (Gen N 1078 in GG 36980 of 30 October 2013), the Presidential Infrastructure Coordinating Commission is empowered to expropriate land or any right in land for the purpose of implementing a "strategic integrated project". A "strategic integrated project" will include, amongst other things, the building of airports, roads, railways, ports and harbours (s 7(1)(a) read with sch 1) as well as projects that "would be of significant economic or social importance to the Republic" (s 7(1)(b)(i)). However, the *Infrastructure Development Bill* does not make mention of the transfer of expropriated property to third parties to realise the purpose for which the property is expropriated.

106 See note 99 above. See further Walsh 2010 *DULJ* 1-23; Waring "Prevalence of Private Takings" 419-437.

107 Legislation aimed at stimulating the economy by creating jobs and increasing the tax base, must authorise the expropriation of property in order to realise these specific aims.

realisation of the public purpose.[108] However, it is arguable that the level of scrutiny could be lower in cases where there is a legislative scheme. Nevertheless, it requires the courts to evaluate whether or not the purpose of the expropriation necessitates the expropriation of property. If the economic development also involves a third party transfer, even stricter scrutiny should be applied to both the lawfulness of the purpose and the legitimacy of the transfer in order to realise the purpose.

[108] There may be another less invasive means available to achieve the same purpose for which expropriation is sought. See Slade 2013 *TSAR* 199-216.

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LIST OF ABBREVIATIONS

ASSAL	Annual Survey of South African Law
Col LR	Columbia Law Review
Cornell LR	Cornell Law Review
DULJ	Dublin University Law Journal
Harv JL & Pub Pol'y	Harvard Journal of Law and Public Policy
Mich State LR	Michigan State Law Review
NYU LR	New York University Law Review
Oregon LR	Oregon Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman-Dutch Law
TSAR	Journal of South African Law
Yale LJ	Yale Law Journal