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

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 upon their property as expropriation in the hope of being compensated for their losses. It is therefore essential to have a principled distinction between these two forms of state interference, especially given the danger that uncertainty in this regard can hold for legitimate land reform initiatives, which often entail severe limitations on property.

In the *Agri SA* case the Constitutional Court recently revisited this distinction and held that the distinguishing feature of expropriation is that it entails state acquisition of property. Two aspects of this judgment are worthy of consideration. Firstly, the centrality of acquisition makes it necessary to clarify its meaning and role in our law. Secondly, the Court's effect-centred test to establish whether acquisition took place appears incapable of coherently categorising property infringements that fall within the grey area between deprivation and expropriation.

To address these two questions this article is divided into two parts. Part I investigates the meaning and role of state acquisition in South African law. Pre-constitutional expropriation law reveals that expropriation is an original method of acquisition of ownership and that the objects of expropriation include ownership, limited real rights, and certain personal rights, which correspond to the meaning attributed to this

* Part II appears in the same edition of this journal.

** 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 Proff 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.

requirement in *Agri SA*. However, post-constitutional judgments diverge from pre-constitutional law regarding the role of state acquisition, where it was merely regarded as a general hallmark of expropriation. After *Agri SA* state acquisition is (now) the "key feature" that distinguishes expropriation from deprivation.

A brief analysis of Australian constitutional property law shows that the meaning attached to "acquisition" in that jurisdiction is broadly similar to the construction placed upon the term in South African law, which explains why the expropriation of limited real rights (as well as the extinguishment of claims in certain cases) amounts to acquisition of property. The jurisprudence of the Australian High Court also sheds light on one of the factors laid down in *Agri SA* for determining whether or not acquisition took place, namely the source of the affected right. It also confirms another aspect of pre-constitutional South African expropriation law, namely that whether a property interference results in expropriation or not does not depend only on whether or not acquisition occurred.

In dealing with these considerations Part II of this article expands on the shortcomings of confining the expropriation question to whether or not acquisition took place. It then suggests an alternative approach to state acquisition, one which focuses on the purpose of the impugned statute, as opposed to its effect, as was done by the Constitutional Court in *Harksen*.

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