

**THE EFFECT OF LAND EXPROPRIATION WITHOUT COMPENSATION ON  
MORTGAGEES**

**RESEARCH SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE  
LLM DEGREE AT THE UNIVERSITY OF VENDA**

**SCHOOL OF LAW**

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2022

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## DECLARATION

I, **Munyai Tebogo Innocentia**, declare that this Dissertation is my own, unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Law, Commerce, and Management at the University of the Venda, Limpopo. It has not been submitted before for any degree or examination in this or any other university.



26 February 2022

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Munyai Tebogo Innocentia

## ACRONYMS

ANC	African National Congress
BASA	Banking Association of South Africa
LAMOSA	Land Movement of South Africa
Land Bank	Land and Agricultural Development Bank of South Africa

## ABSTRACT

Expropriating land without compensation is an old notion that has been in the South African legal system. The colonial history of South Africa must be considered to better understanding of the origin of this phenomenon. Through colonial and apartheid governments, most whites were able to gain exclusive use of the majority of valuable and rich land. This position was made possible by the enactment of unjust and discriminatory legislation. To redress these injustices, the democratic government enacted section 25 of the “Constitution of the Republic of South Africa, 1996” (the Constitution). Therefore, the history of land ownership in South Africa serves as a foundation for a critique of section 25 of the Constitution. Section 25 not only serves as a basis for the protection of property rights, but also to create equality by restoring all other rights, including property rights, to previously disadvantaged people. However, section 25 has been criticised for impeding any meaningful land reform, thus a call was made for an amendmend to the property clause that allows for expropriation without compensation. In this regard, the aim of the study is to examine the potential effect of land expropriation without compensation on mortgagees. To achieve this objective, an analysis of the laws and legal mechanisms regulating mortgage bonds is analysed, the constitutional perspective on the expropriation of land without compensation is assessed, and the effect of expropriation of land without compensation on mortgagees in South Africa is appraised. The study employs the doctrinal methodology. The study contends that expropriation of land without compensation has a direct or indirect effect on mortgagees in South Africa. It poses a substantial risk to the banking sector as a decrease in the value of land-based property, caused by an amendment to section 25, could impact negatively on mortgagees.



## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

The notion of expropriating land with no compensation has been in the legal system for many years. To allow a clearer understanding of the background to the phenomenon, one has to take into consideration the colonial history of South Africa. The land history provides a basis on which a critique against section 25 of the “Constitution of the Republic of South Africa, 1996” (the Constitution) must be premised. Turner and Ibsen contend that in the twentieth century, most whites were able to garner exclusive use of the most of the valued, fertile, and arable land through colonial and apartheid regimes.<sup>1</sup> In addition, they argue that this position was made possible through the promulgation of unjust and discriminatory laws, for example, the 1913 Natives Land Act. This statute stripped Africans (who are black) of “their land, restricted areas where blacks could live and effectively limited ownership of land by blacks”.<sup>2</sup> Resultantly, the black majority were left wanting and were unfairly condemned to “homelands and native reserves.” After this promulgation, a number of similar laws continued to be promulgated with the sole purpose of building a ‘white Africa’.<sup>3</sup> In effecting some of these promulgations, all black-owned land that surrounded or was surrounded by land owned by whites was taken away from blacks and portioned amongst whites.<sup>4</sup> De Villiers maintains that roughly 470 000 blacks who stayed on the latter land were forced to ‘homelands or native reserves’ in a bid to clean and exterminate ‘black spots.’<sup>5</sup>

The advent of the Constitution does not only serve as a basis for protection of property rights, but also to create equality by restoring previously disadvantaged

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<sup>1</sup> S Turner & H Ibsen ‘Land and Agrarian Reform in South Africa: A Status Report’ (Cape Town: Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, and Centre for International Environment and Development Studies, Agricultural University of Norway, 2000).

<sup>2</sup> G L Neuman ‘Human rights and constitutional rights: Harmony and dissonance’ (2005) 55 *Stanford Law Review Journal* 1866.

<sup>3</sup> Development Trust and Land Act 18 of 1936, The Act expanded the reserves to 13.6 per cent of the land in South Africa (for 80 per cent of the total South African population).

<sup>4</sup> S Hofstatter ‘Whites Stake Land Claim’, *This Day* (5 August 2004) p 1.

<sup>5</sup> B de Villiers *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 46.

people with all other rights, including property rights. During the 54<sup>th</sup> congress in December 2017, the African National Congress (ANC) tabled the land issue as one of the leading agendas for deliberation. During the congress, a radical paradigm was adopted as a way to expedite the issue of land redistribution without compensation.<sup>6</sup> On 8 January 2018, the ANC-led government made a public statement where they took a stance to proceed with the agenda of ‘expropriation of land without compensation’.<sup>7</sup> Thereafter, with the motion adopted by Parliament, the Constitutional Review Committee was tasked to probe the efficacy of amending the Constitution to permit expropriation of land without compensation.<sup>8</sup>

Courts in South African have made it clear, on various decisions that when interpreting the property clause, one needs to take cognisance of the historical context to which it was enacted. In *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape (Shoprite Checkers case)*,<sup>9</sup> Froneman J explained as follows:

The pre-constitutional conception of property ... entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.

Furthermore, in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another (FNB case)*, the Constitutional Court stated as follows:

The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of

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<sup>6</sup> M van Staden ‘Property Rights and The Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill’ (2020)14 *The Pretoria Student Law Review* 2.

<sup>7</sup> B De Villiers *Land Reform: Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia* (2003) 44.

<sup>8</sup> GL Neuman ‘Human rights and constitutional rights: Harmony and dissonance’ (2005) 55 *Stanford Law Review Journal* 1863.

<sup>9</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) at para 34.

land reform but not limited thereto, and also as striking a proportionate balance between these two functions.<sup>10</sup>

The constitutional basis for the land expropriation programme is found in section 25(2) of the Constitution,<sup>11</sup> which provides that property may be expropriated only in terms of law of general application:

(a) for public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and the manner of payment of which have either been agreed to by those affected or decided or approved by the court.<sup>12</sup>

Furthermore, section 25(5) of the Constitution introduced the second pillar on land reform, which is generally known as the land redistribution programme. This section posits that the state has a constitutional duty to take “reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”<sup>13</sup> However, the use of the property clause in section 25(2) of the Constitution for land reform did not adequately manage to address the inequalities related to the redistribution of land in South Africa.<sup>14</sup> Consequently, this has put political pressure on the expropriation of land without compensation issue.

South Africa has been dealing with the issue of land since the dawn of democracy. This thorny issue emanates from South Africa’s unspeakable truth on the racial socio-economic disparities.<sup>15</sup> Against this backdrop, the general populace in South Africa is clamouring for the land obtained through colonial and apartheid regimes to be redistributed. As such, the land question has been and continues to be a bone of contention among many South Africans. Some groups are advocating for the “rush-and-grab” methodology to accelerate land reform in a bid to address the

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<sup>10</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC) at para 50.

<sup>11</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>12</sup> Sec 25(3) The Constitution of the Republic of South Africa Act 108 of 1996 specifies that the compensation for expropriation (as stated in Section 25(2) must be just and equitable and reflect an equitable balance between the interests of those affected and public interest.

<sup>13</sup> Sec 25(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>14</sup> S M Borrás Jr & T McKinley ‘The Unresolved Land Reform Debate: Beyond State-Led or Market-Led Models.’ (2006) 2 *United Nations Development Programme Policy Research Brief*.

<sup>15</sup> Despite the frantic efforts to eradicate racial inequalities, South Africa remains one of the most unequal countries in the world. See for example: <https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worldsmostunequal-countries>; and <https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-the-world>

historical injustices. For instance, in 2002, one group known as the Land Movement of South Africa (LAMOSA) came out in the open for the adoption of the “rush-and-grab” after the precedent set by Zimbabwe in its land reform agenda.<sup>16</sup>

The contention from one of the main opposition political parties, that is, the Economic Freedom Fighters, appears to be that all land in the country should be nationalised or be expropriated by the state without compensation.<sup>17</sup> The later proposition agrees to some extent with the position of the ruling party, namely the ANC. During the 54th National Conference report and resolution, the ANC emphasised that, “the interventions regarding expropriation of land without compensation” would generally zero in on “government-owned land, prioritised the redistribution of vacant, unused, and under-utilised state land, as well as land held for speculation and hopelessly indebted land”.<sup>18</sup>

Section 8 of the Expropriation Act<sup>19</sup> states that, “an expropriation will extinguish a mortgage bond,” but not the obligation. Basically, if the land is expropriated, the proprietor still owes the bank, yet it turns into an unsecured loan.<sup>20</sup> Needham and Hartmann posit that “the land portion cannot be detached from the immobile asset,” for example, “a building or a house in South Africa's present use of property law.”<sup>21</sup> For the average South African family, the property is their biggest “investment from which they derive wealth.”<sup>22</sup> Consequently, the extensive expropriation of land without compensation policy could be seen as “an obliteration of land value, some of which is financed through mortgage.” Land expropriation without compensation will put the Land and Agricultural Development Bank of South Africa (Land Bank)

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<sup>16</sup> The SA government and WSSD need a wake-up call about land, available at <http://www.nlc.co.za/wssd/press0220maylamosawakeup.htm>; In Zimbabwe war veterans and other opportunist groups used violence to grab and dispossess white commercial farmers of their land and infrastructure. No compensation was payable, and the majority of the commercial farmers lost their personal private property.

<sup>17</sup> T Boshoff, W Sihlobo & S Ntombela, ‘Redistribution of agricultural land: Expropriation without compensation debate’ *Discussion document* February 2018.

<sup>18</sup> African National Congress 54<sup>th</sup> National Conference (2017) Johannesburg, South Africa available at <https://searchworks.stanford.edu/view/13339660> (accessed on 11 April 2021).

<sup>19</sup> Expropriation Act 63 of 1975.

<sup>20</sup> Sec 8 of Expropriation Act 63 of 1975; C Collocott ‘Land expropriation and South Africa's financial institutions’ *Helen Suzan Foundation* 4 September 2018.

<sup>21</sup> T Hartmann & B Needham *Planning by law and property rights reconsidered* (2012) 23.

<sup>22</sup> J B Davies, S Sandström, A Shorrocks, & EN Wolff ‘The level and distribution of global household wealth’ (2011) 121(551) *the Economic Journal* 223.

financial stability at risk, and could siphon billions of State funds in an attempt to save the banking institutions.

The question becomes whether a land owner should then continue servicing their loan when they no longer have ownership rights to that property, and when the bank has no security to count on. Moreover, should financial institutions basically write-off their assets on their balance sheet? Wholesale expropriation of land without compensation could likely trigger a significant devaluation of financial institutions' assets, and ultimately their balance sheets. The value of a corporation is dependent on the strength of the balance sheet, which impacts on the capacity to raise capital and expand the business.<sup>23</sup> Nationalisation, however, could trigger liquidity risk in the Land Bank and other commercial banks.<sup>24</sup> Given the size of the outstanding debts, it is far-fetched to believe that the State will be in a position to financially rescue these institutions.

The law governing property rights is embedded in section 25 of the Constitution. The legislature is thus bound to take into cognisance the section 25 property clause when considering adoption, amendment, and enactment of any legal framework pertaining to property. In 2018, the Constitution Review Committee made recommendations for the "amendment of section 25 of the Constitution in order to provide for land expropriation without compensation."<sup>25</sup> According to the report, amending section 25 is a procedural process that guarantees that land reform will "address historic wrongs caused by arbitrary deprivation of land."<sup>26</sup> In this manner, this will "ensure equitable access to land and further empower the majority of South Africans to be active participants in ownership, food security, and agricultural reform programmes."<sup>27</sup> Those recommendations raised concerns, especially in the South

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<sup>23</sup> B Buchanan, C X Cao & C Chen 'Corporate social responsibility, firm value, and influential institutional ownership' (2018) 52 *Journal of Corporate Finance* 73.

<sup>24</sup> T Padoa-Schioppa, 'Central banks and financial stability: exploring the land in between' (2003) 25 *The transformation of the European financial system* 269.

<sup>25</sup> R Hall & L Ntsebeza, 'Introduction'; 'Transforming Rural South Africa? Taking Stock of Land Reform', in Ntsebeza, L & Hall, R (eds) *The Land Question in South Africa* (2007) 87.

<sup>26</sup> The report of the Joint Constitutional Review Committee on the Possible Review of Section 25 of the Constitution published on 15 November 2018.

<sup>27</sup> C Walker 'The Limits of Land Reform: Rethinking the Land Question' (2005) 31 *Journal of Southern African Studies* 24.

African banking sector.<sup>28</sup> Banks consider the recommendations as a threat to their mortgage facilities.

Currently there is a Draft Expropriation Bill (hereinafter referred as the Bill) that has already been published by the Minister of Public Works, which is open for public comments in respect of land expropriation without compensation.<sup>29</sup> The aim of the Bill is to repeal the Expropriation Act of 1975, and “to provide a common framework in line with the Constitution to guide the processes and procedures for expropriation of property by organs of state and to provide for instances where expropriation with nil compensation may be just and equitable.”<sup>30</sup> The Bill was meant to assist all organs of State (Local, Provincial, and National Authorities) to expropriate land to promote inclusivity, provide access to natural resources, and will benefit women, children, and people with disabilities. Based on this background, the study seeks to assess the impact that expropriation of land without compensation would have on mortgagees.

## **1.2 Statement of the problem**

The proposal to amend section 25 of the Constitution, which will then yield to the expropriation of land without compensation, has in turn resulted in a lot of excitement, debates, criticism, and scepticism. It is argued that mortgagees often approve the granting of loans with an understanding that the registration of a mortgage bond provides a secured claim in the event of non-fulfilment of obligations by the mortgagor.<sup>31</sup> The problem for this study, therefore, is premised on the issue that expropriating land without compensation is likely to directly or indirectly affect mortgagees in South Africa. As such, the potential losers in this process are banks, because they would have invested by issuing credit. In most cases, the credit given to debtors by banks is secured by immovable properties. In that regard, the initiative of land expropriation without compensation will make the consumers lose land

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28 A O Akinola ‘Land reform in South Africa: Interrogating the securitisation of land expropriation without compensation’ (2020) 47 (2) *Politikon* 215.

29 Draft Expropriation Bill, 2020.

30 A H Kwarteng & TP Botchway ‘State Responsibility and the Question of Expropriation: A Preliminary to the Land Expropriation without Compensation Policy in South Africa’ (2019) *Journal of Political & Legal Studies* 12 & p 98.

31 H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 298.

ownership and occupational rights, while the banks (mortgagees) lose their collateral. This will in turn, cause a loss of the overall investment and credit granted, as the mortgagor can simply prove reliability on the lost property as a means to generate income to repay the loan that was secured by such an immovable property.

### **1.3 Aims**

The study seeks to explore the best approach to the issue of expropriation of land without compensation that would mitigate the adverse impact on mortgagees.

### **1.4 Research objectives**

The following are the research objectives:

- i. To provide an analysis of the laws and legal mechanisms regulating mortgage bonds.
- ii. To assess the constitutional perspective on the expropriation of land without compensation.
- iii. To appraise the effect of expropriation of land without compensation on mortgagees in South Africa.

### **1.5. Research questions**

The following are the research questions:

- i. What are the laws and legal mechanisms put in place to regulate mortgage bonds?
- ii. What is the constitutional perspective on the expropriation of land without compensation?
- iii. What is the effect of expropriation of land without compensation on mortgagees in South Africa?

### **1.6 Literature review**

The review of literature in the field of study is discussed under the following themes:



### 1.6.1 An overview of the laws regulating mortgage bonds

The law governing mortgages originates from the law of real security, which is part of the law of property. Scott<sup>32</sup> states that a mortgage is a real right in the field of property law. Mortgage is a term often used to express various legal ideas; sometimes it is used to signify a right, sometimes a property is subject to the right, and often a contract by which this right is created.<sup>33</sup>

The meaning of the term 'mortgage' might be restricted or comprehensive. In its restricted sense, the term 'mortgage' is generally limited to describing securities over immovable property. In this sense, section 102 of the Deeds Registries Act<sup>34</sup> defines 'mortgage bond' as a bond attested by the registrar of deeds hypothecating immovable property. In its comprehensive sense, a mortgage is defined as a right over immovable property of another, which serves to secure an obligation.<sup>35</sup>

According to Wegerif, the "Roman and Roman-Dutch law made use of various terms when referring to the law of security."<sup>36</sup> These terms differed in both meaning and scope. The term '*fiducia*' was the earliest form of mortgage under the Roman law.<sup>37</sup> It established a relationship whereby a debtor passed his property to his creditor with an obligation to transfer the property back to the debtor in certain events.<sup>38</sup> The term 'mortgage' derived from English law and has since been commonly used in South Africa for more than a century.<sup>39</sup>

As stated above, and for the purpose of this study, "A mortgage is a right over immovable property of another (*ius in re aliena*), which serves to secure an

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<sup>32</sup> S Scott 'A step towards a more sympathetic credit security dispensation in South Africa' (2008) 71 *Journal of the Contemporary Roman Dutch-law* 473.

<sup>33</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 7.

<sup>34</sup> Deeds Registries Act 47 of 1937.

<sup>35</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 1.

<sup>36</sup> M Wegerif 'A critical appraisal of South Africa's market-based land reform policy: The case of the Land Redistribution for Agricultural Development (LRAD) programme in Limpopo' (2004) Research report no. 19. Programme for Land and Agrarian Studies, University of the Western Cape, 4.

<sup>37</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 2.

<sup>38</sup> *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 at 251.

<sup>39</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 2  
G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14 p 41]; R Brits *Real Security Law* (2016) 12-13.



obligation (usually by the debtor)<sup>40</sup> The essentials of a mortgage, which flow from the aforesaid definition, are:<sup>41</sup> “(1) the creation of a real right; (2) property of another to which the mortgage is to attach; and (3) an obligation which is to be secured. Based on these essentials, it is apparent that a mortgage is only an accessory to the principal obligation.” This then entails that, “...unless there is an original or principal obligation, there can be no mortgage, ‘*cum unum sine altero intelligi non possit*’.”<sup>42</sup> To simplify, there cannot be a mortgage if there is no principal obligation and *vice versa*.<sup>43</sup> Thus, “extinction of the principal obligation will as a general rule extinguish the real right of mortgage.”<sup>44</sup> This noting is supported in the landmark case of *Kilburn v Estate Kilburn*,<sup>45</sup> wherein the court noted that “a mortgage cannot come into existence without a principal obligation.”<sup>46</sup> With regard to the “property ‘of another’ to which the mortgage right is to attach,” there are two considerations involved, namely what property may be mortgaged and whose property may be given as mortgage, that is, who may be parties to a mortgage.<sup>47</sup> The creation of a mortgage right forms the most essential part of this study. The reason for this is because once we establish that the property to be expropriated is burdened with a real right (thus a mortgage bond), we would be in position to analyse how expropriation without compensation could significantly impact mortgagees. The consequences of non-compliance to the terms of the mortgage agreement by the mortgagor are usually a foreclosure.<sup>48</sup> Mortgage foreclosure is “often used to describe a specific kind of forced sale, namely that of immovable property over which a mortgage bond is registered.”<sup>49</sup> These consequences usually emanate from a term in the mortgage agreement to which the debtor willingly agrees that should

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<sup>40</sup> A Gildenhuys & G L Grobler ‘Expropriation’ in WA Joubert & J A Faris (eds) *The law of South Africa* vol 10 Part 3 (2012) para 12.

<sup>41</sup> G Willes, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 4.

<sup>42</sup> *Kilburn v Estate Kilburn* 1931 AD 501.

<sup>43</sup> *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) at 44; *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259F; *Mohamed & Son Ltd v Estate Horvitch* 1928 AD 1.

<sup>44</sup> *Lomcod Agencies (Pty) Ltd v Amalgamated Construction Co (Pty) Ltd* 1976 (3) SA 86 (D) at 90C-D; *Michele v De Villiers* (1900) 17 SC 85 at 87; *Nulliah v Harper* 1930 AD 141.

<sup>45</sup> *Kilburn v Estate Kilburn* 1931 AD 501.

<sup>46</sup> *Kilburn v Estate Kilburn* 1931 AD 501. See also *Thienhaus v Metja and Zigler* 1995 (3) SA 25 (A).

<sup>47</sup> *Kilburn v Estate Kilburn* 1931 AD 501.

<sup>48</sup> *Land and Agricultural Development Bank of South Africa v Panamo Properties 103 (Pty) Ltd* 2014 2 SA 545 para 21.

<sup>49</sup> P J Badenhorst *et al. The law of property* (2006) 368; G Willes, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 129.

he or she default on the loan repayment, the property can be attached and sold in sale in execution.

In light of the aforementioned, a mortgage therefore falls under express real security, which is established by way of contract or agreement between the mortgagor (debtor) and mortgagee (creditor).<sup>50</sup> This infers that the real security will hypothecate the specified immovable property to secure payment of a debt.<sup>51</sup> This kind of agreement becomes perfecta only upon registration in the deeds registries offices.<sup>52</sup> This contractual relationship merely connotes to the understanding that both parties have an obligation towards each other, and that such contract can only be extinguished once the principal debt is settled.<sup>53</sup> For purposes of this study, the accepted use of a mortgage is to denote a right.

### **1.6.2 The constitutional perspective on the expropriation of land without compensation**

Highlighted from the onset is that the Expropriation Act 63 of 1975 was promulgated with the mandate to outline the expropriation procedures and compensation.<sup>54</sup> What is worth noting is that it repealed in its entirety the Expropriation Act of 1965. As such, it “unified all expropriations.” Section 26(1) of the Expropriation Act succinctly put it that if an expropriation has been approved by an Act other than the Expropriation Act,<sup>55</sup> “compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act”. The overarching effect set is that all all expropriations are premised upon this Act. Ultimately, the Act dictates the expropriation procedures and calculation for compensation. These calculations and procedures apply even when such expropriation is authorised by other legislation other than the Act in question. The issue of the “willing buyer willing seller” principle was unified by the Act when

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<sup>50</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14] p 41.

<sup>51</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14] p 48.

<sup>52</sup> Deeds Registries Act 47 of 1937.

<sup>53</sup> *Kilburn v Estate Kilburn* 1931 AD 501.

<sup>54</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J *Constitutional law of South Africa* vol 3 (2003) [Chap 46] p 10.

<sup>55</sup> Expropriation Act 63 of 1975.

determining payable compensation together with aspects relating to the market value notion.<sup>56</sup>

Section 2(1) of the Expropriation Act<sup>57</sup> obliges the expropriating authority to ensure they validate their expropriation order. The section 2(1) of the Expropriation Act mandates the Minister of Public Works to “expropriate property or temporarily use the property for a public purpose subject to payment of compensation”. As such, to validate expropriation in terms of the Expropriation Act, the below enlisted should be available:

- “Authority to expropriate;
- Public purpose;
- It must be procedurally fair; and
- There should be payment of compensation.”

Worth noting is that the Act extends expropriation beyond moveable and immovable property to personal rights and incorporeal property.<sup>58</sup> Thus, expropriation in such cases refers to “acquisition of property by the expropriator,”<sup>59</sup> as well as a “loss of such property by the expropriatee”.<sup>60</sup> One aspect to highlight is that expropriation is not subject to the seller’s agreement or consent to be effected.<sup>61</sup> This depicts, in other words, that “rights in property are suspended and expropriation gives responsibility on the acquiring authority to compensate the expropriated property.” Based on the above, the discussion then focuses on the requirements to be met for a legal expropriation to unfold, as per the Expropriation Act.

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<sup>56</sup> Expropriation Act of 1965.

<sup>57</sup> Sec 2(1) of the Expropriation Act 63 of 1975.

<sup>58</sup> T Roux “Property” in Woolman S, Bishop M and Brickhill J *Constitutional law of South Africa* vol 3 (2003) [Chap 46] p 17.

<sup>59</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A.

<sup>60</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A.

<sup>61</sup> *Mathiba and Others v Moschke* 1920 AD 354-463, “where Innes CJ held that ‘in my opinion the meaning of the Besluit is clearly that the Government was empowered to take private land required for a location and to give by way of compensation, not what the owner is willing to take but equal land or a fair price, whether the latter concurred in the offer or not and whether he was willing or not to dispose of his land on such compensation’.

Key to initiate an expropriation is to ensure there is authority to expropriate. Under South African law, the state is empowered statutorily to expropriate property.<sup>62</sup> Since the state is empowered statutorily to expropriate property, this expropriation power should emanate from legislation other than common law to validate the authority vested to the state.<sup>63</sup> The Expropriation Act,<sup>64</sup> fundamentally provides for expropriation of “land and property” to the advantage of the populace. The expropriation process is prescribed in the Act. In that regard, the state is empowered to expropriate land and property as articulated in section 2 of the Expropriation Act. It stipulates the following:

- (1) Subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.
- (2) The power of the Minister in terms of subsection (1) or any other law to expropriate any property shall include the power to expropriate, when any property is so expropriated, so much of any other property which, in the opinion of the Minister, is affected by such expropriation as the Minister may for any reason deem expedient.
- (3) The power of the Minister in terms of subsection (2) to expropriate property which, in the opinion of the Minister, is affected by an expropriation, shall, in the case where only a portion of a piece of land is expropriated in terms of this section, include the power to expropriate the remainder of such a piece of land if the owner so requests and satisfies the Minister that due to the said partial expropriation the said remainder has become useless to the owner, or if the Minister, after consultation with the Minister of Agriculture, is satisfied that the said remainder is or is likely to become an uneconomic farming unit.
- (4) If the Minister negotiates with an owner of property for the acquisition thereof by means of agreement and the owner requests the Minister that the property be expropriated, the Minister may, subject to the other provisions of this Act, expropriate such property.

Sections 2-4 of the Expropriation Act gives the State the power (but not absolute power) to expropriate property. These sections clearly state that in executing its mandate, the State should avoid encroaching on other rights that exists if it is not prepared to pay compensation. Furthermore, section 24 of the Expropriation Act allows the Minister in question to delegate authority and power to expropriate to other government officials.<sup>65</sup> It is interesting that this legislation protect private

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<sup>62</sup> *Joyce and McGregor v Cape Provincial Administration* 1946 AD 658 671, “where the court ruled that the state derives its authority from statute and not Roman Dutch law.

<sup>63</sup> There “is no common law authority for expropriation in South African law. The authority for expropriation derives exclusively from legislation, most notably the Expropriation Act 63 of 1975. See A J Van der Walt *Constitutional property law* (2011) 346 & 452.”

<sup>64</sup> Expropriation Act 63 of 1975.

<sup>65</sup> Sec 24 of the Expropriation Act 63 of 1975.

property rights. However, in the same mandate, it authorises the State to also interfere with the protected rights, but subject to a condition that there will be payment of compensation for such interference.

Section 25 of the Constitution has multiple parts that “ought to be seen as mutually supportive and not as creating internal conflict.” Section 25 consists of two categories, namely:

1. Section 25(1), (2) and (3) which “entrench negative property rights: the right not to be arbitrarily deprived of property and the right for property not be expropriated without just and equitable compensation as determined by agreement or approved by a competent court.”
2. Section 25(4) to (9), which entrench positive rights. In the matter of *Haffejee No and Others v Ethekewini Municipality and Others*,<sup>66</sup> it confirmed that these sections “underline the need for redress and transformation of the legacy of the grossly unequal distribution of land in this country”. These sections emphasise “land reform and equitable access to land and resources.”

Section 25 provides for general provisions regarding compensation for expropriation. Firstly, section 25(2)(b) “property may be expropriated subject to compensation and the amount of compensation, the time and manner of such compensation have to be agreed upon by either those affected or decided or approved by the court.” Section 25(3)(a)-(e) allows for a number of factors to be considered when making decisions about compensation to reflect what is just and equitable in the complex social, political, and economic history of land during and since the end of the apartheid era.<sup>67</sup>

The general difference between deprivation and expropriation is that expropriation requires compensation under section 25(3), whereas deprivation under section 25(1), although it does not demand compensation, may not be done arbitrarily. However, this is not entirely accurate in the sense that both deprivation (regulation of property for health and safety reasons) and expropriation (taking away of property

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<sup>66</sup> *Haffejee No and Others v Ethekewini Municipality and Others* 2011 (6) SA 134 (CC) para 30.

<sup>67</sup> A J Van der Walt *Constitutional Property Law* (2011) 504.

for public purposes), involve some kind of State interference with property. Two critical aspects should be noted:

- 1) Deprivation places “a limit on an owner’s use and enjoyment of his/her property,” while expropriation takes away any title that an owner might have had over the property.
- 2) Deprivation affects everyone more or less equally for the benefit of everyone (no compensation is payable), whereas in the case of expropriation – one owner has to sacrifice his/her property for the benefit of the public (compensation is usually payable).

### **1.6.3 The impact of expropriation of land without compensation on mortgagees**

Expropriation is not new in South Africa, and the government of South African frequently expropriates many properties every year for public purposes.<sup>68</sup> The State has the authority to expropriate assets such as land for public purposes when constructing roads or dams. However, the expropriation without compensation from one person to another is a recent development.<sup>69</sup> This, therefore, makes this study unique, as focus is placed on the expropriation of land without compensation from one person to another. As a result of this new development, “there are fears that South Africa will run in to farm invasion problems, along the lines of what transpired in Zimbabwe.”<sup>70</sup> Nevertheless, it is contended that “comparisons with Zimbabwe’s large-scale confiscation of farms are spurious and that there is no indication that expropriation of land without compensation” will happen outside the parameters of the law, just as the land reform was done by the book.<sup>71</sup>

Unlike the Zimbabwean way, it is still unclear how South Africa will avoid the negative effects as those encountered by Zimbabwe in resolving the expropriation of land without compensation from one person to another. However, in South Africa, the concept of land expropriation without compensation is important in light of the

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<sup>68</sup> A J Van der Walt ‘Reconciling the state’s duties to promote land reform and to pay just and equitable compensation for expropriation’ (2006) 123 *South African Law Journal* p 23.

<sup>69</sup> *Ex Parte former Highlands Residents* 2000 (1) SA 489 (LCC)/ (2000) 2 B All SA 26.

<sup>70</sup> W D Thwala ‘land and Agrarian Reform in South Africa’ (2003) available at <http://www.nlc.co.za/index.htm> at 1.

<sup>71</sup> I Currie & J De Waal *The Bill of Rights Handbook* (2005) 553.



historical injustices. It is opined that such a move will likewise be “crucial in extending land to productive forces of society, the youth specifically for the use in agricultural changes.”<sup>72</sup> With clear projects, this will yield food independence for the populace of the country.<sup>73</sup> Writing about Namibia, Louw opined:

Land expropriation without compensation will ultimately unlock the full agricultural potential of Namibia, which currently contributes a meagre 5.1% of the GDP of which 70% represents the output of the livestock sub-sector – by transferring productive land from the few thousand owners into the hands of hundreds of thousands of Namibians, in particular black Africans who are willing and able to work the ground, thus ensuring that optimal quality and quantity of Namibia’s agricultural potential is reached and exceeded, be it crop farming, animal husbandry or both. Any surplus agricultural output will contribute to needed foreign currency through means of export to foreign markets, in particular neighbouring African countries and continental Africa in general.<sup>74</sup>

Extrapolating from Louw’s submission regarding the expropriation of land without compensation above, in South Africa, expropriation of land without compensation is envisaged as essential for fruitful development and economic sustainability of the poor black communities. However, this does not disregard the fact that expropriating land without compensation may infringe on private property rights.

It is contended that expropriation of land without compensation might annihilate the asset value of large portions of South Africa’s land, and could have a huge negative effect on financial institutions and the property market.<sup>75</sup> A bit of background on this – as at March 2018, outstanding bank credit to the private sector totalled R3.5 trillion, as indicated by South African Reserve Bank June 2018 Quarterly Bulletin.<sup>76</sup> Of this, mortgages represented 39% (R1.4 trillion), with households representing 68% (R929 billion).<sup>77</sup> Put into context, the amount of mortgage exposure that the

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<sup>72</sup> K Somerville *Africa's long road since independence: the many histories of a continent* (2017) 33

<sup>73</sup> N Nickanor, L N Kazembe, J Crush & J Wagner ‘Revisiting the African supermarket revolution: The case of Windhoek, Namibia’ (2020) 38 (2) *Development Southern Africa* 230.

<sup>74</sup> S Borrás ‘Can redistributive reform be achieved via market-based voluntary land transfer schemes? Evidence and lessons from the Philippines’ (2005) 41 *Journal of Development Studies* 90 & 92.

<sup>75</sup> J Zimmerman ‘Property on the line: Is an expropriation-centred land reform constitutionally permissible?’ (2005) 122 *South African Law Journal* 375.

<sup>76</sup> J Zimmerman ‘Property on the line: Is an expropriation-centred land reform constitutionally permissible?’ (2005) 122 *South African Law Journal* 378 & 404.

<sup>77</sup> J Zimmerman ‘Property on the line: Is an expropriation-centred land reform constitutionally permissible?’ (2005) 122 *South African Law Journal* 405.

banks have is equivalent of 29% of South African yearly GDP (as at March 2018).<sup>78</sup> This largely incorporates credit extended to purchase houses and vacant land for building a private structure.<sup>79</sup> In South Africa, the overall practice is that banks fund up to 40% of the securing of vacant land (which turns out to be in line with the zones identified for expropriation within the ANC records).<sup>80</sup> On account of free-standing houses, the value of land is incorporated into the selling price, while flat or apartment owners have an undivided share in the land on which the structure is assembled, which is owned jointly through a body corporate.<sup>81</sup>

In the past, “an expropriation would extinguish a mortgage bond and not the obligation”. Thus, “if the land was expropriated, the proprietor would still owe the bank, yet it turns into an unsecured loan.”<sup>82</sup> The current position is that if land is expropriated by the State, it will automatically be released from all mortgage bonds.<sup>83</sup> In this way, the debt will however continue to exist, and the bank enjoys a preference to the compensation payable for the expropriation.<sup>84</sup> The proposed new legislation on expropriation contains similar provisions.<sup>85</sup>

The question then becomes whether a landowner should continue servicing their loan when they no longer have ownership rights to that property, and the bank has no security to count on. Moreover, should financial institutions basically write-off their assets on their balance sheet? Wholesale expropriation of land without compensation could accordingly trigger a significant devaluation of financial institutions’ assets, and ultimately their balance sheets.

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<sup>78</sup> S C A Kasse-Kengne ‘Securitisation of mortgage loans, regulatory capital arbitrage and bank stability in South Africa: Econometric and theoretic analyses’ Doctoral dissertation, University of Cape Town, 2018.

<sup>79</sup> C Walker ‘Redistributive land reform: for what and for whom?’ in R Hall and L Ntsebeza (eds) *The land question in South Africa: The challenge of transformation and redistribution* (2007) 132.

<sup>80</sup> N Vink & J Kirsten *Principles and Practice for successful farmland redistribution in South Africa* (2019) 7.

<sup>81</sup> D Scarrett & J Wilcox *Property asset management* (2018) 21.

<sup>82</sup> K Somerville *Africa's long road since independence: the many histories of a continent* (2017) 37.

<sup>83</sup> Sec 8 (1) of the Expropriation Act 63 of 1975.

<sup>84</sup> Sec 19 of the Expropriation Act 63 of 1975.

<sup>85</sup> Clause 9 (1) (a), (d) & clause 18 of the Expropriation Bill.



## 1.7 Research methodology

This research will adopt the doctrinal methodology. The doctrinal research methodology is an incorporation of various rules, principles, norms, policies, frameworks, interpretive guidelines, and values.<sup>86</sup> This is a methodology of research into the law and underlying legal concepts, with the sources of the data being domestic and international legal frameworks, and court decisions serving as primary sources of law.<sup>87</sup> Journal articles, books, internet sources, and other sources will then serve as secondary sources of law.<sup>88</sup> The choice of this research methodology is guided by the study's discussion of legal concepts, by looking at all potential legal and ethical consequences covering mortgagees if land expropriation without compensation is implemented successfully in South Africa.

## 1.8 Definition of key concepts

The definitions of fundamental concepts to this study are provided and will be adopted as portraying the given meaning throughout the research.

### Compensation

Umezuruike briefly defines compensation as “placing in the hands of the owner expropriated the full money equivalent of the thing which, he has been deprived.”<sup>89</sup> Compensation in this study will mean money paid out to someone, either in exchange for something that has been lost, or for some other problem pertaining to land acquisition.<sup>90</sup>

### Expropriation

According to the Expropriation Bill, expropriation means “...the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority.”<sup>91</sup>

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86 M Purohit 'Legal Education and Research Methodology' (2016) p 179. para 6.

87 M Purohit 'Legal Education and Research Methodology' (2016) p 179. para 4.

88 M Purohit 'Legal Education and Research Methodology' (2016) p 179. para 4.

89 N Umezuruike A Critical Analysis of the Land Use Act of 1978 (1998) 13.

90 R A Oladape & V "Ige, 'Assessment of Claimants' satisfaction to variation in Compensation paid for compulsory land acquisition in Ondo State' (2014) 16.

91 Draft Expropriation Bill, 2020 [Chap 1].

## **Immovable property**

Immovable property means an item of property or an object fixed to the earth that cannot be moved without destroying or altering it.<sup>92</sup>

## **Mortgage**

A mortgage is defined as,

A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.<sup>93</sup>

It therefore involves two parties:

## **Mortgagee**

The term mortgagee will be used to refer to a person or business, giving, or that has given, a loan which is secured by immovable property of the person acquiring the loan (mortgagor).<sup>94</sup>

## **Mortgagor**

Mortgagor is defined as the borrower in a mortgage.<sup>95</sup>

## **Real right**

In this study, real security is used to depict a state of affairs wherein the debtor and/or third parties offer something "... (object) over which a real right in favour of the creditor is vested."<sup>96</sup>

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<sup>92</sup> H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 325.

<sup>93</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) para 2.

<sup>94</sup> R van den Bergh 'The development of the landlord's hypothec' (2009) 15 *Fundamina* 155.

<sup>95</sup> H Grotius *Inleidinge tot de Hollandsche rechtsgeleertheid* (1631 trans by RW Lee *The jurisprudence of Holland* Vol 1 1953, hereafter referred to as Grotius) 3.8.1.

<sup>96</sup> A J van der Walt & G J Pienaar *Introduction to the law of property* 2009 (6th ed) 25.

## **1.9 Overview of chapters**

The study chapters are categorised as follows:

### **Chapter one: Introduction**

Chapter one covers the background to the study, aims and objectives of the study, research questions, statement of the problem, abbreviated literature review, the proposed research methodology, definition of key concepts, and an overview of the chapters.

### **Chapter two: An analysis of the laws relating to mortgage bonds**

This chapter examines the laws governing mortgage bonds in South Africa. It will investigate the origin and concept of “mortgage”.

### **Chapter three: Constitutional perspective on expropriation of land without compensation**

This chapter sets out the law relating to expropriation in general: what is the current position, what are the new developments (amendments in place) – with a focus on mortgagees.

### **Chapter four: Exploring the impact of expropriation of land without compensation on mortgagees**

This chapter discusses the impact on mortgagees when property is expropriated without compensation, and discusses the measures that could be adopted to mitigate the negative impacts.

### **Chapter five: Conclusion and Recommendations**

This chapter comprises of a conclusion and the recommendations of the study. Such conclusion and recommendations are informed by the discussions done in the other chapters.

### **1.10 Delimitation of study**

A limitation of this study is that it addresses the expropriation of land without compensation in South Africa only, and the issue of expropriation of land without compensation is mainly confined to mortgages. The findings are confined to the doctrinal research approach only, no empirical data is incorporated.

### **1.11 Conclusion**

This chapter provided an overview and the background that gave rise to conducting this study. The statement of the problem, the aim, and objectives were formulated, and an overview of the literature in chapter two and three were provided. The research methodology and key concepts of the study were provided, followed by the delimitations and chapter overview the reader could expect.

In the next chapter, the study gives an analysis of the basic principles of real security rights.

## CHAPTER TWO

### BASIC PRINCIPLES OF REAL SECURITY RIGHTS

#### 2.1 Introduction

This chapter gives an analysis on the basic principles of real security rights. Real security entails a real right which one person has over the property of another to secure an obligation. The chapter discusses what constitutes mortgages, the scope, the nature of mortgages, and how mortgages are created in law and judicially before giving a comprehensive analysis of laws regulating mortgage bonds. This discussion is relevant to lay a comprehensive understanding of what a mortgage bond is.

#### 2.2 Real rights in South African law

Two recognised categories of security exist in our law, which are personal security and real security, where real security originates in the field of property law.<sup>97</sup> The structure and doctrinal foundation of real security rights in South African law are historically based on the Roman law, which later developed into Roman-Dutch law. “Roman-Dutch law was introduced in various colonies, including the Cape of Good Hope”<sup>98</sup> and over the years were applied and adapted by the South African courts and legislature.<sup>99</sup>

Wiese defines a real security as “...The right of a creditor over the debtor’s property that serves as security is a limited real right which is usually designated by the generic term of mortgage.”<sup>100</sup>

A real security right has a general purpose, which is to secure a claim of one person

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<sup>97</sup> The mortgage also has relevance in other areas of law, such as contract (see JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 401. However, the primary focus in this study is from a property law perspective.

<sup>98</sup> L Steyn ‘Execution against debtor’s home in terms of the Roman-Dutch law and the contemporary South African law: Comparative observations’ (2017) 23 (2) *Fundamina* 44.

<sup>99</sup> R Brits *Real Security Law* (2016) 12; L Steyn ‘Execution against debtor’s home in terms of the Roman-Dutch law and the contemporary South African law: Comparative observations’ (2017) 23 (2) *Fundamina* 22.

<sup>100</sup> M Wiese, ‘The legal nature of a lien in South African law’ (2014) 17 (6) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2526.

against another.<sup>101</sup> The holder of the real security right is a creditor who obtains a right in the property of the debtor, for the purpose of securing a principal obligation owed by the debtor to the creditor.<sup>102</sup> Real security law functions with the purpose of benefiting both the debtor and the creditor.<sup>103</sup> The creditor receives the benefit of knowing that its investment (or claim) is secured, and that it has a high prospect of retrieving it.<sup>104</sup> For this reason, persons rich in capital (usually banks) are more willing to lend money to potential debtors.<sup>105</sup> This tendency benefits those who need capital because it makes it easier for them to borrow.<sup>106</sup> Consequently, in South Africa, a mortgage (bond) is the most popular and secure legal instrument used to secure financial services from, mostly, financial institutions. This is based on the statutory partiality specified to the mortgagee in terms of the Insolvency Act 24 of 1936.

Real security law regulates the rights acquired in, or the burdens imposed on, the property to ensure the fulfilment of personal obligations.<sup>107</sup> In a sense, real security law involves an overlap between the “law of property and the law of obligations.”<sup>108</sup> In terms of this overlapping obligation, there is always a debtor who owes a duty (whether negative or positive) towards the creditor and the creditor on the other hand who has a claim against the debtor for the fulfilment of his obligation.<sup>109</sup> The duty owed by the debtor to the creditor can entail performance of some actions or the delivery of certain goods or services. However, for purposes of this study, the

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<sup>101</sup> G Wille, T J Scott & S J Scott *Wille's Law of Mortgage and Pledge in South Africa* (1987)1.

<sup>102</sup> C G Hall Maasdorp *The law of property* (1976) 212; CG van der Merwe ‘*Real security*’ in F du Bois *Wille's principles of South African law* (2007) 631; RW Lee, *An introduction to Roman-Dutch law* (1953) 183.

<sup>103</sup> S Scott ‘A step towards a more sympathetic credit security dispensation in South Africa’ (2008) 71 *Journal for Contemporary Roman Dutch Law* 473. Scott describes a pledge as follows: “[A] pledge, however, is for the benefit of both parties, for the debtor, so that he can borrow more readily, and for the creditor, so that his loan is safer”.

<sup>104</sup> N Sham, ‘Executed in execution: discussion and suggestions regarding the immovable property foreclosure process in South Africa.’ LLM thesis, University of KwaZulu- Natal, 2017.

<sup>105</sup> G Dell’Ariccia, D Igan & LU Laeven ‘Credit booms and lending standards: Evidence from the subprime mortgage market’ (2012) 44(2-3) *Journal of Money, Credit and Banking* 367-384.

<sup>106</sup> R Brits ‘Mortgage foreclosure under the Constitution: Property, Housing and the National Credit Act’ unpublished LLD thesis, University of Stellenbosch, 2012.

<sup>107</sup> M Wiese ‘A South African perspective on a lien as a real security right in Scottish law’ (2017) 1 *Journal of the South African Law* 89. Real security means that, on the basis of a creditor’s right against the debtor (principal debt), a creditor acquires a limited real right in the property of the debtor as security for the payment of the creditor’s right (principal debt) by the debtor.

<sup>108</sup> R Brits *Real Security Law* (2016) 1.

<sup>109</sup> A F S Maasdorp “The law of mortgage” (1901) 18 *South African Law Journal* 233.

duty owed by the debtor involves payment of money borrowed by the debtor from the creditor in terms of a loan agreement. The agreement of the loan also establishes a concomitant personal right (for the creditor) to reclaim the money borrowed.

Real security rights in South Africa are governed by law of property. The law of property is largely concerned with “real rights (*iura in rem*), which are rights over property, and are enforceable against the world at large (*erga omnes*).”<sup>110</sup> The opposite of real rights is “personal rights (*iura in personam*), which are only enforceable against persons who are party to a particular obligation.”<sup>111</sup> There are two categories of real rights, namely ownership and limited real rights. The right of ownership (*dominium*) is the right that a person has in property belonging to him or her (*ius in re propria*).<sup>112</sup> In other words, this is the property of which he or she is the owner.<sup>113</sup> Limited real rights, on the other hand, are rights that a person has in property belonging to another (*iura in re aliena*).<sup>114</sup> Different categories of limited real rights exist, which include long leasehold, right of superficies, servitudes, and real security rights.<sup>115</sup>

Real security rights are further divided into various types and these include mortgage, pledge, tacit hypothec, and lien. These sub-types of real security rights are briefly described below.

### 2.2.1 Pledge

Mostert and Pope stated:

A pledge is a bailment that conveys possessory title to property owned by a debtor (the pledger) to a creditor (the pledgee) to secure repayment for some debt or obligation and to the mutual benefit of both parties. The term is also

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<sup>110</sup> P J Badenhorst, P J Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* (2019) 22.

<sup>111</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 13.

<sup>112</sup> N Sham 'Executed in execution: discussion and suggestions regarding the immovable property foreclosure process in South Africa' Doctoral dissertation, University of KwaZulu-Natal, 2017.

<sup>113</sup> Ownership is said to be the most complete or comprehensive right a person can have in respect of property: See *Gien v Gien* 1979 2 SA 1113 (T) 1120. For general principles on ownership, see P J Badenhorst, P J Pienaar & H Mostert *Silberberg and Schoeman's the law of property* (2006) 47, 91 & 132.

<sup>114</sup> P J Badenhorst, P J Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* (2019) 24.

<sup>115</sup> G F Lubbe 'Mortgage and pledge' in WA Joubert & JA Faris *The Law of South Africa* (2008) 17.

used to denote the property which constitutes the security.<sup>116</sup>

A pledge is a form of mortgage in an all-inclusive sense. A pledge is “a right over the movable or incorporeal property of another which serves to secure an obligation.”<sup>117</sup>

### 2.2.2 Hypothec

The hypothec permits the landlord to sell the movable goods of the occupant or a third party that are on the rented premises, if the occupant neglects to pay the rent.<sup>118</sup> Brits noted that generally, real security rights are sometimes granted to a person by operation of law, that is, in the absence of any agreement.<sup>119</sup> These security rights arise automatically if certain preconditions are present. Some of them are referred to as tacit hypothec. A hypothec can be any kind of security right. In this case, it is called 'tacit' because it is created to non-statutory security rights by operation of common law.<sup>120</sup> A landlord enjoys a tacit hypothec over the tenant's movable property that has been brought onto the premises for arrears of rent. Once a movable property falls within the ambit of section 2 of the Security by Means of Movable Property Act 57 of 1993, it is totally excluded from reach of the Landlord's tacit hypothec.

### 2.2.3 Lien

Ween and Lien state:

A lien is a claim or legal right against assets that are typically used as collateral to satisfy a debt. ... A lien serves to guarantee an underlying obligation, such as the repayment of a loan. If the underlying obligation is not satisfied, the creditor may be able to seize the asset that is the subject of the lien.<sup>121</sup>

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<sup>116</sup> H Mostert & A Pope *The principles of the law of property in South Africa* (2010) 30.

<sup>117</sup> C G Hall & EA Kellaway *Servitudes* (1973) 57.

<sup>118</sup> A J Van Der Walt & NS Siphuma 'Extending the lessor's tacit hypothec to third parties' property' (2015) 132(3) *South African Law Journal* 524.

<sup>119</sup> R Brits *Real Security Law* (2016) 436.

<sup>120</sup> G Wille, T J Scott & S J Scott *Wille's Law of Mortgage and Pledge in South Africa* (1987) 110.

<sup>121</sup> G B Ween & M Lien 'Decolonialization in the Arctic? Nature practices and land rights in the Norwegian High North' (2012) 7(1) *Journal of Rural and Community Development* 95.



## 2.3 Analysis of the concept of mortgage

### 2.3.1 Mortgage

The term “mortgage” is used to represent a real security right, which strengthens the creditor’s chances of retrieving the money. For the creditor to have confidence in the enforceability of the loan agreement, the creditor may require that an identifiable piece of property be mortgaged in favour of the creditor, affording the creditor a personal right or claim against the debtor should the debtor fail to pay.<sup>122</sup> In the leading case of *Stewart’s Trustees & Marnitz v Uniondale Municipality*, CJ noted the following:

The object of a mortgage is to give the mortgagee a charge upon the land mortgaged as security for the debt due. It is a charge upon the entire dominium of the land, and therefore if any portion of that dominium is interfered with by the mortgagor, it is a prejudice to the legal rights of the mortgagee. There is no need for the mortgagee to prove actual pecuniary damage; the interference by the mortgagor in diminishing any portion of the dominium of the land charged by imposing a servitude upon it, is a prejudice to the mortgagee’s legal rights, and therefore he or she is entitled to have the act which causes such prejudice set aside.<sup>123</sup>

A mortgage is about collateral for a loan, and it is not only real property that can be mortgaged, for instance, an investment portfolio such as company securities, even royalties accruing from a book can be mortgaged.<sup>124</sup> A good understanding of what constitutes a mortgage bond is crucial when interpreting and discussing laws regulating mortgage bonds. This part discusses what constitutes a mortgage, origin of the concept, differences between mortgage and other concepts, different types of mortgages, creation, registration, and cancellation of mortgage. This study focuses on a real security right created by contract – in other words, an express mortgage.

In some instances, “mortgage is used to refer to the property that is the subject of the real security right.”<sup>125</sup> In some instances, “mortgage is used to refer to the

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<sup>122</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14] 39.

<sup>123</sup> *Stewart’s Trustees & Marnitz v Uniondale Municipality* 1889 7 SC 110.

<sup>124</sup> GF Lubbe “Mortgage and pledge” rev TJ Scott in WA Joubert & JA Faris (eds) *Law of South Africa* (2008) 29.

<sup>125</sup> *Stewart’s Trustees & Marnitz v Uniondale Municipality* 1889 7 SC 133.

specific real right and the privileges that attach to it.”<sup>126</sup> The word ‘mortgage’ (referring to a real security right) used in an all-inclusive sense denotes “a right over the property of another which serves to secure an obligation.”<sup>127</sup> The latter meaning of mortgage fails to meet some material elements, “nature of the property that is the subject of the mortgage, how the mortgage is constituted, or the nature of the obligation it secures. In the restricted sense ‘mortgage’ refers to security over immovable property.”<sup>128</sup>

A mortgage “is a real right in favour of a person (the mortgagee) over the property of another person (the mortgagor) for the repayment or fulfilment of a debt due by the mortgagor or a third party to the mortgagee.”<sup>129</sup> From the proceeds of the purchase of property, the mortgagee has a preferential claim that should be met first. Such a ‘preferential claim’ is “enforceable against all creditors of the mortgagee save for creditors who have a prior or stronger claim to the property.”<sup>130</sup> It is because of this that the real right “...attaches to the property and limits the entitlements of the owner of the property.”<sup>131</sup>

A contract may give rise to a mortgage and in such a scenario it is termed a conventional or express mortgage. On the other hand, a “tacit or legal mortgage arises through operation of law.”<sup>132</sup> Additionally, mortgages can be categorised as general or special. In principle, a “general mortgage bond binds all present and future property of the debtor, whereas a special mortgage bond binds specifically defines property of the debtor.”<sup>133</sup>

A mortgage is constitutionally protected under section 25 of the Constitution. In the *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African*

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<sup>126</sup> C G Hall & EA Kellaway *Servitudes* (1973) 56.

<sup>127</sup> C G Hall & EA Kellaway *Servitudes* (1973) 56.

<sup>128</sup> C G Hall & EA Kellaway *Servitudes* (1973) 56.

<sup>129</sup> S C Harms *Civil Procedure in the Superior Courts* (2016) 87.

<sup>130</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC) and *Nkata v Firstrand Bank Limited and Others* 2016 (4) SA 257 (CC).

<sup>131</sup> G E Devenish ‘A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law’ (2005) *Journal of contemporary Roman Dutch law* 243.

<sup>132</sup> N Sham, ‘Executed in execution: discussion and suggestions regarding the immovable property foreclosure process in South Africa.’ LLM thesis, University of KwaZulu- Natal, 2017.

<sup>133</sup> S Woolman & J Swanepoel *Constitutional Law of South Africa* (2019)43.

*Revenue Services and Another*,<sup>134</sup> the Constitutional Court stated that “constitutional property not only refers to objects of property but also to rights in property themselves, real rights (such as mortgages) being prime examples.”

The Supreme Court of Appeal (SCA) in *Gainsford and Others NNO v Tiffski Property Investments (Pty) Ltd and Others*<sup>135</sup> indicated that “it would accept a registered mortgage bond as constituting a real right that qualifies as property under section 25.” In this same case,<sup>136</sup> the view “that the particular mortgage bonds were not property” was endorsed. In that regard, it is certain that the SCA would have recognised it as valid mortgage bonds as it is tantamount to real rights deserving protection, as envisaged under the property provision.

The meaning of the term ‘mortgage’ may have both a restricted or comprehensive meaning.<sup>137</sup> When referring to the term in a restricted sense, ‘mortgage’ is mostly limited to describing securities over immovable property.<sup>138</sup> Thus, section 102 of the Deeds Registries Act<sup>139</sup> defines a ‘mortgage bond’ as “a bond attested by the registrar [of deeds] specifically hypothecating immovable property.” In the comprehensive sense, a mortgage can be described as a right over another’s immovable property that serves to secure an obligation.<sup>140</sup> When referring to the law of security, the Roman and Roman-Dutch law used different terms, and these terms often varied in meaning and scope. Under the earlier Roman law, the term *fiducia* was the first form to define mortgage.<sup>141</sup> It denoted a relationship where a debtor passed the property to the creditor under the obligation and understanding that the property will be transferred back to the debtor in certain events.<sup>142</sup> The term ‘mortgage’ came from English law, and has subsequently been used in South Africa

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<sup>134</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC) para 50.

<sup>135</sup> *Gainsford & Others NNO v Tiffski Property Investments (Pty) Ltd & Others* 2012 3 SA 35 (SCA).

<sup>136</sup> 2012 3 SA 35 (SCA) paras 42-47.

<sup>137</sup> G Dell’Ariccia, D Igan & LU Laeven ‘Credit booms and lending standards: Evidence from the subprime mortgage market’ (2012) 44(2-3) *Journal of Money, Credit and Banking* 367.

<sup>138</sup> R Brits ‘Parate executie clause in mortgage bond versus post-default authority to sell: *Business Partners Limited v Mahamba*’ (2020) 41 *Obiter* 175.

<sup>139</sup> Deeds Registries Act 47 of 1937.

<sup>140</sup> G Wille, T J Scott & S J Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 1.

<sup>141</sup> G Wille, T J Scott & S J Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 2.

<sup>142</sup> *National Bank of SA Ltd v Cohen’s Trustee* 1911 AD 235 at 251.

for over a century.<sup>143</sup> In *Lief NO v Dettmann*<sup>144</sup> a mortgage bond was defined as an instrument hypothecating immovable property to secure existing and/or future debt. That definition of mortgage was confirmed by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson and Others*<sup>145</sup> where Cameron and Nugent JJA stated as follows:

A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

A mortgage bond, like all other categories of real security, attaches to the property itself, and this is owing to its real nature; put differently, this is owing to the fact that a mortgage bond is a category of limited real rights, and with all limited real rights, it follows the property and not the person.<sup>146</sup> Consequently, the holder thereof can enforce it even when the property leaves the possession of the debtor.

### 2.3.2 Origins of a Mortgage

An express (or special) mortgage comes into existence by an agreement to put the specific property up for security, followed by registration in the Deeds Registries office.<sup>147</sup> During the process of hypothecation<sup>148</sup> the mortgagor agrees to limit his ownership, while allowing the mortgagee to obtain a charge over the property.

Mortgages can be created in three different sets of circumstances, namely: (1) express real security rights (for example mortgage in immovable property; pledge and notarial bonds) are created by agreement; (2) tacit real security rights (for example tacit hypothecs and lien) created by operation of law; and (3) judicial real security rights – created by a court order.

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<sup>143</sup> *Stewart's Trustees & Marnitz v Uniondale Municipality* 1889 7 SC 110.

<sup>144</sup> *Lief NO v Dettmann* 1964 (2) SA 252 (AD) para 252.

<sup>145</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) para 2.

<sup>146</sup> L Steyn 'Execution against debtor's home in terms of the Roman-Dutch law and the contemporary South African law: Comparative observations' (2017) 23 (2) *Fundamina* 22.

<sup>147</sup> A Domanski 'Mortgage bondage' (1995) 112 *South African Law Journal* 159.

<sup>148</sup> A F S Maasdorp "The law of mortgage" (1901) 18 *South African Law Journal* 233.

### 2.3.2.1 Creation of mortgage by agreement between the parties

“For a valid mortgage bond to be concluded there must be a real agreement”<sup>149</sup> between the creditor and the debtor. With this agreement, the creditor advances money to the debtor and in return the debtor agrees to burden his property with a real right in favour of the creditor.<sup>150</sup> The contract (real agreement) brings the mortgage bond into existence and not the one that creates the debts.<sup>151</sup> There are two essential elements to the nature of this agreement, namely the consent of both parties and the intention to create a mortgage.<sup>152</sup> This agreement only becomes perfected once it is registered by the registrar of deeds.<sup>153</sup>

The two distinct sides of an express mortgage are that the mortgage commonly functions between the mortgagor and the mortgagee, owing to the agreement between the two parties, and it establishes a real right in the property, favouring the mortgagee due to the registration, where this right is generally enforceable against all third parties.<sup>154</sup> A mortgage bond usually confers a number of rights - firstly, it affords a right to follow the property and restrain the owner’s dealings with it. Secondly, it provides a right, arising in default of the obligation that it secures, to have the property sold and to obtain payment of the debt from the proceeds of the sale.<sup>155</sup> Thirdly, it provides a preference in favour of the mortgagee in the proceeds of a forced sale of the property, whether due to insolvency<sup>156</sup> of the mortgagor, or

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<sup>149</sup> The real agreement will express the parties’ intention to burden specific property as security for fulfilling a specific obligation. The parties agree on the nature of the transactions and requirements for a valid contract also have to be met – then a mortgage agreement is born.

<sup>150</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 3].

<sup>151</sup> R Brits ‘Mortgage foreclosure under the Constitution: Property, Housing and the National Credit Act’ unpublished LLD thesis, University of Stellenbosch, 2012.

<sup>152</sup> These elements are briefly explained in paras 2.6 below.

<sup>153</sup> R Brits ‘Mortgage foreclosure under the Constitution: Property, Housing and the National Credit Act’ unpublished LLD thesis, University of Stellenbosch, 2012.

<sup>154</sup> *Olif v Minnie* 1953 1 SA 1 (A) 3; *Lief NO v Dettmann* 1964 2 SA 252 (A) 264. See also KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn *Principles of commercial law* (1999) 7; RC Laurens ‘*Mortgage bond: Real security*’ (1984) *Oct De Rebus* 480.

<sup>155</sup> E Kahn *Principles of commercial law* (1999) 7; RC Laurens ‘*Mortgage bond: Real security*’ (1984) *Oct De Rebus* 484.

<sup>156</sup> E Bertelsmann *et al* (C Nagel ed) *Mars the law of insolvency in South Africa* (2008) 432-475. The holder of a mortgage bond that hypothecates immovable property is a secured creditor for sequestration purposes, and a secured creditor is anyone who enjoys a security for his claim over the property of the insolvent by virtue of a special mortgage: See the definition of “special mortgage” in s 2 of the Insolvency Act 24 of 1936.

execution at the instance of another creditor.<sup>157</sup>

As already stated above, a mortgage generally operates between the mortgagor and the mortgagee by virtue of the agreement between them. This does not however imply that a mere agreement between the parties constitutes a valid mortgage, for various formalities must be complied to effect that purpose.<sup>158</sup> The agreement to constitute a mortgage involves two essential points:

1. *Free and mutual consent*: the consent of all parties to the mortgage, as in all other contracts, must be freely given and not obtained by fear, force, mistake, or fraud. Likewise, the undue influence of one person on another resulting in the other passing a bond in his favour will entitle the mortgagor to have the bond set aside.<sup>159</sup>

2. *Intention to mortgage*: The agreement among the parties must express the intent to create a mortgage.<sup>160</sup> Although the intention to create a security is expressed in the agreement, the surrounding circumstances may defeat the objects aimed at, and *vice versa*. The intention to create a security, although not expressed, may be held to be implied; thus, it is necessary to ascertain the true meaning of the agreement.<sup>161</sup>

A mortgage bond is created through a contract and registration in case of immovable property.<sup>162</sup> As such, the general elements of a contract must be met.<sup>163</sup> The National Credit Act also specifies contractual requirements that apply to credit arrangements.<sup>164</sup> The “registration and required documents should be set up by a registered conveyancer.”<sup>165</sup> Only the “conveyancer is answerable for the contents of the registration” documents.<sup>166</sup> These documents should be executed by the

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<sup>157</sup> P J Badenhorst, J M Pienaar, & H Mostert *Silberberg and Schoeman's the Law of Property* (2003) 371.

<sup>158</sup> *Ward v Barrett* 1963 (2) SA 546 (A) 552.

<sup>159</sup> R C Laurens 'Mortgage bond: Real security' (1984) *Oct De Rebus* 483.

<sup>160</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 42.

<sup>161</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 42.

<sup>162</sup> C G Van der Merwe & J M Pienaar 'Law of property (including real security).' (2005) 1 *Annual Survey of South African Law* 368.

<sup>163</sup> S C Harms *Civil Procedure in the Superior Courts* (2016) 87.

<sup>164</sup> Sec 86(7) of the National Credit Act 34 of 2005.

<sup>165</sup> Sec 43(1) of the Deeds Registries Act 47 of 1937.

<sup>166</sup> D Mangena 'A banking perspective on the constitutional right to housing with emphasis on mortgage agreements.' PhD thesis, University of Johannesburg, 2017.



proprietor of “the property in person or their representative authorised with power of attorney, in the presence of, and verified by the Registrar of Deeds.”<sup>167</sup>

An agreement between the debtor and the creditor, where the creditor lends a certain amount of money to the debtor is not sufficient to constitute “a limited real right in favour of the creditor.”<sup>168</sup> The general rule concerning the creation or transfer of limited real rights is that the right is “vested through delivery in the case of movable property and registration in the case of immovable property.”<sup>169</sup> In *Smith v Farrelly’s Trustee*<sup>170</sup> the court held that the only way to achieve “delivery” when dealing with an immovable property is through registration.<sup>171</sup> Section 16 of the Deeds Registries Act<sup>172</sup> provides that ownership and other limited real rights in land can only be transferred or created by way of registration. Registration of a mortgage bond is also essential because it affords the mortgagee a “limited real right which is enforceable against the whole world.”<sup>173</sup>

#### 2.3.2.1.1 Registration

Registration of a mortgage bond allows the owner, in this case the mortgagor, the right to use and enjoy the property.<sup>174</sup> Should the mortgagor be in breach of any term of the mortgage bond, the mortgagee is not obliged to execute against any movable property of the judgment debtor first, as is the case with a judgment creditor, but is entitled to the immediate execution against the mortgaged immovable property.<sup>175</sup> This is also applicable where there is no clause in the bond stipulating this. However, the mortgagee cannot execute against the mortgaged property without recourse to the mortgagor or the court: the mortgagee must first approach the court, sue, and obtain judgment on the mortgage bond by means of a

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<sup>167</sup> Sec 50(1) of the Deeds Registries Act 47 of 1937.

<sup>168</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14] p 41; R Brits *Real Security Law* (2016) 35.

<sup>169</sup> R Brits *Real Security Law* (2016) 36.

<sup>170</sup> *Smith v Farrelly’s Trustee* 1904 TS 949-955; *Land and Agricultural Development Bank of South Africa v Panamo Properties* 103 (Pty) Ltd 2014 2 SA 545 para 21.

<sup>171</sup> Delivery of the debtor’s title deed to the creditor does not create a mortgage over the land.

<sup>172</sup> Sec 6 of the Deeds Registries Act 47 of 1937.

<sup>173</sup> G le Roux & E Frantzen *Deeds course for attorneys* (2017) [Chap 14] p 41.

<sup>174</sup> G F Lubbe & T J Scott ‘*Mortgage and Pledge*’ in WA Joubert & JA Faris *The Law of South Africa* (2008) 360.

<sup>175</sup> *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C).

court order declaring the mortgaged immovable property especially executable.<sup>176</sup> Registration notifies the public that there is a limitation imposed on the owner's property and as such the "owner cannot deal with the property without the mortgagee's consent."<sup>177</sup> The limited real right is not created once a debt has been incurred, but only once the mortgage bond has been registered.<sup>178</sup>

Failure to register the mortgage bond does not prejudice the mortgagee as far as their rights against the mortgagor; however, it affects the mortgagee's relation to third parties.<sup>179</sup> Preference over third parties is one of the critical advantages of the mortgage bond for the mortgagee.<sup>180</sup> The real right created by registration has the outcome of making the mortgagee a preferential creditor, which is a creditor that has a real right over the immovable property being referred to, to the exclusion of other creditors with regards to a mortgage bond.

### 2.3.2.2 Creation by court order

This type of real security is created when a creditor obtains a judgment order against the debtor for monies that has become due. The judicial attachment of property in execution by means of a judgment debt then affords the creditor a security right, which may be referred to as judicial mortgage.<sup>181</sup> The purpose of this type of mortgage is to serve as security for the satisfaction of the judgment debt.<sup>182</sup> The real security here is not created by a real agreement, but comes in as a consequence of a court order, which order enables an officer of the court to attach the property concerned.<sup>183</sup> In *Nedbank Ltd v South African Securitization Programme (Pty) Ltd and Others*,<sup>184</sup> the court held that a judicial pledgee or

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<sup>176</sup> G F Lubbe & T J Scott 'Mortgage and Pledge' in WA Joubert & JA Faris *The Law of South Africa* (2008) 324.

<sup>177</sup> The word deal here refers to actions such as selling the mortgaged property or burdening it any further without obtaining the consent of the initial mortgagee.

<sup>178</sup> R Brits *Real Security Law* (2016) 36; P J Badenhorst *et al The law of property* (2006) 368; T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 129.

<sup>179</sup> Only a real right (which has to be properly registered with the Deeds Registry) is enforceable against the whole world.

<sup>180</sup> P J Badenhorst, P J Pienaar & H Mostert *Silberberg and Schoeman's the Law of Property* (2003) 361.

<sup>181</sup> R Brits *Real Security Law* (2016) 478.

<sup>182</sup> G Wille, T J Scott & S J Scott *Wille's Law of Mortgage and Pledge in South Africa* (1987) 110.

<sup>183</sup> R Brits *Real Security Law* (2016) 478.

<sup>184</sup> *Nedbank Ltd v South African Securitization Programme (Pty) Ltd and Others* 2017/2011 [2013] 128.



mortgagee is in principle in the same position as if he holds the security right through delivery or registration, and that such security is also enforceable against the debtor as well as all other creditors who hold no prior real right in respect to the property. If the property concerned is sold, the effect then is that the judgment creditor will enjoy a preference to the proceeds of sale before other creditors are paid.<sup>185</sup>

### 2.3.3 Constitution of mortgage

As stated above, a mortgage is a right over immovable property of another (*ius in re aliena*), which serves to secure an obligation (usually by the debtor). The essentials of a mortgage include:<sup>186</sup> “(1) the creation of a real right; (2) property of another to which the mortgage is to attach; and (3) an obligation which is to be secured.” Based on these stipulations, it is apparent that a mortgage is only an accessory to the principal obligation. This means that unless there is an original or principal obligation, there can be no mortgage bond - ‘*cum unum sine altero intelligi non possit*’. In simple terms, there cannot be a mortgage without a principal obligation and *vice versa*.<sup>187</sup> The ‘principal obligation’ may arise from such causes as the lending of money, a letting, a hiring, a mandate, a suretyship, or a judgment.<sup>188</sup> Thus, extinction of the principal obligation “extinguishes the real right of mortgage.”<sup>189</sup> This finds support in the case of *Kilburn v Estate Kilburn*,<sup>190</sup> where the court held that a mortgage cannot come into existence without a principal obligation.<sup>191</sup>

### 2.3.4 Cancellation of mortgage

Mortgage cancellation commonly implies that a lender has cancelled, or excused, the debt owed by the borrower.<sup>192</sup> It is, however, rare for lenders to cancel an entire mortgage. It is more common for a lender to cancel part of the mortgage debt as a

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<sup>185</sup> R Brits *Real Security Law* (2016) 479.

<sup>186</sup> G Wille, T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 43.

<sup>187</sup> *Thienhaus v Metje & Ziegler Ltd* 1965 3 SA 25 (A) 44.

<sup>188</sup> T J Scott & S Scott *Willes Law of Mortgage and Pledge in South Africa* (1987) 5.

<sup>189</sup> *Lomcod Agencies (Pty) Ltd v Amalgamated Construction Co (Pty) Ltd* 1976 (3) SA 86 (D) 90C-D; *Michele v De Villiers* (1900) 17 SC 85 at 87; *Nulliah v Harper* 1930 AD 141.

<sup>190</sup> *Kilburn v Estate Kilburn* 1931 AD 501.

<sup>191</sup> See also *Thienhaus v Metje and Zigler* 1995 (3) SA 25 (A).

<sup>192</sup> R Ibragimov ‘Fighting the Undead: Why States Should Use Forced Vesting to Kill Zombie Mortgages’ (2019) 60 *Building and Construction Law Journal Rev* 1279.

consolidation or restructuring measure. Cancelling a bond happens at the point of a property transfer.<sup>193</sup> When the seller has sold the property, the returns will be used to take care of the outstanding credit sum and the bond against the property will be dropped.<sup>194</sup> As long as a mortgage bond is in existence, the dominium of the encumbered property remains. The registration of cancellation of a mortgage bond must be performed by the registrar of deeds.<sup>195</sup> Generally it is the registrar's duty to cancel a mortgage bond on presentation of the original bond, together with the consent by the mortgagee for cancellation, and this duty can be enforced by the court.<sup>196</sup> The court can order the cancellation of a mortgage bond.<sup>197</sup>

There are a number of reasons that may result in a person cancelling a mortgage bond. The first is the point at which the full sum has been paid off to the loaning institution.<sup>198</sup> Secondly, should the loan no longer be needed, the person may choose to cancel the loan account, and hence the bond.<sup>199</sup> Thirdly, a mortgage bond may be cancelled at the point of a property transfer. Fourthly, a mortgage bond may be cancelled when the seller has sold the property and used the proceeds to pay off the outstanding loan amount.<sup>200</sup> Likewise, a mortgage bond may sometimes be cancelled when an individual decides to cancel a property loan with a particular institution to accept an alternative offer, perhaps at a lower interest rate.<sup>201</sup>

The law protects the bondholder's rights even though a mortgage bond may erroneously be cancelled. Thus, the fact that a mortgage bond has been cancelled, does not invalidate the legal rights of the bondholder. For example, in *Barclays*

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<sup>193</sup> G Wehinger 'SMEs and the credit crunch: Current financing difficulties, policy measures and a review of literature' (2014) 2013(2) *OECD Journal: Financial Market Trends* 115.

<sup>194</sup> AE Baum et al *Property investment appraisal* (2021) 33.

<sup>195</sup> Sec 3(1)(g) Deeds Registries Act 47 of 1937.

<sup>196</sup> *Roodt v Registrar of Deeds* (188) 7 SC 39.

<sup>197</sup> Sec 6 of the Deeds Registries Act 47 of 1937.

<sup>198</sup> L Juma 'Mortgage bonds and the right of access to adequate housing in South Africa: *Gundwana v Stoke Development & Others* 2011 3) SA 608 (CC)' (2012) 37(1) *Journal for Juridical Science* 1.

<sup>199</sup> L Juma 'Mortgage bonds and the right of access to adequate housing in South Africa: *Gundwana v Stoke Development & Others* 2011 3) SA 608 (CC)' (2012) 37(1) *Journal for Juridical Science* 1.

<sup>200</sup> N A Zulu 'Reinstatement of a mortgage agreement in respect of residential property: a discussion of the judgment in *Nkata v First Rand bank ltd* and its implications' LLM Dissertation, University of KwaZulu Natal, 2018.

<sup>201</sup> N A Zulu 'Reinstatement of a mortgage agreement in respect of residential property: a discussion of the judgment in *Nkata v First Rand bank ltd* and its implications' LLM dissertation, University of KwaZulu Natal, 2018.

*Nasionale Bank Bpk v Registrateur van Aktes, Transvaal*,<sup>202</sup> a mortgaged property was transferred after the mortgage bond was cancelled by mistake without the consent of the mortgagee as required by section 56(1) of the Deeds Registries Act.<sup>203</sup> The court held that the property was executable in the hands of the new owner, because the registered mortgage bond constituted a real burden against the property, which is enforceable against any owner of the property.<sup>204</sup> It was further held that there was still a valid principal debt between the previous owner and the mortgagee and that the mortgage bond burdening the property as object was executable as a real burden against the property, although it was registered in the name of the new owner.<sup>205</sup> In this manner, the decision of the court indicates that the existence of a mortgage bond is inter-dependant on the continued existence of a principal obligation. The Court of Appeal (in the United States of America) for the Seventh Circuit, applying Illinois law, in *Trinity 83 Development, LLC v. Colfin Midwest Funding, LLC*<sup>206</sup> upheld the same reasoning when it held that:

...an erroneously filed satisfaction of a mortgage, which was corrected two years later by the filing of a cancellation of the satisfaction prior to the mortgagor's bankruptcy filing, did not result in a loss in the bankruptcy case.

Although the decision of the US court is not binding on South African courts, it remains pertinent for this study. The general principle established here is that erroneous cancellations of mortgage bonds do not automatically extinguish the mortgagee's real security rights. Therefore, in the case of expropriation, the property does not vest unburdened in the name of the expropriator, but is burdened by limited real rights (unless these also are expropriated), or with the burden in the form of a duty by the owner to compensate mortgagees or lien holders before the

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<sup>202</sup> *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 (4) SA 936 (T) 941E-942A.

<sup>203</sup> Deeds Registries Act 47 of 1937.

<sup>204</sup> In *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 (4) SA 936 (T) 941A the court referred to the dictum in *Mutual Life Assurance Co v Hudson's Trustee* 1885 (3) SC 264: "It is a claim upon the land itself, which differs in this respect from movables in regards to which the rule is *mobilia non habent sequelam*".

<sup>205</sup> The same was held in *Standard Bank van SA Bpk v Breitenbach* 1977 (1) SA 151 (A) 156C-E. where a property was transferred without the cancellation of an existing mortgage bond. The existing bond endorsed against the title deed of the property was granted by the previous owner in terms of a valid principal debt which still existed at the time of the transfer to the new owner, and it was held that the property be executable in the hands of the new because it constituted a real burden upon the property.

<sup>206</sup> *Trinity 83 Development, LLC V. Colfin Midwest Funding, LLC*, No. 18-2117 (7th Cir. Mar. 1, 2019).

owner may receive any compensation.<sup>207</sup> Consequently, even in the case of expropriation, a mortgage bond will only be cancelled once the mortgagor has honoured the payment of the outstanding monies advanced.<sup>208</sup> Where the owner does not compensate the mortgagor for the expropriation of the property then the new owner carries over the limited real right burdened on the property.<sup>209</sup> It is arguable whether a court would order the cancellation of an existing mortgage bond burdening the property while a valid principal debt is still in force. It would be plausible to have the owner to compensate the mortgagor for the expropriation of the property.<sup>209</sup>

## 2.4 Conclusion

In summation, the discussions in this chapter creates a comprehensive understanding of what is a mortgage bond, and this helps when interpreting and discussing laws regulating mortgage bonds. The chapter established that mortgage bonds in South African law are governed by law of property. Mortgage bonds are largely concerned with real rights and they are enforceable against the whole world. The chapter also established that essentials of a mortgage include: “(1) the creation of a real right; (2) property of another to which the mortgage is to attach; and (3) an obligation which is to be secured.” Based on the latter essentials, a mortgage is only an accessory to the principal obligation. As such, the limited real right is not created once a debt has been incurred, but only once the mortgage bond has been registered. Lastly, the chapter addressed the cancellation of a mortgage bond and shows that a mortgage is afforded constitutional protection under section 25(1) of the Constitution. Next follows a discussion on the constitutional protection afforded to mortgages, and gives an appraisal of the constitutional perspective on expropriation of land without compensation.

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<sup>207</sup> A West Practitioner's Guide to Conveyancing (2018)16.

<sup>208</sup> *Durban City Council v Molliere* 1953 4 SA 312 (N); *Malherbe v Van Rensburg* 1970 4 SA 67 (C) 82D-83A.

<sup>209</sup> G E Devenish 'A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law' (2005) *Journal of contemporary Roman Dutch law* 243.

## CHAPTER THREE

### EXPROPRIATION OF LAND WITHOUT COMPENSATION: A CONSTITUTIONAL PERSPECTIVE

#### 3.1 Introduction

Chapter two gave an analysis of the laws regulating mortgage bonds in South Africa. This chapter gives an appraisal of the constitutional perspective on expropriation of land without compensation. It should be made clear from the onset that the land question in South Africa has been problematic since the dawn of democracy. This issue emanates from the unspeakable truth of the racial and socio-economic disparities in South Africa.<sup>210</sup> The foregoing synopsis in this chapter pinpoints how volatile the land question could become if not meticulously addressed. Therefore, this chapter explores the concept of expropriation, the laws regulating expropriation, purpose of expropriation, expropriation without compensation, and mortgages under expropriation without compensation.

#### 3.2 Expropriation

The section gives an outline on the background of expropriation in South Africa. Therefore, for this study, it is imperative to call attention to the differences between deprivation and expropriation. The need for a cogent distinction between deprivation and expropriation arises from the fact that the two concepts are largely defined with reference to each other, or even in contrast to each other.<sup>211</sup> Van der Walt<sup>212</sup> states that the definition of expropriation is contrasted to deprivation, which is seen as a lesser intrusion and limitation of property, and is generally not accompanied by compensation. Expropriation, as a smaller category, still falls within the larger category of deprivation, according to the court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of*

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<sup>210</sup> Despite the frantic efforts to eradicate racial inequalities, South Africa remains one of the most unequal countries in the world.

See for example: <https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worldsmostunequal-countries> (accessed 28 January 2021).

<sup>211</sup> AJ Van der Walt *Constitutional Property Law*(2011) 192.

<sup>212</sup> AJ Van der Walt *Constitutional Property Law*(2011) 193.

*SA Ltd t/a v Minister of Finance*.<sup>213</sup> As a result, while all expropriations are deprivations, not all deprivations are expropriations. More often than not, expropriation consists of compulsory state “acquisition of private property, while deprivation occurs when the State regulates the use and enjoyment of private property in the public interest.”<sup>214</sup>

Goldstone J, in *Harksen* stated that expropriation is characterised by the acquisition of rights in property by a public authority for a public purpose, while deprivation falls short of such acquisition.<sup>215</sup> Extrapolating from this categorical approach, the court cites the distinction on permanent acquisition of property by the State; if the property is not acquired by the State, or if the acquisition is not permanent, there is no expropriation.” However, permanence on its own cannot be seen as a reliable factor in distinguishing between expropriation and deprivation because temporary expropriation is just as possible as permanent expropriation.<sup>216</sup> In *Agri South Africa v Minister of Minerals and Energy (Agri SA)*<sup>217</sup> “the Constitutional Court revisited the distinction between deprivation (sec 25(1)) and expropriation (sec 25(2)) and held that the State acquisition is the key component that distinguishes the two forms of infringement.”<sup>218</sup> Expropriation, according to the court in *Davies and Others v Minister of Lands, Agriculture and Water Development* case,<sup>219</sup> “involves the transferring of rights in property from the title holder to the state without the previous consent of the title holder.” In a nutshell, expropriation is the transfer of property rights from the owner to the State without the owner's consent.

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<sup>213</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a v Minister of Finance* 2013 (4) SA 768 (CC) par 46.

<sup>214</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) paras 32-33.

<sup>215</sup> The court relied on the decision of the High Court in *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515A-C and two Zimbabwean decisions; *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZSC) and *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC), for the conclusion that expropriation requires the state to acquire the property.

<sup>216</sup> Although the court in *Harksen* suggests that if the acquisition of property is permanent then it is evident that there has been expropriation, there is a comparative authority for the proposition that certain temporary deprivation of property (especially in the form of rights) constitute expropriation.

<sup>217</sup> *Agri South Africa v Minister of Minerals and Energy (Agri SA)* 2013 (4) SA 1 (CC).

<sup>218</sup> *Agri South Africa v Minister of Minerals and Energy (Agri SA)* 2013 (4) SA 1 (CC) para 14.

<sup>219</sup> *Davies and Others v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S).



Having distinguished the two, the section proceeds to explain the concept of expropriation in-depth. “Some constitutions refer to ‘expropriation’<sup>220</sup> while some to “compulsory acquisition”<sup>221</sup> or “taking property.”<sup>222</sup> Van der Walt<sup>223</sup> posits that State acquisition cannot be regarded as the single defining characteristic of expropriation, although it may be one of the factors to be considered. Expropriation affects only specific property or owners.<sup>224</sup> Van der Walt goes further to say expropriation is brought about unilaterally by State action, without the cooperation (and often against the will) of the affected owner.<sup>225</sup> Secondly, expropriation always “involves a (complete or partial) loss of property for the former owner.”<sup>226</sup> This loss is usually complete and permanent, “but in some instances partial and temporary loss of property can constitute expropriation.”<sup>227</sup> Van der Walt is also of the opinion that expropriation is always final even when it is of a temporary nature.<sup>228</sup>

Expropriation, in Van der Walt’s submissions, “denotes the power of the state to terminate all rights that come with property rights for public interest.”<sup>229</sup>

### 3.3 The Laws Regulating Expropriation

Expropriation legislation establishes the criteria for expropriation as well as the procedures to be followed. The government cannot seize land as a form of retaliation against the owner or for any other political, arbitrary, or capricious

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<sup>220</sup> See section 25(2) of the Constitution of the Republic of South African 1996; art 14.3 of the German Basic Law 1946; art 16(2) of the Constitution of the Republic of Namibia Act 1990; art 5 of the Australian Basic Law of 1867.

<sup>221</sup> For example, art 31(2) of the Indian Constitution as amended by the Fourth Amendment in 1955; sec 16(1) of the Constitution of the Republic of Zimbabwe 1980.

<sup>222</sup> For example, sec 5 of the Government of Ireland Act 1920; art 29 of the Constitution of Japan 1946.

<sup>223</sup> A J Van der Walt *Constitutional Property Law* (2011) 347.

<sup>224</sup> R A Makhado & K L Masehela *Perspectives on South Africa’s Land Reform Debate: Land reform in South Africa* (2012) 77. For example, all land along the route of a new road, or all agricultural land affected by a specific redistribution programme. However, there are exceptions to this rule, for instance when all agricultural land or commercial banks are expropriated. This will usually take the form of nationalisation rather than expropriation, with the result that compensation is probably excluded or limited.

<sup>225</sup> A J Van der Walt *Constitutional Property Law* (2011) 347.

<sup>226</sup> A J Van der Walt *Constitutional Property Law* (2011) 347.

<sup>227</sup> The Constitutional Court in *Harksen v Lane NO* 1998 (1) SA 300 (CC) argued that expropriation involves the permanent acquisition of property by the state, but there is a comparative authority for the proposition that certain temporary deprivations of property (especially in the form of rights) constitutes expropriation.

<sup>228</sup> A J Van der Walt *Constitutional Property Law* (2011) 345.

<sup>229</sup> A J Van der Walt *Constitutional Property Law* (2011) 345.

purpose. The land must be required for specific public use. As part of a comprehensive land reform initiative to address inequalities in land ownership, and reshape the spatial landscape, the government has enacted various pieces of legislation. However, for this study, the discussion is limited to the Expropriation Act,<sup>230</sup> the Restitution of Land Rights Act,<sup>231</sup> the Constitution of the Republic of South Africa, 1996 and the Expropriation Bill.<sup>232</sup> The cogent reason underpinning the limitation is premised on the need to focus on laws that are comprehensively and directly dealing with the aspect of land expropriation.

### 3.3.1 Expropriation Act

The Expropriation Act 63 of 1975 outlines the expropriation procedures and compensation.<sup>233</sup> It completely repealed the Expropriation Act of 1965<sup>234</sup> and “unified all expropriations.”<sup>235</sup> The Expropriation Act has the overriding effect of making all expropriations predicated on it. The expropriating authority is required by Section 2(1) of the Expropriation Act to guarantee the validity of the expropriation order. The Minister of Public Works is authorised to “expropriate property or temporarily use the property for a public purpose subject to payment of compensation.” Therefore, expropriation is valid if it is for use by the public, procedurally fair, and linked to payment of compensation.

It is worth noting that the Act extends expropriation beyond moveable and immovable property, to personal rights and incorporeal property.<sup>236</sup> Thus, expropriation in such cases refers to “acquisition of property by the expropriator”<sup>237</sup> and a “loss of such property by the expropriatee.”<sup>238</sup> One aspect that should be highlighted is that with expropriation, there is no requirement for agreement or

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<sup>230</sup> Expropriation Act 63 of 1975.

<sup>231</sup> Restitution of Land Rights Act 22 of 1994.

<sup>232</sup> The Expropriation Bill [B23-220].

<sup>233</sup> A Gildenhuis *Onteieningsreg* (2001) 44.

<sup>234</sup> B V Slade, JM Pienaar, ZT Boggenpoel & T Kotze ‘Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996’ (2019)

<sup>235</sup> Section 26 (1) of the Expropriation Act provides that “if an expropriation has been approved by an Act other than the Expropriation Act, compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act.”

<sup>236</sup> E Otten ‘A critical analysis of the definition of “property” in clause 1 of the expropriation bill b4d–2015’ Doctoral dissertation, University of Kwazulu-Natal, 2017.

<sup>237</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A.

<sup>238</sup> As above.



consent by the seller to be effected.<sup>239</sup> This depicts, in other words, that rights in property are suspended and expropriation put the responsibility of compensation on the acquiring authority of the expropriated property. In summation, the Expropriation Act offers that “compensation is payable for the value of property.”<sup>240</sup> In that regard, the compensation value is paralleled to the current market value. Thus, the Act hinges expropriation to standardised market value compensation.

### 3.3.2 Restitution of Land Rights Act

According to Section 35(3) of the Act, “the power of the state to expropriate land” is provided for. However, the Act does not oust the power of the State to expropriate property in terms of the Expropriation Act<sup>241</sup> and section 25 of the Constitution.<sup>242</sup> The Act extends the branch of land reform in South Africa. The Restitution of Land Rights Act was the first law passed by the first democratically” elected parliament in 1994.<sup>243</sup> This was done with the understanding that land justice is critical in addressing the problems of poverty, unemployment, and inequality. The Act provides for the return of land rights to people or groups who lost it after June 19, 1913 as a result of previous racially discriminatory legislation or actions. Further to this, the Act established a Commission on Restitution of Land Rights and a Land Claims Court to carry out this work. For the purpose of restitution awards, the Minister has the authority to purchase, acquire in any other way, or expropriate land or rights in land.

Expropriation of property to achieve restitution objectives is allowed under section 42E of the Restitution Act.<sup>244</sup> Section 42E replicates section 25(3) of the Constitution

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<sup>239</sup> *Mathiba & Others v Moschke* 1920 AD 354-463, where Innes CJ held that ‘in my opinion the meaning of the Besluit is clearly that the Government was empowered to take private land required for a location and to give by way of compensation, not what the owner is willing to take but equal land or a fair price, whether the latter concurred in the offer or not and whether he was willing or not to dispose of his land on such compensation’.

<sup>240</sup> E Otten ‘A critical analysis of the definition of “property” in clause 1 of the expropriation bill b4d–2015’ Doctoral dissertation, University of Kwazulu-Natal, 2017.

<sup>241</sup> Expropriation Act 63 of 1975.

<sup>242</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>243</sup> S Mark & B Belton ‘Breaking with the past? The politics of land restitution and the limits to restitutive justice in Myanmar’ (2020) 94 *Land Use Policy* 104503.

<sup>244</sup> The Minister may purchase, acquire in any other manner or, consistent with the provisions of section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land, a portion of land or a right in land -

(a) in respect of which a claim in terms of this Act has been lodged, for the purpose of

in terms of the compensation the affected land owner is entitled to once his or her property is expropriated.<sup>245</sup> Likewise, section 42 E (2) also makes provision for the Expropriation Act 63 of 1975.<sup>246</sup> Therefore, in accordance to this Act, expropriations are legal and permissible for restitution purposes, subject to payment of compensation as outlined in the Constitution as well as the Expropriation Act of 1975; if it is not inconsistent with the Constitution.

### 3.3.3 The South African Constitution

The section examines the constitutional guidelines on expropriation. However, issues that pertain to the constitutionality of expropriating property without compensation will be dealt with later on in the chapter. The constitutional basis for land expropriation resides “in section 25(2) of the Constitution, which provides that property may be expropriated” only in terms of law of general application; (a) for public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and the manner of payment of which have either been agreed to by those affected or decided or approved by the court.<sup>247</sup> According to section 25 (4)(b), “property is not limited to land thus any property including movable property and immovable property may be expropriated.”

Section 25 provides for general provisions regarding compensation for expropriation. Firstly, according to section 25(2)(b), property may be expropriated subject to compensation and the amount of compensation, the time and manner of such compensation have to be agreed upon by either those affected or decided or approved by the court. Section 25(3)(a)-(e) provides for a list of factors to consider when making decisions about compensation to reflect what is just and equitable in

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- (i) restoring or awarding such land, portion of land or right in land to a claimant who is entitled to restitution of a right in land in terms of section 2; or
  - (ii) providing alternative relief as contemplated in section 6(2)(b);

<sup>245</sup> Sec 42 E (3) reads – Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the Court in accordance with section 25(3) of the Constitution.

<sup>246</sup> Sec 42 E (2) reads -The Expropriation Act, 1975 (Act No. 63 of 1975), shall, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation.

<sup>247</sup> Sec 25(3) specifies that the compensation for expropriation (as stated in Section 25(2) must be just and equitable and reflect an equitable balance between the interests of those affected and public interest.

the complex social, political, and economic history of land during and since the end of the apartheid era.<sup>248</sup>

Section 25 appears to imply that compensation is necessary in all property expropriations. Each instance is unique, depending on the circumstances. Market value is not a strict criterion for compensation. It can be at market value, above market value, below market value, little or nothing, depending on the facts of the case, after all the elements specified in the Constitution are taken into account. Lastly, it is pertinent to comment on section 25(8) of the Constitution. Section 25(8) provides that,

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

This provision has received very little attention, if any at all. It has yet to be tested in litigation. It is too broad and so flexible that it could potentially allow for expropriation without compensation. Dugard contends:

... it is conceivable that, should action be pursued, and/or a law be adopted that enables the state to expropriate property for the purpose of land restitution without any compensation, this could be deemed constitutional if found 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ...'<sup>249</sup>

The provision is vastly transformational, requiring merely that the state pass legislation that is compatible with Section 36 of the Constitution. This raises the question of whether amending the property clause is both necessary and legal. Justice Albie Sachs, a former judge on the Constitutional Court, argued that:

"...the current constitutional provisions already allowed for land expropriation without compensation provided the expropriations met the general limitations clause in section 36 of the Constitution"<sup>250</sup> and that, Section 25 was an empowering section that called for land reform, giving the state very far-reaching powers in the public interest. However, while it was permissible to

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<sup>248</sup> A J Van der Walt *Constitutional Property Law* (2011) 504.

<sup>249</sup> J Dugard 'Unpacking Section 25: what, if any, are the legal barriers to transformative land reform?' (2019) 9 (1) *Constitutional Court Review* 135.

<sup>250</sup> Justice Albie Sachs, former Judge at the Constitutional Court and Anti-Apartheid struggle stalwart, presentation at the Constitutional Review Committees colloquium on the- land reform through Expropriation Without Compensation Topic on 8 June 2018 available at [https://pmg.org.za/committee\\_meeting/26615/Search](https://pmg.org.za/committee_meeting/26615/Search) (accessed 16 March 2019).

amend the Constitution, amendments should not destroy constitutionalism, and should be subject to judicial review.

Extrapolating from these arguments, it is apparent that the state's emancipatory power enshrined in section 25 of the Constitution has not been adequately utilised to serve the public interest. However, the existence of section 25 (8) does not render an amendment to the Constitution illegal.

### **3.3.4 Expropriation Bill [B23-2020]**

The Expropriation Bill aims to provide the processes and conditions under which land can be expropriated with or without compensation, as set out in Section 25 of the Constitution. In its current version, Section 25 of the Constitution does not explicitly allow for expropriation of property without compensation. In fact, Section 25(2)(b) expressly allows for compensation.<sup>251</sup> This is something that the Expropriation Bill aims to change. By “implication, Section 25 of the Constitution as it currently stands allows for expropriation without compensation in cases where a court could find that such expropriation for nil value would be just and equitable. Nonetheless, the Expropriation Bill seeks to provide clarity by adding a proviso to section 25(2)(b) that reads, “Provided that, in accordance with subsection (3A), a court may determine that the amount of compensation is nil where land and any improvements thereon are expropriated for the purposes of land reform”.

“National Legislation must, subject to sub-sections (2) and (3), spell forth particular instances where a court may rule that the amount of compensation is nil”, according to section 3A of the Expropriation Bill. The Expropriation Bill, which enables the government to expropriate land without compensation, was made possible by these revisions, and the specific situations referred to in section 3A of the Expropriation Bill are covered by section 12(3) of the Expropriation Bill. One of the significant concerns with the Expropriation Bill's latter section is that, while the exact situations under which nil compensation is payable are listed, this list is not exhaustive, and other circumstances under which land is expropriated for nil compensation may exist.

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<sup>251</sup> Sec 25 (2) (b) reads - “Property may be expropriated only in terms of law of general application—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.”

Expropriation must be compensated in a just and equitable manner, according to clause 12 of the Bill.<sup>252</sup> According to clause 12(3), it may be just and equitable to expropriate the following property with no compensation:

- “Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act 3 of 1996;
- where the land is held for purely speculative purposes;
- where the land is owned by a state-owned corporation or other state-owned entity;
- where the owner of the land has abandoned the land;
- Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement on the land.”

Against this backdrop, the researcher argues that the Bill is in accordance with Section 25(8) of the Constitution that requires the State to enact compensation-related legislation.

### 3.4 Purpose of Expropriation

In this section, the study intends to explore the purpose underlying expropriation – (a) is it for land reform purposes, or (b) another purpose? Expropriation is entrenched in section 25 of the Constitution of South Africa, as discussed earlier. Section 25 was enacted in response to discriminatory laws enacted by colonial and apartheid governments, and it preserves rights that had previously been denied.<sup>253</sup> In *Port Elizabeth Municipality v Various Occupiers (Port Elizabeth Municipality)*, the court held that:

The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.<sup>254</sup>

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<sup>252</sup> Clause 12 (1) of the Expropriation Bill of 2019- The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances...

<sup>253</sup> J Dugard ‘Unpacking Section 25: what, if any, are the legal barriers to transformative land reform?’ (2019) 9 (1) *Constitutional Court Review* 135.

<sup>254</sup> *Port Elizabeth Municipality v Various Occupiers (Port Elizabeth Municipality)* 2005 (1) SA 217 (CC) para 15.

Extrapolating from this reasoning by the court, private property rights, mortgaged land included, can be expropriated for affirmative action purposes. This implies that expropriation may be for restitution, redistribution, or tenure security to redress historical injustices. Section 25(2) 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”.

In defining public purpose, Section 1 of the Expropriation Act states, “any purpose connected with the administration of any law by an organ of State.”<sup>255</sup> In *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society*, the court provided a much narrower definition of public purpose, and in contrast to private purpose, “implying that expropriation for the benefit of a third party cannot be considered a public purpose.”<sup>256</sup> The court distinguished between public purpose and public interest in the case of *Administrator, Transvaal & Another v J van Streepan (Kempton Park)*. The court ruled that “expropriation or acquisition of land for the benefit of a third party cannot be for a public purpose, but it might be possible in certain circumstances that it is in the public interest”. As a result of the court's reasoning, it follows that public interest is a broader category than public purpose. Section 25 (4) further provides that “the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land.”<sup>257</sup>

Likewise, the Expropriation Bill stipulates that an expropriating authority may not expropriate property for any reason other than a public purpose or in the public interest (in line with Section 25 of the Constitution of South Africa).<sup>258</sup> The Expropriation Bill clarifies what “public purpose” and “public interest” entail. Public purpose “includes any purposes connected with the administration of the provisions of any law by an organ of state”, while public interest “includes the

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<sup>255</sup> Sec 1 of the Expropriation Act 63 of 1975.

<sup>256</sup> *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271 at para 283.

<sup>257</sup> The provision gives the state an opportunity to undertake a systematic transformation of property regimes. See Water Services Act, 108 of 1997 and the National Water Act, 36 of 1998.

<sup>258</sup> B Hoops ‘Expropriation without compensation: a yawning gap in the justification of expropriation?’ (2019) 136 (2), *South African Law Journal* 261.



nation's commitment to land reform, and to reforms [that] bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices."<sup>259</sup> Inferring from this, expropriation in South Africa is underpinned with the need to redress historical injustices by bringing about equitable access to all South Africa's natural resources.

Taking cognisance that the study is focused on mortgaged land, it is important to note that the determining factor in all expropriations is the "public purpose" and "public interest" requirement. In this regard, whether or not the land is mortgaged is not important for this study. Mortgaged land may be expropriated either for land reform purposes or any other purposes. The fundamental determination is that either purpose must fall within the ambit of "public purpose" or "private purpose". Against this backdrop, it is pertinent to examine expropriation of mortgaged land without compensation. Before doing so, it is imperative to first obtain a comprehensive understanding on the issues influencing the call for expropriating land without compensation in South Africa.

### **3.5 Expropriation without Compensation**

In this section the study examines the issue pertaining to expropriation without compensation. To give context to the discussion, the study gives a brief historical overview of the motivation behind the recommendation to expropriate land without compensation in South Africa. It is appropriate to note that this research focuses on expropriation of mortgaged land and its impact thereof. However, the mooted amendment of section 25 of the Constitution to allow for expropriation of land without compensation, may have an impact on private mortgaged properties. Therefore, this justifies the importance of appreciating the general history on establishing the fulcrum of expropriating land without compensation.

Black Africans were dispossessed of their land by the colonial government in South Africa during the colonial era. In light of European rules, "ownership shifted from

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<sup>259</sup> B Hoops 'Expropriation without compensation: a yawning gap in the justification of expropriation?' (2019) 136 (2), *South African Law Journal* 266.

indigenous law land tenure to private property ownership.”<sup>260</sup> Dispossession, on the other hand, was a continuous process. During the apartheid era, it persisted. The apartheid government manipulated existing black land rights by enacting new legislation.<sup>261</sup> These laws reduced black people's land rights to merely anticipatory rights.<sup>262</sup> The Black Homelands Citizenship Act<sup>263</sup> and the Bantu Self-government Act<sup>264</sup> assigned black indigenous South Africans to homelands. The majority of Africans lost their land as a result of the involuntary displacement of Africans from the land they occupied to reserves. Africans lost all title to land.

Following the downfall of the minority apartheid government, the Final Constitution ushered in a paradigm shift in the land question.<sup>265</sup> The property clause emphasised the need to address the past legacy of racial segregation, namely the unequal allocation of land.<sup>266</sup> The property clause; however, was a product of compromise. The ANC, motivated by the need to address apartheid's spatial effects, believed that a constitutionalised property right should not stymie land reform.<sup>267</sup> The National Party, on the other hand, was sceptical that current land rights of white landowners would be jeopardised if they were not guaranteed by the Constitution.<sup>268</sup> To reach an agreement, both parties agreed to a compromise, and as a consequence, the property clause legalised land reform while also guaranteeing the right not to be arbitrarily dispossessed of property.<sup>269</sup>

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<sup>260</sup> C Boisen 'From land dispossession to land restitution: European land rights in South Africa'. (2017) 7 (3) *Settler Colonial Studies* 321.

<sup>261</sup> J Ubink & J Pickering 'Shaping legal and institutional pluralism: land rights, access to justice and citizenship in South Africa' (2020) 36 (2-3) *South African Journal on Human Rights* 178.

<sup>262</sup> J Murphy 'Property Rights in the New Constitution' (1993) 56 *An Analytical Framework for Constitutional Review* 623.

<sup>263</sup> The Black Homelands Citizenship Act 26 of 1970.

<sup>264</sup> The Bantu Self-government Act 46 of 1959.

<sup>265</sup> T Reddy 'South Africa and the crisis of liberal democracy. The Condition of Democracy' (2021) 3, *Postcolonial and Settler Colonial Contexts*.

<sup>266</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>267</sup> L M Du Plessis & H Corder 'Understanding South Africa's Transitional Bill of Rights' (1994) 182.

<sup>268</sup> H Klug 'Decolonisation, compensation and constitutionalism: land, wealth and the sustainability of constitutionalism in post-apartheid South Africa. *South African Journal on Human Rights*' (2018) 34(3), 469.

<sup>269</sup> H Klug 'Decolonisation, compensation and constitutionalism: land, wealth and the sustainability of constitutionalism in post-apartheid South Africa' (2018) 34(3) *South African Journal on Human Rights* 469.



Consequently, the current legal and constitutional framework has been criticized for impeding meaningful land reform.<sup>270</sup> To buttress this argument, the Black First Land First reported that,

“Section 25 legalises land theft and legitimizes colonialism...Section 25 in its entirety is a yoke around the necks and shackles in the feet and hands of our people. It makes us slaves in our own land.”<sup>271</sup>

Likewise, Bernard Magobe also believes that section 25 is “a fatal obstacle to the objective of achieving justice for indigenous black South Africans”.<sup>272</sup> As a result, the public and political will are pushing for an amendment to the constitutional to allow for expropriation without compensation. This common sentiment arises from the belief that throughout the nearly half-century of white rule, the economic gap between blacks without land and whites with land grew.<sup>273</sup> To secure an equitable distribution of natural resources, white commercial farmlands must be expropriated without compensation as part of the drive for land reform. Consequently, it is a notorious fact that some of these commercial farms are mortgaged. Therefore, the question on what becomes of the existing mortgages in the event of expropriation without compensation remains.

Interestingly enough, there is a contrary school of thought, which contends that section 25 is not an obstacle to land reform. The claim is that history is skewed and that the supposed historical injustices are a fallacy. Cezula and Modise reports: “The argument that whites stole the land is a single biggest fallacy. There are three ways in which whites acquired land, namely resettlement on empty land, the

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<sup>270</sup> A O Akinola ‘Land reform in South Africa: Interrogating the securitisation of land expropriation without compensation (2020) 47(2) *Politikon* 215.

<sup>271</sup> Black First Land First (4 August 2015) ‘Return the stolen land – that’s the only real solution! Sankara policy and political school submission to the Portfolio Committee of Public Works on Public Hearing on the Expropriation Bill [2015]’: <https://black1stland1st.wordpress.com/2015/08/04/return-the-stolen-land-thats-the-only-real-solution-sankarapolicy-and-political-school-submission-to-the-portfolio-committee-of-public-works-on-public-hearing-on-theexpropriation-bill/> (accessed 5 February 2019).

<sup>272</sup> M B Ramose & D Hook ‘*To whom does the land belong*’ 50 *Psychology in Society* (2016).

<sup>273</sup> I Changuion & B Steenkamp ‘*Disputed Land the Historical Development of the South African Land Issue*’, *Pretoria* (2012) 94-96.

purchase of land through treaties, cooperation, and agreements, and through conquest.”<sup>274</sup>

Likewise, Parbury argues that “the land upon which European settlers established their farms was unoccupied and that the black Africans who challenged the settlers for title of the land were actually invaders from the north.”<sup>275</sup> In the same sense, Afriforum condemned expropriating land without compensation and states, “land expropriation without compensation would have catastrophic results ... like in Venezuela and Zimbabwe.”<sup>276</sup> Roets as reported by Sibeko stated that section 25 does not obstruct land reform; rather, it is corrupt government officials that obstruct it.<sup>277</sup> Grimm further argues that expropriation without compensation reduces banks' ability to issue credit that is frequently used by entrepreneurs for personal development and to enhance living conditions.<sup>278</sup> Against this background, the study proceeds to examine mortgages under expropriation without compensation.

### 3.6 Mortgages under Expropriation without Compensation

In 2018, Kabamba<sup>279</sup> referred to the landowner's financial statistics in which he mentioned that 56% of landowners secured loans (in the form of mortgage contract) through banks, 9% through agricultural cooperatives, and 30% through the Land Bank.<sup>280</sup> Now, in the event that the land in question is expropriated without compensation, the obvious question is how these loans will be honoured in the

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<sup>274</sup> NS Cezula & L Modise 'The " Empty Land" Myth: A Biblical and Socio-historical Exploration' (2020), 46 (2) *Studia Historiae Ecclesiasticae* 1-21.

<sup>275</sup> N Parbury *Terra nullius: Invasion and colonisation. In Teaching* (2020) Aboriginal Studies Routledge.

<sup>276</sup> AfriForum's Chief Executive Kallie Kriel <https://www.iol.co.za/news/politics/afriforumcallsanclandexpropriation-plancatastrophic16356815AfriforumcallsANC#LandExpropriationplan'catastrophic> (accessed 1 August 2018).

<sup>277</sup> D Sibeko see <https://www.iol.co.za/news/politics/afriforumcallsanclandexpropriation-plancatastrophic16356815AfriforumcallsANC#LandExpropriationplan'catastrophic> (accessed 1 August 2018).

<sup>278</sup> M Grimm, J Köppel & G Geißler, 2019. A shift towards landscape-scale approaches in compensation-suitable mechanisms and open questions. *Impact Assessment and Project Appraisal*, 37(6), 491-502.

<sup>279</sup> P Kabamba 'The effect of land expropriation without compensation on your business' <https://www.rsm.global/southafrica/news/south-africa/effect-of-land-expropriation-without-compensation-on-your-business>.' 2018 (accessed on 4 September 2020). See also

J W van Rensburg 'Land reform without compensation in South Africa: A critical analysis of the taxation policy' unpublished Master of Commerce, North-West University, 2018.

<sup>280</sup> As above.

absence of any income being generated. In the case where these loans are not repaid, it would lead to impairments on the financial statements of financial institutions, for example, the expected losses will have to be absorbed or recognised by the lender. Likewise, the Banking Association of South Africa (BASA) has warned that there could be a significant impact, if land expropriation without compensation is allowed, on property rights in South Africa.<sup>281</sup>

BASA, which represents all registered banks in South Africa, said that the legislation could have marked a decrease in the value of property caused by either an amendment to the legislation and market uncertainty.<sup>282</sup> It further warned that the reduced appetite from property buyers could destabilise the banking sector and may have a negative impact on the credit rating of the sector and the country. Therefore, this section examines expropriation of mortgaged land under the current property law discourse and the proposed Expropriation Bill. The inquiry in this section is not whether or not expropriation is constitutionally permissible, but rather whether it is tolerable to expropriate mortgaged property without compensation.

In this regard, it was important to examine the existing laws on expropriation, to determine the way mortgages are currently treated in normal expropriations vis-à-vis how this would be different under expropriation without compensation. In essence, the section will explore how mortgages work under the current Expropriation Act and the Constitution and how it would work under the latest Expropriation Bill. Section 26 (1) of the Expropriation Act provides that should an expropriation be approved by an Act other than the Expropriation Act,<sup>283</sup> “compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act”. The overarching result set by this Act is that all expropriations are premised upon this Act. Ultimately, the Act dictates the expropriation procedures and calculation for compensation.

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<sup>281</sup> J Murphy ‘Interpreting the Property Clause in the Constitution Act of 1993’ (1995) 10 *SAPR/PL* 107 25.

<sup>282</sup> ‘This is what could happen to your bond if your land is expropriated –according to South African banks’ <https://businesstech.co.za/news/banking/372978/this-is-what-could-happen-to-your-bond-if-your-land-is-expropriated-according-to-south-african-banks/> (accessed on 4 June 2020).

<sup>283</sup> Expropriation Act 63 of 1975.

These calculations and procedures apply even when such expropriation is authorised by legislation other than the Act in question.

It is worth noting that the Expropriation Act extends expropriation beyond moveable and immovable property, to real rights, personal rights and incorporeal property. Thus, expropriation in such cases refers to “acquisition of property by the expropriator”<sup>284</sup> and a “loss of such property by the expropriatee.”<sup>285</sup> In this regard, it is reasonable to conclude that mortgaged lands or properties fall within the ambit of the Expropriation Act. According to the Expropriation Act,<sup>286</sup> expropriations cannot be said to be valid if compensation is not paid.<sup>287</sup> Section 2(1) of the Act<sup>288</sup> obligates the minister to pay compensation whenever property is expropriated. Section 12(1) of the Expropriation Act notes that the phrase “shall not exceed” infers that the court “must stay close to an estimation based on market value plus 10% solatium in terms of section 12(2) of the said Act except when it has reasons to depart from it.”<sup>289</sup>

Accordingly, compensation is paid for value of the property taken, which value is in most cases equated to market value. Nonetheless, in the case of *Geekie v Union Government and Another*, the court stated, “it is possible for compensation to be in excess of market value.”<sup>290</sup> But in *Kerksay Investments (Pty) Ltd v Randburg Town Council*,<sup>291</sup> the court specified that “compensation under the Act could be less than market value.”<sup>292</sup> It is therefore argued that the conditions laid down by the Act are mere guiding principles to ensure “just and equitable” compensation. Therefore, the compensation value is paralleled to market value. Thus, the Act hinges expropriation to standardised market value compensation.

Likewise, section 25(2) of the Constitution provides that “the expropriation may be permitted subject to compensation”. Section 25(3) lists the considerations that

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<sup>284</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A.

<sup>285</sup> *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A.

<sup>286</sup> Expropriation Act 63 of 1975.

<sup>287</sup> *Jooste v The Government of the South African Republic* 1897 (4) OR 147.

<sup>288</sup> Expropriation Act 63 of 1975 sec 2(1).

<sup>289</sup> *Jacobs v Minister of Agriculture* 1972 (4) SA (W) 648.

<sup>290</sup> *Geekie v Union Government and Another* 1948 (2) SA 494 (N).

<sup>291</sup> *Kerksay Investments (Pty) Ltd v Randburg Town Council* [1997] AZSCA 68; 1998 (1) SA 98 (SCA).

<sup>292</sup> Expropriation Act 63 of 1975.

should be taken to ensure an equitable balance between the interests of the public and the interests of those affected by expropriation. Section 25(2)(b) stipulates, in the first instance that the amount of compensation could be determined by an agreement between the State and individual(s) so affected, alternatively the court can determine the amount of compensation or approve it upon a proposal by either one or more parties.<sup>293</sup> In the absence of an agreement by the parties section 25(3) mentions the considerations to be taken into account when calculating fair compensation.

To determine the amount of compensation within the constitutional framework, the “court has to take into account the factors enumerated in,” but not limited to, section 25(3) (a) - (e).<sup>294</sup> Extrapolating from this brief discussion, it is reasonable to conclude that expropriation of property ought to be followed by the payment of compensation. The compensation must be “just” and “equitable”. This implies that relying on the situations of each case, compensation can either be above or below market value. In this regard, the current property law discourse protects real rights in property and prohibits the State from engaging into arbitrary deprivations. Against this backdrop, the chapter proceeded to examine how expropriation of land (mortgaged land) will work under expropriation without compensation under the latest Expropriation Bill.

As discussed earlier, clause 12 of the Expropriation Bill provides that it may be “just” and “equitable” to expropriate “land occupied or used by a labour tenant, land held for purely speculative purposes, land owned by a state-owned corporation or other state-owned entity, abandoned land and land where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy

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<sup>293</sup> T Ngcukaitobi & M Bishop ‘The constitutionality of expropriation without compensation’ (2018) paper presented at the Constitutional Court Review IX Conference, held at the Old Fort, Constitutional Hill, 2-3 August 2018. Available at: <https://www.wits.ac.za/law/constitutional-court-review-conference/>, (accessed on 20 January 2022). This entails that the court can either play an original role (decide), or a reviewing role (approve).

<sup>294</sup> Sec 25 (3) reads; “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 interests 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.”

in the acquisition and beneficial capital improvement on the land, with no compensation.”<sup>295</sup> However, “expropriation without compensation is not restricted to the circumstances mentioned above.”<sup>296</sup> As a result, the researcher argue that clause 12 of the Bill is vague, and the fact that the preamble to this clause specifies “but is not limited to”, renders it meaningless. Effectively, clause 12 “erodes property rights and creates uncertainty on circumstances qualifying under nil compensation.” Thus, it is justifiable to conclude that with the current uncertainties embedded in clause 12, “the state may expropriate mortgaged property without compensation,” if it deems such to be for a “public purpose” or in the “public interest”.

The Bill appears to exclude registered rights holders from expropriation engagements under clause 9, and the necessity for these registered rights to be expropriated.<sup>297</sup> This is a significant weakening of property rights. Likewise, clause 18(1) of the Bill provides, “that the expropriating authority may not pay out any portion of the compensation amount” for property encumbered by a registered mortgage immediately before the date of expropriation.<sup>298</sup> While the explanation is pertinent, the Bill fails to address in clear terms what happens to property that has not been immediately encumbered by a registered mortgage bond. This causes doubt and unnecessary panic. Furthermore, Boshoff and Sihlobo argue that according to the Bill, expropriation can be effected before ownership is transferred in the deed's registration, which is contrary to the Deeds Registries Act of 1937, and weakens a property owner's rights. Similarly, the Bill also allows property to be expropriated even if it is being challenged in court, undermining a property owner's rights once more.<sup>299</sup> Against this backdrop, the Bill has the effect to undermine

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<sup>295</sup> Expropriation “Bill of 2019 clause 12 (1)- The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances...”

<sup>296</sup> Clause 12 (1) of the Expropriation Bill of 2019.

<sup>297</sup> Sec 9 (1) (d) reads - the property remains subject to all registered rights in favour of third parties, with the exception of a mortgage, with which the property was burdened prior to expropriation, unless or until such registered rights are expropriated from the holder thereof in terms of this Act.

<sup>298</sup> Sec 18 (1) reads If property expropriated in terms of this Act was, immediately prior to the date of expropriation, encumbered by a registered mortgage or subject to a deed of sale, the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant has notified the expropriating authority of the agreement.

<sup>299</sup> The Expropriation Bill [B23-2020].



property rights, in this context mortgaged land. The researcher argues that the Bill is diluting the protection of property rights as enshrined in the Expropriation Act and the Constitution.

The Bill makes no distinction between local and foreign ownership, which might “have a negative impact on foreign investor confidence” and bilateral trade agreements.<sup>300</sup> Based in this, the Bill has the potential to threaten local and international investment into property. It is critical for the Bill to mandate the expropriating authority to consider registered rights, such as a mortgage bond. Thus, the researcher argues that prior or simultaneously to discussions with an expropriated owner on agreed compensation for the property to be expropriated, a clear obligation should be placed on the expropriating authority to purposefully engage with financial institutions as a registered rights holder (bond holders/cessionary), including confirmation that compensation will ensure that, at a minimum, the debt will be extinguished, and that this will not unfairly prejudice the expropriated owner and the financial institution.

In light of this, and despite the Bill's efforts to correct past racial injustices, correct current land ownership patterns, and alleviate poverty, it is necessary for the Bill to be crisp and clear, and to provide definitive guidance to state entities with expropriation powers, ensuring that expropriation is carried out prudently and equitably, failing which local and international investment in property (and particularly land) will suffer. The Bill stipulates that 'just and equitable' compensation for expropriated land may be less than market value or none at all. This will limit banks' capacity to extend credit where property is used as collateral for a loan. In this sense, it is critical that the government devise a way to guarantee the difference between 'just and equitable' compensation and market value.

### **3.7 Conclusion**

The chapter discussed the background on expropriation, the laws regulating expropriation, purpose of expropriation, expropriation without compensation and mortgages under expropriation without compensation. Firstly, the chapter

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<sup>300</sup> The Expropriation Bill [B23-2020].

established that expropriation is the transfer of property rights from the owner to the State without the owner's consent. The chapter further established that in South Africa, the State's power for expropriation is found in section 25(2) of the Constitution, which provides that property may be expropriated only in terms of law of general application; (a) for public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and the manner of payment of which have either been agreed to by those affected or decided or approved by the court.

Secondly, the chapter proceeded to discuss expropriation under the Expropriation Act,<sup>301</sup> the Constitution,<sup>302</sup> and the Expropriation Bill.<sup>303</sup> The discussion under the Expropriation Act and section 25 appears to imply that compensation is necessary in all property expropriations. Each instance is unique, depending on the circumstances. Market value is not a strict criterion for compensation. It can be at market value, above market value, below market value, little or nothing, depending on the facts of the case after all the elements specified in the Constitution are taken into account. The Bill deviates from this position and proposes for expropriation without compensation. In that regard, the Bill gives a list of circumstances under which expropriation without compensation would be legally permissible. Buttrressing on this foregoing analysis, the next chapter evaluates the effects of expropriation of land without compensation on mortgagees in South Africa. In the next chapter, the study proceeds to analyse the effects of expropriation of land without compensation on mortgagees in South Africa.

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<sup>301</sup> Expropriation Act 63 of 1975.

<sup>302</sup> Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>303</sup> The Expropriation Bill [B23-2020].



## CHAPTER FOUR

### THE EFFECTS OF EXPROPRIATION OF LAND WITHOUT COMPENSATION ON MORTGAGEES IN SOUTH AFRICA

#### 4.1 Introduction

The preceding chapter discussed the potential setbacks that might materialise from adopting land expropriation without compensation and the constitutionality of land expropriation without compensation. One of the objectives of this study, as mentioned in chapter one, is to investigate the consequences of land expropriation without compensation on South African mortgagees, which is examined in this chapter. The current proprietorship of land in South Africa have its origins in apartheid and colonialism.<sup>304</sup> As such, a call in full support of drives to review the injustices of the past, create employment, lessen inequality, and alleviate poverty has been made.<sup>305</sup> The aim is embedded in the need to provide a better life for every South African citizen. It is appropriate to truly consider the undertaking by President Cyril Ramaphosa that this will be accomplished without harming South Africa's possibilities for economic growth, food security, and within the boundaries of the law.

Land reform is inescapable and pertinent for South Africa to succeed.<sup>306</sup> Nonetheless, it is critical that land reform be carried out in a legal, constitutional, inclusive, and long-term manner without jeopardising property rights.<sup>307</sup> If land expropriation without compensation is not handled properly, it would have serious consequences for all South Africans. Adebayo states, “the land reform legislative process is ongoing, with the Expropriation Bill and the proposal to amend Section 25 of the Constitution being far from complete.”<sup>308</sup> In this sense, it is critical to avoid

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<sup>304</sup> M Strauss 'A historical exposition of spatial injustice and segregated urban settlement in South Africa' (2019) 25 (2) *Fundamina* 135.

<sup>305</sup> D Dorling *Injustice: Why social inequality still persists* (2015) 86.

<sup>306</sup> M Evans 'Addressing historical wrongs in post-transition South Africa' in M Evans *Transitional and Transformative Justice* (2019) 36.

<sup>307</sup> L A Wily 'The law is to blame': The vulnerable status of common property rights in sub-Saharan Africa' (2019) 42 (3) *Development and change* 733.

<sup>308</sup> J O Adebayo 'The Bill, the Billed and Billy: analysis of media framing of the South African land expropriation Bill' (2019) 17 (2) *African Identities* 147.

systemic risk to the banks, the economy, food security, and the ultimate fate of South Africa.<sup>309</sup>

Expropriation of land without compensation will often have detrimental effects on the property market and economic development.<sup>310</sup> Landowners who have mortgages or other commitments relating to property that could be expropriated without compensation are particularly vulnerable. Whether the underlying asset has been expropriated without compensation or not, debtors would be accountable for the full obligation on a property.<sup>311</sup> The reason for this is that customers sign credit agreements with banks that are backed by a mortgage on the home. Irrespective of the value of the property used as security, these credit agreements remain lawful and binding.<sup>312</sup> Banks issued credit of R1.6 trillion to borrowers in “residential, commercial, and agricultural mortgages to borrowers”.<sup>313</sup> The market value of land-based property in South Africa is currently appraised at R7 trillion, reflecting regular people's houses and their savings.<sup>314</sup>

Banks are acutely aware of that there is an urgent requirement to protect their clients' interests, both investors and borrowers, with some standing to benefit from land reform.<sup>315</sup> Against this background, a few submissions were made concerning the Constitutional Amendment Bill that aimed, “to provide that where land and any improvements thereon are expropriated for the purposes of land reform, the amount of compensation payable may be nil.”<sup>316</sup> Most of these submissions are incredulous of the amendment and contend against such amendment. Therefore, this chapter aims to examine the implications of expropriating land without compensation on

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<sup>309</sup> N Vorster ‘Land and identity in South Africa: An immanent moral critique of dominant discourses in the debate on expropriation without compensation’ (2019) 75 (4) *HTS Theological Studies* 1.

<sup>310</sup> Akinola (note 28 above).

<sup>311</sup> V S Buccola ‘Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress’ (2019) 114 *Nw. UL Rev* 705.

<sup>312</sup> M Brinkmann, D Rüter & B Scraback ‘Security rights in intellectual property in Germany’ in EM Kieninger *Security Rights in Intellectual Property* (2020) 395.

<sup>313</sup> S Butcher ‘Creating a gap that can be filled: Constructing and territorializing the affordable housing submarket in Gauteng, South Africa’ (2020) 52 (1) *Environment and Planning A: Economy and Space* 173.

<sup>314</sup> S Butcher *Infrastructures of property and debt: making affordable housing, race and place in Johannesburg* (2016) 34.

<sup>315</sup> N Michail *Money, Credit, and Crises: Understanding the Modern Banking System* (2021) 13.

<sup>316</sup> S M Viljoen ‘The South African Redistribution Imperative: Incongruities in Theory and Practice’ (2021) 65 (3) *Journal of African Law* 1.

mortgagees. However, before exploring the effects of expropriating land without compensation on mortgagees, it is crucial to first obtain a general appreciation of the effect of expropriating land without compensation. In the next session, the researcher explores the general effects of nil compensation during land expropriation.

## 4.2 General effects of expropriation without compensation

This section unpacks the general effects of expropriation without compensation.

Louw argues that:

A lack of clear and decisive political leadership is undermining assurances by President Cyril Ramaphosa that expropriation without compensation will be done in such a way as to not harm economic growth and food security. Thus it is pertinent to ensure that an independent impact assessment is done to ensure this is in fact the case.<sup>317</sup>

Inferring from this argument, expropriating land without compensation holds negative effects on economic development and investment. To reinforce this argument, Kwarteng and Botchway argue that, “the possibility of expropriation without compensation has already started discouraging essential investment by farmers and others into their property”.<sup>318</sup> Expropriating land without compensation will almost certainly result in increasing food insecurity as a result of lower investment in local agriculture.

There are two key facts that relates to the difficulty of enacting expropriation without compensation and the consequences of doing so. First and foremost, how will the law account for the assets and improvements on the land should the Constitution be amended to consent to land expropriation without compensation?<sup>319</sup> When taking into account the immovable and moveable assets, the land alone only accounts for 10% of the value of a typical farm operation.<sup>320</sup> Would investments, for

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<sup>317</sup> G P Louw ‘The Antagonists’ Arguments, Opinions and Viewpoints against Changing Section 25 (2)(b) of the South African Constitution (4)’ (2019) 40 (2) *Ensovoort* 7.

<sup>318</sup> A H Kwarteng & TP Botchway ‘State Responsibility and the Question of Expropriation: A Preliminary to the Land Expropriation without Compensation Policy in South Africa’ (2019) 12 *J. Pol. & L.* 98.

<sup>319</sup> W Sihlobo & T Kapuya *Why land ‘expropriation without compensation’ is a bad idea* (2018) 33.

<sup>320</sup> M Mubecua & V H Mlambo ‘The Expropriation of Land Without Compensation in South Africa: A Strategy for Alleviating or Worsening Poverty’ In AO Akinola *The New Political Economy of Land Reform in South Africa* (2021) 55.

example, “infrastructure and other investment assets such as farm machinery” – which often account for the majority of the farm's value, be liable to expropriation without compensation as well? Should compensation be only due and payable for the assets on the farm and not for the actual land, it raises a valid, although technical question: Would it be fitting for the State to pay up to 90% in compensation for improvements on the land acquire the 10% that represents the actual land value?

A second issue that should be considered is that South African agricultural land is significantly indebted: the debt on the farm is interconnected with the actual land via title deeds used to obtain loans. If expropriation without compensation becomes a reality, two scenarios should be considered. One issue is how the State will deal with heavily indebted land. The question is that if compensation is not owing and payable to farmers, this compensation could be owed to banks, who are de facto owners of the land arising from the debt. If the government refuses to compensate the banks, the banks' books will be wiped clean of R160 billion. Another scenario is that if the government values the infrastructure and investments on commercial farms, and then uses that value to pay off the debt, is that not expropriation with compensation?

As a result, if the government estimates the value of improvements on the land and then uses that same value to cover the debt owing to the banks, situations may arise in which commercial farmers receive no compensation. Expropriated farmers may also become bankrupt, in which case the government would be obligated to pay the banks the balance of what the farmers whose land they are expropriating owe.<sup>321</sup> This arrangement is currently permissible under the current Constitution and does not necessitate any legislative changes.

Finally, land reform would have slowed to a halt by the time the government realised the complexities of expropriating land without compensation. This will most likely prompt a further rushed implementation of other draconian reforms that allows the State to expropriate land without any potential repercussions. This was shown in Zimbabwe, where commercial farmers filed a lawsuit against the government for

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<sup>321</sup> B V Slade, JM Pienaar, ZT Boggenpoel & T Kotze ‘Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa, 1996’ ( 2019) 7.

land confiscation.<sup>322</sup> The courts were engulfed in litigation that would have taken years to resolve, and the Constitution was amended in 2003, in another flash of frantiness, to invalidate each of the claims brought to the courts by commercial farmers.<sup>323</sup> The Zimbabwean government sought to get rid of the pains that came with land seizures, and in doing so, it wiped out billions of dollars in land value.<sup>324</sup>

Policymakers must draw on the experiences in Zimbabwe, which most people choose to overlook and ignore, and this should be the benchmark of land reform in South Africa. Expropriation without compensation can undermine the land market irreparably by depreciating the value of land, investments, and assets. Because of the heightened risk of future expropriation without compensation, there is unlikely to be any new capital available to invest in the land. Kwarteng and Botchway argue “even though the costs of compensation for land fall, and thereby assisting government to expedite land reform, such costs will be borne by land reform beneficiaries who will have to be subjected to falling land prices, low on farm asset prices and higher costs of borrowing”.<sup>325</sup>

Sihlobo and Kapuya argue that “with government's low compensation costs being out-weighted by the beneficiaries' high borrowing costs and land costs and farm assets, becomes evident that the concept of a value-neutral expropriation is a myth”.<sup>326</sup> In a quasi-capitalist economy, there is no such thing as expropriating land without compensation. What the government refuses to pay in compensation, will be made up for by the negative consequences that the beneficiaries will face, and the wider economic ramifications.<sup>327</sup> The historical backdrop of apartheid-era land expropriation has left a significant wound in South African society that must certainly be healed. However, in economics, the long-standing principle of equitable and just compensation serves as a useful benchmark.

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<sup>322</sup> J Mawere ‘The legality of land expropriation without compensation in South Africa: A comparative in international legal approach’ Master dissertation, University of Venda, 2020.

<sup>323</sup> N H Thomas ‘Land reform in Zimbabwe’ (2003) 24(4) *Third World Quarterly* 691.

<sup>324</sup> A C Laurie ‘The land reform deception: Political opportunism in Zimbabwe's land seizure era’ (2021) 62 (2) *Historical Association of South Africa* 3.

<sup>325</sup> Kwarteng & Botchway (note 318 above).

<sup>326</sup> Sihlobo & Kapuya (note 319 above).

<sup>327</sup> M B Xaba ‘South African land question and the dilemma of land expropriation without compensation: a critical examination’ in AO Akinola *The New Political Economy of Land Reform in South Africa* (2021) 79.

Sihlobo and Kapuya further argue:

If government seizes private property, someone somewhere within the economy will have to pay, whether directly through loss in current and future on-farm job opportunities as well as export revenues, or through protracted economic decline that will erode the purchasing power of money, lead to losses in pensions and savings, and cause de-industrialisation that will destroy future economic growth and off farm job opportunities for the current generation.

In light of this, the researcher understands the position of the ANC that land redistribution without compensation is possible; however it should be sustainable and should not undermine the agricultural sector or the economy. After gaining a comprehensive understanding of the implications of expropriating land without compensation, there is a need to focus on the effects of expropriation without compensation on mortgagees.

### **4.3 The impact of expropriation without compensation on mortgagees**

This section focuses on the impact of expropriation without compensation on mortgagees when a mortgaged property is the subject of an expropriation without compensation process. These consequences are discussed in two key areas below: financial systemic risk and mortgagee rights of lenders.

#### **4.3.1 Financial systemic risk**

A little background on this:

Land expropriation without compensation is critical for redressing historical injustices, and to provide land to society's productive forces, particularly the youth, for use during agricultural reforms.<sup>328</sup> However, it is argued that taking land without compensation will, by definition, obliterate the asset value of a big percentage of South Africa's land, as well as having a significant negative impact on banks and the property market. This in turn will have a negative financial impact on mortgagees. A bit of background on this – the credit agreements total R2.04 trillion in borrowings from credit providers. Mortgages account for 51% of consumer credit, secured credit accounts for 22%, credit facilities account for 13%, unsecured credit accounts for 10%, and short-term credit accounts for 5%. (less than 0.1%).

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<sup>328</sup> K Somerville *Africa's long road since independence: the many histories of a continent* (2017) 18.



Mortgages accounted for 39% (R1.4 trillion), with households accounting for 68% (R929 billion).<sup>329</sup> In context, the amount of mortgage risk held by the mortgagees is equal to 29% of South Africa's annual GDP (as at March 2018).<sup>330</sup>

Assuming possession of all land without compensation indicates a loss of the land component of the acquisition from the consumer's perspective, while maintaining ownership of the building structure.<sup>331</sup> In South Africa's current property law, the land element is linked to the immobile asset, including a house or any other structure.<sup>332</sup> Property is the largest investment from which an ordinary South African household derives wealth.<sup>333</sup> Likewise, South Africa's agricultural debt, according to estimates from the Department of Agriculture, Land Reform and Rural Development, reached a new high of R187 billion in 2019, nearly tripling since 2010.<sup>334</sup> The effect of the agricultural debt will be felt by commercial banks; the government also has "skin in the game" through the Land Bank, which holds 33% of the agricultural debt.<sup>335</sup> Land expropriation without compensation may jeopardise the Land Bank's financial health and billions of dollars from the State budget may be required to save the bank.

Property rights and contract law are the foundation of global commerce, and the expansion of ownership to capital goods (including land) is the basis on which mortgagees' financial markets are built.<sup>336</sup> If expropriation without compensation is implemented in its current form, it will have a negative impact on all mortgagees in South Africa's capital adequacy and stability, posing a systemic risk to the country's financial sector and, by extension, the economy.<sup>337</sup> The soundness of a

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<sup>329</sup> J Zimmerman 'Property on the line: Is an expropriation-centred land reform constitutionally permissible?' (2005) 122 (2) *South African Law Journal* 378 & 405.

<sup>330</sup> SCA Kasse-Kengne 'Securitisation of mortgage loans, regulatory capital arbitrage and bank stability in South Africa: Econometric and theoretic analyses' Doctoral dissertation, University of Cape Town, 2018.

<sup>331</sup> J Rao 'Fundamental Functionings of Landowners: Understanding the relationship between land ownership and wellbeing through the lens of 'capability' (2018) 72 *Land Use Policy* 74.

<sup>332</sup> B Needham and T Hartmann *Planning by law and property rights reconsidered* (2016) 93.

<sup>333</sup> J B Davies, S Sandström, A Shorrocks, and EN Wolff 'The level and distribution of global household wealth' (2011) 121 (551) *The Economic Journal* 223.

<sup>334</sup> W Sihlobo 'The long shadow of South Africa's farm debt' *Businessstech* 2 November 2020.

<sup>335</sup> Xaba (note 327 above).

<sup>336</sup> García-Lamarca, M. & Kaika, M. 'Mortgaged lives': the biopolitics of debt and housing financialisation' (2016) 41(3) *Transactions of the Institute of British Geographers* 313.

<sup>337</sup> Akinola (note 28 above).

corporation's balance sheet determines its value, and this has an impact on its ability to raise capital and expand its operations. Nationalisation, on the other hand, might put the Land Bank and other commercial banks at risk of insolvency.<sup>338</sup> Given the enormity of the outstanding loans, it seems unlikely that the government will be able to financially save these institutions. When an expropriating authority delivers a notice of expropriation to an owner or holder of mortgaged land, a mortgagee has no right to deliver a claim for compensation to the expropriating authority to safeguard its interests, despite having largely or totally financed the purchase of such land.<sup>339</sup>

For the same reasons, unless the mortgagee pledges to fund the challenge, a mortgagee has minimal control over the content of a demand for compensation and the content of any legal challenge brought by an owner or holder against an expropriation without compensation procedure.<sup>340</sup> The fact that mortgaged land might be expropriated without respect for any mortgage on the property, under an expropriation without compensation procedure, will have a direct impact on mortgagees' capital sufficiency and stability, posing a systemic risk to all South African mortgagees.<sup>341</sup>

If property rights are not recognised, land expropriation without compensation will jeopardise investment in the capital improvement of the land. As this asset base depreciates, the financial industry will reassess their risk exposure and diversify into other areas of the economy. A drop in the land asset's value would expose financial institutions to a level of risk that they might not be willing to take. As a result, they can opt to use their right to recall loans. Keenan<sup>342</sup> argues that,

...legally the financial institutions hold the title deeds for any land subject to financing. Should the outstanding loan amounts exceed the value; the financial institutions will require that the farmer settle any difference between the valuation amount and the loan amount.

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<sup>338</sup> T Padoa-Schioppa, 'Central banks and financial stability: exploring the land in between' (2003) 25 *The transformation of the European financial system* 269.

<sup>339</sup> Vorster (note 309 above).

<sup>340</sup> *Ibid.*

<sup>341</sup> W M Grimm 'Key legal consequences of expropriation of land without compensation' Doctoral dissertation, University of Pretoria, 2020.

<sup>342</sup> S Keenan 'Making land liquid: On time and title registration' in SB Jones & E Grabham *Law and Time* (2018) 145.



Land expropriation without compensation distorts banks' credit facilities.<sup>343</sup> This is critical considering inclusive economic growth is fundamentally based on a sound banking and financial system.<sup>344</sup> Sharma contends that, "banks rely on the market value of property as security for loans, to protect investors and ensure that consumer deposits can be paid on demand".<sup>345</sup> Xhao et al. also argues that "banking crises often start with a decline in the value of land-based property and the impact this has on market confidence, as was evident in the global financial crisis of 2008".<sup>346</sup> Expropriation of land without compensation, when executed without proper judicial oversight, will likewise reduce the capacity of mortgagees to approve credit, which is regularly used by entrepreneurs, for personal development and to improve living standards.<sup>347</sup> The South African Banks Act and the global Basel regulatory framework for the financial sector necessitate that "banks have adequate capital and liquidity to return depositors and investors funds – with interest – on demand".<sup>348</sup> If the value of land is reduced by expropriation without compensation, mortgagees will have fewer assets on their balance sheet with which to extend credit and they would have to implement more conservative mortgage policies.

According to Schwarcz, "it is important to note that the Landbanks' terms of mortgages include unencumbered property rights at market values – the international mortgagees they account to will call up this exposure where property rights are affected, and market values compromised".<sup>349</sup> He further argues that "commercial banks and cooperatives will need to be serviced and represents a real

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<sup>343</sup> S Dlamini & O Ogunnubi 'Land reform in South Africa: contending issues' (2018) 53 (2-1) *Journal of Public Administration* 339.

<sup>344</sup> A Usman, MSA Makhdum & R Kousar 'Does financial inclusion, renewable and non-renewable energy utilization accelerate ecological footprints and economic growth? Fresh evidence from 15 highest emitting countries' (2021) 65 *Sustainable Cities and Society* 3.

<sup>345</sup> D Sharma 'Nexus between financial inclusion and economic growth: Evidence from the emerging Indian economy' (2016) 8 (1) *Journal of financial economic policy* 16.

<sup>346</sup> S X Zhao, et al 'How big is China's real estate bubble and why hasn't it burst yet?' (2017) 64 *Land Use Policy* 153.

<sup>347</sup> T Boshoff 'Land expropriation without compensation will impact the ordinary citizen' (2017) 3 (12) *FarmBiz* 13.

<sup>348</sup> D Oyemade, AA Obalade & PF Muzindutsi 'Impact of the Basel IV framework on securitization and performance of commercial banks in South Africa' (2020) 15 (3) *Banks and Bank Systems*, 95.

<sup>349</sup> S L Schwarcz 'Secured transactions and financial stability: regulatory challenges' (2018) 81 *Law & Contemporary Problems* 45.

contingent liability for the economy where farmers will not be able to remain profitable".<sup>350</sup> Hull, Babalola and Whittal states that,

Where uncertainty of the asset class comes into play – i.e., land that can be expropriated without compensation, whether it is for public interest or where there are arbitrary principles such as 'land not being used and where the main purpose is to benefit from the appreciation in market value - or land where compensation to be paid in terms of the Labour Tenants Act, the price of the asset class will fall due to market risk'.<sup>351</sup>

Extrapolating from this argument, expropriation without compensation may prompt financial institutions to re-evaluate any working capital and credit allocation they approved for the borrower. As a result, expropriation without compensation puts the whole financial sector in South Africa in jeopardy. Reduced local and international investment in South African mortgagees would both cause and worsen the systemic risk posed by expropriation without compensation.

#### 4.3.2 Mortgage rights of lenders

When a mortgagee registers a mortgage bond over a consumer's property, they gain certain rights,<sup>352</sup> including the right to foreclose,<sup>353</sup> a preference on the property's disposition in the event of the consumer's insolvency,<sup>354</sup> the fact that the mortgage cannot be overcome by alienation or the registration of leases or servitudes over the property because the mortgage attaches to it,<sup>355</sup> and the fact that a consumer may not terminate a mortgage until the principle debt has been cleared.<sup>356</sup> It is self-evident that a mortgage protects a consumer's debt to a mortgagee and grants the mortgagee certain rights.<sup>357</sup> According to the Expropriation Act,<sup>358</sup> title of land subject to expropriation, transfers to the expropriating authorities free and clear of any mortgage. An expropriation, according to section 8 of the Expropriation Act, will cancel a mortgage bond but not

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<sup>350</sup> As above.

<sup>351</sup> Akinola (note 28 above).

<sup>352</sup> Roodepoort United Main Reef G.M Co Ltd (In Liquidation) v Du Toit, NO 1928 AD 66 (A), 69.

<sup>353</sup> G F Lubbe 'Mortgage and Pledge' in *H Silberberg, J Schoeman & J Badernhorst et al The law of property in South Africa* (2006) 327.

<sup>354</sup> Roodepoort (note 352 above).

<sup>355</sup> Sec 1 of the Deeds Registries Act 47 of 1937.

<sup>356</sup> Sec 60 of the Deeds Registries Act 47 of 1937.

<sup>357</sup> A Hutchison & D Allen 'Unsecured lending and the indigenous economy in Australia and South Africa.' (2021) 48(1) *Journal of Law and Society* 84.

<sup>358</sup> Sec 15(3) read with sec 21 of the Expropriation Act.

the obligation. In other words, if the land is expropriated, the owner is still liable to the mortgagee, but the loan is now unsecured.

Although a borrower whose land is subject to an expropriation without compensation process may still be liable to the mortgagee for the full amount of the mortgage over that land, the mortgagee will be unable to attach and sell that land to satisfy the borrower's obligations under the mortgage agreement, because the land has been expropriated without regard for the mortgage over that land.<sup>359</sup> As a result, the Expropriation Act seeks to override mortgagees' existing rights.<sup>360</sup> This has serious implications for mortgagees, particularly in the case of mortgaged land subject to expropriation without compensation, where an expropriating authority and a borrower cannot agree on a just and equitable amount of compensation.<sup>361</sup>

According to section 19(1), where the property is burdened by a mortgage bond or existing liens, no compensation is paid out to the owner of the property unless an agreement has been reached between the owner and the mortgagee or holder of the lien regarding the payment of the outstanding balance of the principal debt to such a third party.<sup>362</sup> If the owner or mortgagee or holder of a lien fails to agree upon the portion of the compensation payable to such a third party, the matter is referred to a high court with jurisdiction over the matter to determine which portion of the compensation is payable to the holder of the mortgage or the holder of the lien.<sup>363</sup> The real security right of the mortgagee is not extinguished automatically on expropriation, but it is protected by the expropriation procedure.<sup>364</sup>

The Expropriation Bill attempts to provide guidance in the case of an expropriated property that is encumbered by a mortgage.<sup>365</sup> However, in terms of mortgagees'

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<sup>359</sup> Sec 21(5) read with secs 8(3)(f), 9(1)(d) and 9(2) of the Expropriation Act.

<sup>360</sup> Roodepoort (note 352 above).

<sup>361</sup> Grimm (note 345 above).

<sup>362</sup> Sec 19(1) Expropriation Act 63 of 1975. Also see *Barclays Bank DCO v Tarajia Estates (Pty) Ltd* 1966 1 SA 420 (T) 423 where the court dealt with the continued protection of the principal debt after expropriation of the immovable.

<sup>363</sup> Sec 19(3) Expropriation Act 63 of 1975.

<sup>364</sup> G J Pienaar 'The effect of original acquisition on existing limited real rights' (2015) 18 (5) *Potchefstroom Electronic Law Journal* 99.

<sup>365</sup> Sec 18 (1) of the Expropriation Bill reads – "If property expropriated in terms of this Act was, immediately prior to the date of expropriation, encumbered by a registered mortgage or subject to a deed of sale, the expropriating authority may not pay out any portion of the compensation money except to such person and on such terms as may have been agreed upon between the expropriated

rights, the bill leaves a lot to be desired. For example, consultation should be held with financial institutions as mortgagees during the expropriation process. However, in terms of the Bill the expropriating authority has no clear obligation to engage with financial institutions as mortgagees prior to considering compensation for the property to be expropriated.

Clause 18 of the Bill provides that “if the expropriated land is mortgaged or subject to a deed of sale, the expropriating authority may not pay out any compensation money unless the owner, holder, mortgagee, or buyer agrees on terms”.<sup>366</sup> In other words, the debt and responsibilities must be paid off before the owner is compensated. The main issue is how such debt is discharged when a property is expropriated without compensation; how does a debtor repay his or her mortgage loan when his or her property is expropriated without compensation? The Expropriation Bill is silent on this issue; consequently, the Bill's inability to address this issue is a grave error that threatens economic stability and predicts disaster. The ensuing conundrum is that when a property is expropriated, both the registered owner and the mortgagee lose their rights; the owner loses land ownership, while the mortgagee loses actual security rights.

The utmost predicament is that the borrower will repudiate the mortgage arrangement when mortgaged land is expropriated without compensation by an expropriating authority.<sup>367</sup> The borrower will stop paying the payments required under the mortgage agreement because he or she no longer enjoys the benefit of the land in question, and the mortgagee will be unable to attach and sell that land to satisfy the borrower's mortgage obligations.<sup>368</sup> Mortgagees would be compelled to institute legal proceedings to implement the contractual remedies available under the mortgage contract. This may include accelerating repayment schedules,

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owner or expropriated holder and the mortgagee or buyer concerned, as the case may be, after the claimant has notified the expropriating authority of the agreement.”

<sup>366</sup> T Mvunyiswa ‘Realising Land Reform Through Expropriation: An Analysis Of The Just And Equitable Compensation Requirement’ Masters Dissertation, University of Johannesburg, 2021.

<sup>367</sup> Grimm (note 345 above).

<sup>368</sup> The Banking Association South Africa ‘Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wpcontent/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 30 January 2022) 31.

foreclosure of property, call-up of other loans given to the borrower, or sequestrating the borrower, this is all harmful to the borrower.<sup>369</sup>

Even if the mortgagee sequestrates the borrower's assets to offset some of the losses that would occur if the mortgaged property were expropriated without compensation, the mortgagee would still be subject to substantial debt amortisation because it cannot be attached or the land sold, subject to expropriation without compensation, to acquit the borrower's contractual obligations and the long-term proceedings to enforce the borrower's contractual obligations under mortgage agreements; and the constant risk that additional land within the ambit of section 12(3) of the Expropriation Act over which they hold mortgages will be subject to expropriation without compensation. In addition, mortgagees who are unable to renegotiate existing mortgage agreements in their favour and adequately raise interest rates on their products to compensate for the increased risk and debt write-offs that expropriation without compensation will entail, risk bankruptcy or the need for financial assistance from the South African Reserve Bank, which may or may not be able to assist.

Furthermore, courts will be forced to weigh competing public policy considerations such as the enforceability and enforcement of mortgage agreements by mortgagees against a borrower's right to use, enjoy, and own property that they have paid for, when a mortgagee seeks to enforce contractual remedies against a borrower for a breach of a mortgage agreement caused by an expropriation without compensation process.<sup>370</sup> It is possible that courts may be wary of enforcing such contractual obligations, simply because the property (land) on which the borrower obtained the mortgage was expropriated from them without compensation in the public interest by an expropriating authority.

Expropriation without compensation poses a threat to foreign investors (mortgagees)' current interests in South Africa, as well as any future investments they may consider making in the country.<sup>371</sup> Taking into account section 13(5) of the

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<sup>369</sup> The Banking Association South Africa (note 368 above).

<sup>370</sup> Grimm (note 341 above).

<sup>371</sup> S McKenzie et al. "South African investment laws - foreign investors with treaty protection may challenge proposed expropriation of land" Webber Wentzel available online:

Protection of Investment Act 22 of 2015, which states that “international arbitration in disputes involving foreigner's investments in South Africa may only be used after domestic remedies have been exhausted”, these mortgagees will be forced or motivated to sell their existing investments and not make new ones in South Africa.<sup>372</sup> Furthermore, by claiming domestic law, South Africa's proposed expropriation without compensation undermines mortgagees' rights under international treaty law requirements.<sup>373</sup> In this regard, expropriation without compensation proposes to undermine mortgagees' real rights.

#### 4.4 Conclusion

The chapter showed that land expropriation without compensation is critical not only in redressing historical injustices, but also in extending land to society's productive forces, particularly the youth, for use in agricultural reforms.<sup>374</sup> Expropriation of land without compensation, on the other hand, will obliterate the asset value of a big section of South Africa's land, as well as have a significant negative impact on financial institutions and the property market. If approved in its existing form, expropriation without compensation poses a risk to mortgagees.<sup>375</sup> When viewed in conjunction with the Protection of Investment Act 22 of 2015, it will also undermine mortgagees' international law rights.<sup>376</sup>

The chapter further outlined that expropriation without compensation may motivate mortgagees to take severe measures to safeguard their businesses, causing the property market to remain stagnant. The chapter was particularly important in demonstrating how the Expropriation Bill, in its current form, could dissuade international and local investment in South Africa, as well as result in capital flight, if mortgagees lose money due to expropriation at below market value. To provide better clarity and certainty to investors, the definition of property that can be

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<https://www.webberwentzel.com/News/Pages/south-african-investment-laws-foreign-investors-with-treaty-protection-may-challenge-proposed-expropriation-of-land.aspx> (accessed 15 January 2022).

<sup>372</sup> Sec 13(5) of the Protection of Investment Act 22 of 2015.

<sup>373</sup> Art 27 of the Vienna Convention on the Law of Treaties, which treaty binds all states regardless of whether they are a party to it or not.

<sup>374</sup> K Somerville *Africa's long road since independence: the many histories of a continent* (2017) 33.

<sup>375</sup> The Banking Association South Africa (note 369 above).

<sup>376</sup> Art 27 of the Vienna Convention on the Law of Treaties.

expropriated should be limited to tangible property. Intellectual property must be protected.

The chapter further established that mortgagees who fail to renegotiate existing mortgage agreements favourably, and raise interest rates on their products sufficiently to compensate for the increased risk and debt write-offs that expropriation without compensation, will cause risk insolvency or the need for financial assistance from the South African Reserve Bank, which may be unable to assist. Expropriation of land without compensation, particularly when done without judicial oversight, will likewise diminish the capacity of mortgagees to extend credit, which is regularly used by entrepreneurs, for personal development and to improve living standards.

In this regard, the researcher contended that the ramifications of expropriation without compensation would be far-reaching and negatively impact on mortgagees. However, these contentions do not suggest that South Africa should not urgently deal with the current imbalance in land ownership. It is vital that South Africa implement a decentralised and effective land reform programme to restore land rights to most of the black people. There is, nonetheless, the need to employ a considerably more mindful solution that will not crush financial sectors, pension funds, property rights (real security rights), and the economy. The next chapter proposes recommendations regarding a possible functional concept.



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The main purpose of the study was to investigate how the expropriation of land without compensation will affect mortgagees. As such, in this chapter the researcher draws conclusions from the preceding discussions and makes recommendations on how the law would ensure that the interests of the mortgagees are protected where vested rights in land are expropriated.

The outstanding aspect raised in the study was the problem statement that noted that the proposed amendment to section 25 of the Constitution, which allows for expropriation without compensation, has in turn resulted in a lot of excitement, debates, criticism, and skepticism. It is argued that mortgagees often approve the granting of loans with an understanding that the registration of a mortgage bond provides a secured claim in the event of non-fulfilment of obligations by the mortgagor.<sup>377</sup> The study's problem, therefore, is premised on the issue that expropriation of land without compensation is likely to directly or indirectly affect mortgagees in South Africa. As such, the potential losers in this process are banks because they would have invested by issuing credit.

##### 5.1.1 An analysis of the laws regulating mortgage bonds

This chapter gave an analysis of the basic principles of real security rights. Real security means a real right, which one person has over the property of another to secure an obligation. The chapter discusses what constitutes mortgages, the scope, and nature of mortgages and how mortgages are created in law and judicially before giving a comprehensive analysis of laws regulating mortgage bonds. This discussion is relevant to present a comprehensive understanding of what a mortgage bond is. In that regard, the chapter established that mortgage bonds in South African law are governed by law of property. Mortgage bonds are largely concerned with real rights and they are enforceable against the whole world. The

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<sup>377</sup> H Mostert & A Pope *The principles of the law of property in South Africa* (2010) 298.

chapter also established that essentials of a mortgage include: (1) the creation of a real right; (2) property of another to which the mortgage is to attach; and (3) an obligation which is to be secured. Based on these essentials, a mortgage is only an accessory to the principal obligation. As such, the limited real right is not created once a debt has been incurred, but only once the mortgage bond has been registered. Lastly, the chapter addressed the cancellation of a mortgage bond and shows that a mortgage is afforded constitutional protection under section 25(1) of the Constitution.

### **5.1.2 Expropriation of land without compensation: A constitutional perspective**

The chapter discussed the background on expropriation, the laws regulating expropriation, purpose of expropriation, expropriation without compensation and mortgages under expropriation without compensation. Firstly, the chapter established that expropriation is the transfer of property rights from the owner to the state without the owner's consent. The chapter further established that in South Africa, the state's power for expropriation is found in section 25(2) of the Constitution, which provides that property may be expropriated only in terms of law of general application; (a) for public purpose or in the public interest; and (b) subject to compensation, the amount of and the time and the manner of payment of which have either been agreed to by those affected or decided or approved by the court.

Secondly, the chapter proceeded to discuss expropriation under the Expropriation Act,<sup>378</sup> the Constitution,<sup>379</sup> and the Expropriation Bill.<sup>380</sup> The discussion under the Expropriation Act and section 25 appears to imply that compensation is necessary in all property expropriations. Each instance is unique, depending on the circumstances. Market value is not a strict criterion for compensation. It can be at market value, above market value, below market value, little or nothing, depending on the facts of the case after all the elements specified in the Constitution are taken into account. The Bill deviates from this position and proposes for expropriation without compensation. In that regard, the Bill gives a list of circumstances under which expropriation without compensation would be legally permissible. The next

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<sup>378</sup> Expropriation Act 63 of 1975.

<sup>379</sup> Constitution of the Republic of South Africa, 1996.

<sup>380</sup> The Expropriation Bill [B23-2020].

chapter evaluated the effects of expropriation of land without compensation on mortgagees in South Africa.

### **5.1.3 The effects of expropriation of land without compensation on mortgagees in South Africa**

The chapter established that land expropriation without compensation is vital not only in the extreme review of historical injustices, but will likewise be crucial in extending land to productive forces of society, the youth specifically for the use in agricultural reforms.<sup>381</sup> However, expropriation of land without compensation will, as a matter of course, annihilate the asset value of large portion of South Africa's land and could by definition, have a huge negative effect on financial institutions and the property market. Expropriation without compensation poses a risk to mortgagees if adopted in its current form.<sup>382</sup> It will also undermine mortgagees international law rights when read in conjunction with the Protection of Investment Act 22 of 2015.<sup>383</sup>

The chapter further outlined that expropriation without compensation may motivate mortgagees to take severe measures to safeguard their businesses, causing the property market to remain stagnant. The chapter was also critical to demonstrate that the Expropriation Bill, in its current form, may deter international and domestic investment in South Africa and result in capital flight if mortgagees lose money owing to expropriation at below market value. In this regard, the definition of property that can be expropriated should be limited to tangible property to provide greater clarity and certainty to investors.

The chapter further established that mortgagees who are unable to renegotiate existing mortgage agreements favorably and raise interest rates on their products sufficiently to compensate for the increased risk and debt write-offs that expropriation without compensation will cause them, face insolvency or the prospect

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<sup>381</sup> K Somerville *Africa's long road since independence: the many histories of a continent* (2017) 33.

<sup>382</sup> The Banking Association South Africa 'Public submission to the ad hoc committee on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996' (Constitution Eighteenth Amendment Bill) 30 January 2020 available online: <https://www.banking.org.za/wpcontent/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed 7 January 2022).

<sup>383</sup> Art 27 of the Vienna Convention on the Law of Treaties.

of requiring financial assistance from the South African Reserve Bank, which may be unable to help. Expropriation of land without compensation, particularly when done without judicial oversight, will likewise diminish the capacity of mortgagees to extend credit, which is regularly used by entrepreneurs, for personal development and to improve living standards.

In this regard, the researcher contended that the ramifications of expropriation without compensation would fairly be far-reaching and negatively impact on mortgagees. However, these contentions do not suggest that South Africa should not urgently deal with the current imbalance in land ownership. It is vital that South Africa implement decentralised and effective land reform programme to restore land rights to most of the black people. There is, nonetheless, the need to employ a considerably more mindful solution that will not crush financial sectors, pension funds, property rights (real security rights) and the economy.

## **5.2 Concluding remarks**

In conclusion, it is trite to note that expropriation of land without compensation is likely to directly or indirectly affect mortgagees in South Africa. In other words, it could pose a significant risk to the banking sector in that a marked decrease in the value of land-based property caused by either an amendment to legislation and/or market uncertainty, and the resultant reduced appetite from property buyers, could destabilise the banking sector.

From the foregoing analysis, it is clear that there is a lack of certainty around what will happen to existing bonds and loans should land be expropriated without compensation. In other words, expropriation without compensation in its current form does not seem to take into consideration the security rights (real rights) mortgagees have over immovable property.

With the above in mind, it should be understood that in the event that property (in this case land), which the bank has taken security over, is to be expropriated without compensation, such an event will be considered as default under the mortgage and this will have the following consequences:

- The repayment of the mortgage at the election of the bank could be accelerated and this would place the borrower in a situation whereby he/she would need to repay the loan far quicker than what was anticipated;
- The immovable property could, at the discretion of the bank, be foreclosed upon as set out above; and/or
- Cause default in other loans (not only residential or commercial property finance loans), which have the potential impact of financially crippling the borrower, as those loans could be accelerated at the election of the bank and security executed against same.

### **5.3 Recommendations**

In line with the above-mentioned, the study recommends the following relating to the effect of expropriation of land without compensation on mortgagees:

#### **5.3.1 Avoid amending section 25 of the Constitution**

The study recommends that section 25 of the Constitution should not be amended to give way to expropriation of land without compensation. It is worth noting that the South African law recognises and allows constitutional amendments in the land. To smoothly take the amendment route, section 74(2) of the Constitution provides the requirements that should be met. Key to allow the constitutional amendment is that a majority vote of two thirds of the National Assembly is required. In addition, at least six provinces out of nine in the National Council of Provinces should support the proposed amendment. Thus, section 25 of the Constitution can be amended if such an amendment is within the parameters of section 74 of the Constitution. In that regard, if the Constitution is to be amended to allow for such, then mortgagees will be negatively affected hence recommending against amending the Constitution.

#### **5.3.2 Expedite the Expropriation Bill process to become an Act to address the gaps in the existing Expropriation Act**

It is worth noting that the 2020 Expropriation Bill was passed to discussion. Against this backdrop, the study recommends that quick insightful comments be made on it to facilitate the enacting of legislation that regulates land expropriations merely for land reform purposes, closing the gaps in the existing Expropriation Act. This

proposed legislation ought to demystify the nature and types of expropriations. This should include among other things excluding private property but putting focus on land. This legislation will deter the cruel and unlawful 'rush and grab' procedure that was adopted by Zimbabwe or the uncontrolled taking of land secured by banks without proper arrangements made. If a smooth and organized expropriation can unfold, a continued and undisrupted economic flow is guaranteed without prejudicing any party.

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