

Justifying land expropriation - public purpose, public interest

Section 25(2) of the Constitution sets out the requirements for a lawful expropriation of property, one of which is that the expropriation must be for a public purpose or in the public interest. However, public purpose and public interest are not specifically defined in section 25, though some interpretative guidance is provided in section 25(4), which states that the public interest includes the nation's commitment to land reform and to reforms aimed at bringing about equitable access to all of South Africa's natural resources.



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Pre-constitutional era

The Supreme Court of Appeal distinguished between expropriation in the public interest and expropriation for a public purpose. The notion of public interest was viewed as a much wider category that could encompass expropriations for purposes other than actual state or public use. The notion of public purpose was regarded as a narrower concept that only allowed for expropriations for actual state or public use.

This approach was largely dictated by the wording of the statutory provision that authorised the expropriation. This statute was the Expropriation Act of 1975. Interestingly, the Expropriation Act permitted expropriation for the public purpose, but not for the public interest. In some cases, however, depending on the wording of the particular authorising statute, courts were willing to follow a more lenient approach that corresponded with the wider notion of public interest rather than the approach that corresponded with the narrower notion of public purpose.

Constitutional era

The public purpose/public interest requirement serves a dual function in the constitutional era. The first function is to control the justification and authority for expropriations. Examples of accepted public purposes are the building of roads and hospitals. Expropriations of property for purely private purposes will not be allowed.

The second function is to ensure that the ordinary functioning of the property clause in protecting property does not frustrate or impede expropriations that are done for land or similar reforms that the Constitution has committed itself to.

Land reform was not a consideration that could justify expropriation before the promulgation of the Constitution (when expropriations took place in terms of the Expropriation Act, and not in terms of the Constitution). The government now has a broader authorisation to expropriate than it had in the pre-Constitutional era, but the same document that gives it this broader power, also limits it.

In the constitutional era, the approach to the interpretation of the public purpose/public interest requirement is a broader one that incorporates its dual function. This approach does not go as far as to be completely deferent to the legislature or executive decisions regarding what constitutes a public purpose or a purpose in the public interest that characterised the pre-constitutional era nor does it frustrate land reform. This means that the purpose for an expropriation can be challenged in court and the expropriating authority will have to satisfy the court that the purpose meets the requirement of 'public interest' or 'public purpose'.

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