

CHAPTER 13: PROPERTY

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1. INTRODUCTION

In *Port Elizabeth Municipality v Various Occupiers*¹ the Constitutional Court ('CC') said the following about the constitutional right to property:

*'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 by 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.'*²

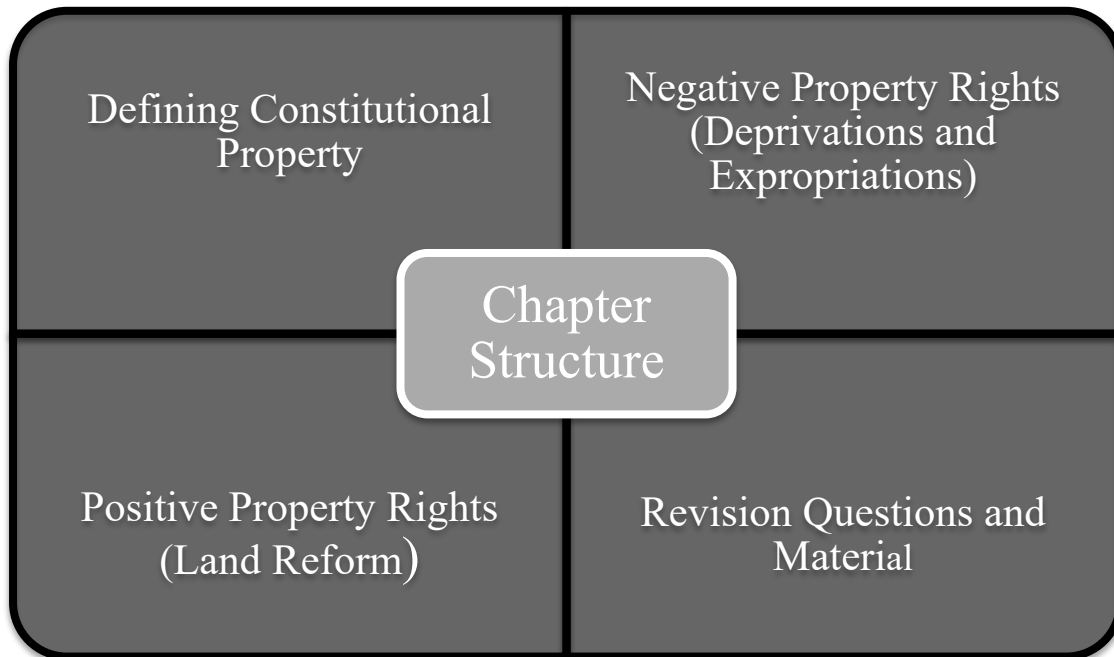
Section 25 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') constitutionalises the right to property. Consisting of eight subsections, it is the longest clause in the Bill of Rights. The right to property strives to balance the political tensions and various socio-economic interests which accompanied the introduction of a constitutional democracy in South Africa.

First, the chapter will discuss what constitutes 'property' for the purposes of section 25 of the Constitution. Secondly, it will discuss section 25(1) and 25(2) which protect the right of every property holder from 'deprivations' and 'expropriations' of property which do not comply with various constitutional requirements. Thirdly, the chapter will discuss section 25(4)-(8) of the Constitution, which places an active obligation on the state to transform the current patterns of property ownership in South Africa with a particular emphasis on land reform. The diagram immediately below sets out the structure which this chapter will take.

¹ (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)

² Ibid para 15.

Chapter Structure



2. DEFINING 'PROPERTY'

(a) Private law notions of property

Section 25 protects the right to property and simultaneously requires the state to take active measures to make the distribution of property rights more accessible and equitable to redress the effects of racialised dispossession and systemic discrimination. Therefore, the first question we must consider is what constitutes 'property' for the purposes of section 25?

'Constitutional property' is related to - but not identical or equivalent - to traditional private law conceptions of property.³ The private law conception of 'property' is generally limited to the law of things. The law of things regulates the relationships and rights that natural or juristic persons can acquire over legal

³ Theunis Roux 'Property' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 46:11.

objects.⁴ For example, the private law of property confers the rights of (a) ownership which is the strongest relationship a legal subject can exercise over a legal object and (b) limited real rights which are rights in the property of another person for example, a servitude or usufruct.⁵ The law of things does not regulate the rights and obligations that legal subjects may have in relation to another legal subject. That is regulated by the law of obligations which broadly consists of the law of contract, delict and unjustified enrichment. This narrow common law conception of property would not offer proprietary protection for claims in the law of unjustified enrichment for example. Traditionally, the protection of property in private law was limited to protecting corporeal things. Other relationships were regulated by another branch of private law or public law.

When discussing the constitutional conception of property, two things must be kept in mind. First, the intervention of the Constitution has broadened the scope of the concept of property. Second, it also broadened the range of permissible limitations that can be placed on the right to property in terms of the Constitution.⁶

(b) The constitutional conception of property

Section 25(4)(b) of the Constitution functions as a 'definition clause'. However, section 25(4)(b) has not cleared up various problems of interpretation that arise from section 25 generally – it simply makes it clear that property is not limited to land. Because there is no closed list of proprietary relationships and interests that can receive constitutional protection, the meaning of 'property' has been, and will continue to be, incrementally developed by the courts.⁷ When doing so, the courts have been reluctant to set out a concrete definition of 'property'. Given that the institution of property is a fluid concept which is influenced by the socio-economic context of each society, this cautious approach adopted by the judiciary is a

⁴ AJ van der Walt *Constitutional Property Law* (2005) 14

⁵ Ibid.

⁶ Ibid.

⁷ Ibid 222.

necessary one. In discussing the constitutional conception of property, we can broadly divide proprietary relationships into three categories:

1. The traditional conceptions of property in the law of things such as real and limited real rights in corporeal moveable and immovable property.
2. Incorporeal rights such as copyright, patents, intellectual property, shares and debts.
3. Public law rights such as welfare rights to social grants and other public entitlements such as a liquor license for example.

In the seminal case of *First National Bank v Commissioner for the South African Revenue Service* ('*First National Bank*')⁸ the CC had to determine the constitutionality of section 114 of the Customs and Excise Act 91 of 1964 ('Excise Act').⁹ Section 114 of the Excise Act authorised a statutory lien in favour of the South African Revenue Service ('SARS') over property that belonged to various debtors in tax arrears.¹⁰ This lien was established over vehicles that were to be purchased in regular instalments and ownership of the vehicles had not passed from the sellers ('FNB') to the buyers ('the tax debtors').¹¹

When SARS seized these vehicles, FNB argued this infringed their constitutional right to property because there was no causal nexus between the debts owed to SARS by the debtors and FNB.¹² The CC declined to provide a comprehensive definition of property for the purposes of section 25.¹³ However, the court did find that, 'ownership of a corporeal movable must – as must ownership of

⁸ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC).

⁹ *Ibid* para 4.

¹⁰ *Ibid*.

¹¹ *Ibid* para 7-13.

¹² *Ibid* para 24-6.

¹³ *Ibid* para 47.

land – lie at the heart of our constitutional conception of property'.¹⁴ Although the court narrowed its finding to ownership of a corporeal movable, it did not preclude the extension of constitutional protection to incorporeal property and others forms of proprietary relationships which are different from ownership.¹⁵

In addition to ownership, all the limited real rights recognised at common law enjoy protection under the Constitution. For example, this would include a pledge over corporeals and incorporeals.¹⁶ This same principle would apply to limited real rights created by statute: such as mineral rights. The essentials of elements of ownership - such as the rights to use, enjoy and dispose of property - also enjoy protection. In *Geyser v Msunduzi*, the court stated:

'the property protected by the Constitution includes property rights such as ownership and the bundle of rights that constitute ownership, such as the right to use property or exclude other people from using it or to derive income from it or transfer it to others'.¹⁷

Section 25 also protects incorporeal property. In *Laugh It Off Promotions v South African Breweries*, the CC held that intellectual property, such as trade rights and copyright, constitute property for the purposes of section 25.¹⁸ In *Phumela Gaming v Gründingh*, the court similarly found that goodwill is property for the purposes of section 25.¹⁹ In *National Credit Regulator v Opperman* ('Opperman'), the CC found a right to restitution of money paid based on unjust enrichment fell within the ambit of section 25 of the Constitution.²⁰

¹⁴ Ibid para 51.

¹⁵ Van der Walt op cit note 4 at 222.

¹⁶ Roux op cit note 3.

¹⁷ 2003 (5) SA 18 (N) 249I-J.

¹⁸ (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) para 17.

¹⁹ 2006 (8) BCLR 883 (CC) para 37-42.

²⁰ [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) para 57-64.

The property clause also protects certain constitutional entitlements, such as: access to natural resources, access to land, access to adequate housing, healthcare services and social security. In suitable cases, it could include the right to choose a trade, occupation or profession. In *Alexkor Ltd v Richtersveld Community*, the CC appeared to suggest that customary land rights claims which are not based on contract also deserve constitutional protection.²¹ This is an important development in responding to the need to redress the effects of apartheid-based land control.

Other forms of public law entitlements are the largesse of the state. However, these forms of public rights are often indirectly protected by administrative law. In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development*, found that state largesse, such as a liquor licence, is property for the purposes of section 25.²² In this case, Justice Froneman provided the following guidelines for defining property in section 25 of the Constitution:²³

- First, is the largesse clearly definable and identifiable by persons other than the holder?
- Secondly, does it have commercial value?
- Thirdly, is it capable of been transferred?
- Fourthly, is it sufficiently permanent in that the holder is protected in an administrative sense against arbitrary revocation?

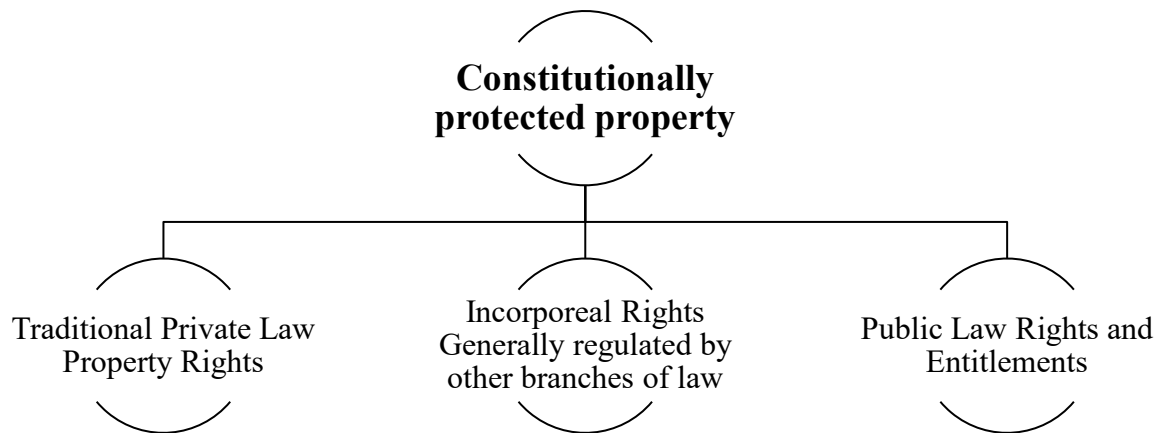
The above discussion illustrates, the constitutional definition of property includes those relationships which are traditionally regulated by the law of obligations. The definition also seems to extend protection to span those interests and rights which are traditionally regulated by the public law subject of administrative law. In principle, the definition is capable of a sufficiently broad and open ended

²¹ [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) para 47-52 and 59.

²² [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) para 39-52 and 68-72.

²³ Ibid para 38.

formulation that it could theoretically cover anything which has a monetary value in the estate of a legal person.



3. THE STRUCTURE OF THE PROPERTY CLAUSE

Having discussed the interests that can potentially receive constitutional protection under section 25, we can now consider how the property clause protects such interests. First, we will discuss the provisions that entrench a 'negative' property right. Before doing so, it is necessary to provide a brief explanation of what constitutes a 'right' and the philosophical difference between a 'negative' versus a 'positive' legal right.

A right is a legal, social or ethical freedom or entitlement. Namely, rights are fundamental normative rules about people are permitted to do according to some legal system, social convention or ethical theory. Rights are normative instruments that generate the obligations that individuals owe and are owed by other persons or entities and the state. Simply, a right is an entitlement. Positive rights require others to provide another person with goods or service. On the other hand, negative rights only require them to abstain from interfering entitlements held by others. Section 25(1)-(2) are said to provide for a negative right right to property insofar as these sections prohibit any entities from interfering with the property rights of existing holders unless certain legal requirements are met. Section 25(1)-(2) therefore

provides protection for existing holders of property rights by requiring others to desist from curtailing their entitlements.²⁴

Sections 25(4)-(8) are said to provide for a positive property right, insofar as they place active obligations on the state to take measures to provide the South African citizenry with greater access to property rights.²⁵ The reason behind this structure is a direct consequence of our unique socio-political history which is discussed below.²⁶ The nature of these positive obligations are developed incrementally by the courts and legislature. In *First National Bank*, the CC stated that a central aim and purpose of section 25 is to 'strike a proportionate balance between the protection of existing property rights and the promotion of the public interest'.²⁷

This position is uncontroversial. Since the inception of property rights there has always been the need to balance and respect property rights as a social good with the need for legitimate public interventions in proprietary rights. Even in Roman times, it was clear the concept of ownership was not absolute.²⁸ However, the manner in which this balance manifests itself will depend largely on the socio-economic realities influencing any given society. South Africa has a unique history with regard to land dispossession.²⁹ The law played a heavy hand in skewing property relationships and excluding the majority of people inhabitants from property ownership rights and land. During Apartheid, Black ownership of was capped at 13%. Such distorted patterns of land ownership still have negative social, political and economic consequences today. It is against this backdrop that the constitutionalising of the right to property occurred.

²⁴ See AJ van der Walt, 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12(1) *Fundamina: A Journal of Legal History*

²⁵ Roux 'op cit note 4 at 40:18.

²⁶ See Juanita Pienaar and Jason Brickhill 'Land Rights' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 48:11.

²⁷ Van der Walt op cit note 24.

²⁸ P Birks 'The Roman Law Concept of Dominion and the Idea of Absolute Ownership' (1985) *Acta Juridica* 1.

²⁹ Roux op cit note 4 at 44:1.

Section 25 undoubtedly offers a degree of protection to existing property owners by prohibiting deprivations and expropriations which fail to meet various requirements. However, the section also requires the state to advance access to land on an equitable basis and create a framework for land restitution.³⁰ This means that Constitution has broadened the justificatory grounds the state could invoke when attempting to persuade a court that an interference with land rights is constitutional. In this regard, our property jurisprudence is exclusively distinctive from others whose roots we share. Currie and De Waal explain that most modern bills of rights usually embody three broad types of claims:

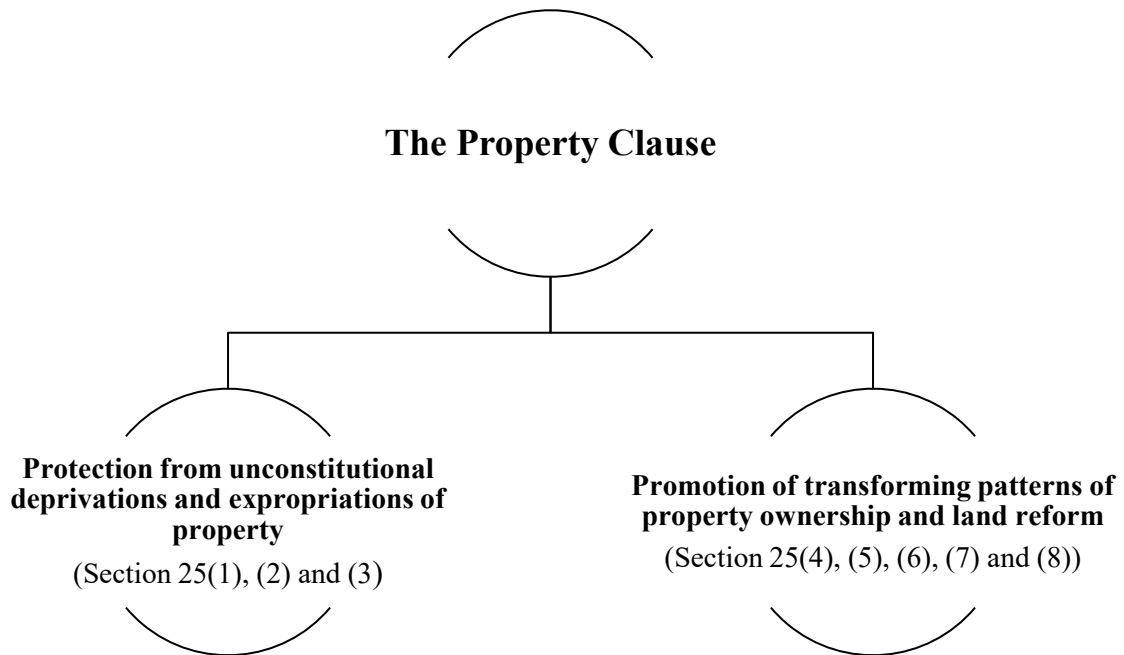
1. Claims against arbitrary deprivations and uncompensated expropriations;
2. Claims of eligibility to hold property; and
3. Claims to have property.³¹

Most protect (1) and (2). The remainder do not encompass (3). However, it has been argued that in the South African context property is a fast developing to create a category of 'second generation' socio-economic rights insofar as it burdens the state to take measures to provide access to property rights'.³² This is because section 25(5) requires the state 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'. It is on this basis that the property clause is said to encompass negative and positive obligations. We now discuss the way in which the section seeks to balance these two objectives and purposes, beginning with section 25's protection against arbitrary deprivations and expropriations.

³⁰ Ibid.

³¹ See Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4 ed (2001) 417.

³² Ibid.



4. THE PROTECTION OF PROPERTY: ‘DEPRIVATION’ AND ‘EXPROPRIATION’

We now discuss the various limitations on property rights and the manner in which the courts have interpreted the protection afforded to property rights. It should be obvious by now that just like all other rights, the entitlements afforded are not absolute and there are circumstances where there are legitimate reasons to limit the right in question. The main limitations are deprivations and expropriations. The traditionally conceived limitations on property rights occur where the state exercises its regulatory powers or where it exercised its powers of eminent domain.³³

Regulatory power is defined as the power of the state to secure public welfare by restraint and compulsion.³⁴ Eminent domain refers to the state’s power to take private property away from the holder for public use – for example police power encompasses the state’s regulation of the entitlements of property rights. Eminent domain denotes the appropriation of property rights by the state for a public

³³ Van der Walt op cit note 4.

³⁴ Ibid.

purpose.³⁵ This distinction comes from United States constitutional law and has influenced jurisdictions around the world. Section 25 thus makes a similar distinction between deprivations and expropriations – with a deprivation encompassing the state’s regulatory power and expropriations aligned to the state’s power of eminent domain. In *First National Bank*,³⁶ the court set out the following test for interpreting and applying section 25(1) and (2). The test includes the following questions which appear in diagrammatical form on the following page.

1. Does that which is taken away from the property holder by the operation of the particular law in question amount to ‘property’ for purpose of section 25?
2. Has there been a deprivation of such property by law or conduct?
3. If there has, is such deprivation consistent with the provisions of section 25(1)?
4. If not, is such deprivation justified under section 36 of the Constitution?
5. If it is, does it amount to expropriation for purposes of section 25(2)?
6. If so, does the expropriation comply with the requirements of section 25(2)(a) & (b)
7. If not, is the expropriation justified under section 36.

³⁵ *Ibid.*

³⁶ *FNB supra* para 46.

**Has there been a deprivation
of a constitutionally
protected interest**

No: End of Inquiry

Yes: Does the deprivation meet the requirements of section 25(1)?

No: End of inquiry, and the impugned interference must be tested against section 36 (limitations clause)

Yes: Does the deprivation reach the level of an expropriation?

No: The interference is a deprivation and must accordingly be dealt with under section 25(1)

Yes: Does the expropriation comply with the requirements of section 25(1) & (2)

No: The impugned expropriation must be justified under section 36

Yes: The expropriation will survive constitutional scrutiny

(a) Has There Been a Deprivation of a Constitutionally Protected Interest?

Once the court is satisfied that the interest is constitutionally protected, it must proceed to decide whether there has been a deprivation of the interest in question. Again, the *First National Bank* decision is of importance. The original definition of deprivation adopted in *First National Bank* simply requires a regulatory interference with the use, enjoyment or exploitation of the property.³⁷ Whilst the prevailing case law since *First National Bank* seems to have adopted a broader definition of 'deprivation', the decision in *Mkontwana v Nelson Mandela Metropolitan Municipality* ('*Mkontwana*') threatened to narrow the ambit of a deprivation.³⁸ The CC had to determine the constitutionality of section 118(1) of the Municipal Systems Act 32 of 2000 which limits a landowner's power to transfer immovable property. This section provides that an owner may not execute a sale of their property without a certificate issued by the municipality certifying that any consumption charges on the property have been paid.³⁹ This therefore prohibited an owner from transferring immovable property where unpaid consumption charges had accrued by a lawful tenant - or even an unlawful occupier - who had run up consumption charges. The CC did find that the provision constituted a deprivation as it interfered with an incidence of ownership, namely the right to alienate one's property. However, it seemed to apply a higher threshold of deprivation than that envisaged in *First National Bank*.⁴⁰ In doing so, the court made the following remark:

'Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation [and] at the very least, substantial interference or limitation that goes

³⁷ See AJ der Walt 'Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality* (2005) 122 SALJ 75-89.

³⁸ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) para 28.

³⁹ *Ibid.*

⁴⁰ See Van der Walt op cit note 37.

*beyond the normal restrictions on property use or enjoyment found in an open and democratic society.*⁴¹

The extent of the substantial interference was therefore not so clear so as to qualify as a deprivation when state interference exceeds what is 'normal in an open and democratic society'. AJ van der Walt has argued that the narrower approach in *Mkontwana* has been paid 'lip service' by the courts. However, when assessing the substantive results of the deprivations analysis, one can clearly see that the courts are actually using the wider conception from *First National Bank* which does not require a substantial interference going beyond what is normal in 'an open and democratic society' to trigger a deprivation.⁴² Prevailing case law suggests that the interference need only be legally significant ie not *de minimis*. In *Opperman*, the CC retreated from *Mkontwana* by stating that any legally significant interference with property amounts to a deprivation under section 25(1).⁴³ This indicates acceptance of the wider approach first suggested in *First National Bank*.

(b) Does the deprivation comply with section 25(1)?

Once the court is satisfied that the interest is constitutionally protected and that there has been an interference with property that constitutes a deprivation, it must assess whether the deprivation complies with section 25(1).⁴⁴ First, the deprivation must be effected by way of a law of general application and secondly that any law of general application permitting the deprivation cannot be arbitrary.⁴⁵ If the deprivation not comply with the above requirements, it will be arbitrary. This requires the court to

⁴¹ *Mkontwana* supra note 38 at para 32.

⁴² Van der Walt op cit note 37.

⁴³ See *Opperman* supra note 20 at para 66 where the court quotes the FNB interpretation: '[w]hether there has been a deprivation depends on the extent of interference with the use, enjoyment or exploitation of the constitutionally protected property . . . interference significant enough to have a legally relevant impact on the rights of the affected party amounts to deprivation'.

⁴⁴ Roux op cit note 3 at 46:24.

⁴⁵ *Ibid.*

determine whether that the arbitrary deprivation can be justified in terms of a section 36 limitations analysis or it will be unconstitutional.⁴⁶

(i) *Law of General Application*

The first requirement ensures that when the state deprives a person of property rights, it only does so only when has the requisite legal authority from an empowering provision. This flows from the rule of law which requires every exercise of public power to be authorised by law in order to be legitimate and lawful.⁴⁷

(ii) *Non-Arbitrariness*

A deprivation is arbitrary the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or where the deprivation is procedurally unfair'.⁴⁸ This second requirement is often the primary focus of the property clause inquiry.⁴⁹ Before the *First National Bank* decision, it was not clear how the 'arbitrariness' requirement would be determined. On one hand, it was argued that non-arbitrariness should be interpreted as equivalent to rationality. Rationality is a low threshold and simply requires that the means employed and the ends chosen to achieve it rationally connected.⁵⁰ On the other hand, non-arbitrariness could be interpreted as something closer to proportionality which is a higher threshold. Proportionality would not only require showing that the means and the ends are rationally connected. It would also require showing that the means

⁴⁶ Ibid.

⁴⁷ See Leonard van Rummel: *A Comparative analysis between German and South African Law*, Masters Thesis, Stellenbosch University (2015) published by GRIN Verlag. Roux 'Property' points out that because of this requirement, the property clause inquiry will in principle deal with a law rather than any other type of state action. Administrative action which is not based on law of general application can be reviewed under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Executive action that amounts to a deprivation without being authorised by a law of general application is reviewable under section 25(1) under the principle of legality. See also AJ van der Walt 'Procedurally Arbitrary Deprivation of Property' (2013) 23 *Stell LR* 88-94.

⁴⁸ *First National Bank* supra note 8 at para100.

⁴⁹ Van der Walt op cit note 37.

⁵⁰ For a full discussion, see Roux op cit note 3 at 46: 22.

adopted were the most appropriate or proportional in the circumstances having regard to the impact of the deprivation on the effected person. Proportionality would inevitably draw the courts into an analysis of the merits of the case and raise questions about their institutional competence.

So when we say that for a limitation not to be arbitrary it must provide sufficient reasons. Sufficiency could either require rationality or even proportionality. Where sufficiency takes the form of a proportionality inquiry it would resemble the section 36(1) inquiry. On this basis, academics have argued that the *FNB* non-arbitrariness test 'telescopes the entire section 25 analysis into the non-arbitrariness requirement'.

The important question is how the courts interpret the ambit and content of 'non-arbitrariness' when it comes to deprivations. There seem to be some general factors which guide the determination of non-arbitrariness. The general guiding principles below have been taken from *First National Bank* and are set forth in full for the sake of comprehensiveness.⁵¹

1. It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
2. A complexity of relationships has to be considered.
3. In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
4. In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
5. Generally speaking, where the property in question concerns ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right

⁵¹ *First National Bank* supra note 8 at para 65.

something less extensive. This judgment is not concerned at all with incorporeal property.

6. Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
7. Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
8. Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the inquiry is concerned with 'arbitrariness' in relation to the deprivation under section 25.

In summary form, this requires the court to assess the following:

- (a) The relationship between the deprivation and its purpose;
- (b) The relationship between the purpose of the deprivation and person affected by the deprivation;
- (c) The relationship between the purpose of the deprivation and the degree of the deprivation taking into account the nature of the property; and
- (d) Balance these factors to determine whether non-arbitrariness should take the form of mere rationality or a threshold akin to proportionality.⁵²

The factors distilled from *First National Bank* seem comprehensive. Indeed, they seem to be so comprehensive that a court should not have any difficulty applying the above test. However, a closer reading of these factors should

⁵² See Roux 'op cit note 3 46:23.

immediately would suggest that the court has an incredibly wide discretion.⁵³ The advantage of judicial discretion is that the courts can adopt a purposive approach and place substance over form. There should not be one blanket approach to the arbitrariness inquiry. Section 25 is an inherently policy-laden section and requires the complex balancing of multiple interests, concerns and considerations.⁵⁴ Indeed, the court cannot subject all interferences to the same level of judicial scrutiny. The challenge comes in assessing where and when which test is appropriate.⁵⁵

Therefore, wide judicial discretion which is carefully applied could lead to the court placing undue emphasis on certain factors whilst ignoring others that are important to the inquiry. Certainty in the law is to some extent sacrificed where discretion exists. But for the benefits of such a trade-off to be realised it is necessary for courts to exercise their discretion in a proper manner. As many academics note, it is difficult to discern how the courts will exercise their discretion. This could be attributed to judicial caution in the early development of our constitutional property jurisprudence, but this has led to this area of law presenting increasingly difficult challenges for the judiciary.

Van der Walt argues that *Mkontwana* did not apply the *First National Bank* arbitrariness test as 'rigorously and with the same commitment to substantive analysis of means and ends as in *FNB*' and consequently a rationality test was employed. Van der Walt further argues that if the court had applied its discretion more carefully, a mere rationality review would only have been suitable where the purposes of the limitation were for public health, safety, security and land reform. It is submitted that this view is correct.⁵⁶ First, the arbitrariness test applied in *Mkontwana* downplayed the contextual factors in the initial arbitrariness test from *First National Bank*. The court hinged its analysis on the extent of the deprivation and its relationship with the purposes of the deprivations. However, in assessing the *First*

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Van der Walt op cit note 37 at 75.

National Bank test above that is just one consideration that should be balanced amongst the others identified by the court.⁵⁷ Secondly, whether the courts employ an arbitrariness test closer rationality, or a higher threshold of reasonableness, should depend on the considering all the factors and not just selected ones.⁵⁸ For example, the court identified the fact that the purpose of the deprivation was to encourage the payment of consumption charges but never considered weighing the purpose of the legislation *against* the burden which may be imposed on property owners, or the relationship between the purpose (collecting rate taxes) of the deprivation and the deprivation itself (prohibiting the alienation of one's immovable property). The court simply assessed the purpose of the legislation against the means employed as opposed to assessing *the contents and effect of those means*, which would *inter alia* invoke the extent of the deprivation on owners.⁵⁹ If these factors had been properly engaged with, the court would have seen that an owner's strongest form of remedial action against unlawful occupiers was curtailed by the Prevention of Illegal Evictions Act.⁶⁰ It follows that where an owner's right of eviction is curtailed and unlawful occupiers increase consumption charges, the financial consequences for an owner are dire.

Despite the pronouncements in *Mkontwana*, the courts have generally preferred the approach adopted in *First National Bank*.⁶¹ Depending on the balancing of the above factors, no more than a mere rational relationship between the means and the ends is required. In other the evaluation requires something closer to proportionality. As Nkabinde J explained in *Reflect-All 1025 CC v MEC for Public Transport ('Reflect-all')*:

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ *Mkontwana* supra 38 at para 44.

⁶⁰ Roux 'op cit note 3 at 46: 23.

⁶¹ Ibid 46:24

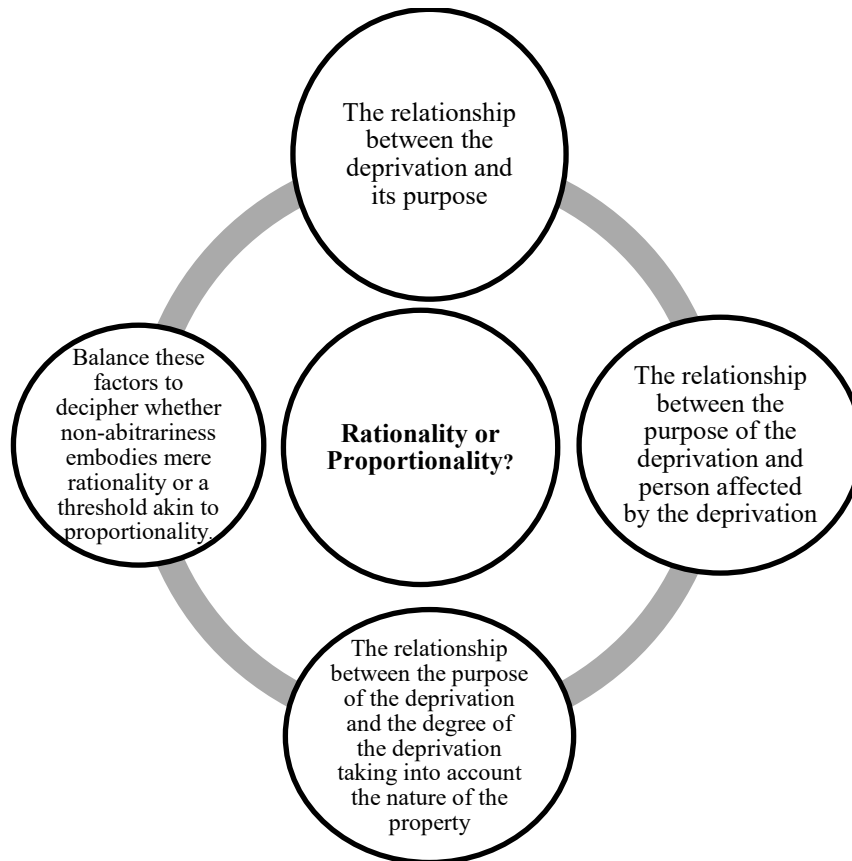
*'In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate.'*⁶²

Where it is found that the deprivation does not comply with the section 25(1), the deprivation will be constitutionally invalid unless that the arbitrary deprivation can survive a section 36(1) limitations analysis.⁶³ However, this is unlikely given that the same factors that render the deprivation arbitrary are likely to render that arbitrary deprivation an unreasonable and unjustifiable limitation in terms of section 36(1). Where it is found that the deprivation complies with the requirements of section 25(1), the court must then proceed to determine whether the deprivation has reached the level of an expropriation.

⁶² *Reflect-All 1025 CC v MEC for Public Transport Gauteng Provincial Government* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) para 63.

⁶³ Roux 'Property' op cit note 3 at 46:26.

Will the Court Apply Rationality or Proportionality as the Threshold for Non-Arbitrariness?



(c) Does the deprivation constitute an expropriation for purposes of section 25(2)?

As discussed, section 25 protects against arbitrary deprivations. In addition, it prohibits the expropriation of property that does not comply with the requirements in section 25 or section 36(1). First, we will consider the relationship between 'deprivations' and 'expropriations'. Second, what forms of intervention in property rights constitute an expropriation. Thirdly, the requirements that must be met once it is shown that property has been expropriated.

(i) *What is the relationship between deprivations and expropriations?*

The term 'deprivation' broadly refers to state impositions on private property for the purposes of policing or regulating its use.⁶⁴ The term expropriation is said to encompass the state's power of eminent domain which permits it to unilaterally terminate all entitlements over property a public purpose or public use.⁶⁵ The consensus among courts and academics is that this is usually accompanied by an acquisition of those property entitlements by the state although these entitlements may not be identical to those lost by the previous holder.

The structure of section 25 does suggest that there is some difference between deprivations and expropriations. This is because where an expropriation has occurred the state is required to provide compensation to the affected party, whereas for a deprivation it is not. As Mostert argues, any further categorisations will depend on whether sections 25(1) and 25(2) are read disjunctively or conjunctively.⁶⁶ There are different schools of thought about whether sections 25(1) and 25(2) are separate provisions: one dealing exclusively with deprivations and the other exclusively with expropriations.⁶⁷ The only similarity between them is the fact that section 36(1) may be applied to both. This is the *disjunctive* interpretation which treats deprivations and expropriations as distinct categories.⁶⁸ The alternate approach is that expropriations are a sub-species and more severe form of deprivation. Therefore, on this second view, once the deprivation reaches the level of an expropriation, the requirements of section 25(2) are triggered. Under the conjunctive approach an expropriation must comply with both sections 25(1) and 25(2).

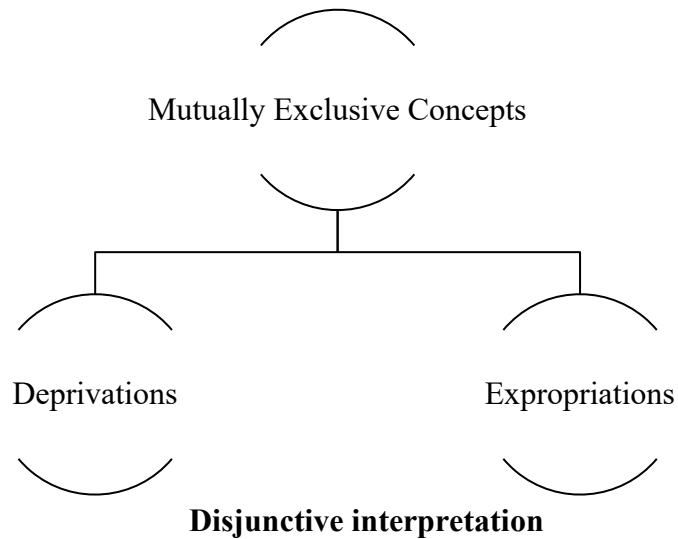
⁶⁴ See Thenuis Roux 'The "Arbitrary Deprivation" Vortex: Constitutional Property Law after FNB' in Stuart Woolman Woolman & Michael Bishop Bishop (eds) *Constitutional Conversations* (2008) 275.

⁶⁵ *Ibid.*

⁶⁶ Hanri Mostert 'The Distinction between Deprivations & Expropriations and the Future of the "Doctrine" of Constructive Expropriation' (2003) 19(4) *SAJHR* 572.

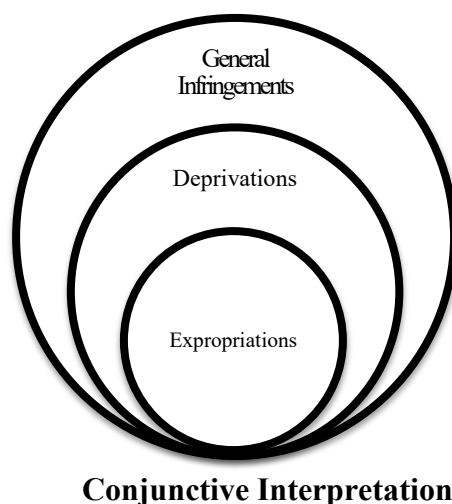
⁶⁷ *Ibid* 573.

⁶⁸ *Ibid.*



In diagram form, we see that the disjunctive approach treats deprivations and expropriations as distinct concepts. Thus, each has different sections applying exclusively to each respective form of property interference: section 25(1) exclusively for deprivations and section 25(2) exclusively for expropriations. In *Harksen v Lane* the CC opted to treat the relationship between deprivations and expropriations in this disjunctive manner.⁶⁹

⁶⁹ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC)



In diagram form, we see the conjunctive approach treats deprivations and expropriations as variants of the same concept. Expropriation is a concept of deprivation.⁷⁰ Therefore, expropriations are a particular form of deprivation and the most severe. Here, one must first assess whether there has been a deprivation. Thereafter, one can assess whether that deprivation has reached the level of an expropriation – with the exception that expropriations have stricter rules such as the compulsory payment of compensation.⁷¹

(d) Which approach is adopted by the courts?

In *Harksen*, Goldstone J stated that expropriation is characterised by the ‘acquisition of rights in property by a public authority for a public purpose, whilst a

⁷⁰ Mostert op cit note 66 at 567-592

⁷¹ Ibid 582

deprivation falls short of such acquisition'.⁷² This finding from *Harksen* rested on three propositions:⁷³

1. First it was assumed that the distinction between deprivations and expropriations was categorical (ie the disjunctive approach).
2. Secondly the court reasoned that this distinction was associated with permanent acquisition by the state: if the state did not acquire the rights in question, no expropriation could be said to have occurred.
3. Finally, the court assumed that a litigant who wishes to challenge an interference with their property right, must either source their cause of action in section 25(1) (deprivations) or section 25(2) (expropriations).

The last proposition is of particular importance in illustrating how the *Harksen* court sees mutual exclusivity between the two such that the cause of action should be sourced in one and not the other. This disjunctive approach from *Harksen* was later rejected by the CC in *First National Bank*. The *First National Bank* test clearly envisages expropriations as a sub-species of deprivations. The basis for any investigation into the constitutionality of an infringement is by testing it against the provisions of section 25(1) and only thereafter, where necessary, assessing whether section 25(2) is in fact applicable.

A further blow dealt to the disjunctive interpretation is the manner in which the *First National Bank* court abandons the third premise from *Harksen* – namely that a litigant need not select between pleading a deprivation or expropriation but rather the court will investigate the deprivation first regardless of whether it was raised by the applicant.⁷⁴ Given the judicial acceptance of the *First National Bank* test, it follows that our courts have adopted a conjunctive interpretation of section 25(1) and (2) of the Constitution.⁷⁵

⁷² *Harksen* supra note 69 at para 33

⁷³ For a comprehensive discussion, see Van der Walt op cit note 4.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

(i) *What kind of infringements constitute expropriations?*

In *Reflect All*, the CC addressed the purpose behind the distinction between expropriations and deprivations by remarking that:

*The purpose behind the distinction between expropriations and deprivations by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.*⁷⁶

This recognises that the government may not incur liability for every infringement of property rights – payment of compensation for every infringement would collapse the bureaucracy.⁷⁷ Given that the only distinguishing feature within section 25 is the payment of compensation – it is necessary to differentiate deprivations and expropriations without exclusive reliance on the provision itself. In this regard, academic commentary and case law help identify a few salient distinctions. Ngcukaitobi and Bishop have argued:

‘In our law, it seems that an expropriation differs from other deprivations of property in three ways:

1. An expropriation constitutes a deprivation of the “core content” of the property right;
2. When property is expropriated, the right is transferred to the state; and
3. The transfer to the state is not temporary.’⁷⁸

As the CC has further explained:

‘To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same

⁷⁶ *Reflect-All* supra note 62 at para 66.

⁷⁷ *Ibid.*

⁷⁸ Tembeka Ngcukaitobi & Michael Bishop *The Constitutionality of Expropriation without Compensation* (2018) research paper 4.

*as the rights that were lost... There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.*⁷⁹

The most recent attempt of the CC to grapple with the nature of an expropriation occurred in *AgriSA v Minister for Minerals and Energy*.⁸⁰ The essence of the applicants argument was that the Minerals and Petroleum Resources Development Act (MPRDA) expropriated the right of the applicant to mine coal. The empowering provision stated that the state would be custodian of all mineral rights in South Africa and gave the state the power to determine who would be allowed to exercise these rights by way of applying for licence. The majority of the court found as follows:

*'The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no. Unlike in the case of the state (i) acquiring land for governmental projects such as road infrastructure, industrial development or other purposes, and (ii) acquiring mineral rights so that it could exploit them, in this case the state did not acquire any mineral rights, including those of Sebenza, at the commencement of the MPRDA.'*⁸¹

It seems that because the mineral rights did not vest in the state (instead the state held them as custodian) the court reasoned that the 'core content of the right was not acquired by the state' and therefore the deprivation fell short of an expropriation.⁸² As stated by the minority judgment of Justice Froneman, the majority adopted a strict interpretation which 'in effect immunises, by definition, any legislative

⁷⁹ *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) para 59.

⁸⁰ *Ibid.*

⁸¹ *AgriSA supra* para 68.

⁸² *Ibid* para 58.

transfer of property from existing property holders to others if it is done by the state as custodian of the country's resources from being recognised as expropriation'.⁸³ In essence, the implication of the majority judgment in *AgriSA* that there can never be an expropriation where the state is acting as custodian.

Ngcukaitobi and Bishop identify two salient points which soften the implications of *AgriSA*. First, where the state acts as custodian, essentially because it has not acquired the core content of the right, and it is treated as a deprivation instead of an expropriation, notwithstanding a transfer of property from one entity to another, it will no doubt be arbitrary in terms of section 25(1) unless some sort of compensation is provided.⁸⁴ Secondly, the court in *AgriSA* seems to have resisted a rigid doctrinal interpretation of the concept of an 'acquisition'. Indeed, the majority stated, '[a] one-size-fits-all determination of what acquisition entails is not only elusive but also inappropriate, particularly when an alleged expropriation of incorporeal rights, like mineral rights, is considered.' It seems that the courts do recognise there are cases where the borderline between an acquisition and custodianship is conflated – notwithstanding that an empowering provision explicitly provides that the state is holding the property as custodian.⁸⁵ The courts are thus aware of the possibility of an expropriation being disguised as custodianship.

(ii) *Requirements for a lawful expropriation*

Section 25(2) sets out three requirements that must be met for an expropriation to be constitutionally permissible. These are that the expropriation must:

1. take place in accordance with a law of general application;
2. be for a public purpose or in the public interest; and
3. be accompanied by just and equitable compensation.

⁸³ Ibid.

⁸⁴ Ngcukaitobi & Bishop op cit note 78.

⁸⁵ *Agri SA* supra note 79 at para 63.

(e) 'Law of general application'

This requirement is similar to the requirement in section 25(1). As van der Walt identifies, many of the same considerations apply in both cases. The view of the courts seems to suggest it is highly likely that when the law of general application issue presents itself at the expropriation stage, it would have been dealt with sufficiently when the court was initially assessed whether the infringement was a deprivation. Roux also argues that a law of general application encompasses the rules of the common law. However, it is unlikely that these will be invoked or become the source of authority where an expropriation occurs.

(f) 'Public purpose or public interest'

Section 25(2) additionally requires that the property be expropriated for a public purpose or the public interest. Section 25(4)(a) further states that the public interest includes, 'the nations commitment to land reform and reforms to bring about equitable access to all South Africa's natural resources'. The public interest and public purpose requirements are remnants of a classical liberal tradition which view state infringements, and particularly expropriation, as being restricted to circumstances where they are unavoidable. However, it was the introduction of the Constitution which gave rise to the requirement of public interest.

Whilst this chapter is not able to give a detailed analysis of the Expropriation Act and pre-constitutional cases dealing with expropriation, one should aware of the fact that the Expropriation Act is still in force and remains relevant. Both under the common law and the Expropriation Act the principle of a public purpose only was contemplated. The 1975 Expropriation Act, which still applies to all expropriations, contains a partial definition of the term 'public purpose' which is defined as 'including any purpose connected to the administration of the provisions of any law by an organ of state'.⁸⁶ The use of the word 'include' means the list is non-exhaustive and thus subject to judicial development.

⁸⁶ H Mostert 'The Poverty of Precedent on Public Purpose/Interest: An Analysis of Pre-Constitutional and Post-Apartheid Jurisprudence in South Africa' (2016) *Rethinking Expropriation Law I: Public Interest in Expropriation*.

According to Van der Walt, the public purpose and public interest requirements may be interpreted in three ways. First, a narrow interpretation which restricts expropriations to actual public use. Secondly, a broader interpretation which envisages some public benefits that exceed actual public use. Thirdly, the wide interpretation which includes virtually any purpose that resembles a public interest or purpose.⁸⁷ Mostert argues that the balance of pre-constitutional case law suggests that the public purpose requirement was interpreted more broadly to encompass expropriations generating some particular advantage for the public in general because 'public purpose in expropriation matters was traditionally taken to denote issues whereby the whole population or the local public is affected, and not merely matters pertaining to the state or the government'.⁸⁸ In this regard, Mostert submits argues that the distinction introduced by section 25 between 'public interest' and 'public purpose' is unnecessary given the wide interpretation of public purpose in the common law and in the Expropriation Act. Indeed, it does seem that 'public purpose' is wide enough to include public interests. Slade has argued that public purposes also encompass public interest and therefore the terms may be used interchangeably and an expropriation may be for either a public interest or public purpose. The only relevant distinction is where the expropriation is from one private entity to another.⁸⁹ Two further distinctions must be made:

1. Where the expropriated property is transferred to a third party to enable the third party to realise a public purpose (narrow public purpose).
2. Where the expropriation is undertaken for the benefit of a third party (wide public purpose or interest)

Let us clear this up with two examples. Presume the government decides to expropriate property to build a hospital. It is not possible for government to construct the hospital itself and it transfers the property to a third party who will build the hospital. This would be scenario (1) above because the purpose of the expropriation

⁸⁷ Van der Walt op cit note 4.

⁸⁸ Mostert op cit note 86.

⁸⁹ Bradley Slade 'Public purpose or public interest and third-party transfers' (2014) 17(1) *PELJ*.

is the construction of facilities that will go towards actual public use. The third party may receive a benefit, but this benefit is incidental to the fulfilment of the public purpose. That is to say any benefit - such as remuneration for construction - is an incident of the state's fulfilment of a public purpose.

In a second example, presume that an expropriation has occurred and the property has been transferred from one private entity to another for the objective of land restoration and restitution. This is scenario (2) above as there is no actual public use and no benefits accruing to anyone other than the person receiving the property. Narrowly defined, no public purpose would be served. Here lies the difficulties of interpretation. Some courts have interpreted public purpose to include public interests and thus any purpose that resembles something public in nature. Other courts have interpreted public purpose narrowly to only encompass 'actual use or benefits accruing to the public'.⁹⁰ In scenario (2) above, no actual use or benefit accrues to the public. So when the courts have adopted the narrow approach to public purpose the justification of expropriation is done with recourse to the public interest requirement. Where a broad definition of public purpose is adopted ie for a public purpose, actual use or a benefits need not accrue to the public, the expropriation has been justified in terms of the public purpose requirement.

In *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd*, the court stated that in third party transfers there is a distinction between public purpose and public interest.⁹¹ The distinction is that expropriation by way of third party transfer can only occur where it is in the public interest. Here, a narrow approach was taken to public purpose. The court seemed to suggest it must result in actual public use. Because actual use vests in a third party, it is not for a public purpose and can only be justified if it is in the public interest.

In *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation* the court adopted the wider interpretation of public purpose and questioned the distinction emanating *Van Streepen* with regard to third party transfers by stating

⁹⁰ Van der Walt op cit note 4.

⁹¹ (640/88) [1990] ZASCA 78; 1990 (4) SA 644 (AD); [1990] 2 All SA 526 (A)

that, 'there is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose'.⁹² This was because there were actual use and benefits which accrued to the public, as opposed to exclusively benefiting a third party only.

In *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-A-Phofung Municipality*, the High Court adopted a broader interpretation of the public purpose requirement by concluded the construction of a mall was for a public purpose but also stating that 'dispossessing an owner for the benefit of a third party can never be characterised as being in the public purpose'.⁹³ Such a case would therefore have to be justified in the public interest. The transfer to third parties for narrow purposes, such as the construction of a school or hospital, are uncontroversial public purposes. It seems that any transfer to a third party where the public does not use or derive a benefit from the expropriation will have to be justified under the public interest requirement. Public interest has not received the same amount of judicial attention as 'public purpose'. Mostert argues the one instance in which courts understand public interest to afford the expropriator more leeway than public purpose is legitimate in third-party transfers ie of which the third party is the exclusive beneficiary.⁹⁴ How much leeway does 'interest' provide in these circumstances? Section 25(4) of the Constitution indicates that the public interest includes the nation's commitment to land reform and to bring about equitable access to all South Africa's resources. However, it remains to be seen what exactly the ambit of these requirements are. It is accepted in our law that land may be expropriated from one private party and transferred to another private party in terms of the restitution process, since it is authorised by the Constitution.

Our courts have given thought to the possibility that employment opportunities and development for major sporting events may entail public interests. However,

⁹² *Offit Enterprises v Coega Development Corporation* 2011 (1) SA 293 (CC) ; 2011 (2) BCLR 189 (CC)

⁹³ (4415/2008) [2010] ZAFSHC 11.

⁹⁴ Mostert op cit note 86.

Slade argues that absent specific legislation authorising transfer of property to a third party for their exclusive benefit, the justification for expropriation will not be entirely clear.⁹⁵

(g) Just and Equitable Compensation

The last requirement for an expropriation to pass constitutional muster is the state must provide compensation. A further requirement is that the amount and the timing of the compensation must be 'just and equitable'.

(i) Amount of Compensation

Unless there is consensus between the state and the affected owner, section 25(2) and section 25(3) provide that compensation must be determined by a court of law and be 'just and equitable, reflecting an equitable balance between the public interest and the interest of those affected'. Section 25(3) provides a non-exhaustive list of the relevant considerations which must be taken into account when determining a just and equitable amount of compensation.

- (i) Current use of the property;
- (ii) The history of the acquisition and use of the property;
- (iii) The market value of the property;
- (iv) The extent of direct state investment and subsidy in the acquisition and beneficial improvement of the property; and
- (v) The purpose of the expropriation.⁹⁶

The Expropriation Act 63 of 1975⁹⁷ is of some relevance to determine 'just and equitable compensation'. The model of the Act is based on 'market value' been determinative of just and equitable compensation. However, section 25 has introduced a broader range of considerations which must be taken into account. In

⁹⁵ Slade op cit note at 89 at 167-206.

⁹⁶ S 25(3) of the Constitution.

⁹⁷ Act 63 of 1975

Maize v DG: Department of Rural Development and Land Reform ('Maize') this legal interpretation was confirmed where it was emphasised that the guiding principle in section 25(3) is for just and equitable compensation and not market value compensation.⁹⁸ This means that while market value is a useful starting point in determining compensation, a court could still award below-market-value compensation where it is 'just and equitable'. In *Du Toit v Minister of Transport* the CC stated that:

*'Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.'*⁹⁹

Besides market value, the remaining considerations which must be considered have clear socio-economic objectives informed by government policy objectives.¹⁰⁰ When considering the current use of the property it is clear that justificatory grounds for expropriation exist where property is not being used productively and where it is required for reform objectives such as public housing.¹⁰¹ The history of the acquisition of the property recognises the effect of forced removals and land dispossession in making land available to a small minority – dispossessing those who remained.¹⁰² Such devastating effects were only possible in a setting where the state had the political will and capacity to act in that way. That is why the third consideration is the extent of state investment and subsidy. The Apartheid mining complex and availability of cheap black labour enabled the regime to provide significant forms of social welfare and subsidisation to a minority of its citizenry. It

⁹⁸ [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016).

⁹⁹ [2005] ZACC 9; 2005 (11) BCLR 1053 (CC); 2006 (1) SA 297 (CC) para 37.

¹⁰⁰ Jackie Dugard: 'Unpacking Section 25: Is South Africa's Property Clause an Obstacle or an Engine Towards Socio-Economic Transformation' *Wits Institute for Social and Economic Research* 9 available at: https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Potential%20and%20Limits%20of%20Section%2025_CCR.pdf

¹⁰¹ Ibid.

¹⁰² Ibid.

follows that one purpose of expropriation is to 'alleviate pressing social needs' which may justify 'downward adjustment of the amount of compensation'.¹⁰³

Compensation need not necessarily not take the form of the payment of money. In *AgriSA*, the minority seemed to open the door to the concept of compensation in kind.¹⁰⁴ This could mean that compensation could take the form of a benefit other than money. The minority judgment suggests that the provisional arrangements that advantaged pre-MPRDA licence holders and which permitted them to apply earlier and have their applications specially considered may have constituted compensation in kind. It also follows that the compensation in kind must also be just and equitable in order to be constitutional.

It could be possible that on a proper consideration of the factors that nominal or zero compensation could be 'just and equitable'. Bishop and Ngcukaitobi submit a limited number of circumstances where expropriation without compensation may be just and equitable –

- (a) The land is abandoned or unused;
- (b) The land is held purely for speculative purposes;
- (c) The land is under-utilised and owned by public entities; or
- (d) The land is actively farmed by labour tenants in the absence of a title deed holder.

This would apply only to cases of expropriation without compensation for the purpose of land reform: not for other public purposes such as building roads or dams. Expropriation without compensation outside a land reform context would be extremely difficult to justify.¹⁰⁵

¹⁰³ *Ibid.*

¹⁰⁴ *Agri SA* supra note 79 para 88.

¹⁰⁵ Ngcukaitobi & Bishop op cit note 79 at 12.

(ii) *Timing of Compensation*

In *Haffejee NO v eThekweni Municipality* the court stated that this requirement does not necessarily require predetermination and payment of compensation prior to the act of expropriation.¹⁰⁶ As a general rule, it would be just and equitable for the amount to be determined before expropriation: but in some circumstances it may not. This is particularly important where affected owners prolong the expropriation of their property notwithstanding the expropriation having survived constitutional muster. For example, in *Uys v Msiza* the amount of compensation was contested and 14 years elapsed before the property was transferred.¹⁰⁷ Therefore, in an effort not to frustrate land restitution, the state should establish an institution which assists in determining compensation with recourse to the above factors. Thereafter, if the affected owner disputes the amount of compensation, they may approach the court for judicial review but this will not suspend the expropriation. This argument gains traction considering that former affected owners will be occupiers - where the property is residential - and have extensive protection against eviction under section 26(3).¹⁰⁸

5. LAND REFORM

It was previously mentioned that various interests have to be balanced by section 25 which are also (in many senses) antagonistic. Big business felt that a failure to constitutionalise and protect a right to private property would dissuade foreign investment and the economy would crumble. Others endorsed the constitutionalisation of property rights to ensure that citizens of were never again subject to the arbitrary and capricious use of state power to curtail and abolish property rights: a situation the majority of citizens had lived with until the introduction of the constitutional dispensation. Pienaar Jason Brickhill argue that:

'[The] legal regulation of land rights has had a special social, economic and cultural significance in South Africa. Indeed, much of

¹⁰⁶ *Haffejee NO v eThekweni Municipality* 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC).

¹⁰⁷ [2017] ZASCA 130; 2018 (3) SA 440 (SCA)

¹⁰⁸ Ngcukaitobi & Bishop op cit note 79 at 11.

*the struggle to end apartheid can be understood as a struggle to regain land rights that were lost through colonial conquest and apartheid forced removals.*¹⁰⁹

On the other hand, it has been argued that the constitutionalising of the rights to property frustrates the process of land reform. Madlingozi presents the boldest argument. He argues that, 'in South Africa, like elsewhere in the colonised world, the unjust wars of colonisation solidified and eventually ensured . . . the rights of conquest are constitutionalised'.¹¹⁰ Indeed, apartheid and its policies were declared a crime against humanity by the United Nations. It is questionable how this is reconciled with the fact the Constitution protects rights that were acquired as a result of a commission of a crime against humanity. The chapter leaves this question open for the reader to reach their own conclusion.

While these considerations feature in the general debate around the constitutionalising of a right to property, what is clear is that land reform, secure tenure and restitution have a role to play in any legitimate transformation process in South Africa. The remainder of the chapter will briefly discuss land rights in the context of sections 25(4)-(8).

The land reform programme can broadly be divided into: (a) reforms aimed at addressing historical injustices and (b) programmes aimed at redistributive justice to address present day inequality. Section 25(7) is aimed at addressing historical injustice whilst section 25(5) and section 25(6) do not neatly fit into either category. This is because they deal with redistributive justice and present-day inequalities: largely as a result of historical injustices. Redistribution legislation in other parts of the world is usually limited to agricultural redistribution. But given South Africa's history the political undercurrents heavily influence our land reform programmes and encompass urban, rural and agricultural land reform.

¹⁰⁹ Pienaar & Brickhill 'Land Rights' op cit note 26 at 48:11

¹¹⁰ Ibid

It has been argued that these provisions taken together encompass a cluster of socio-economic rights.¹¹¹ Each provision will be briefly discussed regarding its respective role in the overall process of land reform. Section 25(5) provides the basis for redistribution, 25(6) the basis for tenure reform and 25(7) is aimed at restitution of land.

(a) Section 25(5): redistribution

Broadening access to land and enabling effective redistribution are provided for by section 25(5). This section provides that '[t]he state must 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'. Section 25(5) is mandatory as opposed to discretionary, given the use of the word 'must'. We can now unpack the approach to redistribution and the relevant legislation that gives effect to the rights contained in section 25(5).

(i) 'Reasonable'

In *Government RSA v Grootboom* the CC held that:

*'A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.'*¹¹²

The above *dictum* does not expressly clarify how reasonableness will be tested in the context of socio-economic rights. However, the literature and case law suggest that 'the programmes chosen must be capable of facilitating the realisation of the right'. A court would therefore be permitted to assess: (a) the conception and

¹¹¹ Ibid.

¹¹² *Government RSA v Grootboom* 2001 (1) SA 46; 2000 (11) BCLR 1169 para 41.

design of a programme; (b) the manner, pace and extent of its implementation and (c) the state's capacity to implement the programme, to assess whether the measures taken can facilitate the realisation of the right.¹¹³ This will inevitably take the courts into the terrain of policy formulation which is traditionally the domain of the executive.¹¹⁴ This is an unavoidable consequence of the courts having to interpret the scope of the positive obligations bestowed upon the state.

(ii) 'Legislative and other measures within its available resources'

These requires state is to take immediate steps towards the realisation of the right. Besides enacting of legislation to 'give effect' to these rights, the state is also obliged to take other measures to realise the right. These includes: formulating policy and other administrative, financial, educational and social measures.

The reference to 'available resources' indicates that the state has a discretion in determining the nature of the policies and legislative measures it adopts. Pienaar and Brickhill argue this does not mean that the state has an unfettered discretion in determining the resources available when the state embarks on realising the right in question. 'Available resources' must be understood as the 'total available resources of a country, including resources available from the international community through co-operation and assistance'.

(iii) Access to land

This means that the measures taken do not have to be limited to delivering ownership but may encompass other rights to land. This naturally feeds into the multi-pronged objectives of the land reform programmes, particularly the measures aimed improving security of tenure.

¹¹³ Pienaar & Brickhill supra note op cit note 26 at 48:11.

¹¹⁴ Ibid 48:12.

(iv) Empowering Legislation

Two main pieces of legislation have been promulgated giving effect to redistribution: The Land Reform (Labour Tenants) Act 3 of 1996 ('LTA') and the Provision of Land and Assistance Act 126 of 1993 ('PLAA').

(b) Section 25(6) Security of Tenure

The effect of race-based land control was to create varying systems of tenure which depended on one's socio-economic position, location (urban or rural) and quite obviously the colour of one's skin. In recognition of the large numbers of black people who lived and often worked on land that was owned by another, without security of occupation or use, section 25(6) establishes the need for the state to recognise and protect land occupation and use rights, even where such rights may clash with the rights of ownership. Section 25(9) requires the state to enact legislation to give effect to section 25(6). Several pieces of legislation have been enacted for this end. This includes the LTA (mentioned above), the Interim Protection of Informal Land Rights Act 31 of 1996 ('IPILRA') which governs the security of tenure of people who occupy or use land under customary law; the Extension of Security of Tenure Act 62 of 1997 ('ESTA'), which provides protection against the eviction of people who occupy non-formally proclaimed township areas with the consent of the owner; and the well-known Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 ('PIE').

(c) Section 25(7) Restitution

Section 25(7) deals with restitution by providing that '[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.' The scope and detail of section 25(7) have been fleshed out in the Restitution of Land Rights Act 22 1994 (RLRA).

6. QUESTIONS

(a) True/False

1. Private law's definition of property is wider than section 25's conception of property.
2. Section 25(5), (6), (7) entrenches a negative right to property.
3. 'Police Power' refers to the state's regulatory power (ie the power to regulate how we use our property).
4. In *Mkontwana v Nelson Mandela Metropolitan Municipality* the court broadened the ambit of the term 'deprivation'.
5. In *First National Bank v Wesbank*, the court adopted a conjunctive interpretation of deprivations and expropriations.

(b) SHORT QUESTIONS

1. Discuss the three ways in which the 'public interest' and 'public purpose' requirements of section 25(2) can be interpreted' **(3 marks)**
2. 'Just and equitable compensation (for expropriations) is determined with reference only to the market value of the property' Critically discuss this statement with reference to case law. **(7 marks)**

(c) LONG QUESTION

WozaWeekend is an events company situated in Johannesburg, known for 'throwing the greatest parties in South Africa'. It has been operating for 10 years and has an events licence granted by the Minister. WozaWeekend also has 10 vehicles which it uses to transport various artists to and from events. Recently the Minister has been concerned about the levels of noise and pollution created by these huge

events and has introduced regulations requiring all events companies in the country to provide a plan on how they would deal with pollution after events and compile an annual noise assessment report for the Minister to enable him to assess each company's impact on noise and pollution. The regulations state that a failure to do so would result in the revocation of the events licence and a penalty authorising the government to order any activity to cease and seizure of any property used to conduct the events business. The provision permitting the seizure of property only applied to Johannesburg, as the Minister felt that 'the nightlife scene in Johannesburg is just too rowdy' and that the penalty of seizure would 'show these events people who the real sheriff in town is'. The deadline for the submission of the plans has passed and WozaWeekend has received an email advising that their events licence had been terminated with immediate effect. In addition, Sithembiso and Ayesha (the directors of WozaWeekend) were informed that all their vehicles were going to be impounded.

You are a candidate attorney at Pogba & Iniesta Attorneys who have been approached to provide WozaWeekend advice on the following:

- (i) Whether the vehicles and events licence are subject to constitutional protection?
- (ii) Was the revocation of the licence an arbitrary deprivation?
- (iii) Did the seizure of the vehicles amount to an expropriation?

7. ANSWERS

(a) True/False

1. **False:** The private law conception of 'property' is generally limited to the *law of things* – section 25 provides protection to proprietary relationships spanning beyond only the law of things.
2. **False:** These provisions place positive obligations on the state to take measures in transforming and reforming the redistribution and security of tenure. These provisions thus entrench the positive component of the right to property.
3. **True.**
4. **False:** The court adopted a narrower definition – it must be a deprivation that at the very least results in *substantial* interference or limitation that *goes beyond the normal* restrictions on property use or enjoyment found in an open and democratic society.
5. **True.**

(b) Short Questions

1. A narrow interpretation restricts expropriations to actual public use; a broader interpretation envisages some public benefits that exceed actual public use and finally the wide interpretation includes virtually any purpose that resembles a public interest or purpose.
2. The Expropriation Act 63 of 1975 is of some relevance in determining just and equitable compensation. The model propounded by the Act is predicated on the 'market value' being determinative of just and equitable compensation. However, the intervention of section 25 has introduced a broader range of considerations which must be taken into account. *Msiza v Director-General, Department of Rural Development and Land Reform and Others (Msiza LCC)*, has confirmed this legal interpretation, emphasising that the guiding principle in section 25(3) is for just and equitable compensation rather than market value compensation, meaning that, even if market value is a useful starting

point in deciding the amount of compensation, a court can award below-market value compensation in the public interest.

In *Khumalo and others v Potgieter and others (Khumalo)*, the LCC used market value as merely the starting point for its determination of the value of compensation.

In Du Toit v Minister of Transport the court stated: 'Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces'.

Section 25(3) provides a list of non-exhaustive considerations which must be taken into account when assessing just and equitable compensation.

- Current use of the property;
- The history of the acquisition and use of the property;
- The market value of the property;

The extent of direct state investment and subsidy in the acquisition and beneficial improvement of the property; and

The purpose of the expropriation.

The 'current use' requires justificatory grounds for expropriation where the property is not being used productively, and the property is required for reformative objectives such as public housing.

The 'history of the acquisition' of the property is recognition that in determining just and equitable compensation the effects of forced removals and unjust land dispossession made land and property available to a small minority of the Republic's citizenry. It recognises the role the law played in skewing South Africa's property regime.

The 'purpose of the expropriation' is taken into account to ensure 'expropriations are aimed at alleviating pressing social needs' and justifying 'downward adjustment of the amount of compensation'.

The 'extent of state subsidy' refers the inequity of white farmers who have received substantial state subsidies receiving market value compensation (amounting to a double subsidy for historically advantaged persons) in instances of expropriation.