

# Chapter 46

## Property

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## The property clause

The property clause of the Interim Constitution, s 28 of Act 200 of 1993 ('IC'), reads as follows:

(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The property clause of the Final Constitution of the Republic of South Africa, s 25 of Act 108 of 1996 ('FC'), reads as follows:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) 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 to by those affected or decided or approved by a court.

(3) 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.

(4) For the purposes of this section —

- (a) 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
- (b) property is not limited to land.

(5) The 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.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) 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.

(8) 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).

(9) Parliament must enact the legislation referred to in subsection (6).

## 46.1 The function and structure of the property clause inquiry

The decision of the Constitutional Court in **First National Bank**<sup>1</sup> resolved much of the initial uncertainty surrounding the interpretation of s 25 of the Constitution.<sup>2</sup> The overriding purpose of the constitutional property clause, the Court held, is to strike 'a proportionate balance'<sup>3</sup> between the protection of existing property rights and the promotion of the public interest.

On its own, this holding was nothing new: the balancing of private and public interests in property is the traditional function of property clauses in comparative constitutional law. What the decision in *FNB* added, however, was greater clarity on how the South African property clause should be interpreted to suit this end. Before *FNB*, it was theoretically possible that the private/public balance might have been struck at any one or more of six stages in the property clause inquiry — (1) in determining whether the right or interest allegedly protected by s 25 was indeed constitutionally protected property; (2) if so, in deciding whether the law at issue provided for the deprivation of property; (3) if so, in determining whether such deprivation was arbitrary; (4) in deciding whether the law at issue provided for the expropriation of property; (5) if so, in determining the amount, timing and manner of any compensation that might be due, and (6) in determining whether any deviation from the property clause standard could be justified under the general limitations clause. After *FNB*, it is apparent that the property clause inquiry will focus on stage (3) — the test for arbitrariness. As more fully explained below, the Constitutional Court's analysis in this case telescoped

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1 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('*FNB*').

2 See AJ van der Walt *The Constitutional Property Clause* (1997); Geoff Budlender 'The Constitutional Protection of Property Rights: Overview and Commentary' in Geoff Budlender, Johan Latsky & Theunis Roux *Juta's New Land Law* (Original Service, 1998) Ch 1; Matthew Chaskalson & Carole Lewis 'Property' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz & Stu Woolman (eds) *Constitutional Law of South Africa* (1<sup>st</sup> Edition, RS5, 1999) Ch 31; Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4<sup>th</sup> Edition, 2001) Ch 25; and Theunis Roux 'Property' in Halton Cheadle, Dennis Davis & Nicholas Haysom *South African Constitutional Law: The Bill of Rights* (2002) 429. Whilst resolving many of the interpretative debates in these commentaries, the decision in *FNB* has not necessarily rendered the outcome of future cases more predictable. As explained in § 46.5(b) *infra*, in substituting for the wording of s 25 a foundational test for arbitrariness, the Court has developed a new set of rules that will defy formulaic (as opposed to formalistic) application.

3 *FNB* (*supra*) at para 50.

many of the issues that might have been addressed (and in comparative constitutional law are addressed) at other stages of the property clause inquiry into this stage. This is not to say that the other stages are unimportant, or that they will not determine the outcome of some cases.<sup>4</sup> But the breadth of the Court's arbitrariness test in *FNB* is such that it will tend to dominate the inquiry.<sup>5</sup>

Viewed in this way, the direction taken by the Constitutional Court in *FNB* is very similar to that taken in its socio-economic rights jurisprudence.<sup>6</sup> The trend in this area, too, has been to elevate what amounts to an internal limitations test to a position of pre-eminence. This recent trend has had two consequences. The traditional two-stage inquiry into whether a constitutional right has been violated and, if so, whether such violation is justified under the general limitations clause, has largely become a single inquiry: whether the law at issue is justified against a review standard varying in intensity between reasonableness (in the case of socio-economic rights) and arbitrariness (in the case of the property clause).<sup>7</sup> As a result, the general limitations clause has receded into the background.

At a formal level, of course, the classification of the property clause inquiry into distinct stages survives. According to the Court in *FNB*, these stages may be expressed in the form of the following questions:

- (a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation]<sup>8</sup> comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?<sup>9</sup>

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4 Some additional balancing may, for example, occur at stages (4) and (5).

5 See *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC) at paras 30-31 (applying the arbitrariness test in the context of land reform) and *Geyser v Msunduzi Municipality* 2003 (3) BCLR 235, 250B-251H (N) (applying the arbitrariness test to assess the constitutionality of s 118 of the Local Government: Municipal Systems Act 32 of 2000).

6 See S Liebenburg 'Interpretation of Socio-economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

7 The arbitrariness standard mandated by the property clause is itself variable in intensity. See § 46.5(b) *infra*.

8 The Court in *FNB* here uses the word 'deprivation'. As explained in § 46.4 *infra*, all expropriations are also deprivations, and therefore this formulation is not entirely incorrect. Nevertheless, at this stage of the property clause inquiry, the focus has been narrowed to expropriations as a sub-set of deprivations. The word 'expropriation' is accordingly preferable.

9 *FNB* (*supra*) at para 46.

This structure has been described as a 'true algorithm'.<sup>10</sup> That is, it requires the court to assess the law under challenge stage by stage until it is found to be either constitutional or unconstitutional. A close examination of the Court's decision-making tree<sup>11</sup> reveals that this is mostly true. A finding of constitutionality will occur (and terminate the inquiry) if one of the following answers is given: a negative answer to the question in (a) (meaning that the law does not interfere with constitutionally protected property); a negative answer to (b) (the law does not provide for the deprivation of property); a negative answer to (e) (the law does not provide for the expropriation of property); a positive answer to (f) (the law provides for the expropriation of property but is consistent with s 25(2)), and a positive answer to (g) (the law provides for the expropriation of property contrary to s 25(2) but is justified under s 36). Similarly, a finding of unconstitutionality will occur (and terminate the inquiry) if a negative answer is given to (d) (meaning that the law unjustifiably deprives a person of property contrary to s 25(1)), or a negative answer is given to (g) (unjustifiable expropriation of property contrary to s 25(2)).

There is, however, one situation in which the court will have to skip one of the stages. That is where a positive answer is given to (c): meaning that the law provides for the deprivation of property consistent with s 25(1). A law of this type need not pass through the (d) stage of the inquiry since there is no constitutional violation that requires justification. Such a law might, however, provide for the expropriation of property, and therefore it is necessary to pose the question in (e) and continue with the inquiry. The question in (e) is itself ambiguous as to whether it refers back to the answer to the question in (c) or (d).<sup>12</sup> Does the 'it' in (e), in other words, refer back to the deprivation described in (d) (a justified deprivation contrary to s 25(1)), or does it refer back to the deprivation in (c) (a deprivation consistent with s 25(1))? As we shall see below, both types of deprivation could also amount to expropriations, and it is hence necessary to pose the question in (e) in both instances. It follows that the structure of analysis in *FNB* is not a true algorithm, but one in which it is possible to skip a stage, depending on the answer to the question in (c).

Subject to this qualification, this chapter follows the formal structure of the *FNB* Court's analysis of the constitutional property clause. The purpose throughout, however, will be to demonstrate in respect of each stage why it is that the focus of the property clause inquiry will tend to fall on the question in (c), or rather on a subset of this question, namely whether the law at issue permits the arbitrary deprivation of property.

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- 10 Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (5<sup>th</sup> Edition, forthcoming, 2004).
- 11 See *Nhlabathi v Fick* (supra) at paras 30-1 and *Geyser v Msunduzi Municipality* (supra) at 250B-251H.
- 12 I am indebted to Stu Woolman for drawing this ambiguity to my attention, and for suggesting the idea of representing it by means of a decision-making tree.

## 46.2 Application

### (a) Application of the property clause to private actors

The constitutional property clause undoubtedly provides protection against the deprivation of property by state actors and by private actors when exercising statutory rights.<sup>13</sup> But does it provide protection against deprivation by private actors acting in terms of the common law? The test for deciding this type of question was laid down in *Khumalo v Holomisa*.<sup>14</sup> According to this case, the common law does not 'in all circumstances . . . fall within the direct application of the Constitution',<sup>15</sup> and therefore the Bill of Rights does not apply directly to litigation between private actors in every instance. Rather, ss 8(2) and (3) of the Constitution require a two-stage analysis. First, the court must inquire whether 'the nature of the right and the nature of any duty imposed by the right' are such that the right can be said to bind a natural or juristic person.<sup>16</sup> If this question is answered in the affirmative, 'a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to the right'.<sup>17</sup>

The Constitutional Court has not as yet been required to apply this test to s 25. However, its decision in *Phoebus Apollo Aviation CC v Minister of Safety and Security*<sup>18</sup> sheds some light on how the Court might decide this issue. In *Phoebus*, the Constitutional Court was asked to overturn a decision of the Supreme Court of Appeal on the grounds that it had failed to develop the common law indirectly, as required by s 39(2) of the Constitution. Three police officers had stolen money that had earlier been stolen from the appellant by an armed gang. The appellant argued that s 25(1) of the Constitution applied because the thefts had deprived it of its property and that, in promoting the 'spirit, purport and objects' of the property clause in accordance with s 39(2), the Supreme Court of Appeal should have extended the State's vicarious liability in delict to this situation.<sup>19</sup> The Constitutional Court rejected this argument. It held that the provisions of the property clause 'are aimed at protecting private property rights against governmental action and are quite irrelevant here where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by three thieves'.<sup>20</sup> This

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13 See *Nhlabathi v Fick* (supra) at paras 27-35 (property clause applied in constitutional challenge to land reform law conferring on tenants a statutory right to bury their relatives on the land on which they are residing, where an established practice to this effect exists).

14 2002 (5) SA 401 (CC), 2002 (8) BCLR 772 (CC).

15 Ibid at para 32.

16 Ibid at para 31 (quoting s 8(2) of the Constitution).

17 Ibid.

18 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) ('*Phoebus*') at para 4.

19 Ibid at para 3.

20 Ibid at para 4.

somewhat ambiguous dictum is authority for the proposition that the property clause does not apply to private conduct that is not authorised

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by law<sup>21</sup> or to conduct on the part of government employees when acting outside the course and scope of their employment. The first part of the dictum is also wide enough to suggest that the property clause does not provide protection against deprivation by private actors acting in terms of the common law. Since the direct horizontal application of the property clause was not at issue in *Phoebus*, however, the correctness of this proposition should not be assumed without further analysis.

In the academic literature written before *Phoebus*, the only author who came close to saying that the property clause might be binding on private actors when acting in terms of the common law was AJ van der Walt. In his extended commentary on the clause, Van der Walt wrote that 'the fact that section 25(1) refers to "law of general application", as opposed to "a law" . . . subjects common-law and customary-law authorised deprivations of property to the requirements of section 25(1), namely that they should not be arbitrary'.<sup>22</sup> He then gave two examples that seemed to imply that deprivations of property by private actors acting in terms of the common law or customary law should be subject to s 25(1), namely 'deprivations in the context of customary-law land rights and common-law rules relating to the original acquisition of ownership'.<sup>23</sup> On such an approach, a person who was 'deprived' of property through, say, the attachment of a movable thing to immovable property owned by a private actor, could theoretically challenge the common-law rule in question as providing for the arbitrary deprivation of property contrary to s 25(1).

Quite apart from the fact that it is difficult to conceive of a convincing example where the common law provides for deprivation of property by private actors contrary to s 25(1), it would not be necessary for the court directly to apply s 25 in such cases. According to s 173 of the Constitution, 'the Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power . . . to develop the common law, taking into account the interests of justice'. Faced with an arbitrary deprivation of property sanctioned by the common law, any of these courts would be empowered to develop the common law so as to achieve a just result. In so doing, they would be obliged by s 39(2) of the Constitution to 'promote the spirit, purport and objects of the Bill of Rights'. Since one of the objects of the Bill of Rights is to protect people against arbitrary deprivation of property, it would seldom be necessary to consider whether s 25 was directly applicable to the case.

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As De Waal, Currie & Erasmus have pointed out (and as *Phoebus* appears to confirm), the words 'deprivation' and 'expropriation' in s 25 have a 'specialised'

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21 Cf *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* [2003] 1 All SA 465 (T) at paras 42, 44 and 45 ('*Modderklip*') (holding that a squatter community's refusal to comply with an eviction order amounted to a *de facto* expropriation of the applicant's land in conflict with s 25 of the Constitution). *Modderklip* was handed down eight days before the decision in *Phoebus*. Insofar as it provides authority for the proposition that the property clause applies to private conduct that is not authorised by law, it appears to have been tacitly overruled.

22 Van der Walt *The Constitutional Property Clause* (supra) at 106.

23 Ibid at 107.

meaning that limits the obligations imposed by ss 25(1), (2) and (3) to state actors.<sup>24</sup> If the question of the direct application of the property clause to private actors were ever to be decided on the basis of the test laid down in *Khumalo*, the court would be enjoined to consider both the 'intensity' of the right and 'the potential invasion of that right which could be occasioned by persons other than the state or organs of state'.<sup>25</sup> Arguably, both the right not to be arbitrarily deprived of property and the right not to have one's property expropriated without compensation would pass the first part of this test. However, the potential for invasion by a private actor of these rights is limited. First, there can be no direct challenge to a common law rule providing for the *expropriation* of property by a private actor, because such a rule simply does not exist. Second, although the term 'deprivation' could conceivably be stretched to cover the examples Van der Walt mentions, in its technical sense this term refers to the regulation of private property by the state, and therefore has no meaning in the context of private law relations.

For the aforementioned reasons, the remainder of this Chapter assumes that s 25 has no direct horizontal application. It also assumes that s 25 is not indirectly applicable between private actors. These two situations must be distinguished from the indirect application of the property clause to state actors. In *South Peninsula Municipality v Malherbe NO*,<sup>26</sup> for example, s 25 was applied in the interpretation of a town-planning ordinance. Where legislation that provides for the expropriation of property is unclear, the Court held, s 25 requires that it be interpreted in favour of the payment of compensation. And in another, concurring judgment in *Premier, Eastern Cape v Cekeshe*,<sup>27</sup> the rule in *Pretoria City Council v Modimola*<sup>28</sup> relating to the non-application of the *audi alteram partem* principle in certain circumstances was held to be incompatible with s 25. The indirect vertical application of the property clause in this way is an important side effect of the constitutionalisation of property rights in South Africa, and should not be ignored.<sup>29</sup>

## **(b) Who is entitled to the rights protected by section 25?**

Section 8(4) of the Constitution provides that '[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' In *FNB*, the Court offered two independent rationales

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24 De Waal et al *The Bill of Rights Handbook* (4<sup>th</sup> Edition) (supra) at 412.

25 *Khumalo v Holomisa* (supra) at para 33. On the 'intensity' of fundamental rights, see further *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (describing privacy as 'a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves way from that core').

26 1999 (2) SA 966 (C), 983E-I.

27 1999 (3) SA 56 (TK), 103E-F.

28 1966 (3) SA 250 (A).

29 See also *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at paras 14-29 (interpreting the proviso to s 12(1) of the Expropriation Act 63 of 1975 in conformity with s 25 of the Constitution).

for extending the protection of s 25 to juristic persons. First, the Court held that 'the property rights of natural persons can only be fully and properly realized if such rights are afforded to companies as well as natural persons.'<sup>30</sup> Second, 'denying companies entitlement to property rights would ". . . lead to grave disruptions and would undermine the very fabric of our democratic State".<sup>31</sup> The first reason is a logical extension of the express protection given to natural persons by s 25. The second amounts to a rule-utilitarian argument in favour of the right to private property.<sup>32</sup> The significance of the Court's use of this argument lies not in the result it defends (which is fairly uncontroversial as a matter of constitutional interpretation), but in what it reveals about the Court's underlying sense of the link between democracy, property rights and economic growth.<sup>33</sup>

Several countries in the developing world, in an attempt to overcome the legacy of colonialism, have limited the protection afforded by their constitutional property clauses to citizens. Although such policies are unlikely to be pursued in the foreseeable future in South Africa, it is worth noting that the plain meaning of s 25 is that anyone who is affected by a deprivation of property is entitled to protection, whether or not they are a citizen, and whether or not they are residing in South Africa at the time of the alleged violation.<sup>34</sup> Similarly, it should not make any difference whether a company's head office is in South Africa or elsewhere. Provided it has interests that are affected by a law of general application in South Africa, and provided further that such interests are recognised as constitutional property,<sup>35</sup> the company will be entitled to the rights protected by s 25.

## 46.3 Is the interest at stake constitutional property?

### (a) Introduction

Section 25(1) of the Constitution prohibits the deprivation of property 'except in terms of law of general application' and specifies that 'no law may permit arbitrary deprivation of property'. Section 25(2) prohibits the expropriation of property

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except in terms of law of general application and specifies that property may only be expropriated 'for a public purpose or in the public interest' and 'subject to compensation'. The threshold question in any constitutional property inquiry,

30 *FNB* (supra) at para 45.

31 *Ibid* citing *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (supra) at para 18.

32 See Jeremy Waldron *The Right to Private Property* (1988) 5-12.

33 Although the finding in *FNB* was limited to juristic persons in the form of companies, both of the lines of reasoning just described are equally applicable to other business entities such as close corporations, trusts, partnerships and the like. All of these forms of business entity should enjoy protection under the property clause.

34 Generally speaking, when the Constitution intends to distinguish between citizens' and non-citizens' rights it does so expressly. See, for example, s 19(1) (freedom to make political choices).

35 See § 46.3 infra.

therefore, is whether the interest at stake constitutes property as contemplated in s 25(1) and (2). No matter how oppressive or unfair the law at issue is, if it does not interfere with property in this sense, the protection afforded by s 25 is not triggered.

In *FNB*, the Court declined to furnish 'a comprehensive definition of property for purposes of s 25', on the basis that such an exercise would be 'practically impossible'.<sup>36</sup> Instead, the Court restricted its decision to the narrow holding that ownership of a corporeal movable, together with land ownership, was 'at the heart of our constitutional concept of property'.<sup>37</sup> The first part of this holding was dictated by the facts of *FNB*: the detention (for the purpose of establishing a lien in terms of s 114 of the Customs and Excise Act 91 of 1964) of three motor vehicles belonging to the appellant. The second part, that relating to the ownership of land, merely confirmed the significance of the stipulation in s 25(4)(b) that 'property is not limited to land'.

Notwithstanding the narrowness of this holding, the decision in *FNB* does give an indication of how the Court might approach the threshold property question in future cases. In stating that ownership of corporeal movables and land constituted property for the purposes of s 25, the Court held that this was the case 'both as regards *the nature of the right* involved as well as *the object of the right*'.<sup>38</sup> This choice of words suggests that the Court's determination of more complex claims will hinge on a composite assessment of these two issues.<sup>39</sup>

In private law, the object of a property right is typically a corporeal thing.<sup>40</sup> This might explain why the Court in *FNB* was at pains to say that its judgment was 'not concerned at all with incorporeal property'.<sup>41</sup> Then again, there is nothing in the judgment to suggest that, when presented with the appropriate case, the Court will not extend the protection of the property clause to encompass incorporeal property. On the contrary, in outlining its general approach to the meaning of property, the Court quoted with approval AJ van der Walt's argument that it was necessary to break the shackles of private law conceptualism in favour of a

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36 *FNB* (supra) at para 51.

37 *Ibid.*

38 *Ibid* (emphasis added).

39 Section 12(1) of the Expropriation Act makes a distinction between 'property other than a right' (para (a)) and 'a right to use property' (para (b)) and provides for different standards of compensation in respect of each. This distinction is not necessarily incompatible with the Court's approach to constitutional property in *FNB*, since that approach is broad enough to accommodate both aspects of the property concept, and s 25(3) allows for differential compensation depending on the nature of the property.

40 See Van der Walt *The Constitutional Property Clause* (supra) at 32ff.

41 *FNB* (supra) at para 100. See also *FNB* (supra) at para 54.

more 'dynamic', transformation-oriented, public law conception of property.<sup>42</sup> The Court's endorsement of Van der Walt's pioneering work in this area suggests that it will probably adopt a fairly wide conception of property, one that includes incorporeal property, and that it will seek to strike the private/public balance at other points in the constitutional property clause inquiry.<sup>43</sup>

For analytic purposes, this Chapter follows the Constitutional Court's lead in compartmentalising the question whether a constitutional property right is at stake into a discussion of the nature (or legal form) of the right and the object of the right. This way of proceeding is somewhat artificial since in most cases only one of these two issues will be problematic.<sup>44</sup> Thus, in relation to (rights in) incorporeal property, the question is what categories of incorporeal property (if any) should enjoy constitutional protection. The various legal forms that incorporeal property takes are all very familiar and consequently do not pose any difficulty once this question has been answered. Conversely, there are a range of rights in corporeal property, some of which may be deserving of constitutional protection and others not. Here the key issue is the legal form of the right, since it is settled law after *FNB* that both movable and immovable corporeal property enjoy constitutional protection. In order to avoid duplication, the section on 'the nature of the right' that follows focuses on the nature of property rights in *corporeal* property, and the section on 'the object of the right' focuses on the various types of *incorporeal* property and their claim to constitutional protection.

### **(b) The nature of the right**

Counsel for the respondents in *FNB* argued that the legal form of the appellant's right — ownership of a corporeal movable — was merely 'a contractual device . . . designed to protect the [appellant]',<sup>45</sup> and that it should therefore not enjoy protection under s 25. The Court rejected this argument, holding that '[t]he fact that an owner of a corporeal movable makes no or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property.'<sup>46</sup> In particular, the right of ownership reserved by financial institutions when leasing motor vehicles should not be conflated with their 'commercial interest' in the vehicles themselves.<sup>47</sup>

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42 *FNB* (supra) at para 52, citing Van der Walt *The Constitutional Property Clause* (supra) at 11.

43 Further reasons in support of the extension of the constitutional conception of property to include incorporeal property are given in § 46.3(c) infra.

44 Disputes, such as that in *Du Toit v Minister of Transport* (supra), over whether what was expropriated constituted a right to use property or the physical thing itself may of course arise, but they will generally not affect the outcome of the threshold property question, ie the question whether a constitutional property interest is at stake.

45 *FNB* (supra) at para 53.

46 *Ibid.*

47 *Ibid* at para 55.

The Court was careful to restrict this holding to cases involving ownership of corporeal movables.<sup>48</sup> The Court's reasoning, however, is likely to be extended to other types of rights and other types of things, ie whether the right at issue is ownership, a limited real right, or a personal right to movable or immovable property, the inquiry into the legal form of the right will be objective. According to this approach, the Court will not concern itself with 'the subjective interest' of the claimant in the object of the right, nor with the 'economic value of the right',<sup>49</sup> but with the legal form of the right at the time of the alleged infringement.

The Court's refusal to deal with the subjective interest of the claimant at the threshold stage in *FNB* does not, of course, mean that this question is irrelevant. It simply means that the Court will deal with it at a later stage of the inquiry.<sup>50</sup> For example, assume that the Department of Housing, as part of its low-income housing strategy, were to target land held for speculative purposes on the periphery of cities and large towns. Before *FNB*, it might have been possible for the state to have argued that, given the urgent need for suitable land to accommodate the urban poor, land speculation in such areas was socially harmful, and therefore that rights in land held for these reasons should not be protected under s 25. After *FNB*, this argument will not be possible. Instead, any attempt by the state to target land held for speculative purposes would have to be defended at a later stage of the property clause inquiry.

If the subjective interest of the right-holder is irrelevant at the first stage of the inquiry, what can the legal form of the right tell us about the likelihood that a particular right will be recognised as constitutional property? When referring to this issue in *FNB*, the Court implied that some rights and interests in property, by their very nature, should not enjoy protection under s 25. Although the Court itself wisely refrained from saying what those rights and interests were, one of the purposes of a commentary such as this is to consider the arguments for and against the recognition of particular rights and interests.

The starting point has to be the distinction drawn in private law between real rights, which are binding on the world at large, and personal rights, which are binding only on the immediate parties to the legal relationship. The law of property as a subject in private law is concerned with the former category of rights, as well as possession (although possession is sometimes regarded as a limited real right).<sup>51</sup> Personal rights, on the other hand, take a number of different forms, and traverse a number of different areas of law. For the reasons given earlier, this section will focus on real and personal rights in corporeal things. The question of which forms of incorporeal property should enjoy constitutional protection will be examined in the next section.

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48 *FNB* (supra) at para 54.

49 *Ibid* at paras 54 and 56.

50 *Ibid* at para 54 (remarking that the use to which the property is being put 'may be relevant in deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under s 36').

51 See DG Kleyn & A Borraine *Silberberg and Schoeman's The Law of Property* (3<sup>rd</sup> Edition, 1993) 111-13.

Although the decision in *FNB* was silent on this issue, there can be little doubt that, in addition to ownership, all of the limited real rights recognised at common law (lease, mortgage, pledge, servitude and lien) should enjoy protection under the property clause, together with limited real rights recognised by statute, such as mineral rights.<sup>52</sup> The fact that a property right has been recognised at common law or by statute means that the courts or the legislature have already deemed it to be important. The legislature may, of course, wish to adjust the importance accorded to certain classes of property rights, particularly if the recognition of that class is seen as an impediment to social transformation. However, to exclude a particular class of property rights from constitutional protection at the threshold stage would be tantamount to adopting a principle that, in every situation in which rights belonging to that class conflict with the public interest, the latter should prevail. The courts might want to do this in respect of certain interests in property, but not in respect of interests that have already been recognised at common law or by statute. In respect of such interests, the rule of law requires a more subtle form of balancing, one that can be achieved only at other points in the property clause inquiry.

For the same reason, the traditional incidents of ownership (the right to use and enjoy (the fruits of) the thing owned, the right to possess, consume, alienate, and vindicate the thing, and the right to exclude others from it) should enjoy separate protection under the property clause.<sup>53</sup> For example, a zoning law that interferes with the way the owner of a building intends to use that building should in principle be subject to scrutiny under s 25, even though the zoning law does not affect the entire bundle of rights that the owner has in the building.

Further support for this argument may be found in the *FNB* Court's tacit approval of the 'conceptual severance'<sup>54</sup> approach to property when elaborating its test for arbitrariness under s 25(1). One of the components of that test, as we shall see,<sup>55</sup> is to determine whether the impugned deprivation 'embraces all the incidents of ownership' or 'only some incidents of ownership and those incidents only partially'.<sup>56</sup> Since this determination is made only after the threshold stage

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52 See, for example, s 5(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (recognising prospecting, mining exploration and production rights granted in terms of the Act as limited real rights). The finding in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23, 28E-G (T) that, '[i]f the drafters of the Constitution [had] intended to protect mineral rights, they would have done so expressly', is based on a clear misunderstanding of the decision in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1997 (1) BCLR 1 (CC) ('*First Certification*') at para 74. It should not be followed.

53 See *Geyser v Msunduzi Municipality* (supra) at 249I-J (holding that '[t]he property that is protected by section 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it or to derive income from it or to transfer it to others').

54 The term was coined by Margaret Radin 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia LR* 1667.

55 See § 46.5(b) *infra*.

56 *FNB* (supra) at para 100.

has been passed, the constitutional conception of property must, by implication, include all the recognised incidents of ownership. The clear inference to be drawn from the *FNB* decision is that the Court will not bar property clause challenges merely because the state has interfered with a few incidents of ownership only. Rather, the Court will entertain the challenge and assess the constitutionality of the law concerned according to the nature and severity of its impact and the number and importance of the incidents the law affects.

Laws that interfere with the traditional incidents of ownership or limited real rights should be distinguished from laws that merely cause patrimonial loss. For example, a law regulating the way in which mineral rights may be held, once assented to by the President, may have an adverse economic impact on the holders of such rights. Until the law is put into operation, however, the impact will affect the holders' subsidiary interest in the market value of their rights, rather than the rights themselves.<sup>57</sup> Such a law will give rise to a claim under the property clause only if the court were prepared to recognise this type of subsidiary interest as property for the purposes of s 25.<sup>58</sup>

The reference in *FNB* to the possibility that some incidents of ownership may be 'partially' affected by a law suggests that the Court may indeed be prepared to countenance claims of this kind.<sup>59</sup> The reason for extending the constitutional conception of property in this way, however, would not be to erect an artificial hurdle in the way of social transformation, but to postpone the necessary interest-balancing exercise to a later, more flexible stage. The *FNB* Court thus held that a law that (partially) deprived the claimant of some of the incidents of ownership would be subject to review for arbitrariness, but that a lower standard of review would apply to such a law when compared to a law that deprived the claimant of all of the incidents of ownership.<sup>60</sup> In most cases this would mean that a law (partially) depriving the claimant of one or two incidents of ownership would easily pass constitutional muster. Likewise, the extension of the constitutional conception of property to the traditional incidents of ownership and to subsidiary interests would not necessarily mean that the state would have to pay just and equitable compensation in every case. The duty to pay just and equitable compensation, as explained below,<sup>61</sup> depends on whether the law provides for the expropriation of property. Even if every conceivable strand in the property rights bundle were recognised as property for purposes of s 25, expropriation could be

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57 See the Mineral and Petroleum Resources Development Act 28 of 2002, which at the time of writing had been assented to by the President but not yet put into operation. Item 12 of Schedule II to this Act provides for the payment of compensation for expropriation in certain circumstances.

58 Such interests have been recognised as property at common law. See *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 (3) SA 336 (A).

59 *FNB* (supra) at para 100(f).

60 *Ibid.*

61 See § 46.7 *infra*.

defined in such a way as to preclude the payment of compensation in cases where this would tilt the private/public balance too far in favour of the claimant.<sup>62</sup>

Outside the private law of property, the most important forms of property are personal rights to performances regulated by the law of contract, including some important commercial rights, intellectual property rights (copyright, trademarks and patents), and certain public-law entitlements (the so-called 'new property'), including welfare rights (pensions and medical aid benefits) and other forms of state 'largesse' (such as licences, permits and quotas).<sup>63</sup> The question whether the constitutional conception of property should be extended to these forms of property depends on whether incorporeal property as such should be protected under s 25 and, if so, whether any distinction should be made between the various forms of incorporeal property. The extension of s 25 to incorporeal property is dealt with in the next section.

### (c) The object of the right

As we have seen,<sup>64</sup> the Constitutional Court in *FNB* was at pains to restrict its holding to corporeal property. In so doing, however, the Court was simply being cautious. Neither this decision nor that in the *First Certification* case<sup>65</sup> should be taken as an indication that the Court, when confronted with an appropriate case, will not extend the constitutional conception of property to encompass incorporeal property. In addition to the general arguments raised by Van der Walt about the need for a 'dynamic', transformation-oriented, public-law conception of property,<sup>66</sup> there are three specific reasons for extending the protection of the property clause to incorporeal property. First, the blanket exclusion of incorporeal property from the protection of s 25 would be a very crude way of balancing competing public and private interests in property. As with the definitional exclusion of

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62 Alternatively, it might be possible for the state to justify the non-payment of compensation where the right expropriated constitutes a very minor strand in the owner's property rights bundle. See *Nhlabathi v Fick* (supra) at paras 32-5 (assuming, without deciding, that the granting of permission to establish a grave by statute might constitute a 'de facto expropriation', but holding that the non-payment of compensation was justified under s 36).

63 The term 'largesse' to describe these forms of state benefit, and the term 'new property', were coined by Charles Reich 'The New Property' (1964) 73 *Yale LJ* 733.

64 See § 46.3(b) supra.

65 In *First Certification* (supra), the Court held that the fact that the 1996 Constitution does not extend express protection to incorporeal property rights was not contrary to the Constitutional Principles in Schedule 4 of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) because such rights are not 'universally accepted fundamental rights'. This ruling should not be misunderstood as a ruling that s 25 does not protect incorporeal property. The purpose of the certification exercise was to test the 1996 Constitution against the Constitutional Principles, including the principle that all 'universally accepted fundamental rights' should enjoy constitutional protection. A decision that a particular kind of right in property is not universally accepted and therefore need not have been expressly recognised in the Constitution is not tantamount to a finding that it is not recognised at all. See further the remarks made in § 46.3(b) supra in relation to mineral rights, and the finding in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23, 28E-G (T).

66 See § 46.3(a) supra.

rights and subsidiary interests in corporeal property, such an approach would amount to declaring for all future cases that, where private and public interests in incorporeal property conflict, the latter should prevail. A much more nuanced approach than this is required, one that can only be achieved at a later stage of the property clause inquiry. Second, the overwhelming preponderance of foreign law authority favours the constitutional protection of incorporeal property.<sup>67</sup> And, finally, the second of the two reasons given by the Court in *FNB* for extending the protection of s 25 to juristic persons — the role that these forms of property have to play in economic growth and the consolidation of democracy<sup>68</sup>— applies equally well to the extension of that protection to incorporeal property.

The main category of incorporeal property, personal rights to performances, including a range of commercial rights, has been widely recognised in foreign law as being in principle capable of constitutional property clause protection. It is impossible to list all of the possible sub-categories here, but some examples are shares in a company,<sup>69</sup> goodwill,<sup>70</sup> rights in a partnership,<sup>71</sup> and the right of management of a company.<sup>72</sup>

Another important category of incorporeal property concerns public law entitlements in the form of welfare rights (including pensions and medical aid benefits) and other kinds of government 'largesse' (including licences, permits and quotas). Such entitlements — collectively referred to as 'the new property'<sup>73</sup>— enjoy constitutional protection in many countries. However, such protection is typically afforded against procedurally unfair deprivation, and not against expropriation.<sup>74</sup> Since these entitlements are by their very nature contingent on mutable government policies or programmes, it would in most cases be nonsensical to impose on the state a duty to compensate individuals in the event of these entitlements being withdrawn. Such an approach would effectively lock the state into an existing set of welfare policies and programmes, thereby unfairly tilting the balance in favour of the current class of beneficiaries at the expense of the state's

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67 See Van der Walt *The Constitutional Property Clause* (supra) at 30-71.

68 See § 46.2(b) supra.

69 *Government of Mauritius v Union Flacq Sugar Estates Co Ltd; Government of Mauritius v Medine Shares Holding Co Ltd* [1992] WLR 903 (PC).

70 *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 (distinguishing *Government of Malaysia v Selangor Pilot Association* [1977] 2 WLR 901 (PC)).

71 *Societe United Docks v Government of Mauritius; Marine Workers Union v Mauritius Marine Authority* [1985] LRC (Const) 801 (PC).

72 *Attorney-General v Lawrence* [1985] LRC (Const) 921 (St Christopher and Nevis CA).

73 See Charles Reich 'The New Property' (1964) 73 *Yale LJ* 733.

74 On the position in the United States and the Commonwealth in this regard, see Matthew Chaskalson 'The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth' (1993) 9 *SAJHR* 388, 404-7.

obligation to promote the public interest by pursuing the best set of policies and programmes for changing circumstances.

The question whether the new property should enjoy protection under the property clause in the interim Constitution was considered in *Transkei Public Servants Association v Government of the Republic of South Africa*.<sup>75</sup> In this case, the Transkei High Court observed that 'the meaning of 'property' in section 28 of the [interim] Constitution may well be sufficiently wide to encompass a State housing subsidy'.<sup>76</sup> This *obiter dictum* is no more than persuasive authority, of course, but is nevertheless likely to be followed in cases decided under the 1996 Constitution. After all, it is not the recognition of the new property as such that constitutes the real difficulty, but the degree and nature of the protection afforded to such property. For this reason, it is once again likely that the answer will lie not at the threshold stage of the inquiry, but in the application of the Constitutional Court's test for arbitrariness. As we shall see,<sup>77</sup> a court has tremendous scope in terms of that test to vary the level of scrutiny applied according to the nature of the impugned law and the form of property at stake. Where that law is a welfare law, and the form of property at issue a public law entitlement, a court is likely to give the state a fairly wide margin to adjust the structure, and method of enjoyment, of the entitlement, subject only to the requirement that any adjustments it does make should be effected in a procedurally fair manner. Precisely so as to allow for the enforcement of rights to procedural fairness at the s 25(1) stage, most public law entitlements should be recognised as property. The only real reason for excluding claims based on such entitlements at the threshold stage would be to eliminate cases where the interest has not as yet taken the form of a vested right. This consideration would mainly apply where the remedy sought was compensation rather than the enforcement of the claimant's right to procedural fairness.<sup>78</sup>

Finally, intellectual property rights in the form of patents, trademarks and copyright should, and are likely to be, recognised as constitutional property, for all the aforementioned reasons: the need to subject any interference with such rights to the Court's more flexible balancing test for arbitrariness, their importance to the economic development of South Africa, and the weight of foreign law authority.<sup>79</sup>

## 46.4 Has there been a deprivation of property?

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75 1995 (9) BCLR 1235 (Tk).

76 *Ibid* at 1246-7.

77 See § 46.5(b) *infra*.

78 See *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS) (holding that a public servant's right to an annual bonus is not expropriated where it is withheld before having vested).

79 For an overview of these foreign cases see Van der Walt *The Constitutional Property Clause* (*supra*) at 64 n114.

If the court decides that the right or interest at stake amounts to constitutionally protected property, the next stage of the inquiry requires it to determine whether there has been a deprivation of property. After *FNB*, it is clear that the term

'deprivation' will be given a very wide meaning, and that this stage of the inquiry will consequently play very little role (if any) in future cases. Noting that the term was 'somewhat misleading or confusing',<sup>80</sup> the Court in *FNB* remarked that '[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'.<sup>81</sup> Without offering a comprehensive definition, the Court held that 'dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense'.<sup>82</sup>

The actual holding in *FNB* with regard to the meaning of 'deprivation' is therefore quite narrow. Nevertheless, there is enough in the Court's *obiter dicta* to suggest that very little will turn on whether the law at issue deprives the claimant of property as opposed to interfering in some other way with that property short of an actual deprivation. The more likely scenario is that a court hearing a constitutional property clause challenge will construe almost any interference with the use or enjoyment of property as a deprivation, and will deal with the level of intrusiveness of the deprivation when considering whether the requirements of s 25(1) have been met. For example, a law that interferes with only one or two 'sticks' in the property rights bundle will not for that reason alone be treated as providing for something less than a deprivation.<sup>83</sup> Rather, the fact that the deprivation of property is less than total will be a factor relevant to the court's determination, at the next stage of the inquiry, whether there is 'sufficient reason' for the deprivation.<sup>84</sup>

Although it failed to give a comprehensive definition of the term 'deprivation', the Constitutional Court's judgment in *FNB* did endorse the view expressed in an earlier version of this chapter that expropriations should be construed as a form of deprivation.<sup>85</sup> Whatever else the term 'deprivation' may mean, therefore, it is certain that a law that provides for the expropriation of property will also constitute a deprivation of property. The significance of this rule is that a law providing for the expropriation of property, in addition to the requirements of s 25(2), will have to satisfy the requirements of s 25(1). Indeed, on the evidence of *FNB*, it would seem

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80 *FNB* (supra) at para 57, citing Van der Walt *The Constitutional Property Clause* (supra) at 101ff.

81 *Ibid.*

82 *Ibid* at para 61.

83 See *Geyser v Msunduzi Municipality* (supra) at 250B (interference with right to transfer property constitutes deprivation for purposes of s 25(1)); *Nhlabathi v Fick* (supra) at para 29 (appropriation of grave by farmworker tenant constitutes deprivation).

84 See, in particular, para (f) of the test for arbitrariness laid down in para 100 of *FNB* (discussed in § 46.5(b) *infra*).

85 See Matthew Chaskalson & Carole Lewis 'Property' in Chaskalson et al *Constitutional Law of South Africa* (supra) at 31-14, cited with approval in *FNB* (supra) at para 57.

that the Constitutional Court, when confronted with such a law, will *first* test it for compliance with s 25(1), before moving on, if necessary, to s 25(2).<sup>86</sup>

Once again, this approach will tend to de-emphasize the potential balancing function performed by other stages of the constitutional property inquiry — in this case the distinction between expropriations and deprivations — in favour of the Court's test for arbitrariness. Whilst in most instances, the privileging of the test for arbitrariness has the effect (and virtue) of introducing greater flexibility into the property clause inquiry, the Court's insistence that a law that provides for the expropriation of property should first be tested against s 25(1) may have the opposite effect. One of the principal means by which an individual's interest in the use and enjoyment of property, and the state's interest in acquiring it, may be balanced is through the payment of compensation. This idea is recognised in the US Supreme Court's takings jurisprudence, which regards compensation as the mechanism through which society shares the burden imposed on property holders by the forced enlistment of their property in service to the public good.<sup>87</sup> An otherwise arbitrary law may be perfectly rational, and indeed proportional, if it provides for the payment of just and equitable compensation. This being so, it would make no sense to assess the arbitrariness of a law that provides for the expropriation of property without also considering what that law says about the amount, time and manner of compensation. In this way, the inquiry mandated by the state's duty to pay compensation in s 25(2)(b) will tend to become sucked into, or at least rendered redundant by, the test for arbitrariness in s 25(1). As explained below,<sup>88</sup> there are several points in that test at which the 'means employed' by the legislature and the 'extent of the deprivation' occasioned by the law need to be assessed.<sup>89</sup> In respect of deprivations that take the form of expropriations, the means employed to effect the deprivation may be a scheme of expropriation that includes the payment of just and equitable compensation. If so, this would make all the difference in the world to the question whether the law permits the arbitrary deprivation of property.

The same conclusion may be reached by means of the following *reductio ad absurdum* argument. Conceptually, the most severe form of deprivation is an expropriation, which is defined as the forced transfer of a right in property from the individual to the state.<sup>90</sup> If just and equitable compensation is provided, however, the impact of an expropriation may not be so severe. It would therefore be somewhat

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86 See the set of questions posed by the Court in *FNB* (supra) at para 46.

87 See, in particular, *Armstrong v United States* 364 US 40, 49 (1960) ('[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'). The principle laid down in *Armstrong* was used to explain the US Supreme Court's *ad hoc* balancing test for regulatory takings in two more recent cases. See *Yee v City of Escondido* 118 L Ed 2d 153, 162 (1992) and *Concrete Pipe and Products of California Inc v Construction Laborers Pension Trust for Southern California* 124 L Ed 2d 539, 580 (1994).

88 See § 46.5 *infra*.

89 *FNB* (supra) at paras 100(a), (d) and (g), discussed in § 46.5(b) *infra*.

90 See § 46.7 *infra*.

odd for a court to delay its consideration of this aspect of the law to a later stage. To do so, a court would have to counter-factually assess the law as though no compensation had been offered, and then either find the regulatory

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scheme to be non-arbitrary, or arbitrary but justified under s 36, or arbitrary and not justified. Where just and equitable compensation was indeed provided, a finding that the law provided for the arbitrary deprivation of property based on such a counterfactual inquiry would be absurd. To avoid this result, the Court would have to take into account the fact that the scheme of expropriation provided for the payment of compensation in the course of applying the test for arbitrariness. This approach would have the effect of sucking the inquiry into the amount, time and manner of payment of compensation into the arbitrariness test.

'Sucking in' will also occur, as in *FNB*, where a law permits the expropriation of property but does not provide for compensation. Confronted with a law that provided for civil forfeiture (in effect, an uncompensated expropriation) the Court in *FNB* did not move directly, as it might have done, to consider the question whether the state's failure to pay compensation to the appellant was justified under s 36. Rather, it construed s 114 of the Customs and Excise Act<sup>91</sup> as providing for a 'total deprivation' of property,<sup>92</sup> and then proceeded to measure it against the standard set by s 25(1). The fact that the deprivation was total was central to the Court's conclusion that s 114 permitted the arbitrary deprivation of property. Substantially the same result, however, might have been achieved by construing s 114 as permitting the expropriation of property without compensation, in violation of s 25(2) (b).

Where, as in *FNB*, the remedy sought is the striking down of the law, it matters little whether the law is found to be unconstitutional because it provides for the arbitrary deprivation of property or because it permits the expropriation of property without compensation. Where, on the other hand, the proper outcome is for the Court to uphold the law, subject to reading in a requirement that the state pay just and equitable compensation, the Court would have to find that the law provided for the expropriation of property, since the duty to pay compensation only arises where property is expropriated. On the approach laid down in *FNB*, however, such a finding would be unlikely, because the prior finding that the law unjustifiably violated s 25(1) would terminate the constitutional inquiry.

## 46.5 Is the law that provides for the deprivation consistent with section 25(1)?

After the decision in *FNB*, it is clear that every law that deprives a person of property, including by way of expropriation, must satisfy the requirements of s 25(1). These requirements that the deprivation must occur in terms of law of general application, and that the law in terms of which the deprivation occurs must not be arbitrary.

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### (a) Law of general application

91 Act 91 of 1964.

92 *FNB* (supra) at para 108.

The term 'law of general application' as used in s 36 of the Constitution is discussed in the chapter on 'Limitation'.<sup>93</sup> As it occurs in s 25(1), the requirement that any deprivation of property must occur 'in terms of law of general application' is intended to protect individuals from being deprived of property by bills of attainder or other laws that single them out for 'discriminatory treatment', or which 'capriciously interfere with [their] property rights'.<sup>94</sup>

The important consequence of this requirement is that the focus of the s 25(1) inquiry, and indeed the entire property clause inquiry, will invariably fall on a law rather than any other type of state action. Administrative action that deprives a person of property without being authorized by law of general application will be reviewable in the first instance under the Promotion of Administrative Justice Act,<sup>95</sup> and possibly also under s 33 of the Constitution (the right to just administrative action).<sup>96</sup> Similarly, *executive* action that deprives a person of property without being authorized by law of general application will be reviewable in the first instance as a violation of the principle of legality.<sup>97</sup>

### **(b) Arbitrary deprivation of property**

The specification in s 25(1) that 'no law may permit the arbitrary deprivation of property' received by far the greatest attention in the *FNB* decision,<sup>98</sup> and will clearly be central to the balancing of public and private interests in property in future cases. Before the decision in *FNB*, the consensus of academic opinion, relying on the Constitutional Court's decision in *S v Lawrence; S v Negal; S v Solberg*,<sup>99</sup> had been that the requirement of non-arbitrariness in s 25(1) was equivalent to the rationality requirement imposed by s 9(1) of the Constitution.<sup>100</sup> This view was conclusively

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93 See S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

94 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* (supra) at 29H (endorsing the position taken in an earlier version of this Chapter).

95 Act 3 of 2000.

96 See J Klaaren & G Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2002) Chapter 63.

97 See further § 46.5(c) *infra*.

98 See *FNB* (supra) at paras 61-109.

99 1997 (4) SA 1176 (CC).

100 See Geoff Budlender 'The Constitutional Protection of Property Rights: Overview and Commentary' in Budlender et al *Juta's New Land Law* (Original Service, 1998) 1-34-6, Matthew Chaskalson & Carole Lewis 'Property' in Chaskalson et al *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 31-13-4, and Theunis Roux 'Property' in Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 429, 461. But see De Waal et al *The Bill of Rights Handbook* (supra) at 422 (arguing that a deprivation is arbitrary 'if it follows unfair procedures, if it is irrational, or is for no good reason').

rejected in *FNB*. The Court, after an exhaustive survey of foreign law, held that the validity of a deprivation depends on 'an appropriate

relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve'.<sup>101</sup> In so doing, the Court made it clear that the test for arbitrariness 'is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination'.<sup>102</sup> The precise test to be applied is worth quoting in full:

[D]eprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) 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.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.
- (d) 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.
- (e) Generally speaking, when the property in question is ownership of land or a corporeal movable, 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 something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) 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.
- (g) 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 s 36(1) of the Constitution.
- (h) 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

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101 *FNB* (supra) at para 98. Note the similarity between this formulation of the test and the burden-sharing principle articulated in *Armstrong* (supra).

102 *Ibid.* See also *FNB* (supra) at para 65: 'In its context "arbitrary", as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36.'

that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.<sup>103</sup>

On first reading, this passage appears to be a godsend to practitioners long perplexed by the labyrinthine commentaries on the property clause that predated *FNB*. Unfortunately, appearances can be deceptive, and never more so than

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when a court appears to be making the outcome of future cases more predictable. What seems at first blush to be a step-by-step guide to the resolution of virtually any s 25 challenge, on closer examination turns out to be a deliberate retention by the Court of an almost absolute discretion to decide future cases in the manner it deems fit.

To make matters worse, after a lengthy display of comparative law scholarship in the thirty paragraphs leading up to the formulation of this test, the Court in *FNB* scarcely applied it. Instead, it decided the constitutionality of s 114 of the Customs and Excise Act<sup>104</sup> mainly by distinguishing the facts in *FNB* from the facts in several Australian cases.<sup>105</sup> The actual application of the test for arbitrariness is contained in two short paragraphs.<sup>106</sup> The precise holding is that, where the state seeks to deprive a third party of property to exact payment of a debt (in this case a customs debt) owed by another party (the debtor) to the state, there must be a close nexus between: (1) the third party and the transaction giving rise to the debt, (2) the property taken and the debt, and (3) the third party and the debtor.<sup>107</sup> So much is admirably clear. The reasoning leading up to this holding, however, hardly amounts to a systematic application of the factors listed in paras (a) to (h) of the passage quoted above. Rather, the Court simply asserts the legitimacy and importance of the state's general need to exact payment of customs debts, and then reduces the means adopted in the Customs and Excise Act to three brief propositions, concentrating on the lack of connection between means and ends.<sup>108</sup> 'In the absence of any such relevant nexus,' the Court concludes, 'no sufficient reason exists for s 114 to deprive persons other than the customs debtor of their goods.'<sup>109</sup>

On this evidence, there are two keys to understanding the Court's test for arbitrariness. First, because it applies to all deprivations, including expropriations,

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103 *FNB* (supra) at para 100.

104 Act 91 of 1964.

105 *FNB* (supra) at paras 101-7.

106 *Ibid* at paras 108-9.

107 *Ibid* at para 108.

108 These propositions are: the lack of any connection between the third party and the 'transaction giving rise to the customs debt', the lack of any connection between the property taken and the customs debt, and the lack of any representation on the part of the third party inducing the state to act to its detriment in incurring the customs debt (implying that the claimant might have been estopped from challenging the validity of the law had it indeed made such a representation). *Ibid*.

109 *FNB* (supra) at para 109.

the test will be the focus of almost any property clause inquiry. It will be in the application of this test that courts will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public interest underlying, the law in question. Of the remaining stages of the constitutional property clause inquiry, the threshold question concerning the meaning of property may serve to eliminate claims based purely on the impact of the law on the claimant's wealth, rather than on any particular right in property or legally recognised incident of ownership. The only other stages of the inquiry

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that may be meaningfully applied are the distinction between deprivation and expropriation (to determine whether the additional duty to pay just and equitable compensation arises, where it serves the claimant's interests to raise such an argument) and the inquiry into the adequacy of compensation (where this stage provides a more nuanced method for balancing private and public interests in property).

The second key to unlocking the arbitrariness test in *FNB* is to accept that it is a test that leaves much scope for judicial discretion. Both the factors that the court must take into account and the level of scrutiny will vary according to the circumstances. No mere formulaic application of the test will be possible, at least not until many more cases have been decided. Even the stipulation in para (e) of the test that, 'where the property in question is 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 where the property is something different and the property right something less extensive', is preceded by the qualification 'generally speaking'. One of the main exceptions to this rule may be the most contentious, namely the deprivation of ownership rights in land in pursuit of land reform. In this case, as more fully argued in § 46.8 below, the normative force of the declaration in s 25(4)(a) that the 'public interest includes the nation's commitment to land reform', together with the attempted immunisation of land reform from constitutional impediment in s 25(8), may have the effect of lowering the level of scrutiny, even though 'the property in question is ownership of land'.

All that can be said with any certainty is that the level of scrutiny will vacillate between two fixed poles: rationality review at the lower end of the scale, and something just short of a review for proportionality at the other.<sup>110</sup> Where the deprivation totally deprives the claimant of all his or her rights in land or a corporeal movable (and is not effected in pursuit of land reform or other reforms aimed at broadening access to South Africa's natural resources), the law at issue is unlikely to pass constitutional muster unless it provides for something approximating the prompt payment of market value compensation. Where, on the other hand, only some rights in the property are affected, and the impact of the law does not impose a disproportionate burden on those affected when compared to the purpose sought to be achieved, especially where the purpose of the law is land

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110 The level of scrutiny applied may, of course, be crucial to the outcome of the case. At the time of writing s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 had been the subject of two contradictory High Court decisions, and was awaiting consideration by the Constitutional Court. See *Geyser v Msunduzi Municipality* (supra) and *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality* ('*Mkontwana*') unreported SECLD Cases 1238/02 and 903/02 (judgment of Kroon and Leach JJ). The difference between these two decisions is attributable to the fact that a rational basis test was applied in *Geyser*, whereas in *Mkontwana* the Court applied something approximating a proportionality test.

reform or another kind of reform aimed at broadening access to South Africa's natural resources, then the law is unlikely to be found unconstitutional.

Although s 114 of the Customs and Excise Act was not challenged in *FNB* on the basis of procedural fairness, the Constitutional Court held in passing that a deprivation of property is also arbitrary where the law in terms of which the deprivation is effected is procedurally unfair.<sup>111</sup> The inquiry into the procedural fairness of a law for the purposes of s 25(1) must be distinguished from the procedural fairness of particular administrative action. Where the deprivation of property occurs in terms of procedurally unfair administrative action, but the law authorizing such action is not on the face of it procedurally unfair, the proper course is to have the administrative action set aside under the Promotion of Administrative Justice Act.<sup>112</sup> The interaction between the right to procedural fairness and the right not to be arbitrarily deprived of property is discussed in the next section.

### **(c) Deprivation of property and the right to just administrative action**

Since the right to just administrative action, including procedurally fair administrative action, in FC s 33 deals with administrative action rather than 'law', there will generally be no overlap between the property clause and the administrative justice clause with regard to allegations of procedural unfairness. A law that provides for the deprivation of property in a procedurally unfair manner will be challengeable under s 25(1) of the Constitution, and administrative action that deprives a person of property in a procedurally unfair manner will be challengeable under the Promotion of Administrative Justice Act. There are, however, two possible areas of overlap between the property clause and other parts of the Constitution that need to be clarified.

First, in the opinion of some commentators,<sup>113</sup> delegated rule-making falls within the definition of administrative action in the AJA and also within the concept of administrative action for purposes of s 33. Since delegated rules (such as regulations made under an Act of Parliament) undoubtedly constitute 'law of general application', they will in theory be susceptible to review for procedural fairness both under s 25(1) and the AJA.

The second possible area of overlap between s 25(1) and other parts of the Constitution concerns executive action that effects a deprivation of property without

being authorized by a law of general application.<sup>114</sup> Executive action is by definition not reviewable under s 33 or the AJA. However, the Constitutional Court has held that all executive action is subject to the principle of legality, and must be

111 *FNB* (supra) at para 100. See further *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 221E (T) and *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at para 82.

112 Act 3 of 2000 ('the AJA').

113 See Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) § 2.38.

authorised by law.<sup>115</sup> Executive action that effected a deprivation of property without being authorised by a law of general application would therefore be reviewable both under s 25(1) and in terms of the principle of legality.

In respect of both of these potential areas of overlap, the property clause should be applied only as a last resort. Thus, were it indeed held that delegated rule-making is a form of administrative action, the procedural fairness of a delegated rule that effected a deprivation of property should first be tested against the AJA.<sup>116</sup> Similarly, executive action that effected an arbitrary deprivation of property and which was not authorised by law should be reviewed in the first instance as a violation of the principle of legality.

## 46.6 Is the deprivation justified under section 36?

Should the court find that s 25(1) has been infringed, either because the deprivation did not take place 'in terms of law of general application', or because the law authorizing the deprivation was arbitrary, the state could theoretically seek to justify such infringement under s 36 of the Constitution, the general limitations clause.<sup>117</sup> On closer analysis, however, the application of s 36 to infringements of s 25(1) is beset by conceptual difficulties.<sup>118</sup> Deprivations that limit s 25(1) because they do not occur 'in terms of law of general application' cannot be saved by s 36 because the precondition for the application of this section is that the limitation should have occurred 'in terms of law of general application'. And a law that permits the arbitrary deprivation of property, either because it is procedurally unfair or because it provides insufficient reason for the deprivation, is hardly likely to be 'reasonable and justifiable in an open and democratic society', as required by s 36(1).

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In dealing with the issue of justification in *FNB*, the Court acknowledged these difficulties, but assumed in favour of the state that s 36 was applicable to infringements of s 25(1).<sup>119</sup> The Court then proceeded to apply a pared down version of its s 36(1) justification analysis to the facts as follows:

114 Administrative action that effects a deprivation of property without being authorised by a law of general application will generally be reviewable under s 6(2)(f)(i) of the AJA (because it is not authorised by the empowering provision on which it ostensibly relies). There may be some instances, however, where action undertaken by a member of the administration does not constitute administrative action because it does not amount to the exercise of a public power or the performance of a public function in terms of any legislation. (See the definition of administrative action in s 1 of the AJA.) Such action will therefore not be reviewable under the AJA, but will be reviewable in terms of the principle of legality, therefore precluding the need to resort to the property clause.

115 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59.

116 Of course, if delegated rule-making were found *not* to constitute administrative action, such action would generally not be reviewable for procedural fairness, except if the law concerned effected a deprivation of property, in which case it would be reviewable for procedural fairness under s 25(1), following the holding in *FNB*.

117 See S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* supra.

118 See De Waal et al *The Bill of Rights Handbook* (supra) at 426-8.

FNB's ownership in the vehicles concerned is ultimately completely extinguished by the operation of s 114 of the Act. As against this the Commissioner gains an execution object for someone else's debt. But, as already indicated, there is no connection between FNB or its vehicles and the customs debt in question. Under these circumstances the object achieved by s 114 is grossly disproportional to the infringement of FNB's property rights.

This passage tends to confirm the view that s 36 has 'no meaningful application' to infringements of s 25(1).<sup>120</sup> The issues addressed by the Court in this passage are precisely the same as those addressed in its test for arbitrariness. Thus, the complete extinguishment of First National Bank's ownership of the vehicles is addressed in paras (d) and (f) of the arbitrariness test, which requires the Court to examine 'the extent of the deprivation' and whether it 'embraces all the incidents of ownership'. Likewise, the absence of a 'connection between FNB or its vehicles and the customs debt' was, as indicated above, central to the Court's finding that 'no sufficient reason' existed for the deprivation.<sup>121</sup>

In cases where the test for arbitrariness approximates rational basis review rather than proportionality, the conceptual case for the non-application of s 36 is strongest: a law that infringes s 25(1) for lack of means-end rationality will never be capable of justification under the general limitations clause. At the other end of the scale, where the test for arbitrariness approaches a test for proportionality, the application of s 36 can at best confirm a conclusion already reached under s 25(1), as illustrated by *FNB*.<sup>122</sup>

For similar reasons, the reference to s 36(1) in s 25(8) of the Constitution is probably redundant. Section 25(8) provides:

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).

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The intention behind this provision was to insulate land reform measures from constitutional impugment under s 25. Unfortunately, subsection (8) has been formulated in a way that tends to defeat this purpose. The addition of the proviso indicates that the Constitutional Assembly contemplated that certain land reform measures might 'depart' from the provisions of the property clause. The word

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119 *FNB* (supra) at para 110.

120 De Waal et al *The Bill of Rights Handbook* (supra) at 427.

121 See *FNB* (supra) at para 109. See also *Mkontwana* (supra) at paras 60-67 (holding that the limitation imposed by s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 was not reasonable and justifiable for reasons similar to those given by the Court in finding that this section provided for the arbitrary deprivation of property).

122 See also *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204, 222E (T). The contrary finding, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), that an infringement of s 25(1) was justified under s 36, is explicable on the basis that the limitations clause was applied to justify the infringement of other rights as well, meaning that the finding in this case that the law was justified was not specific to the finding that the law infringed s 25(1). In addition, *Bathgate* predated *FNB*, and accordingly did not apply the arbitrariness test as laid down in that case.

'departure' in s 25(8), however, has no meaning other than a limitation of the rights in s 25. Thus, s 25(8) in effect provides that a land reform measure that limits a right entrenched in s 25 must comply with s 36(1). But s 36(2) in any event states that: 'Except as provided in [s 36(1)] . . . no law may limit any right entrenched in the Bill of Rights.' The proviso to s 25(8) was therefore unnecessary. At most it supports the inference to be drawn from s 36(2).<sup>123</sup>

The only other interpretative weight that can be given to s 25(8) is that the court should apply a lower level of scrutiny when testing land reform measures against s 25 than it does in respect of other measures. After *FNB*, however, it is clear that the appropriate point in the analysis for this type of 'measure-based' distinction is not the general limitations stage, but the test for arbitrariness. In respect of a land reform measure, for example, the court might decide to depart from the general rule laid down in *FNB* that 'where the property in question is ownership of land . . . a more compelling purpose will have to be established'.<sup>124</sup> The normative force of s 25(8) would justify weakening the standard of review in such a situation, even where the measure deprived the complainant of ownership of land. This type of adjustment to the level of scrutiny must, however, be made when applying the test for arbitrariness. Once that test has been applied, the same conceptual difficulties that beset the application of s 36 to infringements of s 25(1) will render the application of s 25(8) redundant.

## 46.7 Does the deprivation amount to an expropriation of property?

According to s 25(2) of the Final Constitution, the state may only expropriate property on three conditions. First, it must do so in terms of law of general application. Second, the law authorising the expropriation must be enacted in pursuit of 'a public purpose' or must otherwise be 'in the public interest'. Third, the law must provide for the payment of compensation, either by agreement or as determined by a court of law. Section 25(3) of the Constitution adds more detail to the third condition by specifying the standard that the compensation scheme must meet if it is to pass constitutional muster.

After *FNB*, it is clear that these requirements must be met *in addition to* the requirements laid down in s 25(1). Since the requirement that the law should be a law of general application appears in both s 25(1) and (2), a law that provides for the expropriation of property must, in addition to meeting the requirements in

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s 25(2), provide 'sufficient reason' for depriving the claimant of property by way of expropriation and be procedurally fair. Put differently, the *consequence* of classifying a law as providing for the expropriation of property is to add two requirements to the list of requirements that the state must meet if the law is to pass constitutional muster. First, the law must have been enacted in pursuit of 'a public purpose' or be otherwise 'in the public interest'. Second, compensation must be paid.

In comparative constitutional law, the categorization of a law as providing for the expropriation (or 'compulsory acquisition' or 'taking') of property as opposed to the mere deprivation (or 'regulation') of property is often the main point of contestation

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123 See *Nhlabathi v Fick* (supra) at para 33.

124 See para (e) of the test for arbitrariness as set out in *FNB* (supra) at para 100.

between the constitutional complainant and the state. Much of the US Supreme Court's takings jurisprudence, for example, concerns whether a law that purports to be a mere regulation of property 'goes too far',<sup>125</sup> and in so doing amounts to an expropriation of property (or 'regulatory taking'). Similarly, in the Commonwealth, a great deal of energy is put into determining the boundary between the deprivation and compulsory acquisition of property.<sup>126</sup>

In South Africa, by contrast, the distinction between deprivation and expropriation has lost much of its significance. The *FNB* Court treated expropriations as a form of deprivation<sup>127</sup> and insisted that an impugned law, even where it clearly provided for the expropriation of property, first be tested for compliance with s 25(1). As *FNB* itself illustrates, a law that totally deprives the claimant of its property, without providing for compensation, is unlikely to survive the Court's test for arbitrariness.<sup>128</sup> From the point of view of the constitutionality of such a law, it matters little whether it is classified as providing for a deprivation of property that does not amount to expropriation, or as a law that provides for the expropriation of property. Similarly, a law that expressly provides for the expropriation of property subject to compensation, but which is not aimed at achieving 'a public purpose or in the public interest', is unlikely to provide sufficient reason for depriving the claimant of property, and therefore unlikely to survive constitutional scrutiny beyond the s 25(1) stage. The only situation in which a claimant might have an interest in persuading the court that the law being challenged provides for the expropriation of property rather than the arbitrary deprivation of that property is where it wishes the court to uphold the law, and to read in a requirement that the state pay at least some compensation (where

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none is provided) or more compensation or better structured compensation (where the essence of the complaint is that the amount, time and manner of the compensation is not just and equitable). Where, as in *FNB*, the purpose of the challenge is to have the law struck down, a finding that the law provides for the arbitrary deprivation of property is as good as (from the claimant's perspective) a finding that the law provides for expropriation and fails to meet the two additional requirements set by s 25(2).

The two leading South African decisions on the distinction between expropriation and other forms of deprivation of property are those in *Harksen v Lane NO*<sup>129</sup> and *Steinberg v South Peninsula Municipality*.<sup>130</sup> In *Harksen*, the Constitutional Court was

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125 *Pennsylvania Coal Co v Mahon* 260 US 393, 415-16 (1922).

126 See Thomas Allen 'Commonwealth Constitutions and the Right Not to be Deprived of Property' (1993) 42 *ICLQ* 523. But see Tom Allen 'The Human Rights Act (UK) and Property Law' in Janet McLean (ed) *Property and the Constitution* (1999) 147, 151 (arguing that the distinction between expropriation and deprivation in Article 1 to the First Protocol on the European Convention on Human Rights is 'less important than it is in the USA' because compensation is not guaranteed in every case).

127 *FNB* (supra) at para 57.

128 Cf *Nhlabati v Fick* (supra) at paras 27-31 (law providing for the appropriation of a grave without compensation found not to amount to an arbitrary deprivation of property). The case illustrates that where the property right affected forms a small part only of the claimant's overall estate, the non-payment of compensation may survive the test for arbitrariness.

asked to declare s 21(1) of the Insolvency Act<sup>131</sup> unconstitutional in terms of s 28(3) of the Interim Constitution, which guaranteed the payment of compensation for any expropriation of property. Section 21(1) of the Insolvency Act provides that:

The additional effect of the sequestration of the separate estate of one or two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property . . . of the spouse whose estate has not been sequestrated . . . as if it were the property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly. . . .

Writing for the majority, Goldstone J assumed in favour of the appellant, without deciding, that the effect of this provision is that, on sequestration of an insolvent spouse's estate, 'full ownership in the solvent spouse's property did in fact pass to the trustee of the insolvent estate'.<sup>132</sup> Even if this assumption were correct, Goldstone J held, the appellant's property had not been expropriated. In South Africa, expropriation was generally understood to be 'the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.'<sup>133</sup> Before a law could be said to provide for expropriation, it must be clear that the legislature intended that the public authority should *permanently* acquire the affected party's property for a public purpose.<sup>134</sup> Section 21(1) of the Insolvency Act did not provide for expropriation in this sense. Rather, it provided for the *temporary* divestment of the appellant's property, subject to proof of ownership.<sup>135</sup>

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This decision has been criticised for laying down an inflexible rule that the temporary compulsory acquisition of property by the state can never amount to expropriation.<sup>136</sup> In the US Supreme Court's takings jurisprudence, by contrast, greater emphasis is placed on the economic impact of a law, and whether it is fair to expect the complainant to bear the burden of such impact without compensation.<sup>137</sup> On such an approach, the duration of the expropriation is not necessarily decisive.

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129 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 CC.

130 2001 (4) SA 1243 (SCA).

131 Act 24 of 1936.

132 *Harksen v Lane NO* (supra) at para 31.

133 *Ibid* at para 32.

134 *Ibid* at para 37.

135 *Ibid*.

136 See AJ van der Walt & Henk Botha 'Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO*' (1998) 13 *SAPL* 17 and Theunis Roux 'Constitutional Protection of Property and Land Reform' *Annual Survey of South African Law* 1997 332, 333-4.

Nevertheless, the general approach to the distinction between expropriations and other forms of deprivation in *Harksen* is likely to be followed in future cases. In short, a law may be said to provide for expropriation where, in addition to whatever other impact the law may have on the claimant's property, an organ of state acquires the property. To this must be added the important qualification that the effect of an expropriation may also be to transfer the property from the claimant to a third party, other than an organ of state, where the benefit thereby extended serves a 'public purpose' or is otherwise 'in the public interest'.<sup>138</sup>

In *Steinberg v South Peninsula Municipality* — a Supreme Court of Appeal decision handed down after *Harksen* — the appellant sought an order 'directing the respondent to take all steps necessary "to complete the expropriation process implemented in respect of", or, alternatively, to expropriate, certain immovable property of which she [was] the owner'.<sup>139</sup> The appellant had purchased a residential house that was affected by a road scheme. The scheme had been declared some twenty-five years prior to the purchase. But it had never been implemented. The appellant knew about the scheme when purchasing the house, but claimed that the respondent's continuing failure to implement it amounted to the 'constructive expropriation' of her property.<sup>140</sup> In the course of argument, direct reliance was placed on various decisions of the US Supreme Court in which that Court has elaborated its 'inverse condemnation' or 'regulatory takings' doctrine. In terms of this doctrine, a regulation that goes 'too far'<sup>141</sup> may in certain circumstances be regarded as an expropriation of property.<sup>142</sup>

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The significance of the Supreme Court of Appeal's decision in response to this argument is not so much the rule laid down — that 'advance notification of a possible intention' on the part of the state to expropriate the complainant's property does not in itself amount to expropriation<sup>143</sup>— but the Court's *obiter* remark that

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137 See, for example, *Armstrong v United States* 364 US 40 (1960); *Penn Central Transportation Co v City of New York* 438 US 104 (1978); and Frank I Michelman 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard LR* 1165.

138 See *Nhlabati v Fick* (supra) at para 32 (law authorising appropriation of grave on landlord's property by farmworker tenant assumed to be a 'de facto expropriation of a servitude over the land concerned').

139 *Steinberg* (supra) at para 1.

140 *Ibid.*

141 See *Pennsylvania Coal Co v Mahon* 260 US 392 415-16 (1922); *Penn Central Transportation Co v City of New York* (supra).

142 See further *Mugler v Kansas* 123 US 623 (1887); *Pumpelly v Green Bay and Mississippi Canal Co* 80 US (13 Wall) 166 (1871); *Goldblatt v Town of Hempstead* 369 US 590 (1962); *Penn Central Transportation Co v City of New York* 438 US 104 (1978); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Keystone Bituminous Coal Association v De Benedictis* 480 US 470 (1987); *Nollan v California Coastal Commission* 483 US 825 (1987).

143 *Steinberg* (supra) at para 12.

there may be room for the development of a doctrine akin to constructive expropriation in South Africa — particularly where a public body utilizes a regulatory power in a manner which, taken in isolation, can be categorized as a deprivation of property rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body.

Although the Court went on to hold that it was not necessary to decide whether 'a doctrine of constructive expropriation can or should be developed in South Africa',<sup>144</sup> this remark is interesting for what it reveals about the Supreme Court of Appeal's preparedness, even after the Constitutional Court's decision in *Harksen*, to countenance a more complex conception of the distinction between expropriations and other forms of deprivation. *Steinberg* also raises the pertinent question of whether, after the decision in *FNB*, South African constitutional property law can be said to have moved closer towards, or further away from, what is sometimes ominously referred to as the 'spectre' of the US Supreme Court's regulatory takings jurisprudence.

For the reasons given in the introduction to this section, *FNB* has minimised rather than increased the likelihood that something akin to the US Supreme Court's regulatory takings doctrine will be adopted in South Africa.<sup>145</sup> The essential function performed by this doctrine in US takings law is to ensure that a law that has an adverse economic impact on the constitutional claimant should be treated as providing for expropriation where to do otherwise would be to impose a disproportionate burden on the claimant. After *FNB*, however, such a law is likely to be found to provide for the arbitrary deprivation of property, and would therefore be struck down as a violation of s 25(1), rendering the question whether it also provides for the constructive expropriation of property redundant.

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## 46.8 Does the expropriation comply with sections 25(2) and (3)?

A law that is found to provide for the expropriation of property must, in addition to the three requirements set by s 25(1), satisfy two further requirements. First, it must have been enacted 'for a public purpose or in the public interest'.<sup>146</sup> Second, it must provide for the payment of compensation: the amount, time and manner of payment of which must have been agreed or 'decided or approved by a court'.<sup>147</sup>

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144 Ibid at para 9.

145 For a (conceptually confused) contrary view, see Kevin Hopkins & Kate Hofmeyr 'New Perspectives on Property' (2003) 120 *SALJ* 48, 57-8. The flaw underlying the authors' argument in these pages is the assertion that the test for arbitrariness may produce a finding that the law under challenge provides for the expropriation of property. This is incorrect. The test for arbitrariness may produce at most a finding that the law provides for the arbitrary deprivation of property. Such a finding will terminate the constitutional inquiry, subject to the notional application of s 36. The question whether the law effects a regulatory taking or constructive expropriation of property is a separate question, which is less likely to arise after *FNB* because laws that are amenable to this type of interpretation will tend to be struck down as arbitrary deprivations of property rather than uncompensated expropriations.

146 Section 25(2)(a).

147 Section 25(2)(b).

## **(a) 'For a public purpose or in the public interest'**

Since all expropriations are to be treated as deprivations, and subjected first to the standard set by s 25(1), it is highly unlikely that a law that provides for the expropriation of property contrary to s 25(2)(a) will in fact be tested against this requirement. Logically, a law that does not serve a public purpose and is not in the public interest is unlikely to provide 'sufficient reason' for any deprivation of property it may authorise, and is therefore unlikely to pass the *FNB* test for arbitrariness. Conversely, laws that *do* pass that test are unlikely to be set aside under s 25(2)(a) because of the very broad power given to the state by this paragraph to expropriate property for a public purpose or in the public interest. It is difficult to conceive of a court finding that a law that did *not* permit the arbitrary deprivation of property was *not* enacted for a public purpose or in the public interest. The typical example of a law that would fall foul of s 25(2)(a) is a law enacted in pursuit of the interests of a single individual. But such a law would invariably be found to permit the arbitrary deprivation of property, and would thus be struck down before s 25(2)(a) was applied.

The fact that a law permits the expropriation of property for the purposes of transferring it to a third party (rather than the state) would not give rise to a finding of unconstitutionality under s 25(2)(a), provided that the overall purpose of the law was to promote the public interest. For example, Chapter III of the Land Reform (Labour Tenants) Act<sup>148</sup> provides for the judicial expropriation and transfer of property from one private individual to another. The state at no point acquires the property thus expropriated. The entire scheme of expropriation provided for in the Act, however, is clearly in the public interest, and therefore not unconstitutional. In case there were any doubt about this, s 25(4)(a) of the Constitution expressly 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'.

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## **(b) Just and equitable compensation**

The second requirement imposed by s 25(2) is that a law that authorises the expropriation of property must provide for the payment of compensation. Barring an agreement between the state and the party affected, the amount and the time and manner of payment of compensation must be determined by a court of law. Section 25(3) provides that all three aspects of the compensation scheme must be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected'. In assessing this requirement, the court is enjoined by s 25(3) to have 'regard to all relevant circumstances'. A non-exhaustive list of circumstances is thereafter provided as follows:

- (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 improvement of the property; and
- (e) the purpose of the expropriation.

## (i) A just and equitable amount of compensation

Ordinarily, a reference to just and equitable compensation in a constitution means market value compensation.<sup>149</sup> However, by identifying as issues relevant to the amount of compensation the extent of state investment and subsidy in the acquisition and improvement of the property,<sup>150</sup> the use to which the property is being put, and the history of its acquisition, the Constitutional Assembly clearly contemplated that compensation at less than market value could be awarded in appropriate cases under s 25(3). The Constitutional Court has not as yet been asked to consider this question. In *Khumalo v Potgieter*,<sup>151</sup> however, the Land Claims Court had occasion to interpret the constitutional compensation standard as incorporated in s 23(1) of the Land Reform (Labour Tenants) Act.<sup>152</sup> The Court held that just and equitable compensation should be assessed in two stages. First, the court must determine the market value of the property by using accepted valuation methods and principles, including the comparable sales method (where appropriate) and the so-called *Pointe Gourde* principle, which requires the court to disregard the effect of the scheme of expropriation on the value of the property.<sup>153</sup> After arriving at the market value, the court must next 'consider to what

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extent the market value . . . must be adjusted according to the dictates of the other factors referred to in paragraphs (a), (b), (d) and (e) of section 25(3).<sup>154</sup>

Given the range of factors in s 25(3), some of which are quantitative and others qualitative, it is hard to think how else the task of determining just and equitable compensation could have been approached. By definition, disputes about the quantum of compensation are disputes about rands and cents. Some method therefore has to be found of translating the rather vague criteria in s 25(3) into terms that are readily quantifiable. The method suggested by the Land Claims Court, of first determining the market value of the property according to accepted methods, and thereafter adjusting this value upwards or downwards according to the Court's sense of the equities of the matter, is a commonsense approach that should ultimately be endorsed by the Constitutional Court.

## (ii) Payment of compensation in a just and equitable manner

149 See A Eisenberg 'Different Formulations of Compensation Clauses' (1993) 9 *SAJHR* 412; G Erasmus (ed) *Compensation for Expropriation: A Comparative Study* Vol 2 (1990).

150 Section 25(3)(d).

151 [2000] 2 All SA 456 (LCC) ('*Khumalo II*'). For the background to this case, see the Court's earlier judgment in *Khumalo v Potgieter* [2000] 1 All SA 24 (LCC).

152 *Supra*. Section 23(1) provides that '[t]he owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land'.

153 *Khumalo II* (*supra*) at paras 23-6.

154 *Khumalo II* (*supra*) at para 93. See also *Ex parte Former Highland Residents; In re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at paras 25-38 (applying the same method in assessing just and equitable compensation for the purposes of s 2(2) of the Restitution Act). This decision was cited with approval in *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 23.

Section 25(2) and (3) require that the manner of payment of compensation must also be just and equitable, reflecting 'an equitable balance between the public interest and the interests of those affected'. It is possible that a law could pass constitutional muster even though it provided for compensation in a form other than cash (for example, government bonds). The test would be whether the private interest in cash compensation was outweighed by the public interest in paying compensation in that other form. Even if that were the case, the overall manner of payment of compensation would have to be 'just and equitable' on the basis of the factors listed in s 25(3).

### (iii) Payment of compensation within a just and equitable time

Like the amount and manner of payment of compensation, the time within which compensation is paid must be just and equitable. Ordinarily, prompt payment of compensation would have to follow an expropriation.<sup>155</sup> Sections 25(2) and (3) do, however, leave open the possibility of delayed compensation in circumstances where this is just and equitable. The presence or absence of such circumstances would have to be assessed by the court, taking into account the same factors that are relevant to the quantification of just and equitable compensation. For example, the use to which property was being put could be relevant to the time within

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which it was just and equitable that compensation be paid. If an owner were not using a particular property and did not intend to derive any material benefit from it in the immediate future, it might be just and equitable to delay the payment of compensation.

## 46.9 Is the expropriation justified under section 36?

Given the algorithmic<sup>156</sup> structure of the constitutional property clause inquiry as set out in *FNB*, the final stage of the inquiry will be reached in exceptional cases only.<sup>157</sup> A law that provides for the expropriation of property will first be tested against s 25(1), in which case s 36 will be applied in the first instance to justify an infringement of this provision. Only laws that are found *not* to violate s 25(1), or which are saved by s 36, are in principle subject to the discipline of s 25(2) and (3), and only then if they are found to provide for expropriation. This means that the final stage of the constitutional property clause inquiry applies in theory to laws of general application that do not provide for the (unjustifiable) arbitrary deprivation of property, but which are found to authorise the expropriation of property other than for a public purpose or in the public interest, and/or which fail to provide for the payment of just and equitable compensation. Very few such laws will survive constitutional scrutiny until the final stage. For the aforementioned reasons,<sup>158</sup> a law providing for the expropriation of property that is not aimed at achieving a public

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155 Erasmus (ed) *Compensation for Expropriation: A Comparative Study* (supra).

156 See De Waal et al *The Bill of Rights Handbook* (5<sup>th</sup> Edition, forthcoming, 2004) (supra) and the discussion at § 46.1 supra.

157 *Nhlabathi v Fick* (supra) (s 36 applied to justify appropriation of grave without compensation in terms of s 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997).

158 See § 46.7 supra.

purpose or is not in the public interest will in all likelihood fail the arbitrariness test mandated by s 25(1). In the unlikely event that it survives constitutional scrutiny to the penultimate stage, it will be struck down for violating s 25(2)(a). Thereafter, the state would be faced with the conceptually impossible task of having to justify, as being reasonable and justifiable in an open and democratic society, a law that, *ex hypothesi*, was enacted in pursuit of a non-public, private interest.<sup>159</sup> Similarly, a law that fails to provide for just and

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equitable compensation will only be reasonable and justifiable under s 36 where the adverse impact of the law is minimal in relation to the object sought to be achieved.<sup>160</sup>

## 46.10 Land rights

Subsections (5), (6), (7) and (9) of s 25 confer certain rights to land. These rights are discussed in a separate chapter.<sup>161</sup>

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159 Cf Hopkins & Hofmeyr 'New Perspectives on Property' (supra) at 61-2. In support of their argument that s 36 may have meaningful application, the authors of this article posit the example of a law providing for compulsory community service for plastic surgeons in order to provide medical assistance to motor vehicle accident victims. Such a law would impose a disproportionate burden on plastic surgeons and would consequently be struck down at the s 25(1) stage. The question whether it served a public purpose or was in the public interest as required by s 25(2) would never arise. If the court made a mistake, and found that the law did not violate s 25(1), it would have to make two further mistakes before s 36 could have meaningful application. First, it would have to find that that such a law was not in the public interest, and, second, it would have to find that a law that was not in the public interest was reasonable and justifiable in an open and democratic society. To say, as these authors do, that, '[f]or as long as there are arguments available to both sides, there is a possibility that the court may find for the applicants' is equivalent to saying that a wrong argument may be right because courts sometimes make mistakes. Ibid at 61.

160 See *Nhlabathi v Fick* (supra) at para 35. In this case the Land Claims Court, applying s 36 after a finding that s 25(2) had been violated, upheld a law that granted a farmworker tenant the right to bury a relative on land belonging to someone else. The impugned provision was found to be justified, *inter alia*, because 'the right [expropriated did] not constitute a major intrusion into the property rights of the landowner.' Ibid.

161 See J Du Plessis and J Brickhall 'Land' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 48.