

**A CRITICAL ANALYSIS OF THE DEFINITION OF “PROPERTY” IN CLAUSE 1  
OF THE EXPROPRIATION BILL B4D – 2015**

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## **Declaration**

I, Edward Otten, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

This project is an original piece of work which is made available for photocopying and for inter-library loan.

Signed and dated at Pietermaritzburg on the 10 March 2017.

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Edward Otten

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## **Abstract**

Property remains a contentious issue in the new South Africa due to the unequal distribution of wealth. At the heart of this emotive issue is the question of land reform - owing to the history of racially based land dispossession. Politicians have been discussing using expropriation as a method to transform land ownership and redress past injustices.

The Expropriation Bill has been introduced in this context with the aim to assist the state in its land reform policies. The Bill contains a definition of property (which is capable of expropriation) that simply directs the reader to Section 25 of the Constitution, which itself has no express or limited definition of property.

The logical question which faces scholars, politicians, foreign investors and the man-on-the-street therefore is, “What constitutes property for the purpose of section 1 of the 2015 Expropriation Bill?”

## Table of Contents

<b>CHAPTER ONE – INTRODUCTION AND BACKGROUND TO THE TOPIC</b> .....	7
<b>1.1 Introduction</b> .....	7
<b>1.2 Synopsys of the context of expropriation in South Africa</b> .....	7
<b>1.3 Main objectives of this dissertation</b> .....	8
<b>1.4 Research question and sub-questions</b> .....	9
<b>1.5 Methodology</b> .....	10
<b>1.6 Structure of dissertation</b> .....	10
<b>1.7 Limitations of the dissertation</b> .....	11
<b>CHAPTER TWO – TYPES OF PROPERTY IN TERMS OF PRIVATE LAW</b> .....	13
<b>2.1 Introduction</b> .....	13
<b>2.2 The common law</b> .....	13
<b>2.3 Sources of property law</b> .....	14
<b>2.4 The concept of a thing</b> .....	15
<b>2.5 The classification of things</b> .....	17
<i>(a) Introduction</i> .....	17
<i>(b) Classifying things according to their relation to persons</i> .....	17
<i>(c) Things classified according to their nature</i> .....	17
<b>2.6 The concept of a real right</b> .....	20
<b>2.7 Creditor’s rights and intellectual property rights</b> .....	21
<b>2.8 Statutes which create new types of property</b> .....	22
<b>2.9 Virtual property</b> .....	24
<b>2.10 Summary and conclusion</b> .....	24
<b>CHAPTER THREE – DEFINITION OF PROPERTY IN THE CONSTITUTION</b> .....	25
<b>3.1 Introduction</b> .....	25
<b>3.2 The purpose of section 25</b> .....	27
<b>3.3 The section 25 analysis</b> .....	29
<b>3.4 The constitutional concept of property</b> .....	30

<b>3.5 Corporeal objects</b> .....	32
<b>3.6 Ownership and limited real rights</b> .....	33
<b>3.7 Creditors' rights</b> .....	34
<b>3.8 Intellectual property rights</b> .....	35
<b>3.9 Commercial interests and new property</b> .....	36
<b>3.10 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape</b> .....	37
<i>(a) Introduction</i> .....	37
<i>(b) The facts</i> .....	38
<i>(c) The judgment</i> .....	38
<i>(d) Froneman J's values-based approach</i> .....	39
<i>(e) Madlanga J's attributes-based approach</i> .....	41
<i>(f) Moseneke's dissenting approach</i> .....	43
<b>3.11 Conclusion</b> .....	43
<b>CHAPTER FOUR – LEGISLATION ENABLING EXPROPRIATION</b> .....	44
<b>4.1 Introduction</b> .....	44
<b>4.2 The Expropriation Act</b> .....	44
<b>4.3 The draft policy on expropriation</b> .....	46
<i>(a) Introduction</i> .....	46
<i>(b) The legislative framework and its challenges</i> .....	46
<i>(c) Principles identified to guide the draft policy</i> .....	47
<b>4.4 The Expropriation Bill 2008</b> .....	48
<b>4.5 The Expropriation Bill 2013</b> .....	48
<b>4.6 The Expropriation Bill 2015</b> .....	49
<b>4.7 The definition of property in the Expropriation Bill 2015:</b> .....	50
<i>(a) Introduction</i> .....	50
<i>(b) The ordinary grammatical meaning</i> .....	50
<i>(c) The constitutional meaning</i> .....	51
<b>4.8 The Expropriation Bill vs the Expropriation Act</b> .....	52

<b>4.9 Implications of the Expropriation Bill 2015</b> .....	52
<i>(a) Introduction</i> .....	52
<i>(b) Uncertainty for foreign investors</i> .....	52
<i>(c) Opening flood gates to court challenges</i> .....	53
<i>(d) Inadequate processes to accommodate different types of property</i> .....	54
<b>4.10 Alternative definitions</b> .....	54
<i>(a) Introduction</i> .....	54
<i>(b) South African Institute for Race Relations</i> .....	54
<i>(c) Democratic Alliance</i> .....	55
<b>4.11 Conclusion</b> .....	56
<b>CHAPTER FIVE – ANALYSIS AND RECOMMENDATIONS</b> .....	57
<b>5.1 Introduction</b> .....	57
<b>5.2 The different definitions of property</b> .....	57
<b>5.3 The practical difficulty posed by a lack of an “in-text” definition</b> .....	57
<b>5.4 Property for the purpose of section 25</b> .....	58
<b>5.5 Impact of the constitutional definition of property on the Expropriation Bill</b> .....	58
<b>5.6 The purpose for no explicit definition of property in the Constitution</b> .....	59
<b>5.7 Future difficulties in the constitutional jurisprudence</b> .....	60
<i>(a) Introduction</i> .....	60
<i>(b) The values-based approach</i> .....	61
<i>(c) The attributes-based approach</i> .....	63
<i>(d) Conclusion</i> .....	65
<b>5.8 Alternative definitions and policy recommendations</b> .....	65
<b>5.9 Conclusion</b> .....	67
<b>BIBLIOGRAPHY</b> .....	68
<b>Books</b> .....	68
<b>Journal articles</b> .....	69
<b>Theses and dissertations</b> .....	71
<b>Online resources</b> .....	71

<b>Table of Statutes</b> .....	73
<b>Table of Cases</b> .....	74

## CHAPTER ONE – INTRODUCTION AND BACKGROUND TO THE TOPIC

### 1.1 Introduction

The expropriation of land and movable property, in the interest of advancing the agenda and goals of the state, is not a unique concept to South Africa. It is possible to find laws granting the ability to expropriate property to the state throughout the entire world. However, when a Bill is drafted so that property means ‘[p]roperty as contemplated in section 25 of the Constitution’<sup>1</sup> and the Constitution only expressly contemplates property to mean that it is “not limited to land”,<sup>2</sup> it poses a problem with regard to the certainty of what exactly can be expropriated by the state under the proposed legislation.

### 1.2 Synopsis of the context of expropriation in South Africa

In the South African context, the expropriation process for movable and immovable property is presently provided for by the Expropriation Act passed in 1975.<sup>3</sup> This Act vested the state with the lawful capacity to compel a citizen to part with their property and so acquire property needed to advance the objectives of the state. This Act applies to movable and immovable property<sup>4</sup> and provides that compensation for expropriation should be the amount “which the property would have realized if sold on the date of notice in the open market by a willing-seller to a willing-buyer”.<sup>5</sup>

At the dawn of democracy the Interim Constitution<sup>6</sup> and now our present Constitution<sup>7</sup> made provision for the protection of property rights, but also for the state to expropriate property for a public purpose or in the public interest. While this dissertation does not seek to explore

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<sup>1</sup> Section 1 Expropriation Bill B4D-2015, ISBN 978-1-4850-0314-4. Henceforth referred to as the “Expropriation Bill 2015”.

<sup>2</sup> Section 25(4)(b) of the Constitution of the Republic of South Africa, 1996. Henceforth referred to as the “Constitution”.

<sup>3</sup> Act 63 of 1975. Henceforth referred to as the “Expropriation Act”.

<sup>4</sup> See the definition of property in section 1 of the Expropriation Act.

<sup>5</sup> Section 12(a)(i) of the Expropriation Act.

<sup>6</sup> Constitution of the Republic of South Africa, Act 200 of 1993. Henceforth referred to as the “Interim Constitution”.

<sup>7</sup> The right to property was protected in section 28 of the Interim Constitution and is protected in section 25 of the Constitution.

the details of the historical development of the constitutional property clause,<sup>8</sup> it will touch on the interpretation of this clause as it currently stands to examine the scope of property for the purpose of the Expropriation Bill 2015.<sup>9</sup>

The introduction of constitutionalism in South Africa requires that all legislation and common law be developed to ensure that it promotes the spirit, purport and objects of the Constitution and further promotes a society based on human dignity, equality and freedom.<sup>10</sup> The Constitution, therefore, is transformative in nature, as opposed to being conservative/preservative in nature,<sup>11</sup> and this should be borne in mind when considering its application to the field of property law in South Africa.

It is on the above basis that existing laws are being reviewed both by responsible departments who use existing legislation in their functions and by the courts when a challenge to the constitutional validity of provisions of legislation is raised.

It is in this context that the Expropriation Bill 2015 was introduced and it is in this context that this dissertation seeks to critically assess the scope and ambit of the definition of property in clause 1 of the Expropriation Bill 2015.

### **1.3 Main objectives of this dissertation**

As indicated above, the purpose of this dissertation is to critically assess the scope and ambit of the definition of property in clause 1 of the Expropriation Bill 2015 in light of the fact that the Bill does not provide a substantive definition. Instead, it simply refers the reader to section 25 of the Constitution, which simply provides that “property is not limited to land”.

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<sup>8</sup> This a broad reference to the whole of section 25 of the Constitution which is frequently used in various academic literature.

<sup>9</sup> Although the Expropriation Bill 2015 has been passed by both the National Assembly and the National Council of Provinces, the President has referred the Bill back to Parliament for reconsideration in terms of section 79(1) of the Constitution. In his referral the President indicated that he has reservations about extent to which the National Council of Provinces and the Provincial Legislatures have facilitated public participation in the legislative process (see the letter referring the Expropriation Bill (B4D – 2015) to the National Assembly dated 14 February 2017, available at: [http://legalbrief.co.za/media/filestore/2017/02/zuma\\_on\\_expropriation\\_bill.pdf](http://legalbrief.co.za/media/filestore/2017/02/zuma_on_expropriation_bill.pdf), accessed on 17 February 2017).

<sup>10</sup> Section 39 of the Constitution.

<sup>11</sup> FI Michelman “Expropriation, Eviction, and the Dignity of the Common Law” (2013) 24(2) *Stellenbosch Law Review* 245.

As this dissertation will illustrate, the constitutional concept of property is a particularly wide one and stretches far beyond the narrow common law concept of property of real rights in things to include, *inter alia*, creditors' rights in performances, intellectual property rights in intellectual property, intangible commercial interests such as a grocer's wine licence and even "new property" such as a government housing allowance.<sup>12</sup>

Given that the constitutional concept of property is not limited to land or movables, the decision to base the definition of property in the Expropriation Bill 2015 on the conceptual concept of property may prove to be a potential slippery slope for the security of property rights in South Africa.

The principle concern of this dissertation, therefore, will be to explore what is presently considered to be property and therefore what is presently capable of being expropriated should the definition of property in the Expropriation Bill 2015 not be revised

#### **1.4 Research question and sub-questions**

The purpose of this dissertation is to critically analyse the definition of property in clause 1 of the Expropriation Bill 2015. More particularly, the purpose of this dissertation is to critically discuss the following research questions:

- (a) How is property defined in terms of common law and in the Constitution?
- (b) How has the Constitution, if at all, altered the definition of property from what it was previously understood to be in terms of the common law?
- (c) In light of the meaning of property in terms of the constitutional jurisprudence and private law meaning, what does property in clause 1 of the Expropriation Bill 2015 mean?
- (d) How does the definition of property in the Expropriation Bill 2015 therefore compare with the definition of property in terms of section 1 of the Expropriation Act of 1975?

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<sup>12</sup> See chapters two and three of this dissertation.

- (e) What is the impact of the new definition of property (as proposed in the Expropriation Bill 2015) on the security of property rights in South Africa?
- (f) Should the definition of property be left in its present form in the Expropriation Bill 2015?

## **1.5 Methodology**

This dissertation is the product of a desktop enquiry, which draws all its sources from the public domain. Sources for this research, therefore, will include, but are not limited to, published textbooks, academic journal articles, Government Gazettes, national and provincial legislation, regulations determined in terms of any legislation from time to time, websites of institutes which publish researched content related to the topic and other articles published in the public domain.

## **1.6 Structure of dissertation**

This dissertation is divided into five chapters.

Chapter One of this dissertation gives a basic introduction to the topic area and raises the need to discuss the definition of property as defined in the Expropriation Bill 2015.

Chapter Two introduces the reader to the types of property which exist in terms of private law. More specifically it discusses the development of the concept of a thing, how things may be classified, what real rights and limited real rights are, before considering types of property created by statute. This chapter essentially reminds the reader of what has been settled to be property in terms of the common law and statutes. This basis will inform and enrich the discussion of property throughout the dissertation.

Chapter Three examines the definition of property according to section 25 of the Constitution and discusses constitutional jurisprudence which has considered the question of what should constitute property in terms of this section. It will examine the historical development of the

property clause before examining the constitutional concept of property. What is of special interest to the reader will be to consider the most recent jurisprudence which has expanded the meaning of property beyond the types identified in Chapter Two so as to include commercial interests.

Chapter Four proceeds to introduce the existing Expropriation Act of 1975 and the historical development of the Expropriation Bill 2015. It is specifically noted that, given the focus of Chapters Two and Three, only the definitions of property in the Act, draft bills and the Expropriation Bill 2015 are considered. This chapter will explore the historical development of the post-apartheid Expropriation Bill, from its inception and first tabling in 2008, to its redraft in 2013, and finally to its present form which this dissertation will analyse. Attention is paid to how the meaning of property, as discussed in Chapter Three, will be of particular importance to understanding the meaning of property in clause 1 of the Expropriation Bill 2015 before discussing its implications and alternative definitions for property which have been proposed by interested parties.

Chapter Five critically analyses the implications of the ideas contained in the second to fourth chapters, as noted above, and further the impact of attempting to import the definition of property from the Constitution into the Expropriation Bill 2015. Future difficulties are considered, especially in light of the developing constitutional jurisprudence on this topic, before proposing an alternative definition and the reasons therefor.

### **1.7 Limitations of the dissertation**

From the outset, any dissertation analysing the Expropriation Bill 2015 needs to draw very clear and deliberate lines regarding what will be discussed and what will not. The purpose is to ensure that a topic is adequately dealt with in one paper, without considering other issues that may detract from a comprehensive discussion of the topic at hand.

For the purpose of clarity, this dissertation aims only to explore the meaning of property as developed in the common law and constitutional jurisprudence and how it resultantly affects what will be deemed to be property for the purposes of the Expropriation Bill 2015.

This dissertation, therefore, will not discuss:

- (a) what constitutes a public purpose, or what may be considered to be in the public interest;
- (b) issues concerning access to the courts;
- (c) comparisons of the scope of expropriation legislation in other jurisdictions unless expressly referred to in cited cases; and
- (d) the multitude of challenges facing land reform, other than where expropriation has been argued to be an alternative.

Where the above have been mentioned, it is for the sake of completeness but not with the intention of detracting from the main focus of this dissertation as stated before.

## CHAPTER TWO – TYPES OF PROPERTY IN TERMS OF PRIVATE LAW

### 2.1 Introduction

Prior to the new constitutional dispensation in South Africa, the rights in and to property were recognised in the common law and various statutes. This chapter seeks to explore the legal foundation for the types of property which exist in the private law in South Africa. The Roman, Roman-Dutch and English law influences shall be examined first before considering how statutes have also shaped the law when considering the meaning and scope of property.

It will be necessary to revisit with the common law first, since this forms the foundation for interpreting the term property, so as to properly assess what constitutes property in the Expropriation Bill 2015.

### 2.2 The common law

The common law is the law which effects and guides the daily life of the average person in South Africa.<sup>13</sup> The common law has been recognised and recorded through writings of jurists and the judgments of the courts over the centuries, which means that South African property law has both common law and civil law features.<sup>14</sup>

Van der Walt notes that the civil law tradition dominates our property law system resulting in a narrow definition of what the objects of property are, the rights which can be acquired in property and the remedies which exist to protect an owner's right to property.<sup>15</sup>

The civil law tradition in our common law has a particularly narrow concept of property since it recognises only one category of objects and its corresponding category of right to be property, namely things and real rights.<sup>16</sup> Other categories of objects such as performances and intellectual property and their corresponding categories of rights, namely creditors' rights and intellectual property rights are not seen as property in the narrow sense as they crucially

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<sup>13</sup> FI Michelman (See note 11) at 246-247.

<sup>14</sup> PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) at 6.

<sup>15</sup> AJ van der Walt *Property and Constitution* (2012) at 116.

<sup>16</sup> W Erlank "Classifying Objects in Space According to South African Property Law" (2016) 37(1) *Obiter* 87 at 90.

do not meet the corporeality requirement.<sup>17</sup>

Although performances and intellectual property and their corresponding categories of rights, namely creditors' rights and intellectual property rights are not regarded as property in the narrow sense, most academic commentators accept that they should be regarded as property in a broader sense. This is because like things, performances and intellectual property are classified as patrimonial objects and, similarly, like real rights, creditors' rights and intellectual property rights are classified as patrimonial rights.<sup>18</sup>

### **2.3 Sources of property law**

The Roman-Dutch law influences our property law in numerous ways, but specifically plays a large role in determining the law as it applies to the ownership and use of things or corporeal objects.<sup>19</sup> This dissertation does not aim to conduct an in-depth historical study of the Roman and Roman-Dutch rules or jurists' opinions but rather to introduce the framework of the private law of property.

It is noteworthy that English law influences can also be found in our law of property with concepts such as attornment<sup>20</sup> being incorporated and the concept of the 99-year leasehold being introduced to cater for situations where long-term use was desired, but the owner did not wish to dispose of their rights to the property.<sup>21</sup>

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<sup>17</sup> AJ van der Walt and R Shay "Constitutional Analysis of Intellectual Property" (2014) 17(1) *Potchefstroom Electronic Law Journal* 52-85 at 67.

<sup>18</sup> CG van der Merwe "Things" *LAWSA Vol 27* 2ed (2014) at paragraph 5.

<sup>19</sup> *Ibid* at paragraph 6.

<sup>20</sup> A method of delivery of property to effect transfer of ownership.

<sup>21</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 7.

## 2.4 The concept of a thing

According to Van der Walt and Pienaar, a thing may be defined as a “corporeal or tangible object external to persons and which is, as an independent entity, subject to the juridical control by a legal subject, to whom it is useful and of value.”<sup>22</sup> In order to be classified as a thing, therefore, an object has to satisfy the following five characteristics:

- (a) corporeality;
- (b) external to persons;
- (c) independent entity;
- (d) subject to juridical control; and
- (e) useful and of value.<sup>23</sup>

Each of these characteristics will be discussed in turn below:

### *(a) Corporeality*

A thing can be deemed to be corporeal, according to Voet, if it can be felt and touched by a person who is inspecting it whereas other jurists such as Grotius provided that a thing may be corporeal if it is perceivable by the external senses.<sup>24</sup>

### *(b) External to humans/Impersonal in nature*

A thing must be external to the human body and therefore the human body or its parts cannot be regarded as things.<sup>25</sup> A person is generally regarded as a legal subject and not a legal object/thing, although a corpse or body parts that become external to the body could theoretically be classified as things using this classification.<sup>26</sup>

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<sup>22</sup> AJ van der Walt and GJ Pienaar *Introduction to the Law of Property* 7ed (2016) at 15.

<sup>23</sup> AJ van der Walt and GJ Pienaar (See note 22) at 15 to 18. See also PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 14 to 22.

<sup>24</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 14.

<sup>25</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 19.

<sup>26</sup> W Erlank (See note 16) at 92.

*(c) Independence*

To satisfy this requirement, a thing needs to be a definite and distinct entity.<sup>27</sup> For example, a fruit prior to its separation from a tree is not independent and hence does not meet this requirement in order to be a thing until it is separated from the tree.<sup>28</sup>

*(d) Subject to human control*

To be considered a thing, the object needs to be able to be controlled by humans and therefore traditionally celestial bodies (like the moon or sun) or an inaccessible object which cannot be brought under human control (like a shipwreck) cannot be the object of any real rights.<sup>29</sup>

*(e) Use and Value*

No legal relationship may exist between a thing and a legal subject unless there is a use for the thing and it has value.<sup>30</sup> Value need not be economic and can also be sentimental in order to satisfy this requirement.<sup>31</sup>

The concept of classifying things as corporeal or incorporeal did not exist in the Roman property law system<sup>32</sup> hence the notion of corporeality as a requirement for a thing, as discussed by the Roman-Dutch Jurists, is controversial in nature given that South African legal practice has recognised incorporeals as things.<sup>33</sup>

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<sup>27</sup> W Erlank (See note 16) at 93.

<sup>28</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 21.

<sup>29</sup> *Ibid* at 21.

<sup>30</sup> W Erlank (See note 16) at 94.

<sup>31</sup> *Ibid* at 94.

<sup>32</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 15.

<sup>33</sup> *Ibid* at 15.

## 2.5 The classification of things

### *(a) Introduction*

There are many different methods which can be used to classify things - either by their nature or in their relation to a legal subject.<sup>34</sup>

### *(b) Classifying things according to their relation to persons*

Things, may be either in commerce (*res in commercio*) or out of commerce (*res extra commercium*).<sup>35</sup> Things which are in commerce (*res in commercio*) are those objects which are capable of being privately owned, traded and sold – therefore things which are not capable of being categorised as such are things that are “out of commerce” (*res extra commercium*).<sup>36</sup>

Things that are out of commerce, or not capable of being privately owned, include: common things (e.g. the air, the sea or running water),<sup>37</sup> public things (things belonging to a civic community e.g. roads or administrative buildings),<sup>38</sup> things belonging to corporate bodies but are not public (e.g. markets or churches)<sup>39</sup> and religious things (e.g. temples and graves).<sup>40</sup>

### *(c) Things classified according to their nature*

When classifying things according to their nature, several traits are used in classification, namely determining whether things are: corporeal or incorporeal things, movable or immovable things, divisible or indivisible things, consumable or non-consumable things, fungible or non-fungible things and single or complex things.<sup>41</sup> Each of these classifications will be discussed in more detail below.

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<sup>34</sup> See PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 23 to 44 for an in-depth assessment of these categories. See also CG van der Merwe (See note 18) at paragraph 5.

<sup>35</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 25.

<sup>36</sup> *Ibid* at 25.

<sup>37</sup> *Ibid* at 25.

<sup>38</sup> *Ibid* at 26.

<sup>39</sup> *Ibid* at 29.

<sup>40</sup> *Ibid* at 30-31.

<sup>41</sup> See PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 34- 44 for a discussion of these classifications.

(i) Corporeal and incorporeal things

When classifying things according to their nature, a distinction can be drawn between things that are physical/tangible (capable of being perceived by the five senses) and things that are intangible (usually rights or objects that which is incapable of being perceived by the five senses).<sup>42</sup> Examples of corporeal things are items like books, a cellphone, computers, furniture, pots, houses, clothes, cars and so forth.<sup>43</sup> Examples of incorporeal things are “real rights, personal rights and immaterial property rights”.<sup>44</sup> Van der Merwe notes that the classification of things as corporeal and incorporeal still has a practical role in the application of the law to situations and therefore remains an important distinction to be applied when classifying things according to their nature.<sup>45</sup>

(ii) Movable and immovable things

Land and the things deemed to be permanently attached to the land (acceded to the land) constitute immovable property.<sup>46</sup> Movable things are those which are not immovable and hence may be moved from place to place without incurring any damage to the thing that may hinder its usefulness or value.<sup>47</sup> Movables may accede to an immovable if attached in some manner which is deemed to be or intended to be permanent - and thereafter they be considered as part of the immovable.<sup>48</sup> For example, bricks are movable but when they are incorporated into a house in a manner that is intended to be permanent (i.e. laid in a wall with plaster), they then cannot be removed without being damaged and so lose their status as movables.<sup>49</sup>

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<sup>42</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 33.

<sup>43</sup> CG van der Merwe (See note 18) at paragraph 46.

<sup>44</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 33.

<sup>45</sup> CG van der Merwe (See note 18) at paragraph 46.

<sup>46</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 34.

<sup>47</sup> *Ibid* at 34.

<sup>48</sup> CG van der Merwe (See note 18) at paragraph 51.

<sup>49</sup> *Ibid* at 51.

*(iii) Divisible and indivisible things*

A thing is considered to be divisible if it is capable of being split into two or more portions/objects without destroying the thing outright or harming its functionality or value to the user.<sup>50</sup> Examples of divisible things include butter or sand, but a horse would be considered to be indivisible because dividing it in half would destroy it outright and impair its functionality.<sup>51</sup>

*(iv) Consumable and non-consumable things*

A thing which may be used up, or finished, is classified as a consumable and examples would include food, beverages, candles or fuels.<sup>52</sup> A non-consumable thing may be used by the possessor without the thing being diminished or rendered incapable of continuing its function and therefore an example of this would be furniture which may be sat on time and time again without consuming it or diminishing its function.<sup>53</sup>

*(v) Fungible and non-fungible things*

A fungible thing is deemed to be interchangeable with another thing that is considered identical to it hence fungibles are things that have not been individually determined but generally are handled with reference to a weight, a measure or numbers thereof.<sup>54</sup> An example of fungibles may be horses, which are given importance collectively because they belong to a class of objects in which they are considered identical to each other and not because of their individual qualities.<sup>55</sup> A horse may also be considered non-fungible if it is singled out due to distinguishable qualities like its superior breed, ancestry or even a winning track record in races.<sup>56</sup> These qualities make that singled out horse incapable of merely being replaced by another horse unless it shares the same distinct qualities.<sup>57</sup>

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<sup>50</sup> CG van der Merwe (See note 18) at paragraph 50.

<sup>51</sup> *Ibid* at paragraph 50.

<sup>52</sup> *Ibid* at paragraph 49.

<sup>53</sup> *Ibid* at paragraph 49.

<sup>54</sup> *Ibid* at paragraph 48.

<sup>55</sup> *Ibid* at paragraph 48.

<sup>56</sup> *Ibid* at paragraph 48.

<sup>57</sup> *Ibid* at paragraph 48.

(vi) Single and complex things

A single thing is an “individual thing which has not been the subject matter of accession”<sup>58</sup> and so it therefore is considered a thing in its own right – such as a wooden beam.<sup>59</sup> Once a single thing is combined in such a way that it is an accessory to another principle or auxiliary thing, it will lose its independent identity through combination.<sup>60</sup> An example of a complex/composite thing is a ship which was wooden beams built into it.<sup>61</sup>

## 2.6 The concept of a real right

It is not only things that are considered to be property in the narrow sense, but also real rights. According to Badenhorst, Pienaar and Mostert, a real right may be defined as a “legally supported claim to a thing”.<sup>62</sup>

In South African law real rights are divided into two categories, namely: ownership and limited real rights. Of these two categories, ownership is described as the most complete real right. This means, at least in principle, that is an unrestricted right and that an owner may use his or her property as he or she likes. Ownership is also the only real right a person may acquire in his or her own property. It is for this reason that ownership is sometimes referred to as *iura in re propria*.<sup>63</sup> Unlike ownership, limited real rights are not unrestricted. Instead, they are limited to certain specific uses in someone else’s property. It is for this reason that they are sometimes referred to as *iura in re aliena*.<sup>64</sup>

In Roman law there was a closed list (*numerus clausus*) of limited real rights, namely servitudes (*servitutes*), pledge (*pignus*), mortgage (*hypotheca*), building grants (*superficies*) and perpetual leases (*emphyteusis*). The same approach, however, was not followed in Roman-Dutch law, largely as a result of the introduction of feudal rights. Apart from the categories set out above, therefore, several other categories of limited real rights were recognised in Roman-Dutch law, for example the right to inherit, perpetual quitrent and

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<sup>58</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 41.

<sup>59</sup> *Ibid* at 41.

<sup>60</sup> *Ibid* at 41.

<sup>61</sup> *Ibid* at 41.

<sup>62</sup> *Ibid* at 48.

<sup>63</sup> AJ van der Walt and GJ Pienaar (See note 22) at 25-26.

<sup>64</sup> *Ibid* at 25-26.

possibly possession. Like Roman-Dutch law, modern South African law also does not have a closed list of limited real rights.<sup>65</sup>

## 2.7 Creditor's rights and intellectual property rights

As has been seen, most academic commentators also accept that common law definition of property in its broader sense goes beyond things and real rights and also includes “performances” and “intellectual property” as well as their corresponding categories of rights, namely “creditors’ rights” and “intellectual property rights”. This is because, like things and real rights, these categories of objects and rights are patrimonial in nature.<sup>66</sup>

Patrimonial objects are those on which a monetary or pecuniary value can be placed and, accordingly, which form a part of a person’s estate or patrimony. Non-patrimonial objects are those on which a monetary or pecuniary value cannot be placed and which do not form a part of a person’s estate or patrimony. Instead of a monetary or economic value, they have a sentimental value. Given that performances and intellectual property are classified as patrimonial objects, their corresponding categories of rights may also be classified as patrimonial rights.<sup>67</sup>

A performance may be defined as an “act by someone else, which can take the form of *dare* (to give), *facere* (to do) and *non facere* (not to do)”,<sup>68</sup> while a creditor’s right may be defined as a legally supported claim to a human act in terms of which the holder of the right acquires certain powers over the act which has to be performed. The act which has to be performed is also referred to as an “obligation”. Creditors’ rights, therefore, are derived from obligations and obligations arise either from a contract or a delict. The law of contract and the law of delict together are thus known as the law of obligations.<sup>69</sup>

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<sup>65</sup> CG van der Merwe (See note 18) at paragraph 62.

<sup>66</sup> *Ibid* at paragraph 5.

<sup>67</sup> L du Plessis *An Introduction to Law* 3ed (1999) at 145. While things, performances and intellectual property are classified as patrimonial objects, aspects of personality are classified as non-patrimonial objects. Aspects of personality are defined as a person’s dignity (*dignitas*), reputation (*fama*), privacy and physical and mental integrity (*corpus*) (see L du Plessis (See note 67) at 138).

<sup>68</sup> L du Plessis (See note 67) at 138.

<sup>69</sup> *Ibid* at 143-144.

Intellectual property may be defined “as the non-tangible products of the human mind, that is to say the ‘products’ of human skill and ingenuity, such as the design of a house, the contents of a story, an invention, etc”,<sup>70</sup> while intellectual property rights may be defined as legally supported claims to a non-tangible product of the human mind in terms of which the holder of the right acquires certain powers over the non-tangible product. Examples of intellectual property rights include copyright, patents and trademarks.<sup>71</sup>

## **2.8 Statutes which create new types of property**

While the common law definition of what constitutes property aids in the classification of everyday objects as types of property, it simply is not sufficient to keep up with the increasingly complex relationships which people wish to have with things, rights in and to things and incorporeal property. In order to address this problem, Parliament has intervened and passed legislation creating new kinds of things and new kinds of ownership and other limited real rights. The most significant of these is sectional title ownership.<sup>72</sup>

Sectional titles were first introduced in South Africa when the Sectional Titles Act<sup>73</sup> was enacted. This Act was subsequently replaced by the Sectional Titles Act, which is still in force.<sup>74</sup> The 1986 Act has been extensively amended by the Sectional Titles Schemes Management Act.<sup>75</sup> Both the 1971 and the 1986 Sectional Titles Acts were passed in order to make it possible for a person to become the exclusive and individual owner of a part of a building. This is because prior to the enactment of the 1971 Sectional Titles Act, separate ownership of the different parts of a building was not possible.

The reason why separate ownership of the different parts of a building was not possible prior to the introduction of the Sectional Titles Act is because the common law provides that whoever owns the land owns everything that is permanently attached to it.

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<sup>70</sup> L du Plessis (See note 67) at 138.

<sup>71</sup> *Ibid* at 143.

<sup>72</sup> Apart from sectional title ownership, legislation has also made provision for share blocks (Share Blocks Control Act 59 of 1980), property time sharing (Property Time-sharing Control Act 75 of 1983) and housing development schemes for retired persons (Housing Development Schemes for Retired Persons Act 65 of 1988).

<sup>73</sup> 66 of 1971.

<sup>74</sup> 95 of 1986.

<sup>75</sup> 8 of 2011.

This point was confirmed in *Botes v Toti Development Co (Pty) Ltd*<sup>76</sup> where the court held the following:

Where buildings are permanently annexed to land the owner of the land by means of *accessio* becomes the owner of the building; *omne quod inaedificatur solo cedit*. Separate ownership of horizontal layers not being recognised . . . , it was accordingly not possible to divide a building into flats each of which was the object of a separate right of ownership. Mason J in *Rocher v Registrar of Deeds* 1911 TPD 311, was expressing the same principles when he stated the following (at p 315):

‘As I understand our law, the owner of the surface of land is the owner of the whole of the land and of all minerals in it; he is the owner of what is above and what is below. It is unnecessary to determine how far in these days of airships (which at present have not arrived in any numbers in South Africa), the *dominium* extends upwards.’

Times may have changed but (until 1971) our law of property, in this respect, did not. Of necessity, however, much of our Roman-Dutch law is a virile living system . . . and conscious as our Courts have been of the desirability that it keep pace with the requirements of changing conditions and notions . . . , our system of judicial precedent virtually precludes Judge-made modifications to basic legal principles.

In certain instances where such principles have required modification, the Legislature has intervened to supply the remedy. The Sectional Titles Act is an example. Prior to its enactment alternative methods of achieving individual flat ‘ownership’ had to be resorted to. Perhaps the most common was the acquisition of shares in a limited liability company owning a block of flats. It is obvious, however, that such shareholders were not the owners of the flats.

By creating what has been described as ‘a new composite thing or res; called a *unit*, as the object or subject-matter of a new composite form of ownership’ . . . , the Sectional Titles Act has changed the common law position. The result is that several persons can now own different parts of the same building.<sup>77</sup>

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<sup>76</sup> 1978 (1) SA 205 (T).

<sup>77</sup> *Botes v Toti Development Co (Pty) Ltd* 1978 (1) SA 205 (T) at 207.

The Sectional Titles Act thus made it possible for a person to become the exclusive and individual owner of a part of a building by creating a new thing, namely a *unit*. This new thing consists of two components: first, a section (part of a building such as a flat, office or shop) which is individually owned; and second, the common property (the land together with all the parts of the building which do not form a part of the sections) which is co-owned.

Apart from ownership of a portion of a building or holders of a share in a company which grants rights akin to ownership rights, other statutes exist which give persons limited real rights in and to property, such as the Extension of Security of Tenure Act<sup>78</sup> which grant certain occupiers rights to the use of the property they reside on provided certain conditions are met.

## **2.9 Virtual property**

As the introduction of new technologies brings new abilities that allow users to interface with and utilise the internet to confer new rights in and to ideas and develop new concepts or designs – the world will be increasingly faced with the need to regulate ownership and access to this property that exists online. Van der Merwe<sup>79</sup> notes that the vested interests people and companies presently have in virtual property can range from ownership of domain names, websites, contents of websites, databases and even internet profiles.<sup>80</sup> This type of property will continue to develop and the law will be increasingly faced with the need to resolve disputes which may arise in relation to it.

## **2.10 Summary and conclusion**

The definition of property in the private law therefore can be seen to mean either a reference to an object/thing or a right in or to a thing irrespective of how the thing may be classified.<sup>81</sup> Statutes have also played a key role in created new things or rights which did not exist prior to their promulgation.

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<sup>78</sup> Act 62 of 1997.

<sup>79</sup> CG van der Merwe (See note 18) at paragraph 16.

<sup>80</sup> *Ibid* at paragraph 16.

<sup>81</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 7.

## CHAPTER THREE – DEFINITION OF PROPERTY IN THE CONSTITUTION

### 3.1 Introduction

When the Interim Constitution came into operation on 24 April 1994 the right to private property was guaranteed in section 28 which formed a part of the Bill of Rights.

Section 28 was included in the Interim Constitution largely at the insistence of the National Party. During the negotiating process the National Party argued that the inclusion of a right to property was essential for economic confidence and that individuals should be given the assurance that their property would not be confiscated or nationalised by the state in the name of economic freedom.<sup>82</sup>

In response the African National Congress – which was sceptical about a property clause – argued that a constitutional right to private property could be used to maintain the existing racially skewed distribution of property and that this would frustrate the adoption and execution of a programme of land reform. The African National Congress thus demanded that a right to claim restitution should also be included in the Interim Constitution.<sup>83</sup>

These demands were accepted and the Interim Constitution not only included a right to restitution in the affirmative action provisions of the equality clause,<sup>84</sup> but also set out a framework for the establishment of a land claims process.<sup>85</sup> This framework conferred a right of restitution on any person or community who had been dispossessed of their land rights as a result of a racially discriminatory law.<sup>86</sup>

While the Interim Constitution only contained a right to claim restitution, the Constitution goes much further and also includes a right to claim equitable access to land<sup>87</sup> and a right to

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<sup>82</sup> See H Klug *Constituting Democracy: Law, Globalisation and South Africa's Political Reconstruction* (2000) at 124.

<sup>83</sup> *Ibid* at 124. See also H. Mostert (2002) *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* Berlin: Springer at 62-64.

<sup>84</sup> S 8(3)(b).

<sup>85</sup> S 121 to 123.

<sup>86</sup> S 121(2).

<sup>87</sup> S 25(5).

claim tenure that is secure.<sup>88</sup> In addition, these rights have also been grouped together with the rights protecting private property and included in the property clause itself.<sup>89</sup>

The constitutional right to property may thus be divided into two parts: first, subsections (1) to (3) which provide for the constitutional protection of private property; and, second, subsections (4) to (9) which provide for an extensive programme of land reform.

Subsections (1) to (3) thus provide that:

- (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.

And subsections (4) to (9) provide that:

- (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.

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<sup>88</sup> S 25(6).

<sup>89</sup> S 25.

- (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).

### 3.2 The purpose of section 25

When it comes to interpreting section 25 of the Constitution, the Constitutional Court has stated that the property clause has a dual nature in that it both protects private property rights and serves the public interest by providing mechanisms for land reform.<sup>90</sup> In *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance*<sup>91</sup> (hereafter referred to as the *FNB case*) for example, the Court held that subsections (4) to (9) must be kept in mind whenever section 25 is being interpreted, because they emphasise the fact that the protection of private property is not absolute but is subject to the interests of the general public.

The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions . . . When considering the purpose and content of the property clause it is necessary, as Van der Walt puts it:

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<sup>90</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paragraph 50.

<sup>91</sup> 2002 (4) SA 768 (CC).

To move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo ante to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add ‘and control] of entrenched constitutional values’

That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts.<sup>92</sup>

Somewhat similarly, in *Agri South Africa v Minister for Minerals and Energy*<sup>93</sup> the Constitutional Court held that:

The approach to be adopted... is to have regard to the special role that this section has to play in facilitating the fulfilment of our country’s nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged ...in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all.<sup>94</sup>

In the same case, the Court also stated that:

The obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state’s social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources.<sup>95</sup>

The property clause therefore serves a dual function which necessarily affects its interpretation and application to cases brought before the courts.

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<sup>92</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paragraphs 50 to 52.

<sup>93</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

<sup>94</sup> *Ibid* at paragraph 60.

<sup>95</sup> *Ibid* at paragraph 62. See also *Haffejee NO and others v eThekweni Municipality and others* 2011 (6) SA 134(CC) at paragraph 31 where the Constitutional Court held that the “purpose of section 25 is to protect existing private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto. Its purpose is also to strike ‘a proportionate balance between these two functions’.”

### 3.3 The section 25 analysis

Although section 25 has been discussed by the Constitutional Court on a number of occasions over the past twenty years, its judgment in the *FNB case*<sup>96</sup> remains one its most significant. This is because the Constitutional Court adopted a framework in terms of which section 25 should be analysed in this case. This analytical framework is made up of a series of questions. These questions have been summarised as follows:

- (a) Does that which is taken away by the operation of the legislation amount to property for the purpose of section 25?
- (b) Has there been a deprivation of such property by the relevant authority?
- (c) If so, is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under section 36 of the Constitution?
- (e) If so, does it amount to expropriation for the purpose of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?<sup>97</sup>

As Rajak has pointed out, when it comes to determining whether a statutory provision has violated section 25 of the Constitution, the analysis set out above means that a decision-maker must start by asking whether the object, right or interest that has been affected amounts to property for the purposes of section 25 (question (a)). If the answer to this question is yes, she goes on to point out, the decision-maker must ask whether the affected party has been deprived of his or her property by the statutory provision in question (question (b)). If the answer to this question is also yes, then the decision-maker must ask whether the deprivation complies with the requirements set out in section 25(1)(a) and (b) (question (c)).<sup>98</sup>

If the answer to question (c) is yes, Rajak points out further, then the decision maker must jump to question (e), but if the answer is no, then the decision-maker must go onto question

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<sup>96</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>97</sup> *Ibid* at paragraph 46. The common law may also count as “a law of general application” (see *S v Thebus* 2003 (6) SA 505 CC at paragraph 65. While this case related to the late disclosure of an alibi by an accused person, it considered that the existing common law rule, which allowed the courts to change how it gives weight to such evidence due to its late disclosure, was well recognised in the common law and hence could be considered a law of general application. See also CG van der Merwe (See note 18) at paragraph 14.

<sup>98</sup> JN Rajak *Greening Durban: The Constitutional Validity of the Durban Metropolitan Open Space System in Light of Section 25 of the Constitution* Unpublished LLM Dissertation, University of KwaZulu-Natal (2015) at 26 (see also K Davis *A critical analysis of section 25 of the NEM: Integrated Coastal Management Act in light of section 25 of the Constitution* Unpublished LLM Dissertation, University of KwaZulu-Natal (2016) at 39).

(d) and ask if the deprivation can be justified in terms of the general limitation clause in section 36.<sup>99</sup> If the answer is no, the section 25 analysis comes to an end and the deprivation must be declared unconstitutional and invalid. However, if the deprivation does comply with section 25(1)(a) and (b) or if the deprivation can be justified in terms of the general limitation clause, then the decision-maker must ask whether it is an expropriation for the purposes of section 25(2) (question (e)).<sup>100</sup>

If the answer to question (e) is yes, Rajak concludes, then the decision-maker must ask whether the expropriation complies with the requirements of section 25(2)(a) and (b) (question (f)). If the answer is yes, then the expropriation must be declared to be constitutionally valid by the court. If the answer is no, then the court must ask if the expropriation can be justified in terms of the general limitation clause (question (g)). If the answer to this question is no, then the expropriation must be declared unconstitutional and invalid.<sup>101</sup>

For the purposes of this dissertation the most significant question is the very first one, namely “[d]oes that which is taken away by the operation of the legislation amount to ‘property’ for the purpose of section 25?”. This is because it performs a gatekeeping function. If the answer to this question is no, section 25 does not apply and it is unnecessary to continue with the rest of the analysis.

### **3.4 The constitutional concept of property**

Section 25(4) of the Constitution stipulates that “property is not limited to land”. Apart from this section, however, the Constitution does not define the concept of property. In order to determine what is meant by the constitutional concept of property, therefore, it is necessary to examine the manner in which the concept had been interpreted by the courts and especially by the Constitutional Court.

Before turning to consider the jurisprudence, however, it is interesting to note that Du Bois

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<sup>99</sup> Rights may only be limited if they comply with the obligations set out in section 36 of the Constitution, which provides that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

<sup>100</sup> JN Rajak (See note 98) at 26 (see also K Davis (See note 98) at 39).

<sup>101</sup> *Ibid* at 39.

posits that the lack of specifically mentioned categories of property in the Constitution should lead us to conclude that all forms of property should be protected by the provisions of section 25 unless they are specifically excluded.<sup>102</sup> Based on this assertion, the constitutional concept of property would include all forms of recognised property as outlined in the common law which were discussed in chapter two of this dissertation.

In support of her approach, Du Bois also argues that because the constitutional concept of property performs a gatekeeping function, if it is interpreted too narrowly it could deny parties the protection that section 25 is intended to provide them and, at the same time, relieve the state of its obligations to comply with the requirements of section 25 when it interferes with objects, rights and interests. The constitutional concept of property, therefore, should be interpreted broadly to ensure the maximum amount of protection for property holders.<sup>103</sup>

Although the Constitutional Court was initially reluctant to define the constitutional concept of property,<sup>104</sup> over the past twenty years it has largely followed Du Bois' suggestion and adopted an extremely broad definition of constitutional property. In this respect the Court had held that the constitutional concept of property does not only include corporeal movables and immovable objects, but also rights such as ownership,<sup>105</sup> limited real rights,<sup>106</sup> creditors' rights,<sup>107</sup> and intellectual property rights,<sup>108</sup> Apart from these objects and rights, the Court has

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<sup>102</sup> M du Bois "Intellectual Property as a Constitutional Property Right: The South African Approach" (2012) 24 *SA Merc LJ* 177 – 193 at 179.

<sup>103</sup> *Ibid* at 187.

<sup>104</sup> In *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), the Court stated that it is "practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property" (at paragraph 51). Despite this conclusion, the Court nevertheless found that the ownership of a corporeal movable falls into the constitutional concept of property. The constitutional concept thus protects rights and the objects of those rights.

<sup>105</sup> *Ibid* at paragraph 51.

<sup>106</sup> See *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at paragraph 50. In this case the Constitutional Court held that a mineral right falls into the constitutional concept of property.

<sup>107</sup> See *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paragraph 63. In this case the Constitutional Court held that a personal right to claim restitution on the grounds of unjustified enrichment falls into the constitutional concept of property. See also *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) and *Phumelela Gaming and Leisure Ltd v Grundlingh* 2006 (8) BCLR (CC).

<sup>108</sup> See *Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* (2005) SA 144 (CC) at paragraph 17. In this case the Constitutional Court held that a trade mark falls into the constitutional concept of property.

also held that it includes statutory rights and interests such as commercial licences.<sup>109</sup> Each of these will be discussed in turn below.

### 3.5 Corporeal objects

Given that the narrow common law definition of property includes corporeal objects, it is not surprising that the Constitutional Court has held that the constitutional concept of property also includes corporeal objects.

In the *FNB*<sup>110</sup> the Court authoritatively held that land and corporeal movables constitute constitutional property.<sup>111</sup> The Court held in this respect that:

“Here it is sufficient to hold that ownership of a corporeal movable must - as must ownership of land - lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of s25”.<sup>112</sup>

In this case the provisions of the Customs and Excise Act<sup>113</sup> which allowed South African Revenue Services (SARS) to seize property in the possession of a customs debtor in order to settle his or her customs debt, even if that property belonged to a third party, were found to be unconstitutional because they resulted in an arbitrary deprivation of property.

The fact that corporeal objects fall into the constitutional concept of property has also been confirmed by the High Court. In *Zondi v MEC for Traditional & Local Government Affairs*,<sup>114</sup> for example, the KwaZulu–Natal High Court held that livestock constitutes constitutional property.

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<sup>109</sup> See *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) at paragraph 5. In this case the Constitutional Court held that a liquor licence falls into the constitutional concept of property.

<sup>110</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>111</sup> *Ibid* at paragraph 51.

<sup>112</sup> *Ibid* at paragraph 51.

<sup>113</sup> 91 of 1964.

<sup>114</sup> 2004 1 All SA 467 (N).

In this case the provisions of the Pound Ordinance (KwaZulu-Natal)<sup>115</sup> were found to be unconstitutional because they resulted in the arbitrary deprivation of property.<sup>116</sup> On appeal to the Constitutional Court, the provisions of the Ordinance were confirmed to be unconstitutional after an analysis of how the ordinance was racially discriminatory and restricted the rights of citizens to access the courts.<sup>117</sup>

### 3.6 Ownership and limited real rights

Apart from corporeal objects, in the *FNB*<sup>118</sup> the Constitutional Court also found that ownership falls into the constitutional concept of property. The fact that First National Bank retained ownership of the vehicles in question simply to secure the money it had lent to the possessors, the Court held, was irrelevant.<sup>119</sup>

Insofar as limited real rights are concerned, Pienaar notes that “limited real rights to immovable property in particular, either statutory or in terms of common law, constitute Constitutional property in the form of incorporeal immovable property”.<sup>120</sup> Hence, limited real rights such as those that subtract from the *bare dominium* like a servitude (that burdens the property and restricts its usage – like a usufruct or *habitatio*) or a mortgage bond (that restricts transfer of the property unless the outstanding debt is settled) are incorporeal immovable things that are property within the scope of section 25.<sup>121</sup>

In *Ex parte Optimal Property Solutions CC*<sup>122</sup> it was held that restrictive conditions may be classified as praedial servitudes and, therefore, are real rights. Given that they are real rights, the court held further, they fall into the constitutional concept of property.<sup>123</sup> Any deletion of these conditions constitutes a deprivation of property and must comply with the requirements

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<sup>115</sup> 32 of 1947.

<sup>116</sup> CG van der Merwe (See note 18) at paragraph 15.

<sup>117</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

<sup>118</sup> 2002 (4) SA 768 (CC).

<sup>119</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paragraph 56.

<sup>120</sup> G Pienaar “The Effect of the Original Acquisition of Ownership of Immovable Property on Existing Limited Real Rights” (2015)18(5) *Potchefstroomse Elektroniese Regsblad* 1480 – 1505 at 1487.

<sup>121</sup> *Ibid* at 1487.

<sup>122</sup> 2003 (2) SA 136 (C).

<sup>123</sup> *Ex parte Optimal Solutions CC* 2003 (2) SA 136 (C) at paragraphs 4-6. See also G Pienaar (See note 120) at 1487.

of section 25(1).<sup>124</sup> In light of this decision it may be argued that all limited real rights, including both praedial and personal servitudes, real security rights, long-term leases and mineral rights would be recognised as property under section 25.

This argument was confirmed by the Constitutional Court in its judgment in *Agri SA v Minister for Minerals and Energy*<sup>125</sup> where it held that mineral rights fall into the constitutional concept of property. In this case the Court found that Mineral and Petroleum Development Act<sup>126</sup> had deprived, but not expropriated, landowners of their right to sterilise minerals by not exploiting them.<sup>127</sup>

### 3.7 Creditors' rights

A right which is protected as property must generally have patrimonial value and be vested in or accrued to the holder of the right.<sup>128</sup> Examples of rights to performance *inter partes* or rights that carry patrimonial benefits for the holder have also been recognised as property for the purpose of section 25 of the Constitution.

In the case of the *Law Society of South Africa and others v Minister for Transport and Another*<sup>129</sup> the Constitutional Court considered whether a personal right, based in the law of obligations, concerning a claim for loss of earning capacity constituted property for the purposes of section 25 of the Constitution.<sup>130</sup> The Court concluded, without in-depth analysis into the question, that these rights constitute property.<sup>131</sup>

Two years later, in the case of *National Credit Regulator v Opperman and Others*,<sup>132</sup> the Constitutional Court held that an enrichment claim is property for the purpose of section 25 of the Constitution. In amplification of this, the Court stated that “[i]n the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified

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<sup>124</sup> *Ex parte Optimal Solutions CC* 2003 (2) SA 136 (C) at paragraph 19. See also G Pienaar (See note 120) at 1487.

<sup>125</sup> 2014 (4) SA 1 (CC).

<sup>126</sup> 21 of 2002.

<sup>127</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at paragraph 44.

<sup>128</sup> PJ Badenhorst, JM Pienaar and H Mostert (See note 14) at 11.

<sup>129</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC).

<sup>130</sup> *Ibid* at paragraph 10 and paragraphs 81 to 85.

<sup>131</sup> *Ibid* at paragraphs 83 to 84.

<sup>132</sup> *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC).

enrichment, as property under section 25(1) is logical and realistic”.<sup>133</sup>

After considering much of the same material as already noted above, the Gauteng High Court held in the case of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*<sup>134</sup> that:

“Although not real rights enforceable against all, a claim for payment and the right to exercise a vote at a statutory meeting convened for the purpose of voting on a business rescue plan, in terms of s 153(1)(b)(ii) of the Act, constitute ‘property’ within the meaning of s 25(1) of the Constitution”.<sup>135</sup>

It is accepted, therefore, that a claim sounding in money may be property for the purposes of section 25(1) of the Constitution.<sup>136</sup>

### 3.8 Intellectual property rights

When intellectual property was considered in the *First Certification Judgment*<sup>137</sup> the Constitutional Court found that it was unnecessary to add a separate clause protecting intellectual property to the Constitution.<sup>138</sup> It held further that an objection to the exclusion of an express intellectual property right in the Constitution cannot be sustained as it was not an international norm to include such a right.<sup>139</sup>

Du Bois argues in this respect that the term property in section 25 of the Constitution is “wide enough when used in the generic property clause to include rights and interests that require protection according to international human rights standards”.<sup>140</sup> Therefore, there was no need to incorporate a specific provision that would protect intellectual property rights<sup>141</sup> or identify other forms of property for express mention.

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<sup>133</sup> *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC) at paragraph 63.

<sup>134</sup> *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2013 (6) SA 471 (GNP).

<sup>135</sup> *Ibid* at paragraph 45.

<sup>136</sup> AJ van der Walt ‘Constitutional Property Law’ (2013) *Annual Survey of South African Law* 216 at 224.

<sup>137</sup> *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).

<sup>138</sup> M du Bois (See note 102) 181.

<sup>139</sup> 1996 (4) SA 744 (CC) at paragraph 75.

<sup>140</sup> M du Bois (See note 102) 178.

<sup>141</sup> *Ibid* at 178.

Du Bois notes further that in the *FNB case*<sup>142</sup> the Constitutional Court did not exclude intellectual property from constitutional protection and, therefore, impliedly accepted it to be property for the purposes of applying section 25.<sup>143</sup>

This argument was confirmed some 10 years later in the case of *Laugh It Off Promotions CC v SAB International (Finance)*.<sup>144</sup> In this case the Constitutional Court noted that a trademark's ". . . status is that of property albeit *incorporeal*".<sup>145</sup> In addition, the Court also noted that "like other property intellectual property does not enjoy special status under the Constitution. It is not immune from challenge and therefore its enforcement must be constitutionally tenable".<sup>146</sup>

Also reported in 2006, in the case of *Phumelela Gaming and Leisure Limited v Gründlingh and Others*<sup>147</sup> the Constitutional Court noted that the Supreme Court of Appeal<sup>148</sup> accepted that "Phumelela's business system constitutes property"<sup>149</sup> whereafter the Constitutional Court continued its analysis by accepting this premise.<sup>150</sup>

While it is implied that intellectual property does qualify as property, it too is subject to limitations when considering conflicts with other rights in the Constitution.

### **3.9 Commercial interests and new property**

Apart from intellectual property, the courts have also held that commercial interests and even new property fall into the constitutional concept of property. Commercial interests include debts, goodwill and commercial licences, permits and quotas. New property includes socio-

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<sup>142</sup> 2002 (4) SA 768 (CC).

<sup>143</sup> M du Bois (See note 102) 186.

<sup>144</sup> 2006 (1) SA 144 (CC).

<sup>145</sup> *Laugh It Off Promotions CC v Sab International (Finance) Bv T/A Sabmark International (Freedom Of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at paragraphs 17 and 18, G to A.

<sup>146</sup> *Ibid* at paragraph 17 A to B.

<sup>147</sup> 2006 (8) BCLR 883 (CC).

<sup>148</sup> When hearing the case *Gründlingh and Others v Phumelela Gaming and Leisure Ltd* 2005 (6) SA 502 (SCA).

<sup>149</sup> 2006 (8) BCLR 883 (CC), at paragraph 11.

<sup>150</sup> *Phumelela Gaming and Leisure Limited v Gründlingh and Others* 2006 (8) BCLR 883 (CC), at paragraphs 41 and 42, where the court considers what test should be employed to assess whether the deprivation was arbitrary – a step which should only be taken once it is concluded that the object or right does constitute property.

economic or welfare rights which are afforded to the population on a large scale, for example, unemployment insurance paid by the state, child grants, professional licences or access to public resources.<sup>151</sup>

Commercial interests were recognised for the first time in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*<sup>152</sup> (hereafter referred to as *Shoprite Checkers*) and new property in *Transkei Public Servants Association v Government of the Republic of South Africa*. (hereafter referred to as ‘Transkei Public Servants Association case’ )<sup>153</sup> In *Shoprite Checkers* the Constitutional Court held that a grocer’s wine licence falls into the constitutional concept of property and in *Transkei Public Servants Association case* the High Court held that a government housing subsidy falls into the constitutional definition of property.<sup>154</sup>

The *Shoprite Checker’s* case is particularly significant, not only because it extended the constitutional concept of property to include commercial interests, but also because it adopted a normative approach to the interpretation of property. This normative approach will undoubtedly influence the interpretation of the constitutional concept of property and thus clause 1 of the Expropriation Bill in the future. This judgment is discussed in more detail below.

### **3.10 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape**

#### *(a) Introduction*

In *Shoprite Checkers*<sup>155</sup> the issue concerning an entitlement to commercial trade granted in terms of a state licence was held to amount to property for the purpose of section 25.<sup>156</sup> While there are other aspects to this case, this dissertation is focussed mainly on understanding the

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<sup>151</sup> CG van der Merwe (See note 18) at paragraph 15.

<sup>152</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC).

<sup>153</sup> 1995 BCLR 1235 (TK) 1246J.

<sup>154</sup> CG van der Merwe (See note 18) at paragraph 14.

<sup>155</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC).

<sup>156</sup> *Ibid* at paragraph 6.

ambit of what constitutes property for the purpose of section 25, hence it will not examine the other aspects in the analysis of this case.

*(b) The facts*

In 2003, the Eastern Cape government passed the Eastern Cape Liquor Act<sup>157</sup> (the “ECLA”) which, as its name indicates, regulates the sale of alcohol in the province. Before the ECLA was passed, the sale of alcohol was regulated by the Liquor Act (the “Liquor Act”).<sup>158</sup> In terms of the Liquor Act the applicant (“Shoprite Checkers”) held a so-called “grocer’s wine licence”, which allowed it to sell alcohol alongside food in the supermarkets it owned. The ECLA repealed the Liquor Act and abolished this licence. Instead of a grocer’s wine licence, the ECLA provided that Shoprite Checkers could apply for an “all-kinds licence”.<sup>159</sup> This licence allowed a licence-holder to sell any kind of alcohol, but only in a separate dedicated bottle store and not in a supermarket together with food.

After the relevant provisions of the ECLA came into effect, Shoprite Checkers applied to the Eastern Cape High Court for an order declaring the ECLA to be unconstitutional and invalid on the grounds that it unjustifiably infringed section 25(1) of the Constitution.<sup>160</sup> The ECLA infringed section 25(1), Shoprite Checkers argued, because it arbitrarily deprived Shoprite Checkers of its property when it abolished Shoprite’s grocer’s wine licence. The High Court agreed with Shoprite Checkers and declared the relevant parts of the ECLA to be unconstitutional and invalid.<sup>161</sup> It then referred its judgment to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

*(c) The judgment*

A majority of the Constitutional Court refused to confirm the High Court’s judgment. Instead, the majority found that while Shoprite Checker’s grocer’s wine licence could be

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<sup>157</sup> 10 of 2003.

<sup>158</sup> 27 of 1989.

<sup>159</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 2.

<sup>160</sup> *Ibid* at paragraph 10.

<sup>161</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 17.

classified as property, Shoprite had not been arbitrarily deprived of its licence by the ECLA and that the ECLA, therefore, was constitutionally valid.

In arriving at this decision, the Court had to consider two key issues: first, whether Shoprite Checker's grocer's wine licence was property in terms of section 25(1); and, if it was, second, whether Shoprite Checkers had been arbitrarily deprived of its property. For the purposes of this dissertation it is only necessary to focus on the first question. Insofar as this question was concerned, the Constitutional Court split three ways. Two of the judgments (per Froneman and Madlanga JJ) found that the grocer's wine licence was property, although for very different reasons, while the third judgment (per Moseneke DCJ) found that it was not. Each judgment will be considered in turn.

*(d) Froneman J's values-based approach*

In his judgment Froneman J (Cameron J, Nkabinde J and Japie AJ concurring) found that Shoprite Checker's grocer's wine licence was property for the purposes of section 25(1) of the Constitution.

In arriving at his decision, Froneman J began by explaining that the word property in section 25(1) must be interpreted in a manner that promotes the fundamental values that underlie the Constitution and especially the values of human dignity, equality and freedom. In order to achieve this goal, the constitutional definition of property should include those rights and interests which a person needs in order to lead a life that is characterised by personal self-fulfilment.<sup>162</sup>

The notion of personal self-fulfilment in this context, however, does not refer to the maximization of economic wealth or the satisfaction of individual preferences. Instead, it refers to living a life filled with dignity. In addition, it was also important to note that where a right or interest does not only protect a person's dignity, but also protects one of the other rights in the Bill of Rights, for example the right to freedom of trade which is guaranteed in section 23, it is even more likely that it will fall into the definition of constitutional

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<sup>162</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraphs 45 to 50.

property.<sup>163</sup> Froneman J discusses this in detail as follows:

The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other hand, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximization or the satisfaction of individual preference, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of protection afforded to that holding will be stronger than where no relation of that kind exists.<sup>164</sup>

After setting out this values-based approach, Froneman J turned to apply it to the facts. In this respect he began by explaining that while a grocer's wine licence does not protect Shoprite Checker's dignity or freedom to trade because Shoprite Checkers is neither a human being nor a citizen, it may protect a natural person's right to dignity or a citizen's right to trade. This would occur when the licence was held by a person who owned a small grocery store and who needed to sell wine together with groceries in order for his or her business to succeed.<sup>165</sup>

Apart from protecting the right to dignity and the right to trade of such a person, Froneman J explained, a grocer's wine licence also has many of the characteristics of the private law or common law concept of property. It is valuable, it exists for an indefinite period, it can be transferred subject to administrative approval and it can only be withdrawn under certain prescribed conditions.<sup>166</sup> In light of all of these factors, Froneman J went on to find, a grocer's wine licence is property for the purposes of section 25(1) of the Constitution.

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<sup>163</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraphs 45 to 50.

<sup>164</sup> *Ibid* at paragraph 50

<sup>165</sup> *Ibid* at paragraph 64.

<sup>166</sup> *Ibid* at paragraph 68.

If a natural person had been in the position of Shoprite, she would have had an easier task of convincing a court that the grocer's wine licence granted by the State enabled her to conduct a business vocation of her choice that was essential to her living a life of dignity in that there was a 'relationship between [her] work and [her] human personality as a whole'. So the correct question to ask, as noted above, is whether her interest in the business licence would qualify as property protected by section 25(1). This is still an objective enquiry. It is not the subjective assertion of the person involved that determines the outcome, but the court's assessment of the objective value of that assertion. I do not find it too difficult to imagine that a person who wishes to run a small business might have found the opportunity to run a grocery store, with the added advantage of selling wine, as the single chance to run a business successfully, without which it might otherwise have been difficult to do so. But it would, objectively, be a step too far to say that it would be impossible to do so.<sup>167</sup>

Having found that the grocer's wine licence was property, Froneman J turned to consider whether Shoprite Checkers had been deprived of its property by the ECLA and, if so, whether the ECLA was arbitrary. In this respect he found that while Shoprite had been deprived of its property by the ECLA, the ECLA was not arbitrary. The ECLA, therefore, was constitutionally valid.

*(e) Madlanga J's attributes-based approach*

In his judgment, Madlanga J (Tshiqi AJ concurring) also found that a grocer's wine licence is property for the purposes of section 25(1) of the Constitution, but for different reasons.

In arriving at his decision, Madlanga J began by criticising the approach adopted by Froneman J on the grounds that it did not give the concept of property its own independent meaning. Instead, it relied very heavily on the right to dignity and the right to freedom of trade to give meaning to the concept of property. The problem with this approach is that it watered down the right to property to the point where it simply rides on the coat-tails of other rights. It is no longer a self-standing right.

Instead of basing the constitutional concept of property on the relationship between property

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<sup>167</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 64.

and other rights in the Bill of Rights such as human dignity and the freedom to trade, Madlanga J explained further, the constitutional concept of property should be based on the same attributes that the common law concept of property is based, namely: whether the object, right or interest in question has value, whether it is permanent, whether it can be transferred and whether it can be withdrawn.

After setting out this attributes-based approach, Madlanga J then applied it to the facts and found that a grocer's wine licence does display the characteristics he identified in his judgment:

[the grocer's wine licence] grants the holder an entitlement to sell wine under certain specified circumstances. The licence may endure indefinitely. Even though it may be suspended or cancelled, that may not be done at whim. There are circumscribed grounds; and they must be applied in accordance with the strictures of just administrative action as provided for in PAJA. It is not without significance that, from the time they were granted, Shoprite's licences were never cancelled. And Shoprite had been trading in accordance therewith. Also, a grocer's wine licence holds objective commercial value: its very *raison d'être* is to trade in accordance with its conditions. The licence is transferable, albeit subject to that being sanctioned by the authorities. As an item of objective economic value, the transfer may even be for a valuable consideration (*quid pro quo*). Indeed, the value of Shoprite itself (or that of its individual stores) as a commercial entity may well be enhanced by the fact that Shoprite holds grocer's wine licences. All these point to the grocer's wine licence being property for the purposes of section 25(1)<sup>168</sup>

Having found that the grocer's wine licence was property, Madlanga J turned to consider whether Shoprite Checkers had been deprived of its property by the ECLA and, if so, whether the ECLA was arbitrary. In this respect he found that Shoprite Checkers had been deprived of its property by the ECLA and that the ECLA was arbitrary. The ECLA, therefore, was constitutionally invalid.

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<sup>168</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 143.

*(f) Moseneke's dissenting approach*

In his dissenting approach Moseneke DCJ (Mogoeng CJ, Khampepe J, Molemela AJ and Theron AJ concurring) found that it was not necessary to determine whether a grocer's wine licence is property for the purposes of section 25(1). This is because rather than testing the validity of the ECLA against section 25(1) of the Constitution, it should preferably be tested against the principle of legality and especially the requirement of rationality which is an incident of the rule of law.<sup>169</sup>

Nonetheless, Moseneke DCJ proceeded to assess what could constitute property<sup>170</sup> and conducted a comparative analysis of other jurisdictions to aid in determining the answer.<sup>171</sup> In light of this comparative analysis he concluded that the "entitlement to commercial trade under a state licence does not fit comfortably within the constitutional notions of property".<sup>172</sup> The reasons for this were that a license is simply permission to carry out a trade that would otherwise be unlawful, it is conditional, subject to withdrawal, not freely transferrable and has time limits which are not characteristics which normally be associated with property.<sup>173</sup>

The *Shoprite Checkers* case is therefore significant because it confirms that the definition of property for the purposes of section 25 extends beyond the narrow common law perceptions that things and patrimonial rights are property –however the reasons therefor are conflicting.

### **3.11 Conclusion**

The constitutional jurisprudence reveals many examples of what may constitute property for the purpose of section 25 of the Constitution. It is important for the purpose of this dissertation that it is borne in mind that the following are therefore property as per the Constitution: movable and immovable corporeal property, incorporeal things in terms of common law, customary law and legislation (e.g. trademarks and business systems), and most recently a form of "new property", a grocer's wine license, has been accepted as property.

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<sup>169</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 110.

<sup>170</sup> *Ibid* at paragraphs 103 to 116.

<sup>171</sup> *Ibid* at paragraphs 109 to 116.

<sup>172</sup> *Ibid* at paragraph 122.

<sup>173</sup> *Ibid* at paragraph 122.

## CHAPTER FOUR – LEGISLATION ENABLING EXPROPRIATION

### 4.1 Introduction

As Van der Walt has pointed out, the common law does not confer the power on the state to expropriate property, even subject to the payment of compensation.<sup>174</sup> This means that the state may only expropriate property if the power to do so has been conferred upon it by legislation.<sup>175</sup> While a wide range of statutes do presently confer the power on the state to expropriate property,<sup>176</sup> the most prominent of these is the Expropriation Act. This Act, however, is set to be repealed and replaced by the Expropriation Bill 2015 when it comes into operation. The purpose of this chapter is to set out and discuss some of the key provisions of this Act. In addition, the purpose of this chapter is to set out and discuss the process leading up to the drafting and adoption of the Expropriation Bill 2015. Finally, the purpose of this chapter is also to set out and discuss the definitions of property in clause 1 of the Bill, to consider its implications and to examine some of the alternative definitions that have been proposed by interested parties.

### 4.2 The Expropriation Act

The Expropriation Act was assented to on the 20 June 1975 and commenced operation on the 1 January 1977.<sup>177</sup> Although it was drafted, enacted and brought into operation during the apartheid era it was preserved by section 229 of the Interim Constitution read together with Item 2 on Schedule 6 of the Constitution and remains a valid Act of Parliament. It is interesting to note, however, that it has not been amended since the transition to democracy in 1994 when Proclamation R41 was gazetted.<sup>178</sup>

The Expropriation Act sets out the full process for an expropriation,<sup>179</sup> including determining the authorities which may expropriate<sup>180</sup> and the steps to be followed by both the authority and the owner of the property to be expropriated in negotiating the compensation and

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<sup>174</sup> AJ van der Walt *Constitutional property law* 3ed (2011) at 454.

<sup>175</sup> A Gildehuys and GL Grobler “Expropriation” in *LAWSA Vol 10(3)* 2ed (2012) at paragraph 12.

<sup>176</sup> *Ibid* at paragraph 12.

<sup>177</sup> See preamble of the Expropriation Act.

<sup>178</sup> See preamble of the Expropriation Act.

<sup>179</sup> See principally sections 7, 8 and 11 of the Expropriation Act.

<sup>180</sup> See sections 2, 3 and 5 of the Expropriation Act.

payment of the compensation to the dispossessed owner.<sup>181</sup> For the purpose of this dissertation, it is necessary only to assess what constitutes property in terms of for the Expropriation Act for purpose of determining the scope of its application.

Property is defined in section 1 the Expropriation Act as “both movable and immovable property”.<sup>182</sup> Unfortunately, the Act itself does not define what is meant by movable and immovable property.<sup>183</sup> Southwood, however, argues that the ordinary meaning in the context should be given to the meaning of property for the Expropriation Act.<sup>184</sup> Relying on the definition of property given in *Commissioner for Inland Revenue v Estate Crewe and Another*,<sup>185</sup> he goes on to conclude that property means “vested rights with a pecuniary or economic value”.<sup>186</sup> Apart from vested rights with a pecuniary or economic value, it has been held that the ordinary meaning of property includes intangible property, such as real rights and creditors’ rights.<sup>187</sup>

Given that the Expropriation Act was drafted, passed and brought into operation during the apartheid era, it is not surprising that it suffers from a number of deficiencies. Among the most important of these is that it is not consistent with section 25(3) of the Constitution, which provides that compensation must be just and equitable whereas the Act provides that compensation must be market value. Section 25(4) of the Constitution provides that property means more than land and may include new property as discussed in Chapter 3, whereas the Expropriation Act provides that property is limited to movable and immovable property. The Expropriation Act also does not give effect to the transformatory goals of the Constitution in general and section 25 in particular.

In order to address these deficiencies in the Expropriation Act, the Department of Public Works began a long and complex process of drafting a new Expropriation Act. This process may be traced back to the draft policy on expropriation which was published in 2007. Following the publication of the draft policy, an Expropriation Bill was first published in 2008. This Bill, however, was never enacted and five years later it was replaced with a

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<sup>181</sup> See sections 10, 14, 15, 18 and 21 of the Expropriation Act.

<sup>182</sup> See section 1 of the Expropriation Act.

<sup>183</sup> MD Southwood *The Compulsory Acquisition of Rights* (2000) at 47.

<sup>184</sup> *Ibid* at 47.

<sup>185</sup> 1943 AD 656.

<sup>186</sup> MD Southwood (See note 183) at 47.

<sup>187</sup> A Gildenhuys and GL Grobler (See note 175) at paragraph 25.

second Expropriation Bill in 2013. Once again this Bill was never enacted and two years later it was replaced with a third Expropriation Bill in 2015. Although this Bill has been passed by both Houses of Parliament it has not been assented to by the President.

The draft policy on expropriation, the 2008 Bill and the 2013 Bill will be discussed in turn, starting with the draft policy.

### **4.3 The draft policy on expropriation**

#### ***(a) Introduction***

A draft policy on expropriation entitled *Expropriate For Public Purpose in the Public Interest* was published by the Department of Public Works on 13 November 2007.<sup>188</sup> In this 22 page document the Department introduced the reader to the history of South Africa's land dispossession and the property clause in the Constitution.<sup>189</sup> The Department thereafter noted the objects of the policy framework and the existing framework, before surveying other jurisdictions and finally setting out the principles upon which a new Expropriation Act should be based.<sup>190</sup> For the purpose of this dissertation, however, it is not necessary to discuss the draft policy in detail. Instead, it will be prudent to focus only on those parts of the draft policy that deal with the legislative framework, the challenges faced by the legislative framework and the principles which should be applied when drafting of a new Expropriation Act.

#### ***(b) The legislative framework and its challenges***

Insofar as the legislative framework is concerned, the draft policy begins by outlining the provisions of section 25(2) of the Constitution and by noting that the Expropriation Act is in force and effect.<sup>191</sup>

It then goes on to argue that the provisions of the Expropriation Act are not consistent with

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<sup>188</sup> Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007.

<sup>189</sup> See headings A and B in Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 2-8.

<sup>190</sup> See headings C, D, E and F in Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 9-20.

<sup>191</sup> See heading D in Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 10-11.

the provisions of section 25 and, in particular, that they are not consistent with:

- (i) section 25(3) which introduces new factors to be taken into account when determining the amount to be paid for compensation;<sup>192</sup> and
- (ii) section 25(4) which provides that property is not limited to land and that it may include all of South Africa's natural resources.<sup>193</sup>

Apart from the fact that the Expropriation Act is incompatible with section 25 of the Constitution, the draft policy argues that it needs to be revised for other reasons as well. Among these are: first, that the Expropriation Act predates the Constitution and thus lacks the transformative intention of the Constitution; and, second, that the Expropriation Act is inconsistent with other comparable statutes from around the world.<sup>194</sup>

***(c) Principles identified to guide the draft policy<sup>195</sup>***

Insofar as the principles which should be applied when drafting of a new Expropriation Act are concerned, the draft policy identifies five such principles. These are as follows:

- (i) A new Expropriation Act should allow for expropriation in the public interest.
- (ii) A new Expropriation Act should allow for compensation to holders of specified unregistered rights.
- (iii) A new Expropriation Act should align the calculation of compensation with the factors mentioned in section 25(3) of the Constitution.
- (iv) A new Expropriation Act should create a common framework which includes certain minimum norms and standards in relation to which authorities have powers to expropriate.
- (v) A new Expropriation Act should outline three separate phases and mechanisms for each phase which will enable the practical process of expropriation to proceed. These phases should include the following:
  - First, the decision to expropriate. This decision should be informed by consultations with all interested parties and be based on relevant information.

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<sup>192</sup> Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 11.

<sup>193</sup> *Ibid* at 11.

<sup>194</sup> *Ibid* at 11-12.

<sup>195</sup> The summary below is based upon the principles outlined in Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 16-21.

- Second, the process of expropriation. This process should require notices of particular standards.
- Third, the process of agreeing on or determining compensation. Compensation should be just and equitable.<sup>196</sup>

#### 4.4 The Expropriation Bill 2008<sup>197</sup>

Following the publication of the draft policy on expropriation, the Department of Public Works published an Expropriation Bill<sup>198</sup> (B16-2008) together with an Explanatory Summary in 2008. Although the Department claimed that this Bill was drafted after consulting both organs of state and the private sector,<sup>199</sup> it was severely criticised and eventually withdrawn from the parliamentary process due to a lack of public consultation.<sup>200</sup>

Property was defined in clause 1 of this Bill as “includes a right in property and includes movable property”.<sup>201</sup> Although worded differently, this definition did not appear to introduce any significant changes to the manner in which property was defined in the Expropriation Act. It simply highlighted the fact that both objects and the rights that pertain to those objects could be expropriated.

#### 4.5 The Expropriation Bill 2013<sup>202</sup>

Five years after the 2008 Expropriation Bill was published and then withdrawn, the 2013 Expropriation Bill was published.<sup>203</sup> Like the 2008 Expropriation Bill, this Bill came under substantial criticism for various reasons. In light of these criticisms it was never introduced in Parliament and was ultimately withdrawn from the parliamentary process.

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<sup>196</sup> The summary below is based upon the principles outlined in Notice 1654 in *Government Gazette* No. 30468 published 13 November 2007 at 16-21.

<sup>197</sup> Expropriation Bill B16-2008, ISBN 978-1-77037-193-4 in *Government Gazette* No. 30963 published 11 April 2008.

<sup>198</sup> *Ibid.*

<sup>199</sup> Memorandum on the objects of the Expropriation Bill 2008 annexed to Expropriation Bill B16-2008, ISBN 978-1-77037-193-4 in *Government Gazette* No. 30963 published 11 April 2008..

<sup>200</sup> L Donnelly “Expropriation Bill Shelved 'for Fear of Backlash” published 09 September 2008, available at <http://mg.co.za/article/2008-09-09-expropriation-bill-shelved-for-fear-of-backlash> accessed 25 October 2016

<sup>201</sup> Expropriation Bill B16-2008, ISBN 978-1-77037-193-4 *Government Gazette* No. 30963 published 11 April 2008.

<sup>202</sup> Notice 234 in *Government Gazette* No. 36269 published 20 March 2013.

<sup>203</sup> *Ibid.*

Property was defined in clause 1 of this Bill as “not limited to land and includes a right in or to such property”.<sup>204</sup> Once again, although this definition was worded differently from both the Expropriation Act and the Expropriation Bill, it did not appear to introduce any significant changes to the manner in which property was defined in either of those instruments.

#### **4.6 The Expropriation Bill 2015**<sup>205</sup>

Two years after the 2013 Expropriation Bill was withdrawn the 2015 Expropriation Bill was published for public comment. Although this Bill also came under substantial criticism for various reasons, unlike the 2008 and 2013 Bills it was eventually passed by both Houses of Parliament and then sent to the President for his assent and signature. Acting in terms of section 79 of the Constitution, however, the President has referred the Bill back to Parliament for reconsideration. In his referral the President indicated that he has reservations about the constitutional validity of certain sections of the Bill as well as the process that was followed by Parliament.<sup>206</sup>

When the 2015 Bill was first introduced in Parliament, property was defined in clause 1 of the Bill as “not limited to land and includes a right in such property”.<sup>207</sup> This definition was very similar to the one contain in the 2013 Bill which included the words “or to”. During the Parliamentary process, however, the definition of property was amended and in the final version that was passed by Parliament property was defined in clause 1 as “property as contemplated in section 25 of the Constitution”.<sup>208</sup>

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<sup>204</sup> Clause 1 of the Expropriation Bill 2013 Notice 234 in *Government Gazette* No. 36269 published 20 March 2013.

<sup>205</sup> B -2015 explanatory summary published in *Government Gazette* No. 38418 published 26 January 2015.

<sup>206</sup> See: <http://www.polity.org.za/article/cosatu-cosatu-statement-on-the-presidents-decision-to-send-back-the-expropriation-bill-2016-07-26> - accessed 27 October 2016.

<sup>207</sup> Clause 1 of Expropriation Bill B-2015 published in *Government Gazette* No. 38418 published 26 January 2015.

<sup>208</sup> Expropriation Bill B4D-2015, ISBN 978-1-4850-0314-4.

#### **4.7 The definition of property in the Expropriation Bill 2015:**

##### *(a) Introduction*

As discussed above, property is defined in the final version of the 2015 Expropriation Bill as “property as contemplated in section 25 of the Constitution”.<sup>209</sup> The scope and ambit of this definition is considered below.

##### *(b) The ordinary grammatical meaning*

The ordinary grammatical meaning of the definition of property in clause 1 of the final version of the 2015 Expropriation Bill is that property for the purposes of the Bill has the same meaning as property for the purposes of section 25 of the Constitution.

The ordinary grammatical meaning of this definition makes it clear that it is not a definition in and of itself, but rather simply a signpost that refers the interpreter to the Constitution to continue his or her search for the meaning of property.

The interpreter would then be forgiven, in order to understand what can be the subject of expropriation, for logically turning to section 25 of the Constitution to attempt to find the definition of property.

The interpreter would then confusingly find that the Constitution simply does not provide any direct or in-text definition for what exactly constitutes property. The only reference to what constitutes property is contained in section 25(4) which simply states that “property is not limited to land”.

Without any further reading on the topic, the interpreter would therefore only be able to conclude that the meaning of property would simply be that it is not limited to land. The interpreter would need to research constitutional jurisprudence to understand the very object of the Expropriation Bill.

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<sup>209</sup> Clause 1 Expropriation Bill B4D-2015, ISBN 978-1-4850-0314-4.

(c) *The constitutional meaning*

The Constitution is the supreme law of the Republic and requires “an interpretive approach which, while paying due regard to the language that has been used, is ‘generous’ and ‘purposive’ and gives expression to the underlying values of the Constitution”,<sup>210</sup> as was outlined in the case of *Ferreira v Levin N.O. and others; Vryenhoek and others v Powell N.O. and others*.<sup>211</sup>

Our Constitution requires a purposive approach to statutory interpretation as noted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,<sup>212</sup> where it was held that “[t]he technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2) . . . that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights’.”<sup>213</sup> Ngcobo J continues by lamenting that an interpretative process should not focus simply on the ordinary meaning of the words, but also takes into account the “colour given to language by the context”.<sup>214</sup>

Chapter Three of this dissertation examined the scope of what may constitute property for the purpose of the Constitution and the rationale therefor. For the purpose of this portion of the dissertation, it is best to simply summarise the findings by citing the conclusion of Chapter Three:

... the following are therefore ‘property’ as per the Constitution: movable and immovable corporeal property, incorporeal things in terms of common law, customary law and legislation (e.g. trademarks and business systems), and most recently a form of “new property”, being a grocer’s wine license, has been accepted to be property.<sup>215</sup>

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<sup>210</sup> *Ferreira v Levin N.O. and others; Vryenhoek and others v Powell N.O. and others* 1996 (1) SA 984 (CC) at paragraph 46.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).

<sup>213</sup> *Ibid* at paragraph 91.

<sup>214</sup> *Ibid* at paragraph 92.

<sup>215</sup> See Chapter 3 of this dissertation.

## **4.8 The Expropriation Bill vs the Expropriation Act**

The in-text definition of property in the Expropriation Act still extended beyond the immediately obvious as the meaning of movable and immovable property. It extended to vested rights with an economic value and so would include the likes of intellectual property and shares.<sup>216</sup>

The Expropriation Bill 2015 has a somewhat wider definition of property, which is also evolving as new cases are decided by the Constitutional Court. Of particular interest is that concept of “new property” which, with the definition of property as contained in the Bill, now also will be the subject matter of expropriation.

## **4.9 Implications of the Expropriation Bill 2015**

### *(a) Introduction*

Now that the groundwork has been laid for understanding the history of the development of the new Expropriation Bill, as well an interpretation of the possible meaning of property in the context of the private law and constitutional jurisprudence, it would be prudent to consider some of the implications which this law may have for the people of South Africa.

### *(b) Uncertainty for foreign investors*

The definition of property has been different in each version of the Expropriation Bill so far presented for public comment and parliamentary consideration. Further to this, the definition of what constitutes property is not clearly spelt out in the legislation itself.

The referral to the Constitution in the most recent draft does not resolve any of the practical problems many investors have surrounding understanding the very object of the Bill – what may be expropriated. This uncertainty and the further uncertainty surrounding the growing list of what may constitute property in terms of section 25 of the Constitution causes a lack of confidence in the security of investments made in South Africa and hence this

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<sup>216</sup> MD Southwood (See note 183) at 47.

Expropriation Bill 2015 serves as a deterrent to foreign investment.<sup>217</sup>

As evidenced by this dissertation, an in-depth enquiry is required to ascertain the very object of the Expropriation Bill 2015. It is submitted that this illustrates how the uncertainty may impact a foreign investor who looks for safeguards for property rights before concluding a decision to invest.<sup>218</sup>

*(c) Opening flood gates to court challenges*

In *Shoprite Checkers*<sup>219</sup> the main judgment accepted that a grocer's licence to sell wine constituted property for the purposes of section 25.

In commenting on this conclusion Moseneke DCJ briefly introduced the floodgates argument when he stated:

The main judgment may very well create very difficult property jurisprudence. The wider the definition of property, the tighter our understanding of deprivation and arbitrariness will have to be. Would every change in a licensing law possibly attract a Constitutional challenge based on the property clause like the one now in our hands? . . . Also, if a province were to terminate a class of licences, would that amount to expropriation that entitled the holders to compensation?<sup>220</sup>

The questions posed above are legitimate concerns because if a court decision creates a wide category of "new property" and the state was to attempt to expropriate such property, then the courts may face increased volumes of litigation to resolve these disputes. A tighter definition of property could arguably decrease the threat of such litigation in addition to giving foreign investors confidence in the protection of their investments.

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<sup>217</sup> see L Donnelly "Crippled SA Loses Another Crutch" published 31 Jul 2015 available at <http://mg.co.za/article/2015-07-30-crippled-sa-loses-another-crutch/> accessed on 25 May 2016 and S Nkabinde "SA Policies Headache for US Companies BBBEE and Lack of Skills are Biggest Concerns for American Businesses in SA." published 4 July 2015 available at <https://www.moneyweb.co.za/news/economy/local-policy-headaches-us-companies/> accessed on 25 May 2016.

<sup>218</sup> C Smith "Beware of Impact of New Laws on Investment - Chamber" published 5 February 2016, available at <http://www.fin24.com/Economy/beware-of-impact-of-new-laws-on-investment-chamber-20160205> accessed 25 May 2016.

<sup>219</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 125.

<sup>220</sup> *Ibid* at paragraph 148.

*(d) Inadequate processes to accommodate different types of property*

While the Expropriation Bill 2015 makes provisions for the situation “if property is land”,<sup>221</sup> there are no processes for other kinds of property which may require special actions to be taken to assess, inspect or pass transfer thereof to the state. By way of an example, if a person is the owner of a trademark as their intellectual property, but they are hypothetically served with a notice of expropriation, the processes of the Bill does not provide for the Companies and Intellectual Property Commission (CIPC) to be notified in order to update the Register of Trademarks.

#### **4.10 Alternative definitions**

*(a) Introduction*

It is only to be expected, where property rights are concerned and public interest has been stirred, that civic organisations or political parties would create alternative definitions which they believe would be better than the proposed definition. Below are two such alternative definitions for property which were recommended by the interested parties discussed.

*(b) South African Institute for Race Relations*

The South African Institute for Race Relations (SAIRR) is a non-profit organisation which was established in 1929 to “oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa”.<sup>222</sup>

The SAIRR has made several recommendations over the course of the development of the Expropriation Bill 2015, even producing their own “better” Expropriation Bill for the

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<sup>221</sup> See clauses 5(2), 5(5)(b), 7(4)(b)-(c), 8(2)(c), 14(1)(d), 14(2), 232(b) and 24(2)(b).

<sup>222</sup> South African Institute of Race Relations “Petition to President on Expropriation Bill” published on 27 May 2016, available at <http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/petition-to-president-on-expropriation-bill-2013-27-may-2016> accessed 19 January 2017.

consideration of politicians.<sup>223</sup> In this draft, the Institute has put forward an alternative definition for property which it argues is constitutionally compliant, namely:

Property means movable and immovable property; mining and water rights; mortgages, servitudes, and other registered rights; shares or debentures in companies; and patent and other intellectual property rights.<sup>224</sup>

This definition would make an interpreter's interpretation of what may be property far easier than necessitating in-depth and time consuming research to understand the object of the Expropriation Bill.

*(c) Democratic Alliance*

While the United Democratic Movement (UDM) also opposed the definition of property in the Expropriation Bill 2015, the only political party to put forward an alternative definition was the Democratic Alliance.<sup>225</sup> The definition put forward was:

Property for the purposes of this Act shall be limited to: any land; any interest in land; immovable real rights in land including the right of a lessee of the land but shall exclude intangible commercial interests, including, but not limited to securities as defined in the Financial Markets Act 19 of 2013, shares as defined by the Companies Act 71 of 2008, contractual rights such as revenue sharing contracts, concession and other similar contracts, intellectual property rights such as copyrights, patents, trademarks, trade and business secrets, any rights conferred by law to conduct economic and commercial activities including licenses, permits and authorisations.<sup>226</sup>

The rationale for this opposition was further expounded when written opposition to the final version of the Expropriation Bill was submitted. This written opposition stated:

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<sup>223</sup> South African Institute of Race Relations "The IRR's Alternative Expropriation Amendment Bill: A Framework Document" published on 22 April 2015, available at <http://irr.org.za/reports-and-publications/occasional-reports/files/the-irrs-better-expropriation-bill-2013-22-april-2015> accessed 10 November 2016.

<sup>224</sup> *Ibid.*

<sup>225</sup> BAD Martins "Report of the Portfolio Committee on Public Works on the Expropriation Bill [B 4 – 2015]" published in *Parliament of Republic of South Africa, Announcements, Tablings And Committee Reports No 5–2016* 8 February 2016 available at [http://www.parliament.gov.za/live/commonrepository/Processed/20160209/613880\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20160209/613880_1.pdf) accessed 25 January 2017.

<sup>226</sup> *Ibid.*

Section 25(4)(b) [of the Constitution] expressly states that property is not “limited to land” but does not give a precise definition. This definition is arguably too broad and creates a great deal of uncertainty as to what the state may expropriate...It is proposed that if there is certain property that is not subject to expropriation, then such property must be expressly stated so as to avoid uncertainty and the repercussions this will have for investment in our economy.<sup>227</sup>

This definition of property is narrower than the SAIRR’s definition and certainly more specific than the definition of property as contained in the Expropriation Bill 2015.

#### **4.11 Conclusion**

The ability to expropriate is a power of the state created through legislation. Presently, the Expropriation Act is the framework which provides for such expropriations. To date, efforts have been made to produce a new Expropriation Act which is in line with the values of the Constitution. Various versions of a new Act have been tabled and withdrawn, but the latest version, the Expropriation Bill has been passed by the National Assembly and the National Council of Provinces.

The definition of property throughout this development has changed with every redraft or tabling which has created a large amount of uncertainty. While interested civic organisations or opposition political parties have also produced definitions of property for consideration as worthy alternatives, these were rejected. The implications of the accepted definition are uncertain and therefore it would be best at this juncture to consider the practical difficulties and some recommendations in the following chapter.

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<sup>227</sup> A Dreyer “The Democratic Alliance in the National Council of Provinces, hereby objects to the following definitions and/or clauses of the Expropriation Bill [B4D -2015], we request that our objections are recorded so as to reflect our opposition to the aforementioned Bill.” Published on 11 May 2016 available at [https://pmg.org.za/files/160511DA\\_submission.docx](https://pmg.org.za/files/160511DA_submission.docx) accessed 25 January 2017.

## **CHAPTER FIVE – ANALYSIS AND RECOMMENDATIONS**

### **5.1 Introduction**

The principle concern of this final chapter will be to contrast the definition of property in the Expropriation Bill<sup>228</sup> with the definition of property in the Expropriation Act and consider other definitions advanced by interested parties before considering possible implications of the definition as it stands.

### **5.2 The different definitions of property**

The Expropriation Bill, which was passed by the National Assembly and the National Council of Provinces, defines property as “property as contemplated in section 25 of the Constitution”.<sup>229</sup> The existing Expropriation Act defines property as “both movable and immovable property”.<sup>230</sup> It extends to vested rights with an economic value and thus intellectual property and shares may also be included.<sup>231</sup>

The definition of property in the Expropriation Bill is wider than the existing Expropriation Act because it extends to anything which can be classified as property in terms of section 25 of the Constitution. The scope of the Expropriation Act, therefore, could be considered to be settled whereas the Expropriation Bill’s scope is not settled and will not become settled anytime soon unless either another definition for property is employed, or our constitutional jurisprudence is developed in such a manner as to create a closed definition of what constitutes property for the purposes of section 25 of the Constitution.

### **5.3 The practical difficulty posed by a lack of an “in-text” definition**

An interpreter of the Expropriation Bill, as mentioned before, will not find a concrete definition of property in the Bill itself and will only be informed to consult section 25 of the Constitution itself to find one.

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<sup>228</sup> Expropriation Bill B4D-2015, ISBN 978-1-4850-0314-4.

<sup>229</sup> Section 1 Expropriation Bill B4D-2015, ISBN 978-1-4850-0314-4.

<sup>230</sup> Section 1 of the Expropriation Act 63 of 1975.

<sup>231</sup> MD Southwood (See note 183) at 47.

The Constitution itself also does not define the concept of property other than to state that it is “not limited to land” in section 25(4). It is necessary, therefore, in order to understand what property is, to conduct a wide search of constitutional jurisprudence. Only after this lengthy investigation can the very object of the Expropriation Bill be understood.

This will prove to be a difficulty for the ordinary law-abiding citizen or foreign investor who wishes to understand what constitutes property that may be the subject of an expropriation, but who has no formal legal or similar education to assist them with this enquiry.

#### **5.4 Property for the purpose of section 25**

It is prudent at this point to revisit the case law on the subject to identify what is accepted to be property for the purposes of section 25 of the Constitution. With reference to Chapter Three of this dissertation, the conclusion can be brought forward that corporeal things such as movable and immovable property,<sup>232</sup> real rights and certain types of creditors’ rights,<sup>233</sup> intellectual property rights<sup>234</sup> and more recently certain statutory rights<sup>235</sup> all constitute property for the purposes of section 25 of the Constitution.

While this provides an answer to the reader of this dissertation, it does not resolve the practical difficulty encountered by the ordinary citizen who is searching for what may be property for the purpose of this Bill.

#### **5.5 Impact of the constitutional definition of property on the Expropriation Bill**

While the Expropriation Act arguably included real rights, creditors’ rights and intellectual property rights, it did not include statutory rights and interests linked thereto. As it presently stands, the definition of property in the Expropriation Bill is significantly *wider* than the definition of property in the Expropriation Act, especially taking into account the recent

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<sup>232</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), at paragraph 51.

<sup>233</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 1 SA 400 (CC) and *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC).

<sup>234</sup> *Laugh It Off Promotions CC v Sab International (Finance) Bv T/A Sabmark International (Freedom Of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at paragraphs 17 and 18, G to A.

<sup>235</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

decision of the Constitutional Court in the *Shoprite Checkers* case.

The result of the Expropriation Bill directly importing the definition of property as defined in terms of section 25 of the Constitution is that the definition of what may be property will also be *evolving* and possibly *expanding* as more cases are heard by the courts. The scope of what may be the subject of expropriated will resultantly also be growing, whether or not the legislation is adequately drafted to handle this theoretically increasing scope is another question altogether.

## 5.6 The purpose for no explicit definition of property in the Constitution

The Constitutional Court has discussed, from time to time, why there is no explicit definition of property in the Constitution. Below are extracts which summarise the position of the Court.

In the *FNB case*, it held that:

“The purpose of s25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions”.<sup>236</sup>

This rationale lead to the conclusion that:

“At this stage of our Constitutional jurisprudence it is ... practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property for purposes of s25”.<sup>237</sup>

When revisiting this topic, the Constitutional Court, in the case of *Law Society of South Africa and Others v Minister for Transport and Another* concluded that:

For present purposes let it suffice to state that the definition of property for purposes of Constitutional protection should not be too wide to make legislative regulation impracticable

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<sup>236</sup> *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paragraph 50.

<sup>237</sup> *Ibid* at paragraph 51.

and *not too narrow to render the protection of property of little worth*. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected by law as property . . . <sup>238</sup> (my emphasis added).

The above quotes inform the conclusion that the Constitution balances the protection of private property and the need for the public interest to be served through processes that are aimed at redress and transformation of our society. The question to be asked, in light of the above, is whether a Bill which seeks to limit private property rights should simply import a wide and evolving definition of property that is developed on a case by case basis?

## **5.7 Future difficulties in the constitutional jurisprudence**

### *(a) Introduction*

The most recent case which has discussed this issue must be examined in addition to the case law cited above. The difficulties which arise in the case of *Shoprite Checkers* <sup>239</sup> need to be considered.

The first difficulty is in ascertaining whether this judgment could be applied to other statutory rights, such as fishing licenses, water use licenses or licenses to operate taxis on specified routes. The door has now been opened for consideration, but it appears that the approach may be to assess each instance on its facts.

The second difficulty, being one in need of expounding upon, is that there is still no certainty as to what methodology or criteria should be applied by courts in future to determine what the test is for whether something constitutes property for section 25 of the Constitution.

Two separate methodologies were considered for determining whether a statutory right granted through licensing procedure, could constitute property. The first method, employed by Froneman J, is what could be referred to as “a values-based approach” and the second

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<sup>238</sup> *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) at paragraphs 83 to 84.

<sup>239</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC).

approach, adopted by Madlanga J, could be referred to as an “attributes-based approach”.

*(b) The values-based approach*

Froneman J began his analysis by pointing out that an entitlement to trade under a state-granted licence “does not sit comfortably with private law notions of property”,<sup>240</sup> but that in order to determine what property is for the purposes of section 25 a court must heed the values of the Constitution. This is because it is duty bound to interpret the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.<sup>241</sup> Froneman J then assessed the values of human dignity and freedom to choose a vocation which he argued should be used to determine which objects, rights and interests deserved constitutional protection.<sup>242</sup>

In terms of this values-based approach, therefore, it may be said that the concept of property should not be limited to the existing private law notions, but rather that it should be extended to align with constitutional entitlements so as to not become an obstacle to transformation in South Africa.<sup>243</sup>

Therefore the “objective normative values”<sup>244</sup> of the Constitution such as dignity, equality and freedom would necessitate defining property in such a way as to both allow for individual self-fulfilment and to fulfil the social obligation not to harm the public good.<sup>245</sup> Froneman J referred to the illuminating approach of the German courts as foreign law that substantiated his point by showing that the protection of property need not be premised on an economic theory of property – which has the satisfaction of the individual or their preferences at its core.<sup>246</sup>

Froneman J then later proceeded to note that the characteristics of a liquor license were close to the private law grounds used to recognise property and that the “potential objective link to

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<sup>240</sup>*Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 41.

<sup>241</sup> *Ibid* at paragraphs 43 and 44.

<sup>242</sup> *Ibid* at paragraphs 43 and 44.

<sup>243</sup> *Ibid* at paragraph 46.

<sup>244</sup> *Ibid* at paragraph 50.

<sup>245</sup> *Ibid* at paragraph 50.

<sup>246</sup> *Ibid* at paragraph 55.

constitutionally sanctioned self-fulfilment only strengthens the case for recognition of it as property”.<sup>247</sup> It was however noted that both *Agri SA* and *FNB* have clarified that the commercial value of the right does not have a determinative role to help determine whether the right constitutes property for section 25.

In summary, Froneman J’s approach was to assess whether recognising the object, right or interest as property would allow for individual self-fulfilment taking into account the values of the Constitution when making this determination but also disregarding the commercial value of the object, right or interest.

In applying the values of the Constitution, Froneman J created an ideal litigant for him to apply his reasoning to. He questioned that, if a woman who possessed the grocer’s license which enabled her to conduct her vocation of her choice was in the position of Shoprite, would that business licence qualify as property protected under section 25(1)?<sup>248</sup> He concluded that the holding of the license by a natural person may well then constitute property because nothing in the Act regulating the licenses “suggest(s) that a licence of this kind cannot be held by a person who needs it to live a life of individual self-fulfilment and reciprocal dignity to others”.<sup>249</sup>

The complication with this approach is that it can be argued that Shoprite is not dependent on selling wine for its livelihood which gives rise to its self-fulfilment and dignity. Shoprite is a large company which enjoys multiple profit streams. At most, losing its license is inconvenient and necessitates that it reapplies for it.

It is also regrettable that the values based inquiry, while helpful to the development of constitutional jurisprudence, is not in the form of a succinct definitive test that can be applied to determine what property is. This approach may also, in the words of Moseneke DCJ, “very well create very difficult property jurisprudence”.<sup>250</sup>

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<sup>247</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 68.

<sup>248</sup> *Ibid* at paragraph 64.

<sup>249</sup> *Ibid* at paragraph 66.

<sup>250</sup> *Ibid* at paragraph 125.

*(c) The attributes-based approach*

Moseneke DCJ stated that the issue he takes with the main judgment is that “an entitlement to commercial trade under a state licence does not fit comfortably within the constitutional notions of property”.<sup>251</sup> His reasoning is that a license was simply permission to carry out an action which would be unlawful in the absence of a licence.<sup>252</sup> He assessed the characteristics of a license, namely that they are:

- subject to administrative withdrawal and change;
- never absolute, often conditional and frequently time-bound;
- never there for the taking, but instead are subject to specified pre-conditions; and
- are also not freely transferable.<sup>253</sup>

He further concluded that a liquor licence does not vest in its holder since it is granted by the state and is legitimately open to state regulation from time to time.<sup>254</sup> In light of the above, the license does not fit the notions of Constitutional property.

In rejecting the values based approach in favour of assessing the characteristics of the object, right or interest, Moseneke DCJ noted further that “[t]he objective evaluation of whether a liquor licence is property cannot be premised on a speculative claim to other fundamental rights of an individual’s human dignity, occupation and freedom, *particularly on the part of a substantial corporate trader*”<sup>255</sup> (my emphasis added). He continued later to state that “[t]he inherent limitation in the core attribute of a liquor licence cannot be played down and supplanted by other rights in the Constitution in order to justify a finding of property which otherwise does not fit the objective enquiry.”<sup>256</sup> Moseneke DCJ assessed the attributes of the right in question and used this as the basis to conclude whether it should be held to be property or not.

The third judgment, written by Madlanga J, was a minority decision that also adopted an attributes approach to determining whether an object, right or interest is property. Madlanga J

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<sup>251</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 122.

<sup>252</sup> *Ibid* at paragraph 122.

<sup>253</sup> *Ibid* at paragraph 122.

<sup>254</sup> *Ibid* at paragraph 123.

<sup>255</sup> *Ibid* at paragraph 127.

<sup>256</sup> *Ibid* at paragraph 127.

did not, however, agree with the reasoning of the Moseneke DCJ that led to his conclusion that the grocer's license was not property.

Madlanga J raised a concern that Froneman J saw the need to use other rights in the Bill of Rights to water down "the potency of the right to property to the point where it does little more than ride on the coat-tails of rights such as human dignity".<sup>257</sup>

In determining whether a grocer's wine license was property, he compared it to the enrichment claim held to be property in the *Opperman*<sup>258</sup> case and he concluded that "[w]hile an enrichment claim was enforceable against only one party and was extinguishable if successfully defended, it was readily held to be logical and realistic to accept this is property as property whilst it was arguably more removed from acceptable property rights than a grocer's wine license".<sup>259</sup>

In assessing the attributes of the wine license for himself, Madlanga J concluded that it:

- is an entitlement to conduct business under certain circumstances;
- may endure indefinitely;
- is protected by procedures which must be carried out before its cancellation
- has enabled Shoprite Checkers to trade;
- has objective commercial value;
- is transferrable, possibly even as consideration for another valuable asset/right; and
- has given value to the business of Shoprite as an entity.<sup>260</sup>

It was found that the "grocer's wine licence, which has all the hallmarks of property, should be adjudged not to be property purely because it is a licence".<sup>261</sup> Madlanga J also noted that some types of licences "may lack factors that lead to a characterisation that they are property" which is why he did not consider that the finding that this particular license was

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<sup>257</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 139.

<sup>258</sup> *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC).

<sup>259</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 142.

<sup>260</sup> My adaptation of the attributes listed in 2015 (6) SA 125 (CC) at paragraph 143.

<sup>261</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 150.

property could be problematic for legislative purposes.<sup>262</sup>

The first complication with this attributes-based approach that is noteworthy is that there is no closed list of attributes which were listed or discussed in this case to use in the consideration of whether other licenses or rights will be held to be property for the purposes of section 25 of the Constitution.

Second, it could also be seen to be a problem that the justices were relying upon attributes that are used in the common law to determine whether an object/right is property while the Constitution is in fact the supreme law of the Republic and it should be used to interpret the common law to align to values.

#### *(d) Conclusion*

Arguably, it is possible for an attributes based approach to be adopted as the correct method to be used in determining whether an object, right or interest is property given that both Moseneke DCJ and Madlanga J used this approach. Insofar as the *approach* to be used to determine whether the right is property or not is concerned, they form a majority (six out of 11 Justices) by both assessing characteristics – however their conclusions as well as their approaches differed as to which attributes to consider.

Accordingly, there is no certainty as to what methodology or criteria should be applied to determine what the test is for property. There are only confirmed forms which either relate to specific examples that have been accepted as property or relate to forms of property that presently exist in terms of the common law.

### **5.8 Alternative definitions and policy recommendations**

Given the controversy which surrounds the definition of property and the uncertain direction of the developing constitutional jurisprudence, it is recommended that a definition which is

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<sup>262</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) at paragraph 147.

readily understandable and forms a closed list of what may be the object of an expropriation should be adopted.

A possible definition, which is essentially the first portion of the definition put forward by the DA, could be:

“Property for the purposes of this Act shall be limited to; any land; any interest in land; (and) immovable real rights in land including the right of a lessee of the land”.<sup>263</sup>

I do not think it is necessary for the balance of the definition proposed by the DA since the above forms a closed list of what may be expropriated. The reasons for preferring the above closed list are as follows:

(a) Much of the media attention relating to the expropriation Bill has centred on its purpose for land reform. It would follow that the definition of property should match the expectations which the citizenry have formed in light of this and the public consultations.

(b) The state may promulgate other legislation should it wish to forcibly acquire other forms of property. These other laws of general application can be debated and genuine public consultation on those issues by the interested stakeholders may take place. If one considers the expropriation of intellectual property, as an example, which has not been subject to much public debate because of the time taken up by the issue of how expropriation may shape land reform. Do many holders of intellectual property rights even know about the potential powers this Bill grants the state to interfere with their rights to their intellectual property? It is simply not necessary for the State to create a one-size, one-act, fits all-forms-of-property regime in order to enable the provisions of the Constitution.

(c) The closed definition of property above resolves any uncertainty which the ordinary citizen and foreign investors will experience when attempting to understand what may be expropriated. This certainty will enable a positive economic growth environment which is a

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<sup>263</sup> BAD Martins “Report of the Portfolio Committee on Public Works on the Expropriation Bill [B 4 – 2015]” published in *Parliament of Republic of South Africa, Announcements, Tablings And Committee Reports No 5—2016* 8 February 2016 available at [http://www.parliament.gov.za/live/commonrepository/Processed/20160209/613880\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20160209/613880_1.pdf) accessed 25 January 2017.

necessary component to resolving our pressing social issues. This revised definition will adequately address the concerns raised in this dissertation.

## **5.9 Conclusion**

This dissertation was aimed at examining the scope of what constitutes property for the purposes of the Expropriation Bill 2015. The case law, the writings of authors regarding the common law, the Constitutional Jurisprudence, the existing and the proposed expropriation statutes have all been examined in an attempt to pen a succinct understanding of what may constitute property.

While conclusions have been reached about definitive examples or categories that are accepted to be property, this topic will remain open to debate and development as long as the definition of property as contained in the Bill remains unedited. It is noteworthy that the definition of property, as contained in the 2015 Bill, is wider than its predecessor and faces an uncertain/evolving definition due to developing jurisprudence. Interested stakeholders have already noted that, should the Bill be passed in its present form, it will be challenged in the courts.

If the Expropriation Bill is truly aimed at land restitution, then the definition of property should not remain as merely a signpost to section 25 of the Constitution, but should rather be stated in a succinct manner to give the state the tools it needs to proceed with its transformative agenda.

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