

**A CRITICAL ANALYSIS OF THE CONSTITUTIONAL CONCEPT OF PROPERTY IN
LIGHT OF THE JUDGMENT IN SHOPRITE CHECKERS (PTY) LTD V MEC FOR
ECONOMIC DEVELOPMENT, EASTERN CAPE 2015 (6) SA 125 (CC).**

BY

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Submitted in fulfilment of the requirements of the Masters in Constitutional Law Degree

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DECLARATION

I, Khanya Kendra Noko, hereby declare that;

- (a) This research paper is my original work, I have not copied the work of another student or any other person.
- (b) Where I have relied on other sources, I have acknowledged these source.
- (c) This paper has not been submitted to another university in full or partial fulfilment of academic requirements of any other degree or qualification.

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February 2018

ACKNOWLEDGEMENTS

I am very grateful for the sacrifices made by my brothers Knowledge Jamela and Karsten Noko, you made this possible. My mother Thokozile Noko and my father Big Noko, words cannot begin to express how much I appreciate the support I have received from you. My sisters Refiloe Noko and Melissa Tshuma, as well as the extended family and all my friends thank you for your support as well.

Finally, a big thank you goes to my supervisor Professor Warren Freedman, thank you for the skills you passed on to me.

ABSTRACT

The meaning of “property” in a constitutional sense is a globally contested concept. As a result, various jurisdictions have adopted varying approaches to defining the meaning of this concept. Consequently, different conclusions have been reached with regard to the even more controversial issue of the inclusion of public law entitlements within the ambit of constitutional property.

Like in other foreign jurisdictions, the South African courts had no difficulties when dealing with the inclusion of rights and interests already protected as “property” under private law within the constitutional definition of property. Challenges only arose when the court had to extend the ambit of constitutional property beyond the rights and interests protected under private law. In much of the cases, unfortunately, the Courts extended the constitutional concept of property without fully explaining the reasons for such a decision, in a manner that would give certainty of outcomes in future cases.

The Shoprite Checkers case, was the first case, in which the Constitutional Court engaged fully with the meaning of constitutional property, and even went on to decide that constitutional protection of property extends to commercial licences which are public law entitlements.

This dissertation will critically analyse the constitutional concept of property in light of the Shoprite Checkers case. It will question whether the Constitutional Court was correct to extend the constitutional meaning of property to include commercial licenses.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1. BACKGROUND.....	8
2. RESEARCH QUESTION	13
3. RESEARCH METHODOLOGY	14
4. RATIONALE FOR STUDY	14
5. STRUCTURE OF THE STUDY.....	14

CHAPTER TWO: THE CONSTITUTIONAL PROPERTY CLAUSE

1. INTRODUCTION.....	17
2. THE APPLICATION OF THE PROPERTY CLAUSE	22
2.1 WHO IS BOUND BY THE RIGHTS SET OUT IN THE PROPERTY CLAUSE?.....	22
2.2 WHO IS ENTITLED TO CLAIM THE PROTECTION OF THE PROPERTY CLAUSE?.....	23
3. THE CONSTITUTIONAL CONCEPT OF A “DEPRIVATION”	23
4. THE NON-ARBITRARINESS REQUIREMENT	26
4.1 INTRODUCTION.....	26
4.2 THE TEST FOR SUBSTANTIVE ARBITRARINESS	27
4.3 THE TEST FOR PROCEDURAL ARBITRARINESS	29
5. THE CONSTITUTIONAL CONCEPT OF AN EXPROPRIATION.....	31
6. THE PUBLIC PURPOSE OR PUBLIC INTEREST REQUIREMENT	35
7. CONCLUSION	37

CHAPTER THREE: THE PROPERTY CONCEPT PRIOR TO *SHOPRITE CHECKERS*

1. INTRODUCTION.....	39
2. THE DISTINCTION BETWEEN CONSTITUTIONAL PROPERTY AND PRIVATE LAW PROPERTY	41
3. THE CONSTITUTIONAL CONCEPT OF PROPERTY	43
3.1 INTRODUCTION.....	43
3.2 OWNERSHIP.....	44
3.3 LIMITED REAL RIGHTS	46
3.4 LAND-USE-RELATED ENTITLEMENTS	48
3.5 INTELLECTUAL PROPERTY RIGHTS.....	49

3.6	PERSONAL RIGHTS	50
3.7	HOUSING AND OTHER WELFARE RIGHTS	52
4.	CONCLUSION	54

CHAPTER FOUR: THE PROPERTY CONCEPT IN *SHOPRITE CHECKERS*

1.	INTRODUCTION	56
2.	THE FACTS	57
3.	FRONEMAN J	58
4.	MADLANGA J	62
5.	MOSENEKE DCJ	63
6.	CONCLUSION	67

CHAPTER FIVE: COMPARATIVE JURISPRUDENCE

1.	INTRODUCTION	70
2.	THE EUROPEAN COURT OF HUMAN RIGHTS	70
2.1	INTRODUCTION	70
2.2	THE CONSTITUTIONAL CONCEPT OF PROPERTY	71
2.3	THE CONSTITUTIONAL CONCEPT OF PROPERTY AND PUBLIC LAW ENTITLEMENTS	75
3.	GERMANY	77
3.1	INTRODUCTION	77
3.2	THE CONSTITUTIONAL CONCEPT OF PROPERTY	78
3.3	THE CONSTITUTIONAL CONCEPT OF PROPERTY AND PUBLIC LAW ENTITLEMENTS	82
4.	THE UNITED STATES OF AMERICA	83
4.1	INTRODUCTION	83
4.2	THE CONSTITUTIONAL CONCEPT OF PROPERTY	84
4.3	THE CONSTITUTIONAL CONCEPT OF PROPERTY AND PUBLIC LAW ENTITLEMENTS	86
5.	CONCLUSION	88

CHAPTER SIX: ANALYSIS AND CONCLUSION

1.	INTRODUCTION	92
2.	THE RIGHT TO FREEDOM OF TRADE, OCCUPATION AND PROFESSION	95
2.1	INTRODUCTION	95
2.2	THE SCOPE AND AMBIT OF THE RIGHT	96

a)	<i>What is meant by the phrase “trade, occupation and profession”?</i>	96
b)	<i>What is meant by the term “citizen”?</i>	97
2.3	THE STANDARD OF REVIEW	97
2.4	THE ARGUMENT	98
3.	THE RULE OF LAW AND THE PRINCIPLE OF LEGALITY	100
3.1	INTRODUCTION	100
3.2	THE SCOPE AND AMBIT OF THE PRINCIPLE OF LEGALITY	100
3.3	THE ARGUMENT	102
4.	A RE-ASSESSMENT OF MOSENEKE DCJ’S JUDGMENT	102
4.1	INTRODUCTION	102
4.2	THE PRINCIPLE OF SUBSIDIARITY	105
4.3	RADICALLY REGULATED INTERESTS	105
5.	CONCLUSION	106
	BIBLIOGRAPHY	103

CHAPTER ONE: INTRODUCTION

1. Background

The right to property is guaranteed in section 25 of the Constitution.¹ Given the contested nature of property, and especially land rights in South Africa, it is not surprising that this is a particularly complex provision. It consists of nine subsections. The first three subsections are aimed at protecting existing property rights,² while the remaining six subsections are aimed at transforming South Africa's system of land law.³

The first three subsections read as follows:

- (1) "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of 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 the 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 investment of the property; and
 - (e) the purpose of the expropriation."⁴

These three subsections give rise to a number of complex and difficult issues. One of these is what is meant by the constitutional concept of "property". This is a particularly important issue, because a person may rely on the protection provided by sections 25(1) to (3) only if he or she can show

¹ The Constitution of the Republic of South Africa, 1996.

² See sections 25(1) to (3), Constitution of the Republic of South Africa, 1996.

³ See sections 25(4) to (9), Constitution of the Republic of South Africa, 1996.

⁴ See sections 25(1) to (9), Constitution of the Republic of South Africa, 1996.

that the right or object in question falls within the ambit of what the Constitution recognises as “property”. In other words, the constitutional concept of “property” functions as a gate which must be opened before a person can claim the rights set out in sections 25(1) to (3).⁵

The gatekeeping role that is played by the constitutional concept of “property” is clearly illustrated by the section 25 analysis adopted by the Constitutional Court in its seminal judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*.⁶ This analysis consists of the following questions:

- “(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?”⁷

As such, when determining whether a statute or statutory provision has infringed section 25 of the Constitution, a court must always begin by asking whether the interest that has been affected amounts to property for the purposes of section 25 (question (a)). If the answer to this question is yes, only then can the court go on to consider the remaining questions (questions (b) to (g)) and ultimately determine whether the statute or statutory provision is valid or not. If the answer to this question is no, the court cannot go on to consider the remaining questions. Instead, it must find that the statute or statutory provision is valid, at least insofar as section 25 is concerned.

In order to resolve a constitutional property dispute, it is important for the court to interpret the meaning of “property” for the purposes of section 25. The Constitution does not, however, offer much assistance in this regard as it does not expressly define “property” and neither does it provide

⁵ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁶ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁷ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

any express guidelines for defining this concept. Fortunately, this lack of a definition within the Constitution does not usually give rise to any problems where real rights (ownership and limited real rights) in corporeal objects (things) are concerned.⁸ This is because real rights in corporeal objects have always been defined as property in South African private law and it is generally accepted that the constitutional definition of property should not be narrower than the private law definition.⁹

The Constitutional Court has accordingly found that several traditional property rights are protected within the constitutional concept of property. In the leading case, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*¹⁰ the Constitutional Court stated that these interests form the foundation of the constitutional concept of property.¹¹ It went on to hold that the ownership of corporeal movables and immovables fall into the definition of constitutional property. In line with this finding, in *Agri South Africa v Minister of Minerals and Energy*,¹² the Constitutional Court also found that mineral rights fall into the definition of constitutional property and in *Ex parte Optimal Property Solutions CC*¹³ the Cape High Court also held that a registered praedial servitude is constitutional property.¹⁴

Apart from ownership and limited real rights, the Constitutional Court has held that other private law rights such as intellectual property rights and personal rights should be recognised as constitutional property. Thus, the constitutional concept of property has been extended to include intellectual property rights such as a trademark, *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*,¹⁵

⁸ M Chaskalson & C Lewis “Property” in M Chaskalson *et al Constitutional Law of South Africa* 1ed (1996) at 31-6.

⁹ AJ Van der Walt *Property and Constitution* (2012) at 114.

¹⁰ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 33; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 54; and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) at para 33.

¹¹ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51.

¹² [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 50.

¹³ 2003 (2) SA 136 (C).

¹⁴ *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C).

¹⁵ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005(8) BCLR 743 (CC) at para 17.

and personal rights arising from unjustified enrichment, *National Credit Regulator v Opperman*.¹⁶ Although the Constitutional Court was in these cases stretching the concept of constitutional property beyond the scope of the private law notion of property, it did not however fully engage with the issue of property by clarifying the reasons for the inclusion of such interests.¹⁷ Instead, the Constitutional Court was happy to assume that these interest qualify for protection as constitutional property.

The Constitutional Court in its recent judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*¹⁸ unlike earlier cases, actually dealt with the issue of property comprehensively. In this case a plurality of the Court accepted that a grocer's wine licence should be recognised as constitutional property. Apart from the fact that this is the first judgment in which the Constitutional Court has engaged fully with the meaning of the concept of constitutional property, it is also the first judgment in which the Court has accepted that the constitutional definition of property also encompasses interests derived from public law.

Although a plurality of the Constitutional Court accepted that a grocer's wine licence falls within the ambit of the constitutional concept of property, the grounds on which the Court arrived at this decision differed quite starkly.

In his main judgment, Froneman J held that a grocer's wine licence is indeed property protected by the constitution.¹⁹ In arriving at this conclusion, he was of the view that the meaning of property must be sought within the Constitution itself and that the constitutional values must play a key role in this regard (values-based approach)²⁰. In dealing with the facts at hand, Froneman J formulated

¹⁶ [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 61. See also *Phumelela Gaming and Leisure Ltd v Grundlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC) and *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 170 (CC) at para 84.

¹⁷ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 536. See also *Phumelela Gaming and Leisure Limited v Grundlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC) and *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005(8) BCLR 743 (CC)

¹⁸ [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

¹⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 70.

²⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 36, 44 and 46.

an objective test which seeks to establish a close connection between the interest and the holders' right to freedom of trade, occupation and profession as well as their dignity.²¹ This approach has been criticised for diminishing the right to property by requiring that an interest should affect other constitutional rights before it can be regarded as falling within the ambit of the constitutional definition of property.²²

In his concurring judgment, Madlanga J adopted a private law style approach. He was of the view that if the interest has characteristics of property then the court should not "shy away" from finding that it is indeed constitutional property. Madlanga J therefore assessed the characteristics of the Grocer's Wine License and found that, it is; something in hand, has commercial value, can be transferred, may endure indefinitely and it cannot be cancelled or suspended at whim.²³ He also argued that if something as tenuous as an enrichment claim which can only be enforced against a specific party and which can be brought to court and successfully defended was deemed property without hesitation, then logic dictates that a grocer's wine licence should also qualify as "property".²⁴ Madlanga J's approach has been criticised for justifying the extension of the constitutional concept of property to interest not protected under private law on a private law principles of conceiving of property.²⁵

Finally, it is also important to note that in his dissenting judgment Moseneke DCJ held that a grocer's wine licence does not fall within the ambit and scope of the constitutional concept of property. In arriving at this conclusion, Moseneke DCJ expressed the view that it was unnecessary for the court to determine the complex issue of property in this case.²⁶ He reasoned that not only was this a difficult issue, but the inclusion of commercial licenses within the constitutional concept

²¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

²² P Olivier "Property yields to purpose: Shoprite Checkers v MEC" *African Legal Centre* 6 July 2015 <http://africanlegalcentre.org/2015/07/06/piet-olivier-property-yields-to-purpose-shoprite-checkers-v-mec/>, accessed 18 August 2016.

²³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 143.

²⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 142.

²⁵ T Roux and D Davis "Property" in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (2015) at 20-18.

²⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 94.

of property would interfere with the states' constitutional duty of regulating the liquor industry.²⁷ The approach taken by Moseneke DCJ has been criticised for totally avoiding the question of whether or not the grocer's wine licence falls within the ambit of the constitutional concept of property and confusing the "concept of property with when it is acceptable to interfere with property".²⁸

The purpose of this thesis, therefore, is to critically analyse the constitutional concept of property in light of the different approaches adopted by the Constitutional Court in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*.²⁹ More specifically, the purpose of this thesis is to argue that it was unnecessary for the Constitutional Court to extend the constitutional concept of property to include grocer's wine licences for a variety of reasons, but most importantly because the interest of the licence holders are protected by other more appropriate provisions of the Constitution, namely the right to freedom of trade, occupation and profession guaranteed in section 22 of the Constitution, in the case of citizens, and the principle of legality which is an aspect of the rule of law, in the case of non-citizens and juristic persons.

2. Research question

As pointed out above, the purpose of this thesis is to critically analyse the constitutional concept of property in light of the different approaches adopted by the Constitutional Court in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*.³⁰ More specifically, the purpose of this thesis is to argue that it was unnecessary for the Constitutional Court to extend the constitutional concept of property to include grocer's wine licences for a variety of reasons, but most importantly because the interest of the licence holders are protected by other more appropriate provisions of the Constitution, namely the right to freedom of trade, occupation and profession guaranteed in section 22 of the Constitution, in the case of citizens, and the principle of legality which is an aspect of the rule of law, in the case of non-citizens and juristic persons.

²⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA (CC); 2015 (9) BCLR 1052 (CC) at para 120.

²⁸ P Olivier "Property yields to purpose: Shoprite Checkers v MEC" *African Legal Centre* 6 July 2015 <http://africanlegalcentre.org/2015/07/06/piet-olivier-property-yields-to-purpose-shoprite-checkers-v-mec/>, accessed 18 August 2016.

²⁹ [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

³⁰ [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

Before making this argument, however, this thesis will: (a) set out and discuss the manner in which the Constitutional Court has interpreted and applied sections 25(1) and (2) of the Constitution; (b) set out and discuss the different approaches adopted in the *Shoprite Checker's* case; and (c) compare and contrast the different approaches adopted in the Shoprite Checkers case with the approach adopted in comparable foreign jurisdictions, namely the European Union, Germany and the United States of America. The approach adopted in each of these jurisdictions was considered by the Court itself in its judgment in *Shoprite Checkers*.

3. Research methodology

This is a qualitative study. As such, it is based largely on a critical analysis of primary and secondary legal materials in order to identify contradictions, inconsistencies, lacunae and trends in the relevant field. The primary and secondary materials that will be analysed in this study include statutes and law reports. In addition, they also include books, chapters in books journal articles, reports and internet websites.

4. Rationale for study

The motivation for this study is the need for conceptual clarity with regard to the constitutional concept of property. This is essential because the question of property is not only the threshold question in a constitutional property dispute but it is also a point at which the case can be resolved. Therefore, a clearer understanding of the constitutional concept of property is pivotal to the protection of the right of property. Furthermore, clarity would assist in the adjudication of property claims and the protection of property holders from arbitrary deprivation and unlawful expropriation and thereby further the constitutional goals of social transformation and economic security.

5. Structure of the study

The thesis will be divided into six chapters. These chapters are the following;

Chapter One: Introduction

The general background, the research questions, the research methodology, the rationale for the study and structure of the study will be set out in chapter one.

Chapter Two: The constitutional property clause

The manner in which the Constitutional Court has interpreted and applied sections 25(1) and (2) will be set out in discussed in chapter two. This chapter will focus specifically on the manner in which the Court has interpreted and applied the following concepts: “deprivation”, “non-arbitrariness”, “expropriation” and “public purpose/public interest”.

Chapter Three: The property concept prior to Shoprite Checkers

The manner in which the constitutional concept of property was interpreted and applied by courts, and especially the Constitutional Court, prior to its judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* will be set out and discussed in chapter three.

Chapter Four: The property concept in Shoprite Checkers

The judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* will be set out and discussed in detail in chapter four. The different approaches adopted by Froneman J, Madlanga J and Moseneke DCJ will also be highlighted.

Chapter Five: Comparative jurisprudence

The manner in which the European Court on Human Rights, the German Federal Constitutional Court and the Supreme Court of the United States of America have interpreted and applied the constitutional concept of property in their respective jurisdictions will be set out and discussed in this this chapter.

Chapter Six: Analysis and conclusion

The decision to extend the constitutional concept of property to include grocer's wine licences will be critically analysed in chapter six. As a part of this critical analysis it will be argued that it was unnecessary for the Constitutional Court to extend the constitutional concept of property to include grocer's wine licences because the interests of grocer's wine licence holders are protected in section 22 of the Constitution for South African citizens and under the principle of legality for juristic persons and non-citizens.

CHAPTER TWO: THE CONSTITUTIONAL PROPERTY CLAUSE

1. Introduction

The system of apartheid was introduced in South Africa by the National Party following its victory in the 1948 general election.³¹ As its name suggests, this system was aimed at segregating South Africans, not only on an economic, political and social basis, but also on a territorial basis.³² In order to achieve the territorial segregation of South Africans, the apartheid government enacted a vast number of statutes. Among the most notorious were the Black Land Acts³³ and the Group Areas Acts.³⁴

These laws dispossessed black South Africans of their land and transferred ownership to the white minority. As a result of this process, black South Africans were eventually confined to 13% of the land even though they constituted 80% of the population.³⁵ The loss of land was accompanied by a loss of livestock and other forms of wealth. These losses drove the majority of black South Africans into poverty and created a pool of cheap migrant labour. The labour system created by this process ultimately resulted in a break down in community and family structures.³⁶

Given this history, it is not surprising that the process of negotiating and drafting a constitutional property clause proved to be a difficult task. Although both the African National Congress (the “ANC”) and the National Party (the “NP”) agreed that the right to property should be protected in a post-apartheid constitution, each party had a different goal in mind. The ANC wanted to ensure that the socio-economic transformation of South Africa would not be frustrated by the

³¹ C Cachalia and M Suttner *Long walk to freedom* (1998) 27.

³² History.com “Apartheid” (2010). Available at www.history.com/topics/apartheid/2010, accessed on 25 August 2016.

³³ Black (Native) Land Act 27 of 1913 and Native Trust and Land Act 18 of 1936.

³⁴ Act 41 of 1950. This Act was repealed and replaced by the Group Areas Act 77 of 1957 which in turn was repealed and replaced by the Group Areas Act 36 of 1966.

³⁵ M Chaskalson and C Lewis “Property” in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) at 31-2.

³⁶ Department of Land Affairs *White Paper on South African Land Policy* (1997) at para 4.14.1.

constitutional protection of individual property holder,³⁷ while the NP wanted to protect individual property holders from being dispossessed of their existing property rights.³⁸

In order to reconcile these conflicting goals, both parties made important concessions and these concessions are reflected in the provisions of section 28 of the Interim Constitution and especially section 25 of the Constitution.

Section 28 of the Interim Constitution appears to have been modelled partly on Article 14 of the German Basic Law.³⁹ Like Article 14(1), section 28(1) expressly guaranteed the institution of private property. It provided in this respect that “[e]very person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permit, to dispose of such rights”.⁴⁰ Apart from guaranteeing the institution of private property, section 28 also distinguished between the deprivation and expropriation of property. Section 28(2) stated in this respect that “[n]o deprivation of any rights in property shall be permitted otherwise than in accordance with a law”,⁴¹ and section 28(3) that “[w]here any rights in property are expropriated . . . , such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable”.⁴² Provisions dealing with land reform were, however, not included in the property clause. Instead, they were

³⁷ M Chaskalson and C Lewis “Property” in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) at 31-2.

³⁸ M Chaskalson and C Lewis “Property” in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) at 31-2.

³⁹ Article 14 of the German Basic Law reads as follows: “(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts”.

⁴⁰ See section 28(1) Constitution of the Republic of South Africa, Act 200 of 1993.

⁴¹ See section 28(2) Constitution of the Republic of South Africa, Act 200 of 1993.

⁴² See section 28(3) Constitution of the Republic of South Africa, Act 200 of 1993. Apart from declaring that compensation must be “just and equitable, section 28(3) also provided that just and equitable compensation must be determined by “taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected”.

included in the equality clause (s 8(3)(b))⁴³ and in an entirely separate part of the Interim Constitution (ss 121 to 123).⁴⁴

Although the positive guarantee of property rights contained in section 28(1) of the Interim Constitution was not retained in section 25 of the Constitution,⁴⁵ the distinction drawn by sections 28(2) and (3) between deprivations and expropriations was. Section 25(1) provides in this respect that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”,⁴⁶ and section 25(2) that “property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court”.⁴⁷ Section 25(3) goes on to state that “[t]he amount of compensation and the time and manner of payment must be just and equitable reflecting an equitable balance between the public interest and the interest of those affected”.⁴⁸

Section 25 does not only protect the right to private property, but also makes provision for a system of land reform in sections 25(5) – (9). With respect to land rights, the property clause in section 25(5) directs that “the state must take reasonable legislative and other measures, within

⁴³ The Constitution of the Republic of South Africa, Act 200 of 1993. This section stipulated that, “Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.”

⁴⁴ The Constitution of the Republic of South Africa, Act 200 of 1993. Section 121 provided for the enactment of an Act of Parliament to deal with restitution of land rights. Section on the other hand 122 provided for the establishment of a Commission of Restitution of Land Rights and section 123 outlined the various orders the courts could make in land restitution matters.

⁴⁵ Although section 25 in the Constitution does not contain a positive guarantee of property rights, Chaskalson and Lewis point out that this does not pose any problems as the equality clause in the Constitution will ensure that there is no discrimination in this regard (see M Chaskalson and C Lewis “Property” in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) at 31-9). Moreover, in the *First Certification* case, the Constitutional Court confirmed that there is nothing odd about the lack of a positive guarantee of property rights as this is common in several democracies (see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) at para 72).

⁴⁶ See section 25(1) of the Constitution of the Republic of South Africa, 1996.

⁴⁷ See section 25(2) of the Constitution of the Republic of South Africa, 1996.

⁴⁸ See section 25(3) of the Constitution of the Republic of South Africa, 1996. When it comes to determining just and equitable compensation, section 25(3) provides that the courts must take into account all relevant circumstances including: (a) the current use of the property; (b) the history of the acquisition of the property; (c) the market value of the property; (d) the extent of the direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the property”.

its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” Section 6 provides for security of tenure or “comparable redress” to persons or communities whose land tenure is insecure because of racially discriminatory laws and section 8 provides for the restitution of property or “equitable redress” where such property was expropriated after 19 June 1913. In section 8, the property clause also provides that “No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).” Finally, in section 9, the Parliament is directed to enact legislation that deals with land reform issues.⁴⁹

When it comes to the resolution of a constitutional property dispute, before any other issues are dealt with, there should be a determination of whether or not the object, right or interest concerned falls within the constitutional definition of property. This gatekeeping role of the “property” question is clearly demonstrated by the section 25 analysis adopted by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*.⁵⁰ This analysis, which consists of a series of questions, reads as follows:

- “(a) Does that which is taken away by operation of legislation amount to “property” for the purposes 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 purposes 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?”⁵¹

⁴⁹ Land reform as envisaged by section 25 is much more extensive than the system envisaged by the Interim Constitution.

⁵⁰ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51.

⁵¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 46.

As demonstrated by the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*⁵² case, the resolution of a property dispute begins with determining whether the object, right or interest concerned falls within the scope and ambit of what the constitution deems as “property”. At this stage, if the answer is no, then one cannot claim constitutional protection. However, if the answer is yes, then we proceed to question (b) and ask whether there has been a deprivation of the object, right or interest concerned. If there has been a deprivation, then we go on to question (c) and examine whether the deprivation was carried out in a manner consistent with the provisions of section 25(1). Should it be the case that the deprivation does not comply with the provisions of section 25, then, according to question (d) one must go on and look into whether this lack of compliance can be justified through a section 36 limitation clause analysis.

If the deprivation does not comply with the provisions for a lawful deprivation and cannot be justified under section 36, then the enquiry would be concluded at this stage and the deprivation will be found to be unconstitutional and therefore invalid. However, where the deprivation is lawful, question (e) requires one to look into whether the deprivation can also be regarded as an expropriation. If that is so, then as per question (f), the expropriation must be tested against the section 25(2)(a) and (b) provisions for a lawful expropriation. However, if the expropriation fails to pass this test then as outlined in question (g), it must be tested against the section 36 limitation clause. Should the expropriation not be justifiable in terms of the limitation clause, then the expropriation in question will be deemed both unconstitutional and invalid.

The property clause contains a number of key concepts, namely “property”, “deprivation”, “non-arbitrariness”, “expropriation” and “public purpose/public interest”. Apart from the concept of “property”, this chapter will focus on the manner in which each of these concepts has been interpreted and applied by South African courts. As Roux has explained, these concepts are particularly significant because the courts in South Africa and other jurisdictions have used them to strike a balance between the protection of private property and the interests of society. The concept of “property” will be dealt with separately in chapter three because it is the focus of this thesis. Before turning to discuss the key concepts of the property clause, however, it will be

⁵² [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

helpful to briefly discuss who is bound by the rights set out in the property clause and who is entitled to claim these rights.

2. The application of the property clause

2.1 Who is bound by the rights set out in the property clause?

Section 8(1) of the Constitution expressly provides that the Bill of Rights applies to all law and binds all organs of the State.⁵³ It, therefore, applies to all forms of law, including common law and customary law and is binding on the legislative, executive and judicial arms of government. The property clause is one of these rights. As such, it is binding on all law and all organs of the State. Apart from the state, section 8(2) provides that the Bill of Rights also binds natural and juristic persons (i.e. private persons), but only to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.⁵⁴

Although there is no doubt that the property clause is binding on the State, it is not so clear whether it is also binding on private persons. This is partly because the Constitutional Court has held that the property clause is primarily “aimed at protecting private property rights against governmental action” and not against private action.⁵⁵ In addition, the property clause authorises only those deprivations and/or expropriations that have been sanctioned by a law of general application and the concept of a law of general application does not include the actions of private actors.⁵⁶

Despite these arguments, it appears as though the property clause may be binding on private persons, at least in certain circumstances. In *Governing Body of the Juma Musjid Primary School v Essay NO*,⁵⁷ for example, the Constitutional Court held that the Bill of Rights imposes a negative obligation on private persons “not to interfere with or diminish the enjoyment of a

⁵³ See Section 8(1) Constitution of the Republic of South Africa, 1996.

⁵⁴ See Section 8(2) Constitution of the Republic of South Africa, 1996.

⁵⁵ *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) at para 4.

⁵⁶ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 553 and 554.

⁵⁷ [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

right” by another person.⁵⁸ And in *Daniels v Scribante and Another*⁵⁹ a majority of the Court went even further and held that the Bill of Rights may impose a positive obligation on a private parties, at least in some cases.⁶⁰

2.2 Who is entitled to claim the protection of the property clause?

When it comes to identifying those persons who are entitled to claim the protection of the property clause a distinction is sometimes drawn between natural and juristic persons. While there is no doubt that natural persons are entitled to claim the protection of the property clause,⁶¹ the respondents in *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Service*⁶² argued that juristic persons were not. The Court, however, rejected this argument.⁶³ In arriving at its decision, the Court held that, although a company is an entity that exists separate to its shareholders “and its assets are its exclusive property”, the holders of shares are usually natural persons.⁶⁴ As such, the constitutional protection of a juristic person’s property rights is essential as the rights afforded to a juristic person ultimately have an indirect bearing on a natural person.⁶⁵ The property clauses’ protection of property rights therefore extends to property rights held by juristic persons.

3. The constitutional concept of a “deprivation”

⁵⁸ *Governing Body of the Juma Masjid Primary School v Essay N.O. and Others* 2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 58.

⁵⁹ [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

⁶⁰ *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 39 and 63. In order to determine whether the Bill of Rights does impose a positive obligation on a private person, the Constitutional Court held that a number of factors must be taken into account. These include the nature of the right, the history behind the right, the purpose of the right, how best that purpose can be achieved, the potential for a private person to invade the right and whether letting a private person off the hook would negate the essential content of the right.

⁶¹ Section 7(1) of the Constitution states that the Bill of Rights “enshrines the rights of *all people* in our country”. Apart from confirming that natural persons are entitled to claim the protection of the Bill of Rights, the phrase “all people” also seems to suggest that the protection afforded by this clause extends to *all* natural persons regardless of whether or not they are citizens or residents of South Africa (see T Roux “Property” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2ed (2013) at 9).

⁶² [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁶³ *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Service and Another* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 45.

⁶⁴ *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Service and Another* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 43.

⁶⁵ *First National Bank of South Africa Limited t/a Wesbank v The Commissioner for the South African Revenue Service and Another* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 43 to 45.

Having dealt with the issue of who is bound by the property clause and who is entitled to claim its protection, we may now turn to consider the constitutional concept of a deprivation.

Once it has been determined that the object or interest concerned is constitutional property, the next step is to determine whether there has been a deprivation or expropriation, and if so, whether it was carried out in a lawful and legitimate manner. It is important to note that the property clause does not prohibit the deprivation of property per se. Instead, it implicitly gives authority to the State to carry out regulatory and expropriatory deprivations in line with its police-power and eminent domain functions.

The State, therefore, is authorized to enact regulations with regard to the “use, enjoyment and exploitation of private property”.⁶⁶ As such, where the State has carried out a deprivation or an expropriation in accordance with the provisions of section 25, this is regarded as a legitimate use of public power and the holder of a property right who has been deprived of their property will not be entitled to a remedy even where he or she has suffered a loss as a result of the regulatory or expropriatory deprivation.⁶⁷

In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*⁶⁸ the Constitutional Court adopted a very wide approach to the concept of a deprivation. *In casu*, the Court defined this concept as “any interference with the use, enjoyment or exploitation of private property”. The Court further clarified that constitutional deprivation of property does not refer to an actual “taking away” of property, instead, any intrusion with regard to a property holder’s rights to use, enjoy and exploit private property will suffice.⁶⁹

Unfortunately, the broad and simple approach adopted in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*, was undermined by the

⁶⁶ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 214.

⁶⁷ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 214-215.

⁶⁸ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁶⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 57.

Constitutional Court in its subsequent judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality*.⁷⁰ After expressly stating that it would apply the wide definition formulated in *First National Bank*, the Court unexpectedly formulated a much narrower definition. In terms of the narrow definition, the Court held that an interference must be “substantial” and it should “go beyond the normal restrictions on property use and enjoyment found in an open and democratic society”. An important consequence of this approach is that the mere fact that there was an interference may not be sufficient to constitute a deprivation on its own.

It seems that the Constitutional Court in adopting a narrow approach, wanted to avoid a situation whereby even insubstantial interferences with property rights would qualify as deprivations and as a result stand in the way of the States’ regulatory function. Van der Walt, however, criticizes the narrow definition, arguing that it serves no useful purpose to qualify deprivations as the purpose of the property clause is not only to protect property holders from “excessive regulation, but also to authorise and control normal regulation” as was the case in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*.⁷¹ He further argues that limiting deprivation to that which exceeds what is “normal in an open and democratic society” renders section 25(1) redundant as courts do not need this particular clause to strike down undemocratic legislation.⁷²

Following its judgment in *Mkontwana*, the Constitutional Court vacillated between the wide and narrow definitions. In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*,⁷³ for example, the Court followed the wide definition.⁷⁴ In arriving at this decision, it referred with approval to the criticisms O’Regan J levelled against the narrow definition in her concurring judgment in *Mkontwana*.⁷⁵ Despite doing so, however,

⁷⁰ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) the case concerned a constitutional challenge to a statute which prevented owners of immovable property from alienating their property unless they had been issued with a certificate from the municipality. This certificate had the purpose of showing that they had paid their consumption charges for up to two years before the date of issue.

⁷¹ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); see also A J Van der Walt *Constitutional Property Law* 3ed (2011) at 205.

⁷² A J van der Walt *Constitutional Property Law* 3ed (2011) at 205.

⁷³ [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC).

⁷⁴ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) at para 34 and 38.

⁷⁵ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

the Court reverted back to the narrow definition in its subsequent judgment in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*.⁷⁶ In this case the Court stated that it would follow the narrow approach set out in *Mkontwana* although confusingly it did not appear to do so when it applied the law to the facts of the matter.⁷⁷

Fortunately, the confusion generated by these conflicting judgments appears to have been resolved by the Constitutional Court in its most recent pronouncements on this issue, namely *South African Diamond Producers Organisation v Minister of Minerals and Energy*⁷⁸ and *Jordaan and Others v City of Tshwane Metropolitan Municipality*.⁷⁹ In *South African Diamond Producers Organisation* the Court held that the narrow approach must be followed. In arriving at this decision, the Court held that “there will be a deprivation only where the interference is ‘substantial’ – meaning that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party.”⁸⁰ And in *Jordaan*⁸¹ the Court confirmed that deprivations are limited to substantial interferences. In arriving at this decision, the Court held that a constitutionally significant deprivation of property will take place “only where the interference with property rights is “substantial” – meaning that the extent of the intrusion must be extensive to have a legally significant impact on the rights of the affected party”.⁸²

4. The non-arbitrariness requirement

4.1 Introduction

Before *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*,⁸³ there was no certainty in as far as the approach that would be adopted with

⁷⁶ [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) at para 39.

⁷⁷ *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) at para 46.

⁷⁸ [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC).

⁷⁹ [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC).

⁸⁰ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) at para 48.

⁸¹ [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC).

⁸² *Jordaan and Others v City of Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at para 59.

⁸³ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

regard to the interpretation of the non-arbitrariness requirement.⁸⁴ *In casu*, the Constitutional Court interpreted “arbitrary” as when the “law” in question fails to provide a “sufficient reason” for the particular deprivation or when such deprivation is procedurally unfair.⁸⁵ From this definition it is clear that there are two distinct tests which are used to determine whether a law that permits deprivation does so in an arbitrary manner or not. These tests are the substantive arbitrariness test and the procedural arbitrariness test.

4.2 The test for substantive arbitrariness

In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*⁸⁶ the Constitutional Court stated that when determining substantive arbitrariness, the key question is whether there is a sufficient reason for the deprivation of the property holder’s rights.⁸⁷ *In casu*, the Court had to determine whether the provisions of a statute which permitted the deprivation of property belonging to an unrelated third party constituted arbitrary deprivation of property.⁸⁸ Before it could answer this question, however, the Court had to set out and discuss the scope and ambit of the sufficient reason element.

In this respect, the Constitutional Court held that the element is a flexible one and thus encompasses a wide range of tests.⁸⁹ These tests range from a thin rationality test which is located at the low end of the spectrum, to a thicker test similar to the proportionality test which is located at the high end.⁹⁰ In some cases, a simple rational connection between a legitimate government purpose and the manner in which the state seeks to achieve that purpose will

⁸⁴ AJ van der Walt “An overview of developments in constitutional property law since the introduction of the property clause in 1993” (2004) 19 *SAPR/PL* at 67.

⁸⁵ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁸⁶ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁸⁷ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁸⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 46.

⁸⁹ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁹⁰ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 62, 65 and 66.

constitute “sufficient reason”.⁹¹ In other cases, however, there must be a proportional relationship between a legitimate governmental purpose and the burden imposed by the state, which must be the least restrictive method.⁹²

An important difference between these tests is that while the rationality test imposes very few restrictions on the states’ power to interfere with private property,⁹³ the proportionality test does impose more restrictions. It requires that the deprivation should not unfairly place a burden on the property holder where there are less “drastic or oppressive means to accomplish the desired end”.⁹⁴

When analysing the substance of a “law” to determine whether it satisfies the non-arbitrariness requirement, the court must use a “means-ends” test.⁹⁵ In applying this test to the facts before it, the court must among other issues, evaluate the relationship between the means used and the end which the limitation seeks to achieve as well as the relationship between the purpose of the deprivation and the person.⁹⁶ With regard to the level of scrutiny, as a general rule, a stricter test will be applicable where the property right in question is “ownership of land or a corporeal movable” as well as where the “deprivation affects all incidents of ownership”.⁹⁷

After setting out these principles, the Constitutional Court turned to apply them to the facts. Surprisingly, however, it hardly applied the means and ends test it formulated. Instead, the Court relied on the lack of a close connection between (a) the transaction giving rise to the debt and the property holder, (b) the customs debt and the property in question and (c) the property holder and

⁹¹ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁹² *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 65 and 66.

⁹³ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 62.

⁹⁴ C Hoexter “Standards of review of administrative action: Review for reasonableness” in J Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 61 at 64.

⁹⁵ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁹⁶ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

⁹⁷ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

the debtor.⁹⁸ Given that a close connection did not exist between these factors, the Court concluded, it could not be said that there was a “sufficient reason” for the deprivation.⁹⁹ The deprivation, therefore, was arbitrary.¹⁰⁰

The substantive arbitrariness test has been hailed as a “positive development” that brings clarity with regard to the relevant considerations and does not overly limit the states’ police-power.¹⁰¹ The flexibility of the test, however, has resulted in a lack clarity with regard to how future cases will be decided.¹⁰² Roux points out that although it appears like the test for substantive arbitrariness sets out a step-by-step process for the determination of arbitrariness, it does not do so.¹⁰³ Instead, the Constitutional Court effectively “retained a wide discretion for the Court to decide cases on an individual basis rather than setting out guidelines for the prediction of outcomes”.¹⁰⁴ Roux further criticizes the “means-ends” test because it bases the determination of the level of scrutiny on the type of property right and the extent of the deprivation, but it however fails to provide clarity with regard to why “certain property rights are more constitutionally valid than others”.¹⁰⁵ It also fails to give clarity with regard to the considerations used to determine whether a deprivation is total or partial.¹⁰⁶

4.3 The test for procedural arbitrariness

⁹⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 108 and 109.

⁹⁹ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 109.

¹⁰⁰ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 109.

¹⁰¹ AJ van der Walt “An overview of developments in constitutional property law since the introduction of the property clause in 1993” (2004) 19 *SAPR/PL* at 68.

¹⁰² In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) and *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC); the Constitutional Court was confronted with a deprivation caused by a law which movable and immovable property rights respectively, the Constitutional Court however reached different conclusions with regard to whether or not there was sufficient reason for the deprivations.

¹⁰³ T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after FNB” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) at 274.

¹⁰⁴ T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after FNB” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) at 274. See also AJ van der Walt “An overview of developments in constitutional property law since the introduction of the property clause in 1993” (2004) 19 *SAPR/PL* at 68.

¹⁰⁵ T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after FNB” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) at 274

¹⁰⁶ T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after FNB” in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) at 274.

Although the Constitutional Court in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*¹⁰⁷ stated that the non-arbitrariness requirement also includes an evaluation of the procedural arbitrariness of the law, it did not go on to discuss and explain this aspect.¹⁰⁸ This is understandable as the case was decided on the basis of substantive arbitrariness and not procedural arbitrariness.

The test for procedural arbitrariness was subsequently set out in *Mkontwana v Nelson Mandela Metropolitan Municipality*¹⁰⁹ where the Constitutional Court stated that procedural arbitrariness is a flexible concept and that the requirements which must be satisfied to make a law procedurally fair will vary depending on all the circumstances of the specific case.¹¹⁰ The circumstances of this particular case were that the owner of immovable property was not permitted to alienate it until he or she had acquired a certificate from the municipality which showed that he or she had paid his or her consumption bills.¹¹¹

In casu, the Constitutional Court concluded that the procedural fairness requirement had not been met as the legislation failed to place an obligation on the municipality to provide the owner of the immovable property with the copies of the accounts upon request.¹¹²

Finally, it is important to note that the test for procedural arbitrariness is restricted to those disputes in which a person has been deprived of his or her property by a law and not be an administrative decision. This is in order to ensure that the section 25 test for procedural arbitrariness does not overlap with the administrative justice test for procedural fairness. This restrictive approach was adopted by the Constitutional Court in its judgments in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*

¹⁰⁷ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

¹⁰⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

¹⁰⁹ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

¹¹⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 65.

¹¹¹ *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 18-21 and para 28.

¹¹² *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 67.

*and Another*¹¹³ and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*.¹¹⁴ In both of these cases the Court held that it was not prepared to subject the deprivations in question to the section 25 test for procedural arbitrariness because the deprivations had been brought about as a result of an administrative decision and not as a result of a law.¹¹⁵ These cases have to be decided in terms of section 33 of the Constitution¹¹⁶ as well as the provisions of the Promotion of Administrative Justice Act 3 of 2000 the “PAJA”.

5. The constitutional concept of an expropriation

As alluded to above, state interference with a property holder’s rights, interests or objects is authorized by the property clause only where it constitutes either a valid deprivation or a valid expropriation.¹¹⁷ Although the Constitution itself does not define the constitutional concept of an expropriation or indicate how it should be distinguished from the constitutional concept of a deprivation, the Constitutional Court has considered these issues on several occasions. The leading judgments in this respect, however, are *Harksen v Lane NO and Others*,¹¹⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*,¹¹⁹ and *Agri South Africa v Minister for Minerals and Energy*.¹²⁰

In *Harksen v Lane NO and Others*,¹²¹ the Constitutional Court had to determine whether the provisions of section 21(1) of the Insolvency Act 24 of 1936 expropriated a solvent spouses’ property rights.¹²² In this case the Court treated deprivations and expropriations as two

¹¹³ [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC).

¹¹⁴ [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC).

¹¹⁵ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC); unlike in *Mkontwana and FNB*, the limitation did not arise from a ‘law’.

¹¹⁶ The Constitution of the Republic of South Africa, 1996.

¹¹⁷ See sections 25(1) and 25(2) Constitution of the Republic of South Africa, 1996.

¹¹⁸ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998(1) SA 300.

¹¹⁹ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

¹²⁰ [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).

¹²¹ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

¹²² *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 1 – In section 20(1) the Act provides for the sequestration of an insolvent’s estate which then vests in the Master until a trustee is appointed. In section 21 (2) Act also provides for the release of the solvent spouses’ property upon proof that it falls within the specified categories.

categorically distinct concepts.¹²³ It explained, in this respect, that even though expropriations are in essence a form of deprivation, the Interim Constitution's property clause nevertheless drew a strict distinction between them.¹²⁴ The main difference being that an expropriation requires the appropriation of property rights by the public authority, while a deprivation does not.¹²⁵

Apart from identifying the appropriation of property rights by a public authority as a distinguishing feature of an expropriation, the Constitutional Court also held that another key characteristic of an expropriation is that the appropriation must be permanent.¹²⁶ Given that a solvent spouses' property is not appropriated by a public authority and, given further, that the divestment of the solvent spouses' property is temporary and not permanent, the Court held that section 21(1) of the Insolvency Act did not expropriate the solvent spouse's property.¹²⁷ Van der Walt, however, argues that the element of "permanence" on its own is not enough to distinguish between the concepts of a deprivation and an expropriation.¹²⁸ He also submits that it is probable that the court actually had "the finality rather than the permanence of expropriation in mind, but that is not clear from the decision".¹²⁹

Although the Constitutional Court drew a categorical distinction between deprivations and expropriation in *Harksen v Lane NO and Others*,¹³⁰ it rejected this approach in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*.¹³¹ In this case the Court held that deprivations and expropriations are not distinct concepts, instead, they lie on a continuum.¹³² The concept of a "deprivation", therefore, is a wide one which encompasses all forms of interference, whereas the concept of an "expropriation" is a narrower one which encompasses only certain extreme forms of interference. The concept of an

¹²³ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 31.

¹²⁴ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 31.

¹²⁵ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 30.

¹²⁶ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 35 and 36.

¹²⁷ *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at para 37.

¹²⁸ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 339.

¹²⁹ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 339.

¹³⁰ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

¹³¹ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

¹³² *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 58.

expropriation, therefore, is a subset of the concept of a deprivations.¹³³ In terms of this approach, a court will first ascertain whether there has been a deprivation of property and then go on to ascertain whether this deprivation also qualifies as an expropriation, instead of the applicant having to base their application on either of the constitutional concepts.¹³⁴

Although expropriations are now regarded as a subset of deprivations, it is still necessary to distinguish between these concepts.¹³⁵ This is because a deprivation simply has to satisfy the requirements of section 25(1) in order to be valid, while an expropriation has to satisfy the requirements of both section 25(1) and section 25(2). In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*¹³⁶ the Constitutional Court held that a deprivation may be distinguished from an expropriation on the ground that compensation has to be paid only for expropriations and not deprivations.¹³⁷ Given that the payment of compensation is a requirement for a valid expropriation and not for a valid deprivation, this is not a particularly helpful ground on which to distinguish between the two concepts.

An additional and more controversial ground for distinguishing between deprivations and expropriations was identified by the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy*.¹³⁸ In this case the Court had to decide whether the provisions of the Mineral and Petroleum Resource Development Act 28 of 2002 had expropriated the mineral rights held by Sebenza when it vested them in the state on behalf of the people of South Africa.¹³⁹

¹³³ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 58.

¹³⁴ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 58.

¹³⁵ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 59.

¹³⁶ [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

¹³⁷ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 59.

¹³⁸ [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).

¹³⁹ *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 24 and 25.

Although the Court began its judgment by confirming the continuum approach adopted in *First National Bank*,¹⁴⁰ it went on to find that the State must acquire the property right in question or something that is substantially similar to the property right in question before it can be said that an expropriation has taken place. After setting out these principles, the Court went on to find that the old order mineral rights in question had not been acquired by the State. This is because they had simply been extinguished and then replaced by new order mineral rights. Given this fact, it could not be said that they had been expropriated.¹⁴¹

As Swanepoel has pointed out, the problem with this approach is that it is contradictory. Although the Court purported to follow the continuum approach it actually went on to categorically distinguish the two concepts by requiring that the State must acquire the property right before its actions can be classified as an expropriation.¹⁴² Requiring the element of an appropriation to be present for an interference to constitute an expropriation means that an expropriation cannot be regarded as being a subset of a deprivation.¹⁴³ *In casu*, the Court appears to “simultaneously allow and not allow for a grey area” between these two concepts.¹⁴⁴

As can be seen, the *First National Bank* approach appears to have changed the approach in *Harksen v Lane*¹⁴⁵ which regarded the concepts of a deprivation and an expropriation as being two distinct concepts. The continuum approach formulated in *First National Bank* case requires the courts to always ascertain whether there the interference with property rights is in line with the requirements for a valid deprivation first before moving on to ascertain whether the deprivation in question also constitutes an expropriation.¹⁴⁶ In terms of this approach, the court will also look into the question of whether a deprivation qualifies as an expropriation even where

¹⁴⁰ *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 48.

¹⁴¹ *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 58.

¹⁴² *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 48.

¹⁴³ JH Swanepoel *Constitutional Property Law in Central and East European Jurisdictions: A comparative analysis* Unpublished LLD Thesis, Stellenbosch University (2016) at 228.

¹⁴⁴ JH Swanepoel *Constitutional Property Law in Central and East European Jurisdictions: A comparative analysis* Unpublished LLD Thesis, Stellenbosch University (2016) at 228.

¹⁴⁵ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

¹⁴⁶ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 341 to 342.

the issue has not been raised before the court.¹⁴⁷ The approach taken by the Constitutional Court *Agri South Africa v Minister for Minerals and Energy*¹⁴⁸ brought even more confusion as the Court *in casu* stated that it confirms the continuum approach but went on to follow the *Harksen v Lane*¹⁴⁹ approach which categorically distinguishes between the two concepts.¹⁵⁰ Consequently, it is unclear how the courts will interpret or distinguish between these concepts in future cases.

6. The public purpose or public interest requirement

In terms of section 25(2)(a) of the Constitution, an expropriation of property will only be constitutionally valid when it is carried out for the furtherance of a public purpose or public interest.¹⁵¹ After finding that there was an expropriation, a court must then go on to determine whether the expropriation satisfies the public purpose/public interest requirement.

The public purpose or public interest requirement has two main functions which are (a) to limit the expropriatory powers of the State and (b) to authorize the reformative agenda of the property clause.¹⁵² It seeks to ensure that the State does not abuse its power by expropriating individuals' property rights and interests without there being a public benefit which necessitates the expropriation in question.¹⁵³ The Constitution in defining this requirement only states that it includes the "nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources".¹⁵⁴ It does not give a further explanation of what constitutes public purpose/public interest.

There are various ways in which the public purpose/public interest requirement can be interpreted. In a wide sense, it could be interpreted as referring to "all purposes which pertain to or benefit the general public", or in a narrow sense, it could refer to governmental purposes

¹⁴⁷ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 343.

¹⁴⁸ [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).

¹⁴⁹ [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300.

¹⁵⁰ *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 58.

¹⁵¹ The Constitution of the Republic of South Africa, 1996.

¹⁵² AJ van der Walt *Constitutional Property Law* 3ed (2011) at 459.

¹⁵³ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 459.

¹⁵⁴ See section 25(4)(a) Constitution of the Republic of South Africa, 1996.

only.¹⁵⁵ It has been suggested that the best way to interpret this requirement is to find a balance between a strict interpretation which ensures that “the power of expropriation is not abused” and a lenient interpretation which will allow the State to expropriate land from private property holders for public benefit, in line with the reformative agenda.¹⁵⁶ Such an interpretation reflects the double purpose of the property clause which is to both protect individual property rights and to promote the transformative agenda.

The role played by public purpose/public interest requirement for valid expropriations seems to have been downplayed by the *First National Bank* approach to the resolution of property disputes.¹⁵⁷ This approach requires that every interference with a property holder’s rights be first tested against the requirements for a valid deprivation before going on to look into the requirements for a valid expropriation.¹⁵⁸ As a result of this approach, it is unlikely that a law which does not seek to further a public purpose or public interest will be regarded as providing “sufficient reason” for the deprivation of the property holder’s rights.¹⁵⁹ Once a law which provides for the expropriation has passed the test for a valid deprivation, it is very likely that it will easily satisfy the public purpose/public interest requirement in section 25(2)(a).¹⁶⁰

Van der Walt points out that in spite of this, the public purpose requirement is likely to come up in the following cases:

- (a) where the State transfers the property to a private individual or institute,
- (b) where the State has abandoned the original public purpose, and
- (c) where there are other less intrusive ways of achieving the purpose or where the State takes more than what is necessary to achieve the particular purpose.¹⁶¹

¹⁵⁵ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 460.

¹⁵⁶ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 460.

¹⁵⁷ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 458 to 459. See also T Roux “Property” in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2ed (2013) at 33.

¹⁵⁸ T Roux “Property” in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2ed (2013) at 33.

¹⁵⁹ T Roux “Property” in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2ed (2013) at 33.

¹⁶⁰ T Roux “Property” in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2ed (2013) at 33.

¹⁶¹ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 460-461.

An example of one such case is *Harvey v Umhlatuze Municipality*.¹⁶² In this case the KwaZulu-Natal High Court had to decide whether where the State abandoned the original purpose for the deprivation, the original property holder has the right to reclaim the property.¹⁶³ The applicant argued that once the initial public purpose can no longer be realized, the expropriation was no longer constitutional.¹⁶⁴ The KwaZulu-Natal High Court however refused to accept this argument; it was of the view that where the state has acted in good faith, then the expropriation is still constitutional.¹⁶⁵ Van der Walt argues that the High Court *in casu* did not give proper regard to the role played by the public purpose requirement in cases where the public authority fails or can no longer carry out the original authority.¹⁶⁶

Although section 25(1), which deals with the broader concept of a deprivation, does not expressly mention the public purpose or public interest requirement, it is, however argued that it is an implicit requirement for a valid deprivation.¹⁶⁷ The reasoning behind this argument is that the public law regulation of property inherently seeks to promote public good and this is evidenced by the police-power principle which is an integral part of the constitutional concept of property.¹⁶⁸ Thus, it is only logical that even where non-expropriatory deprivations are concerned, the regulatory provisions should in addition to the requirement of non-arbitrariness also satisfy the requirement for the furtherance of a public purpose or public interest.¹⁶⁹

7. Conclusion

The decision in the *First National Bank* case has been praised for having brought clarity with regard to the interpretation of property rights. The Constitutional Court *in casu* made strides as it not only outlined the series of questions for the resolution of disputes but also brought much needed clarity with regard to the interpretation of the non-arbitrariness test. Prior to the finding in

¹⁶² 2011 (1) SA 601 (KZP).

¹⁶³ *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) at para 1.

¹⁶⁴ *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) at para 80.

¹⁶⁵ *Harvey v Umhlatuze Municipality* 2011 (1) SA 601 (KZP) at para 138 and 150.

¹⁶⁶ AJ van der Walt and BV Slade “Public purpose and changing circumstances: *Harvey v Umhlatuze Municipality and Others*” (2012) 129 *SALJ* at 220.

¹⁶⁷ AJ van der Walt *Constitutional Property Law* 2ed (2005) at 140.

¹⁶⁸ AJ van der Walt *Constitutional Property Law* 2ed (2005) at 140.

¹⁶⁹ T Roux “Property” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2ed (2013) at 33.

First National Bank, it was not clear whether the “arbitrary deprivation” requirement would allow courts to examine the substance of the law. The ‘means-ends’ test which is used to test the non-arbitrariness of the substance of a law is a welcome development as it is a flexible test which enables the court to consider contextual issues and decide cases on a case by case basis. This is essential for the realization of the constitutional goal of reforming the unfair racial division in as far as the ownership of property is concerned.

The flexibility of the *First National Bank’s* approach, which is the very characteristic that allows the clause to be interpreted purposively, however, results in the creation of an “arbitrary deprivation vortex”. The non-arbitrariness test appears to assume an overarching role in the resolution of property disputes. Other questions which must be dealt with at a later stage such as the public interest/public purpose requirement for a valid expropriation have been sucked into the “arbitrary deprivation vortex”; this is because the “means-ends” test also includes an examination of the relationship between the interference and the purpose it seeks to achieve. It has to be accepted, however, that only a flexible test can give the courts space to interpret the property clause in light of its double intention which seems to pull in two different directions.

CHAPTER THREE: THE CONSTITUTIONAL PROPERTY CONCEPT PRIOR TO *SHOPRITE-CHECKERS*

1. Introduction

The issue of what constitutes “property” for the purposes of section 25 is very important in the resolution of disputes based on the property clause. This is because it plays a gatekeeping role. A person has to first show that the object, right or interest in question falls within the scope and ambit of the constitutional concept of property before he or she can successfully rely on the property clauses’ protection.¹⁷⁰ The issue of “property”, therefore, is not only a threshold question, but also a point at which a court can resolve a dispute based on the property clause.¹⁷¹ Consequently, if a court should find that the object, right or interest does not fall within the scope and ambit of the constitutional concept of property that will be the end of the road, it cannot go on to look into whether there was an arbitrary deprivation or an unlawful expropriation of the “property” in question.

Clarity with regard to the objects, rights and interests that qualify for constitutional protection and especially clarity with regard to how the courts will determine whether a particular object, right or interest qualifies for constitutional protection, therefore, is very important. This clarity, however, cannot be obtained from the text of the Constitution’s as it does not offer much help in this regard. The text of the Constitution merely stipulates that that the constitutional concept of property includes the ownership of land, but is not restricted to land ownership. It neither defines nor gives express guidelines for the interpretation of the meaning of “property” in a constitutional sense. This question, therefore, has been left to be answered by the legislature and the judiciary.

Given that it is a constitutional right, the interpretation of the concept of constitutional property has to be guided by the principles which govern the interpretation of the Constitution as a whole.

¹⁷⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51.

¹⁷¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51. See also T Roux “The ‘arbitrary deprivation’ vortex: Constitutional property law after FNB” in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008).

In this respect it is important to note that the manner in which the Constitution must be interpreted is different from the manner in which an ordinary statute must be interpreted.¹⁷² This is because, unlike an ordinary statute, the Constitution was drafted “in a broad and ample style”.¹⁷³ This “broad and ample” approach to drafting the Constitution was aimed at ensuring that its provisions can adapt to change and thus remain relevant.¹⁷⁴ In order to achieve this goal, the provisions of the Constitution, therefore, should be interpreted in a generous manner.¹⁷⁵

Apart from interpreting the provisions of the Constitution in a generous manner, they should also be interpreted in a purposive manner with “reference to the values underlying an ‘open and democratic society based in human dignity, equality and freedom’”, even where the literal meaning is clear.¹⁷⁶ This is because the process of constitutional interpretation is essentially aimed at “determining the way in which a commitment to a set of fundamental values translates and applies in a specific context”.¹⁷⁷ The key role that the values underlying the Constitution play in the process of constitutional interpretation is highlighted by various provisions of the Constitution. One of the most significant of these is section 39(1)(a) which provides that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum *must* [own emphasis] promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.¹⁷⁸

The aim of this chapter, therefore, is to set out and discuss the manner in which the constitutional concept of property was interpreted and applied by courts, and especially the Constitutional

¹⁷² J Kentridge and D Spitz “Interpretation” in M Chaskalson *et al Constitutional Law of South Africa* (1996) at 11-10.

¹⁷³ J Kentridge and D Spitz “Interpretation” in M Chaskalson *et al Constitutional Law of South Africa* (1996) at 11-10.

¹⁷⁴ J Kentridge and D Spitz “Interpretation” in M Chaskalson *et al Constitutional Law of South Africa* (1996) at 11-11.

¹⁷⁵ J Kentridge and D Spitz “Interpretation” in M Chaskalson *et al Constitutional Law of South Africa* (1996) at 11-11.

¹⁷⁶ T Roux and D Davis “Property” in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (2015) at 20-12.

¹⁷⁷ J Kentridge and D Spitz “Interpretation” in Chaskalson *et al Constitutional Law of South Africa* (1996) at 11-12.

¹⁷⁸ The Constitution of the Republic of South Africa, 1996.

Court, prior to its judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape*.¹⁷⁹

2. The distinction between constitutional property and private law property

Before setting out and discussing the manner in which the constitutional concept of property has been interpreted and applied by the courts, it will be helpful to briefly discuss the differences between the private law and the constitutional concepts of property. This is because the existing private law concept often plays an important role in determining the scope and ambit of the constitutional concept.¹⁸⁰

At the heart of the private law concept of property is the notion of a “thing”. A thing is defined in modern South African law as a corporeal object which is external to human beings, independent and subject to juridical control. In addition, it must also be useful and valuable to humans.¹⁸¹ Any object which satisfies these criteria may be defined as a thing. As this definition indicates, the notion of a thing is a narrow one which focuses on the intrinsic quality of these objects.¹⁸² The origins of this focus may be traced back to Roman and Roman-Dutch law.¹⁸³

In spite of its focus on things, the private law concept of property is not confined to corporeal objects only; there are exceptions. These exceptions consist of the (incorporeal) real rights a person may acquire in respect of a thing. Real rights are divided into two categories, namely ownership and limited real rights. Ownership is the only real right which a person may acquire in his or her own property. In principle, it confers unlimited powers on an owner.¹⁸⁴ Limited real rights are real rights a person may acquire in someone else’s property. As their name indicates, they confer a limited number of powers on their holders.¹⁸⁵

¹⁷⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

¹⁸⁰ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 85.

¹⁸¹ H Silberberg *Silberberg and Schoeman’s The Law of Property* 5ed (2006) at 9.

¹⁸² AJ van der Walt *Constitutional Property Law* 3ed (2011) at 86.

¹⁸³ AJ van der Walt *Property and Constitution* (2012) at 114.

¹⁸⁴ AJ van der Walt and G J Pienaar *Introduction to the Law of Property* 7ed (2016) at 25.

¹⁸⁵ AJ van der Walt and G J Pienaar *Introduction to the Law of Property* 7ed (2016) at 25.

Although the inclusion of these real rights in the private law concept of property indicates that the concept is not confined to corporeal objects, it is important to note that real rights are closely linked to things. This is because they confer direct powers over the thing itself on their holders and thus establish a direct relationship between the holder of the right and the thing. Other categories of private law rights which do not confer direct powers over the thing itself on their holders, such as personal rights, intellectual property rights and personality rights, therefore, do not fall into the private law concept of property.¹⁸⁶

While the private law concept of property often plays an important role in determining the constitutional concept of property, it must be kept in mind that the constitutional concept is distinct and separate from the private law concept. This is mainly because it arises from public law. Unlike private law, which governs the relationship between individuals, public law governs the creation, organisation, powers and procedures of the state.¹⁸⁷ It therefore concerns itself with the national agenda and not just relationships between individuals. As such, the protection afforded to property holders by the constitution's property clause differs quite significantly from the protection afforded by the private law.¹⁸⁸

Private law property accordingly concerns itself with issues such as the "acquisition, protection and transfer of private property" and protects these individual rights against *any* interference which may affect them.¹⁸⁹ Constitutional property, however, is a "social construct, subject to regulation and amendment in the public interest".¹⁹⁰ The protection of "property" under the property clause, therefore, is aimed not only at protecting the individual's existing property rights, but also at promoting the public good, including the transformation of South Africa

¹⁸⁶ AJ van der Walt *Property and Constitution* (2012) at 114.

¹⁸⁷ AJ van der Walt and GJ Pienaar *Introduction to the Law of Property* 7ed 2016 at 337.

¹⁸⁸ AJ van der Walt *Property and Constitution* (2012) at 141; Van der Walt points out that this approach taken by South African private law differs from the one taken in the Anglo common law tradition where property is defined as referring to the 'rights' and not the particular object itself. As a result, unlike the South African private property notion which is biased towards the corporeality of 'property', the Anglo common law definition of property consists only of intangible property.

¹⁸⁹ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 169; in private law property rights can only be limited by legislation which specifies the limitation which will be imposed on the particular property right. In comparison, the constitutional concept of property imposes a general limitation on property rights. See also H Mostert and PJ Badenhorst "Property and the Bill of Rights" in *Bill of Rights Compendium* (2014) at 3FB6.2.2

¹⁹⁰ H Mostert and PJ Badenhorst "Property and the Bill of Rights" in *Bill of Rights Compendium* (2014) at 3FB6.2.2.

system of land rights.¹⁹¹ It follows, therefore, that what is deemed “property” under the property clause “can be changed, restricted, and subjected to new or stricter regulatory controls, limitations and levies” even without compensation being paid to the property holder.¹⁹²

In light of the differences between the private law concept of property and the constitutional concept of property, Van der Walt argues that:

“the Constitution seems to require a wide notion of property in the sense that a too narrow understanding of property might stand in the way of the reform goal of opening up access to property. If property is defined narrowly for purposes of the section 25, it is at least possible that vested and acquired (mostly white) rights in land would be entrenched, while black interests in land and other property, which remained weak and underdeveloped under apartheid land law and were often not recognized as property in private law, would quite possibly continue to be excluded from both private and constitutional recognition and protection. Furthermore, it might be difficult to include the “new order” rights of access to land, housing and natural resources and the right to tenure security, all of which have been introduced by or in view of the Constitution, under a narrow notion of constitutional property. Such a restrictive reading looks unacceptable in view of constitutional objectives and therefore it is necessary to develop a relatively wide notion of constitutional property, which would allow the introduction of “new order” constitutional access rights under the property guarantee.”¹⁹³

3. The constitutional concept of property

3.1 Introduction

Prior to the judgment in Shoprite Checkers, the Constitutional Court in most of its decisions did not devote a lot of attention to the manner in which the constitutional concept of property should be interpreted. Instead, it simply dealt with this issue on a case by case basis and often simply assumed that the object, right or interest in question fell into the constitutional definition of property.

¹⁹¹ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 107 where Van der Walt explains that this function of the constitution is “difficult to reconcile with the libertarian absolute entrenchment of existing property holdings.”

¹⁹² AJ van der Walt *Constitutional Property Law* 3ed (2011) at 101.

¹⁹³ AJ van der Walt *Property and Constitution* (2012) at 123.

Despite the fact that it did not devote a lot of attention to the manner in which the constitutional concept should be interpreted, it did identify a wide range of objects, rights and interests as constitutional property. Among these were corporeal movables and immovable, ownership, limited real rights, entitlements, intellectual property rights and personal rights. These objects, rights and interests will be discussed in this segment.

3.2 Ownership

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* the Constitutional Court confirmed that the ownership of corporeal movable and immovable things falls into the constitutional concept of property.¹⁹⁴ The facts of this case were as follows. Three motor vehicles owned by First National Bank were seized and detained in terms of the provisions of section 114 of the Customs and Excise Act 91 of 1961.¹⁹⁵ This provision conferred on the Commissioner of the SARS the power to seize and sell goods in the possession of a customs debtor, even if they belonged to an innocent third party, for the purposes of collecting a debt owed to the South African Revenue Authority.¹⁹⁶

First National Bank argued that section 114 unjustifiably infringed section 25 of the Constitution because it expropriated the Bank's property without paying just and equitable compensation. The Constitutional Court found that section 114 was unconstitutional, not because it expropriated First National Bank's property without paying just and equitable compensation and thus infringed section 25(2), but rather because it arbitrarily deprived First National Bank of its property and thus infringed section 25(1). In arriving at this decision, one of the issues the Court had to determine was whether the ownership of a movable corporeal thing fell into the constitutional concept of property. The Court held that it did.

In this respect, the Constitutional Court began by warning that it was not only "practically impossible", but also "judicially unwise" to attempt to provide a comprehensive definition of the

¹⁹⁴ [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

¹⁹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR (CC) at para 2.

¹⁹⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR (CC) at para 4.

constitutional concept of property.¹⁹⁷ The Court, therefore, left the issue of “property” to be decided on a case-by-case basis. Insofar as the ownership of corporeal movable and immovable things was concerned, however, the Court held that:

“[the] 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 as well as the object of the right and must therefore, in principle enjoy the protection of section 25.”¹⁹⁸

Apart from deciding whether the ownership of corporeal movable and immovable things falls into the constitutional concept of property, the Constitutional Court also had to decide whether ownership does so when it is employed simply as a contractual device to secure payment of a debt. The Commissioner of the SARS argued in this respect that First National Bank had sold the three vehicles in terms of a credit agreement and that it retained ownership simply as a contractual device to secure the payment of the purchase price. It never intended to use the vehicles.¹⁹⁹

The Constitutional Court, however, refused to accept this argument.²⁰⁰ Instead, it stated that the determination of what constitutes constitutional property is not dependent on the subjective commercial interest that the owner has in the particular object and neither is it dependent on the economic value of the right (considering that the value of the ownership right would gradually go down as the contract came to an end).²⁰¹ Furthermore, the fact that the property holder does not make any use or makes limited use of the object is irrelevant in answering the threshold

¹⁹⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 47 and 51. The effect of this judgment is that it set precedence for the determination of the bounds of constitutional property on a case by case basis.

¹⁹⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51.

¹⁹⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 53.

²⁰⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 54.

²⁰¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 56.

question.²⁰² The Court pointed out that this may, however, be relevant at a later stage when the Court determines whether the deprivation was carried out in an arbitrary manner.

Besides outlining the relevant and irrelevant considerations, the Constitutional Court did not however go on to give a practical demonstration of how the courts would apply all the relevant considerations to reach a decision on whether an object, right or interest is constitutionally protected property. It did, however, explain that these considerations are issues that would need to be considered in the difficult cases and not in this case.²⁰³ Implying that the inclusion of the ownership right in corporeal movables and land is an easy case. Moreover, the conclusion reached by the Constitutional Court, is in line with the views expressed by legal commentators; that the constitutional concept of property cannot be narrower than its private law counterpart.²⁰⁴

3.3 Limited real rights

Although the Constitutional Court referred only to the right of ownership in corporeal movable and immovable things in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*, after this judgment it was generally accepted by academic and other commentators that limited real rights should also be included in the constitutional concept of property. This belief was subsequently confirmed by the Western Cape High Court in *Ex parte Optimal Property Solutions CC*.²⁰⁵ In this case, the High Court simply held that because the restrictive condition in question had “the character” of a registered praedial servitude it should be protected under the property clause.²⁰⁶ As Van der Walt argued, this decision appears to endorse

²⁰² *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 54.

²⁰³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, Southern African Revenue Service* [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 51.

²⁰⁴ M Chaskalson and C Lewis “Property” in M Chaskalson *et al Constitutional Law of South Africa* (1996) at 31-5; see also T Roux and D Davis “Property” in H Cheadle *et al South African Constitutional Law: The Bill Of Rights* (2015) at 16.

²⁰⁵ 2003 (2) SA 136 (C).

²⁰⁶ *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) at para 4-6.

the inclusion of all forms of servitudes²⁰⁷ and in successive cases the courts have gone on to find that personal servitudes²⁰⁸ as well as public servitude²⁰⁹ are constitutionally protected property.

Insofar as mineral rights are concerned, the Transvaal High Court initially held in *Lebowa Mineral Trust Beneficiaries Forum v Government of the Republic of South*²¹⁰ that they do not qualify for constitutional protection under the property clause. If the drafters of the Constitution had been intended that the constitutional concept of property should encompass mineral rights, the High Court reasoned, then these rights would have been expressly referred to in the property clause. The fact that they were not, indicated that mineral rights did not fall into the constitutional concept of property.²¹¹ As Pienaar and Van der Walt have pointed out, however, requiring that an object, right or interest should be expressly mentioned in the property clause before it can qualify for constitutional protection is problematic. This decision, therefore, has been criticized for adopting an “unnecessarily restrictive interpretation of section 25”.²¹²

In a more recent judgment, *Agri South Africa v Minister for Minerals and Energy*²¹³ the Constitutional Court changed the position and found that mineral rights established under the Minerals Act 50 of 1991 are indeed “property” protected by section 25.²¹⁴ *In casu*, the Constitutional Court had to determine whether the minerals rights which Sebenza had under the Minerals Act had been taken away under the Mineral and Petroleum Resources Development Act 28 of 2002.²¹⁵ In arriving at this conclusion, the Constitutional Court examined the nature of the mineral rights as protected in the Minerals Act. It noted that mineral rights protected under

²⁰⁷ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 139-140.

²⁰⁸ *National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA); [2011] 3 All SA 29 (SCA) [2010] ZASCA 164 at para 33 where the Constitutional Court concluded that the naming right that had been registered by the government was a personal servitude and as such it qualified for constitutional protection.

²⁰⁹ *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) at para 102 - 104 where the court found that the statutory provisions created a public servitude over the land in question.

²¹⁰ 2002 1 BCLR 27 (T).

²¹¹ *Lebowa Mineral Trust Beneficiaries Forum v Government of the Republic of South* 2002 1 BCLR 27 (T) at para 9-11.

²¹² AJ van der Walt and GJ Pienaar *Introduction to the Law of Property* 7ed (2016) at 34.

²¹³ [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC).

²¹⁴ *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 50.

²¹⁵ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 32.

the Minerals Act were similar to the common law position that a landowner had the right to exploit the minerals on their land.²¹⁶ The mineral rights could be alienated by cession, that they could be leased to others, that they were treated as an asset with economic value and that they could be bequeathed to another.²¹⁷ This meant that the owner of mineral rights could decide whether or not to exploit the minerals. The State could only interfere with this right only upon the payment of compensation. On this basis, the Constitutional Court found that the mineral rights held by Sebenza under the Minerals Act were indeed constitutional property.²¹⁸

3.4 Land-use-related entitlements

One of the advantages that is usually associated with ownership and limited real rights is that they confer entitlements over the movable or immovable thing in question on their holders. These entitlements, which differ from real right to real right, include *inter alia* the entitlement to possess, to use and enjoy, to burden, to alienate, to destroy and to vindicate the thing in question. The entitlement to alienate was recognized as constitutional property by the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*.²¹⁹ In this case, the Court found that there had been a “deprivation of a single but important incident of ownership in immovable property namely the right to pass transfer of property to complete alienation.”²²⁰ Since then the courts have recognised various land-use-related entitlements as constituting constitutional property.²²¹ These include the entitlement to use and enjoy land, which also

²¹⁶ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 11.

²¹⁷ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 8-11.

²¹⁸ *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (2) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 33.

²¹⁹ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 33.

²²⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 45.

²²¹ This has sparked a debate about whether or not South African courts have accepted the doctrine of “conceptual severance”. See T Roux “Property” in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* 2ed (2013) at 13 and 14. Roux argues for the adoption of this doctrine. He submits that these cases as well as the First National Bank approach of looking into the separate “incidents of ownership” that have been interfered with are evidence of the acceptance of this doctrine by the courts. See also AJ van der Walt *Constitutional Property Law* 3ed (2011) at 98 where Van der Walt argues against the adoption of this doctrine in South Africa. He argues that it should not be adopted because even in North America where it was formulated, it is not fully accepted. Furthermore, the differences between the South African and the North-American approaches to the notion of property would make it difficult to fit this notion into the former’s understanding of constitutional property.

included the right to extract gravel from it,²²² and the entitlement not to be arbitrarily evicted from land.²²³

3.5 Intellectual property rights

Apart from ownership and limited real rights, the Constitutional Court has also held that intellectual property rights fall into the constitutional concept of property.

Insofar as these rights are concerned, the Constitutional Court initially adopted a cautious approach. In the *First Certification* case²²⁴ it was argued that the failure to expressly refer to intellectual property rights in section 25 of the Constitution meant that these rights would not be protected by the property clause.²²⁵ Although the Court rejected this argument on the grounds that the mere failure to expressly refer to intellectual property rights in section 25 did not mean that they fell outside the scope and ambit of the property clause,²²⁶ it refused to rule conclusively on the issue of whether or not intellectual property rights qualify for constitutional protection under the property clause.

Despite this initial caution, the Constitutional Court subsequently confirmed in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*²²⁷ that intellectual property rights do fall into the scope

²²² *Du Toit v Minister of Transport* [2005] ZACC 9; 2006 (1) SA 297 (CC); 2005 (11) BCLR 1053 (CC) at para 54.
²²³ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217; 2004 (12) BCLR 1268 (CC) at para 23. See also *Constitutional Law of South Africa* 2ed (2013) at 13 and 14 where Roux explains the importance of protecting the “incidents of ownership” as separate rights to the right of ownership. See also AJ van der Walt *Constitutional Property Law* 3ed (2011) at 138 where Van der Walt explains that “[i]n these cases the court avoided the pitfalls of the German Landlord-Tenant decision by deciding the cases on the basis of establishing a balance between the rights of the landowner and the occupiers in terms of the applicable constitutional provisions (prohibition against arbitrary eviction in section 26(3) and right of access to courts in section 34) and land reform laws. The South African court refrained from arguing that the rights of the occupiers were similar to the right of the landowner in private law; protecting both rights constitutionally and even weighing them up against each other does not require such an argument as long as it is possible to see the occupiers’ interest as a constitutionally protected right.”

²²⁴ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 1996; (10) BCLR 1253 (CC).

²²⁵ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 1996; (10) BCLR 1253 (CC) at para 75.

²²⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 1996; (10) BCLR 1253 (CC) at para 75.

²²⁷ [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005(8) BCLR 743 (CC).

and ambit of the constitutional concept of property. In this case the Court accepted that a registered trademark was property for the purposes of section 25, although without addressing this issue in any detail and without providing a legal basis for doing so.²²⁸ After coming to this conclusion, it went on to balance SAB's trademark against Laugh it Off's right to freedom of speech.²²⁹

Apart from a registered trade mark, the Constitutional Court also held in *Phumelela Gaming and Leisure Ltd v Grundlingh* that information (published results and dividends derived from Phumelela's totalisator pool) could be protected as either intellectual property or goodwill²³⁰ and in *National Soccer League v Gidani (Pty) Ltd*²³¹ the South Gauteng High Court held that intellectual property rights in the form of copyrights also fall into the scope and ambit of the constitutional concept of property.²³²

It has been suggested that in the case of intellectual property rights, the following characteristics could also have been used to justify the inclusion of intellectual property;

- (a) inherent or accrued economic value for holder,
- (b) labour and resources were invested in the creation of the interest,
- (c) interest has vested,
- (d) there is no other constitutional clause that could possibly provide protection to the specific category of property interests.²³³

3.6 Personal rights

Although personal rights are not considered to be property rights from a private law perspective primarily because they arise from delict and contract and, consequently, can be enforced only

²²⁸ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005(8) BCLR 743 (CC) at para 17.

²²⁹ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005(8) BCLR 743 (CC) at para 83.

²³⁰ *Phumelela Gaming and Leisure Ltd v Grundlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC). See also A J Van der Walt *Constitutional Property Law* 3ed (2011) at 155.

²³¹ [2014] ZAGPJHC 33; [2014] 2 All SA 461 (GJ).

²³² *National Soccer League v Gidani (Pty) Ltd* [2014] ZAGPJHC 33; [2014] 2 All SA 461 (GJ) at para 96.

²³³ M du Bois "Intellectual Property as a Constitutional Property Right: The South African Approach" (2012) 24 SA *Merc LJ* at 178.

against a specific person or group of persons,²³⁴ the Constitutional Court has not hesitated to include them in the definition of constitutional property. In *Law Society of South Africa and Others v Minister of Transport*,²³⁵ for example, the Court assumed without deciding that personal rights in the form of claims for loss of earning capacity and loss of support are constitutionally protected property rights.²³⁶ In arriving at this decision, the Court stated that it was “unnecessary to resolve the debate” even though it was dealing with interests which did not only fail to fit neatly within the private law concept of property but could only be enforced against specific person(s).²³⁷

Since then other forms of personal rights have also been accepted as falling within the scope and ambit of constitutional concept of property. In *National Credit Regulator v Oppermann and Others*,²³⁸ the Constitutional Court held that a claim based on unjustified enrichment qualifies for constitutional protection²³⁹ and in *National Credit Regulator v Oppermann and Others*²⁴⁰ it held that it was “logical and realistic”²⁴¹ to include a personal right in the form of a “right for restitution of money paid, based on unjustified enrichment” in the constitutional concept of property. Most recently, in *Chevron SA (Pty) Limited v Wilson t/a Transport*²⁴² the Court held that a personal right in the form of a claim for a received payment also constitutes constitutional property.²⁴³ In this case Court justified its extension of the property clauses’ ambit on the basis

²³⁴ PJ Badenhorst *et al Silberberg and Schoeman’s The Law of Property* 4ed (2003) at 52.

²³⁵ [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 170 (CC).

²³⁶ *Law Society of South Africa and Others v Minister of Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 84.

²³⁷ *Law Society of South Africa and Others v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 170 (CC) at 84.

²³⁸ [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC).

²³⁹ *National Credit Regulator v Oppermann and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 64. See also *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 38 where the court also accepted a claim based on unjustified enrichment as constituting constitutional property.

²⁴⁰ [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC).

²⁴¹ *National Credit Regulator v Oppermann and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at para 63.

²⁴² [2015] ZACC 15; 2015 (10) BCLR 1158 (CC).

²⁴³ *Chevron SA (Pty) Limited v Wilson t/a Wilson’s Transport* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) at para 16. See also *Cool Ideas 1186 CC Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 38 where the court also accepted a right of restitution of money paid as falling within the scope and ambit of the constitutional notion of property.

that unlike the personal right in the *Oppermann* case, this was much more easily acceptable as it was a payment that had actually been received by the other party.²⁴⁴

3.7 Housing and other welfare rights

One of the most difficult issues the constitutional concept of property gives rise to is whether public law entitlements should be included. These entitlements fall into various categories which include social welfare rights, employment rights, and commercial and other licences.

As early as 1996, in *Transkei Public Servants Association v Government of the Republic of South Africa*,²⁴⁵ though obiter, the Transkei High Court expressed the view that the constitutional notion of property could be so wide as to include a housing subsidy which a welfare right.²⁴⁶ In another case, *Ex Parte Speaker of the KwaZulu-Natal In re Amakhosi and Iziphakanyiswa Amendment Bill of 1995*²⁴⁷ the court also appears to have regarded “certain conditions of service relating to payment” as constitutional property as the court found that they were not contrary to section 28 of the Interim Constitution.²⁴⁸

The inclusion of housing rights within the notion of constitutional property was confirmed in *Port Elizabeth Municipality v Various Occupiers*²⁴⁹ where the Constitutional Court stated that “the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counter poses to the normal ownership rights of possession, use and occupation a new and equally relevant right not arbitrarily to be deprived of a home.”²⁵⁰

²⁴⁴ *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) at para 16.

²⁴⁵ 1995 (9) BCLR 1236 (Tk).

²⁴⁶ *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 (9) BCLR 1236 (Tk).

²⁴⁷ [1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC).

²⁴⁸ *Ex Parte Speaker of the KwaZulu-Natal In re Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature in re payment of salaries, allowances and other priviledges to the Ingonyama Bill of 1995* [1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) at paras 41 to 44. See also AJ van der Walt *Constitutional Property Law* 3ed (2011) at 167.

²⁴⁹ [2004] ZACC 7; 2005 (1) SA 217; 2004 (12) BCLR 1268 (CC).

²⁵⁰ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217; 2004 (12) BCLR 1268 (CC) at para 23.

Central to the Courts' reasoning was the consideration of the constitutional value of dignity, the need for redress and secure land tenure for the poor as well as the interrelatedness of the property clause and the section 26 goal of providing adequate housing.²⁵¹ In its judgment, the Constitutional Court stated that:

“The Constitution recognises that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home. Thus, the need to strengthen the precarious position of people living in informal settlements is recognised by section 25 in a number of ways. Land reform is facilitated, and the state is required to foster conditions enabling citizens to gain access to land on an equitable basis; persons or communities with legally insecure tenure because of discriminatory laws are entitled to secure tenure or other redress; and persons dispossessed of property by racially discriminatory laws are entitled to restitution or other redress. Furthermore, sections 25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the state to seek to satisfy both, as this Court said in *Grootboom*.”²⁵²

Van der Walt and Viljoen in discussing the right to housing submit that in foreign jurisdictions, housing rights of non-owners are only protected as constitutional rights if they are not specifically protected under the Constitution's property clause.²⁵³ They further argue that the protection of these rights under the property clause will not be necessary as they are already protected under section 26 of the Constitution.²⁵⁴ Besides the fact that the housing rights are already constitutional protected, Van der Walt and Viljoen also argue that the inclusion of housing rights within the constitutional notion of property “might well reduce or even erode the special social, historical and constitutional value and meaning of housing rights.”²⁵⁵

The opposition to the inclusion of public law entitlements, however, seems to be mainly directed to welfare rights. With respect to welfare rights it is has also been argued that there is no need for

²⁵¹ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217; 2004 (12) BCLR 1268 (CC) at para 18 and 19.

²⁵² *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217; 2004 (12) BCLR 1268 (CC) at para 18 and 19.

²⁵³ AJ van der Walt and S Viljoen “The Constitutional Mandate for Social Welfare – Systemic Differences and Links Between Property, Land Rights and Housing Rights” 2015 (18) 4 *PER/PELJ* at 1059.

²⁵⁴ AJ van der Walt and S Viljoen “The Constitutional Mandate for Social Welfare – Systemic Differences and Links Between Property, Land Rights and Housing Rights” 2015 (18) 4 *PER/PELJ* at 1060.

²⁵⁵ AJ van der Walt and S Viljoen “The Constitutional Mandate for Social Welfare – Systemic Differences and Links Between Property, Land Rights and Housing Rights” 2015 (18) 4 *PER/PELJ* at 1035.

such rights to be protected under the property clause as they are already protected constitutionally.²⁵⁶ Legal commentators have conceded that there may, however, be a need to protect commercial interests (licenses, permits and quotas) as well as pension claims under the property clause.²⁵⁷ These interests are quite important in the modern world of commerce. Van der Walt points out that they are important because “these interests can acquire great value, especially when they give access to services, trading or manufacturing opportunities and when they can be sold and transferred.”²⁵⁸

With the exception of housing rights, the inclusion of these public law entitlements was considered for the first time by the Constitutional Court in the Shoprite Checkers case this case will be discussed in the next chapter.

4. Conclusion

The Constitutional Court in *First National Bank* made it clear that the public law approach to determining whether a particular right differs significantly from the approach taken in private law. The Court stated that the constitutional notion of property cannot be derived from applying private law principles of determining “property”. The private law notion is however not devoid of influence in as far as the constitutional concept of property is concerned. As per the finding in *First National Bank*, the rights and objects that it protects form the foundation of constitutional property. These being the ownership rights and real rights. “Property” in the constitutional law sense is, however a much wider concept than its private law counterpart. As such the protection afforded by the constitutional notion of property extends to various forms of intangible property which include, land-use-related rights, intellectual property rights, personal rights and even public law entitlements.

Constitutional property is not derived from an interpretation of section 25 only; but from a purposive interpretation of the property clause that takes into account the provisions of the entire

²⁵⁶ H Mostert and PJ Badenhorst “Property and the Bill of Rights” in *Bill of Rights Compendium* (2014) at 3FB6.2.2. See also AJ van der Walt *Constitutional Property Law* 3ed (2011) at 168.

²⁵⁷ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 168. See also H Mostert and PJ Badenhorst “Property and the Bill of Rights” in *Bill of Rights Compendium* (2014) at 3FB6.2.2.

²⁵⁸ AJ van der Walt *Constitutional Property Law* 3ed (2011) at 158.

Constitution, contextual issues as well as the tension between the interests of the individual and the public interest. As such, the emphasis is on the various objectives which the constitutional protection of property seeks to achieve. These objectives include the transformation of the racially unequal distribution of property and the creation of a society that is based on the constitutional values of “human dignity, equality and freedom”.

When deciding on the objects and interests which constitute the constitutional notion of property, the Constitutional Court has unfortunately often failed to give a practical demonstration of how these considerations are to be used to determine the property issue. This trend began with *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*²⁵⁹ where the court dealt with a right that was already deemed “property” under private law. This trend has, however, been followed in subsequent cases, even where the cases did not concern forms of property that are not traditionally regarded as “property”. The Port Elizabeth Municipality is one of the very few cases in which the courts have applied the principles to the facts at hand. In this case, the Constitutional Court in applying the purposive approach took into account the “rights based vision of the Constitution.” It was therefore of the view that the right to dignity as well as the right to housing which is closely linked with the right to property justified the inclusion of the land-use-related right – not to be arbitrarily evicted from land that one does not own. The omission in as far as the justification for the inclusion of certain objects rights or interests within the constitutional notion of property creates a problem of lack of clarity as to how courts will approach this issue in future cases.

²⁵⁹ [2002] ZACC 5; 2002(4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

CHAPTER FOUR: THE CONSTITUTIONAL PROPERTY CONCEPT IN *SHOPRITE CHECKERS*

1. Introduction

As we have already seen, prior to its judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape*,²⁶⁰ the Constitutional Court approached the constitutional concept of property on a case-by-case basis. Employing this approach, the Court extended the constitutional concept of property far beyond the private law concept of a real right in a thing. It found in this respect that not only real rights and things, but also intellectual property rights and personal rights fell within the constitutional definition of “property”.²⁶¹ Apart from the right not to be arbitrarily deprived of a home derived from section 26 of the Constitution, however, it did not extend this concept beyond the field of private law rights and objects. In addition, it did not fully engage with the constitutional concept of property from a theoretical perspective.

All of this changed in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape*.²⁶² In this case the Constitutional Court, not only extended the constitutional concept of property to include a public law entitlement in the form of a “grocer’s wine licence” (although by a bare majority of six out eleven judges), but also fully engaged with the constitutional concept of property from at least two different theoretical perspectives, namely a “values-based approach” and an “attributes-based approach”. The values-based approach was adopted by Froneman J (Cameron, Jappie and Nkabinda JJ concurring) in his main judgment. Using this approach he came to the conclusion that a grocer’s wine licence is constitutional property. The attributes approach was adopted by Madllanga J (Tshiqi J concurring) in his concurring judgment. Using this approach he came to the same conclusion.

²⁶⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

²⁶¹ See chapter three.

²⁶² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

In his minority judgment, Moseneke DCJ (Mogoeng CJ, Khampepe J, Moemela and Theron AJ concurring) held that it was not necessary for the Constitutional Court to decide whether a grocer's wine licence could be defined as constitutional property. This is because the matter could be resolved by applying the test for rationality which is an aspect of the principle of legality, rather than the test for sufficient reason which is an aspect of the requirement of non-arbitrariness in section 25(1) of the Constitution. Despite coming to this conclusion, Moseneke DCJ, nevertheless, went on to consider whether a grocer's wine licence could be defined as constitutional property. He found that it could not.

Each of these judgments will be discussed in turn. Before doing so, however, it will be helpful to set out the facts and to identify the issues that arose for decision in this case.

2. The facts

In 2003, the Eastern Cape Legislature passed the Eastern Cape Liquor Act 10 of 2003 (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 27 of 1989. In terms of this Act, Shoprite Checkers held a "grocer's wine license", which allowed it to sell alcohol alongside food in its supermarkets in the Eastern Cape. The ECLA repealed the Liquor Act and abolished this license. Instead of a grocer's wine license, the ECLA provided that Shoprite Checkers could apply for an "all-kinds license". This license allowed a license-holder to sell any kind of alcohol, but only in a separate dedicated bottle store and not in a supermarket.

The transitional provisions of the ECLA gave existing licence holders 10 years within which to apply for an all-kinds licence. Shoprite Checkers, however, chose not to do so and at the end of the 10 year period its grocer's wine licence lapsed. Shoprite Checkers then applied to the Eastern Cape High Court in Mthatha for an order declaring the ECLA to be unconstitutional and invalid on the grounds that it arbitrarily deprived Shoprite Checkers of its property contrary to the provisions of section 25(1) when it abolished the grocer's wine license. The High Court agreed with Shoprite Checkers and declared the relevant parts of the ECLA to be unconstitutional and

invalid. It then referred its judgment to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

A plurality of the Constitutional Court refused to confirm the High Court's judgment. Instead, the plurality found that while Shoprite Checkers' grocer's wine license could be classified as "property", Shoprite had not been arbitrarily deprived of its license 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 Checkers' grocer's wine license was "property" in terms of section 25(1); and, if it was, second, whether Shoprite Checkers had been arbitrarily deprived of its property.

Insofar as the first question was concerned, the Constitutional Court split three ways. As pointed out above, two of the judgments (per Froneman J (the main judgment) and Madlanga J (the concurring judgment on this issue)) found that the grocer's wine license was property, although for different reasons, while the third judgment (per Moseneke DCJ (the minority judgment on this issue)) found that it was not. Insofar as the second question was concerned, the Court also split three ways. Two of the judgments (per Froneman J (the main judgment) and Moseneke DCJ (the concurring judgment on this issue)) found that Shoprite Checkers had not been arbitrarily deprived of its property, while the third judgment (per Madlanga J (the minority judgment on this issue)) found that it had.

3. Froneman J

As we have already seen, Froneman J found that Shoprite Checkers' grocer's wine license was property for the purposes of section 25(1) of the Constitution.²⁶³ In arriving at this conclusion, Froneman J, began by setting out the contextual issues which a court must bear in mind when interpreting constitutional concept of "property".

²⁶³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 70.

He pointed out in this respect that South Africa's context is one in which the constitutional protection of property is "regarded with suspicion from different perspectives".²⁶⁴ This is because the history of property in South Africa is a "history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property". This history of dispossession "has resulted in opposing ideological views on the place of property within the constitutional system.

On the one side is the "view that 'property is theft'". On the other side is the "view that the protection of property lies not only at the heart of atomised individual personal autonomy but also a truly efficient free market economic system". In between these extreme views, "lie the contrasting fears that giving too much protection to private property will inhibit the State's role to effect the transformation that the Constitution requires, as against the view that not giving enough protection will also undermine transformation by inhibiting economic development".²⁶⁵

Given these contested views, Froneman J pointed out further, it was necessary to formulate a uniquely South African approach to the interpretation of the constitutional concept of property.²⁶⁶ This unique approach had to be rooted "within the normative framework of the fundamental values and individual rights in the Constitution."²⁶⁷ It could not be based on private law conceptions of property. This is because such an approach would (a) exclude public law objects, rights and interests from the protection provided by section 25 and (b) result in an unintentional failure to subject private law notions of property to section 25 scrutiny.²⁶⁸

Apart from the fact that the constitutional concept of property should not be based on private law conceptions of property, Froneman J went on to point out, the constitutional concept of property has to be defined in a manner that promotes the fundamental values that underlie the Constitution

²⁶⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 4.

²⁶⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 34 and 35.

²⁶⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 36.

²⁶⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 36.

²⁶⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 46.

and especially human dignity, equality and freedom.²⁶⁹ These values demand a constitutional concept of property that “allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding 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”.²⁷⁰

The individual self-fulfilment the protection of property must serve, Froneman J then pointed out, “is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, 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 the protection afforded to that holding will be stronger than where no relation of that kind exists.”²⁷¹

After setting out these principles, Froneman J turned to apply them to the facts. In this respect he began by explaining that the determination of whether an interest is property for the purposes of section 25 is an objective test.²⁷² This test seeks to establish a link between the holding of the interest in question and the achievement of personal self-fulfilment which is constitutive of one’s dignity.²⁷³

“The important distinction between an objective enquiry and a subjective one is illustrated by the question whether Shoprite’s interest in the grocer’s wine licence is one that conceivably serves individual self-fulfilment, not in the sense of mere commercial well-being, but in the sense of running a business as work that forms part of “one’s identity and constitutive of one’s dignity”? If it is, then, on the strength of the close correlation between the holding of the licence and the fundamental right to choose one’s trade or

²⁶⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 44 and 46.

²⁷⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 50.

²⁷¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 50.

²⁷² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

²⁷³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

vocation, a finding that it is property for the purposes of section 25(1) is likely.”²⁷⁴

The fact that Shoprite Checkers was not a natural person, but rather a juristic one and, therefore, could not experience individual self-fulfilment, Froneman J pointed out further, was not the end of the matter. Given that the constitutional validity of the ECLA had to be determined on an objective basis, the Court had to establish whether the ECLA was unconstitutional and invalid not only with respect to juristic persons, but also with respect to natural persons who could experience individual self-fulfilment. The key question that had to be determined, therefore, was whether a liquor licence could promote the individual self-fulfilment of a natural persons.²⁷⁵

The answer to this question, Froneman J went on to point out, was simple. This is because it was easy to imagine that a grocer’s wine licence could promote the individual self-fulfilment of a person who owned a small grocery store and who needed to sell wine together with groceries in order to run her business successfully and, consequently, that this particular business choice 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”.²⁷⁶ The fact that Shoprite was a juristic person, according to the Justice, did not affect the “objective nature of the constitutional challenge”.²⁷⁷

Having made these points, Froneman J then pointed out that there was nothing in the Liquor Act or the ECLA which suggested that a grocer’s wine licence could not be “held by a person who needs to live a life of individual self-fulfilment and reciprocal dignity to others”. It followed, therefore, that a grocer’s wine licence was property for the purposes of section 25 of the Constitution.²⁷⁸

Having found that a grocer’s wine license was property for the purposes of section 25, Froneman

²⁷⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

²⁷⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

²⁷⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 64.

²⁷⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 65.

²⁷⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 66.

J turned to consider whether Shoprite Checkers had been deprived of its property by the ECLA and, if so, whether the ECLA was arbitrary.²⁷⁹ In this respect he found that while Shoprite Checkers had been deprived of its property by the ECLA, the ECLA was not arbitrary.²⁸⁰ The ECLA, therefore, was constitutionally valid.²⁸¹

4. Madlanga J

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

In arriving at this conclusion he began his analysis by criticising the values-based approach adopted by Froneman J. Madlanga J pointed out in this respect that although all there is no doubt that fundamental rights are interrelated, the problem with the values-based approach is that it placed too much reliance on the link between the right to property and other constitutional rights and thus “water[ed] down the potency of the right to property to the point where it does little more than ride on the coast-tails of rights such as human dignity and freedom of trade, occupation and profession”.²⁸² In addition, Madlanga J pointed out further, there was no authority for this approach in any of the Constitutional Court's previous section 25 judgments.²⁸³

After making these criticisms, Madlanga J turned to consider whether a grocer's wine licence could be defined as constitutional property. In this respect he started by pointing out that in *Opperman*, the Constitutional Court had accepted that an enrichment claim fell into the constitutional definition of property on the grounds that it was “logical and realistic” to do so. Given that an enrichment claim can be enforced only “against a specific person” and can “rendered completely valueless” following a successful defence and, therefore, was more

²⁷⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 73 to 88.

²⁸⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 76 and 83.

²⁸¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 90.

²⁸² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 139.

²⁸³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 140.

tenuous and further removed from the constitutional concept of property than a grocer's wine licence was, Madlanga J pointed out further, there was no reason why a grocer's wine licence could not be defined as constitutional property.²⁸⁴

In addition, and even more importantly, Madlanga J then pointed out, a grocer's wine licence has many, if not most, of the attributes of property. It grants the holder an "entitlement to sell wine under certain specified circumstances"; it may "endure indefinitely"; and it may be suspended or cancelled only on circumscribed grounds and in accordance with the principles of just administrative action as provided for in the PAJA. Furthermore, a grocer's wine licence has an "objective commercial value" and is transferable, although subject to the permission of the relevant authorities. "As an item with objective economic value, the transfer may even be for a valuable consideration (*quid pro quo*)". If an object, right or interest has the same attributes as the private law concept of property, Madlanga J concluded, then it should be defined as constitutional property.²⁸⁵

Having found that the grocer's wine license was property for the purposes of section 25, 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.²⁸⁶

5. Moseneke DCJ

In his minority judgment on this issue, Moseneke DCJ began by pointing out that it was not necessary for the Constitutional Court to decide whether a grocer's wine licence could be defined as constitutional property. This is because this was a "difficult and fluid question" and the dispute could be resolved by applying the test for rationality which is an aspect of the principle

²⁸⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 142.

²⁸⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 143.

²⁸⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 169.

of legality, rather than the test for sufficient reason which is an aspect of the requirement of non-arbitrariness in section 25(1) of the Constitution.²⁸⁷

Despite coming to this conclusion, Moseneke DCJ, went on to consider whether a grocer's wine licence could be defined as constitutional property. In this respect he started his analysis by pointing out that Shoprite Checkers had not been deprived of the right to trade in alcohol. Instead, it had been deprived of the right to trade in alcohol together with food from the same premises. In other words, it had been deprived of a "business strategy and model that it prefers and cherishes". The key question that had to be answered, therefore, was whether a preferred business strategy could be defined as property for the purposes of section 25.²⁸⁸

In order to answer this question, Moseneke DCJ pointed out further, it was necessary to determine whether the constitutional concept of property should be extended to include so-called "new property" such as social welfare benefits, employment benefits and, especially, commercial licences. In some foreign jurisdictions these sorts of public entitlements have been included in the constitutional concept of property and in others they have not, depending on their constitutional and social context. It is important to note, however, that even in those countries in which public entitlements have been included, not every form of government largesse is seen as property and, in particular, those that do not have any of the characteristics of property.²⁸⁹

The problem with public law entitlements, Moseneke DCJ went on to point out, is that:

"they are generally 'by their very nature contingent on mutable government policies or programmes'. Badenhorst et al state that they may be 'withdrawn or reduced unilaterally by administrative authorities'. The learned authors add that the withdrawal of the entitlements, thereby invoking compensation requirements, would have a depressing effect on development of welfare policies and programs, by securing the position of current beneficiaries at the expense of the public interest in policies and programmes that are adaptable according to changing circumstances. They state further that in most other jurisdictions, these types of interests are not easily accepted as property for the

²⁸⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 94.

²⁸⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 102.

²⁸⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 113.

purposes of the threshold test, although nuanced acknowledgement and protection of these interests does at times occur. Welfare payments and subsidies generally would not pass the threshold test, but pension interests may under some circumstances be regarded as property”.²⁹⁰

The decision in foreign jurisdictions to include public law entitlements in the constitutional concept of property, Moseneke DCJ then concluded, can usually be traced back to the fact that their Constitutions do not protect these sorts of entitlements from legislative and executive excesses. The South African Constitution is different. This is because it not only protects a very wide range of fundamental human rights, including an impressive set of social and economic rights, but also because it provides that every exercise of public power must comply with the principle of legality and the test for rationality. Every exercise of public power, therefore, is subject to judicial review. Given these features of the South African Constitution, it is not necessary to convert every conceivable object, right or interest into protectable property.²⁹¹

After setting out these principles, Moseneke DCJ turned to consider whether liquor licences should be defined as property for the purposes of section 25.

In this respect the Deputy Chief Justice started by pointing out that one of the objectives of regulation the liquor industry through the use of liquor licences was to impose control over the access to and use of a dangerous substance that has the potential to cause negative socio-economic consequences. Another objective was to maximise the economic benefits of trading in liquor and to balance these benefits against the harmful consequences of alcohol use. If a liquor was defined as constitutionally property a strong entitlement would be placed in the hands of the licence holder and this could “tip the scales and arguably diminish the ability of the Legislature to effectively regulate an industry where regulation is of paramount importance”.²⁹²

²⁹⁰*Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 114.

²⁹¹*Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 115.

²⁹² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 120.

Apart from the fact that it could diminish the ability of the Legislature to regulate the liquor industry, Moseneke DCJ pointed out further, there is another reason why a liquor licence should not be defined as constitutional property: it does not actually possess the attributes that are normally associated with the concept of property. This is because a licence is “a bare permission to do something that would otherwise be unlawful and is usually issued to overcome a statutory prohibition. In addition, a licence is subject to administrative withdrawal and change. Furthermore, they are “never absolute, often conditional and frequently time bound”. They are never there for the taking, but are subject to specified pre-conditions. Over time a licence holder may also cease to be suitable to hold the licence”, they are not freely transferrable and do not vest in their holders.²⁹³

Defining a liquor licence as constitutional property, Moseneke DCJ concluded, could also result in “very difficult property jurisprudence”.²⁹⁴ This is because the wider the definition of constitutional property, the narrower the definition of deprivation and arbitrariness would have to be. It might also open the floodgates of litigation. This is because as every cancellation or change in licencing law could potentially result in a constitutional challenge based on the property clause.²⁹⁵ In addition, such an approach “would impermissibly limit the legislative competence of the provinces”.²⁹⁶

Like Madlanga J, Moseneke DCJ also criticised the approach adopted by Froneman J. He was of the view that:

“The objective evaluation of whether a liquor license 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. This Court in FNB implied that one should look at the objective inherent value of the right or interest to determine if it constitutes “property”. If the core nature of a liquor license is permission, then subjective interests like economic and commercial value, let alone human dignity and vocation of choice and liberty

²⁹³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 123.

²⁹⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 125.

²⁹⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 125.

²⁹⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 125.

are of little assistance in themselves. FNB made it clear that “[n]either the subjective interest of the owner in the thing owned nor the economic value of the right of ownership . . . can determine the characterisation of the right”. Economic and commercial interests, whether objective or subjective, are part and parcel of these permissions. The inherent limitation in the core attribute of a liquor license 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.”²⁹⁷

In his criticism of the main judgment, Moseneke DCJ also stated that;

“There was indeed another route open to the main judgment in reaching its decision. The enquiry into arbitrary deprivation in substance is no different from the enquiry into rationality of the impugned statute. If the impugned statute had authorised a wanton and irrational termination of the liquor licenses of Shoprite in a law that was not properly related to public good, it would have been constitutionally bad. The holder of the permission would have the same substantive constitutional protection. Moreover, the approach that some courts have adopted was to place little emphasis on the threshold question of “property”. An example is that of *Transkei Public Servants Association*¹⁹³ and of *Law Society*, where the Court stated that “[h]appily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes ‘property’ ”.²⁹⁸

Moseneke DCJ found that Shoprite Checkers’ preferred business model did not qualify as “property” for the purposes of the Constitution.²⁹⁹ In so far as the constitutionality of the ECLA was concerned, he concurred with Froneman J’s finding that the provisions of the ECLA were constitutionally valid.³⁰⁰

6. Conclusion

The Shoprite Checkers case is the first case in which the Constitutional Court has stretched the definition of constitutional property to include an interest which is a public law entitlement. The Court was divided into three and a bare majority, 6 out of 11 found that the liquor license

²⁹⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 127.

²⁹⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 129.

²⁹⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 130.

³⁰⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 91.

constitutes constitutional property. This bare majority was constituted by Froneman J and Madlanga J's findings. The Court was however divided into three with regard to the approach to be followed when determining whether a commercial license constitute constitutional property.

Froneman J adopted a values-based approach. He regarded the fundamental values of the Constitution as playing a key role in the determination of constitutional property.³⁰¹ He also set out an objective test in which the court has to assess whether the interest is such that it is necessary for the attainment of the individual's self-fulfilment. In addition to this, Froneman J also examined the characteristics of the Grocer's Wine Licence and found that it constituted a personal enrichment claim and that this strengthened the justification for its inclusion within the ambit of the constitutional concept of property.

Madlanga J, on the other hand, adopted a private-law-style approach. Inasmuch as he set out the context and history within whose framework the constitutional concept of property must be interpreted, when it came to the issue at hand, he focused only on the characteristics of the interest. He was of the view that if an object or interest has the characteristics of 'property', then it should be regarded as such.³⁰² Unlike Froneman J and Madlanga J, Moseneke DCJ was of the view that it was unnecessary to decide on the complex issue of property in this case.³⁰³ He proposed that the court should instead use the rationality test to resolve the property dispute.³⁰⁴ Moseneke DCJ then looked at the purpose served by the regulation of liquor licences, he found that protecting the grocer's wine license under the property clause would obstruct the function of the legislation in as far as the regulation of liquor is concerned. Like the other Justices, Moseneke DCJ also examined the characteristics of the grocer's wine licence. He however concluded that it did not qualify for constitutional protection.

³⁰¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 44 and 46.

³⁰² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 143.

³⁰³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 94.

³⁰⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 94.

As can be seen in the discussion above, the judgments delivered by Froneman J, Madlanga J and Moseneke DCJ all adopted very different approaches. It is therefore important to note that though the Court found that a Grocer's Wine License granted by the state to a juristic person constitutes constitutionally protected property, there was, however, no majority ruling in as far as the approach for the determination of constitutional property is concerned. As such, it is still unclear what approach the courts will adopt in future cases.

CHAPTER FIVE: COMPARATIVE JURISPRUDENCE

1. Introduction

In each of their respective judgments, Froneman J, Madlanga J and Moseneke DCJ engaged in a comparative analysis, although Froneman J appears to have done so in the greatest depth. This is not surprising for two reasons. First, the Constitution expressly provides that when a court, tribunal or forum interprets the Bill of Rights it “may consider foreign law”.³⁰⁵ Second, the question whether commercial licences and other public law entitlements should fall into the constitutional concept of property has been considered by the courts in comparable foreign jurisdictions, and especially by the European Court of Human Rights as well as the courts in Germany, and the United States. The purpose of this chapter is to briefly examine the approach followed in these jurisdictions with a specific emphasis on the extent to which they have recognised commercial licences as constitutional property. Each jurisdiction will be discussed in turn.

2. The European Court of Human Rights

2.1 Introduction

The right to property is guaranteed in Article 1 Protocol 1 of the European Convention on Human Rights (the “Convention”). This Article states that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

³⁰⁵ Section 39(1)(c). Insofar as constitutional property law is concerned, Van der Walt and Walsh point out that “[c]omparatively speaking there are significant divergences internationally in how state powers over private property are controlled by constitutions. Many of these divergences stem from textual differences in the framing of constitutional property guarantees, and from the varied treatment of property rights in civilian and common law legal systems. However, most jurisdictions that protect property rights at a constitutional level encounter similar issues in the interpretation and application of such protection...” (see AJ van der Walt and R Walsh “Comparative constitutional property law” in M Graziddei and L Smith (eds) *Comparative Property Law: Global Perspective* (2017) at 193).

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.³⁰⁶

In *Sporrong and Lonnroth v Sweden*³⁰⁷ the European Court of Human Rights (the “ECHR”) identified three rules which are to be considered when resolving property disputes:

“The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable.”³⁰⁸

The protection of property within the Convention evidently seeks to achieve two main purposes. It seeks to allow the government to “adopt or modify economic and social policies implicating private property, without in every instance, compensating adversely affected owners. On the other hand, the drafters also understood that the rule of law in general and the stability and predictability of property rights in particular would be undermined if governments could arbitrarily deprive owners of their possessions”.³⁰⁹

Before the ECHR can decide whether an interference with an object, right or interest violates Article 1 Protocol 1 it must first ascertain whether the object, right or interest in question can be classified as a “possession” for the purposes of the Convention. The concept of a “possession” for the purposes of the Convention has been interpreted broadly and, consequently, various forms of intangible property rights including some public law entitlements are accepted as falling within the ambit of this concept.

2.2 The constitutional concept of property

³⁰⁶ European Commission on Human Rights (1950).

³⁰⁷ Application no. 7151/75; 7152/75 (1982).

³⁰⁸ *Sporrong and Lonnroth v Sweden* application no. 7151/75; 7152/75 (1982) at para 61.

³⁰⁹ LR Helfer “The New Innovation Frontier? Intellectual Property and the European Court of Human Rights” (2008) 49 *Harvard International Law Journal* at 8.

Like the Constitutional Court, the ECHR has accepted that the concept of a “possession” encompasses corporeal movables and immovables. In *Sporrong and Lonnroth v Sweden*,³¹⁰ the Court held that the ownership of immovable property is protected under Article 1 Protocol 1. In this case, the Stockholm City Council wanted to redevelop land which formed a part of the applicants’ estate, and as a result, it acquired a permit authorising the expropriation of the land and prohibiting construction on it. The applicants argued that the looming expropriation had gone on for too long and that this affected their right to “peacefully enjoy their possessions”.³¹¹ The ECHR found that the interest held by the applicant was indeed a “possession” and that the prohibitions significantly affected the exercise of the owners’ rights to use and dispose of their property.³¹²

Apart from the right of ownership, the ECHR has extended the concept of a “possession” to include the entitlements of ownership, such as the entitlement to access property. In *Loizidou v Turkey*³¹³, an applicant who owned properties in northern Cyprus approached the Court because the Turkish government had occupied this area and thereby prevented her from accessing her properties.³¹⁴ Although the properties themselves had not been interfered with, the Court found that the government of Turkey had interfered with the applicant’s peaceful enjoyment of her possessions as she had “effectively lost all control over, as well as all possibilities to use and enjoy her property”.³¹⁵

Besides ownership and the entitlements of ownership, the ECHR has held that the concept of a “possession” also encompasses various forms of intangible property rights. In *Beyeler v Italy*,³¹⁶

³¹⁰ Application no. 7151/75; 7152/75 (1982).

³¹¹ *Sporrong and Lonnroth v Sweden* application no. 7151/75; 7152/75 (1982) at para 11-18.

³¹² *Sporrong and Lonnroth v Sweden* application no. 7151/75; 7152/75 (1982). In *Gasus Dosier – und Fordertechnik GmbH v the Netherlands* application no. 15375/89 (1995) the ECHR expressly held that the ownership of a movable – in this case, a cement mixer – also fell into the concept of a “possession” and was protected by Article 1 Protocol 1. In *Gasus Dosier–und Fordertechnik GmbH v the Netherlands* application no. 15375/89 (1995) the ECHR expressly held that the ownership of a movable – in this case, a cement mixer – also fell into the concept of a “possession” and was protected by Article 1 Protocol 1.

³¹³ Application no. 15318/89 (1996).

³¹⁴ *Loizidou v Turkey* application no. 15318/89 (1996) at para 12.

³¹⁵ *Loizidou v Turkey* application no. 15318/89 (1996) at para 63.

³¹⁶ Application no. 33202/96 (2000).

for example, the Court held that the scope and ambit of the concept of a “possession” is not only independent from, but also much wider than the scope and ambit of a typical domestic private law concept of “property”.³¹⁷ The Court stated in this respect that “possession in the first part of article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law.”³¹⁸

The ambit of the concept of property as protected in Article 1 Protocol 1, accordingly extends to interests such as income and goodwill. In *Van Marle and Others v the Netherlands*,³¹⁹ the ECHR had the opportunity to decide whether both these interests qualify for protection under Article 1 Protocol 1. The applicants in this case were practicing accountants who did not meet the specified qualifications to be registered as certified accountants.³²⁰ They could, however, apply to get registered as certified accountants, but when they applied, the Board of Appeals refused to grant them their registrations.³²¹ They argued that the decision made by the Board of Appeals had reduced their income and goodwill and thereby interfered with their rights to enjoy their possessions peacefully.³²² The Court found that they could rely on Article 1 Protocol 1 to protect these interests.³²³ The Court also accepted in *Iatridis v Greece*³²⁴ that the goodwill of a cinema is a “possession” even though the applicant did not own the property from which he operated the cinema.³²⁵

Company shares are also protected as “possessions” for the purposes of the Convention. In *Bramelid and Malmstrom v Sweden*,³²⁶ the ECHR had to decide whether company shares are included within the ambit of Article 1 Protocol 1. The Court *in casu* reasoned that “a company share is a complex thing: certifying that the holder possesses a share in the company, together with the corresponding rights (esp voting rights) it also constitutes as it were an indirect claim to the company’s assets. In the present case there is no doubt that the NK shares had an economic

³¹⁷ *Beyeler v Italy* application no. 33202/96 (2000) at para 100.

³¹⁸ *Beyeler v Italy* application no. 33202/96 (2000) at para 100.

³¹⁹ Application no. 8543/79; 8674/79; 8675/79; 8685/79 (1986).

³²⁰ *Van Marle and Others v the Netherlands* application no. 8543/79; 8674/79; 8675/79; 8685/79 (1986) at para 39.

³²¹ *Van Marle and Others v the Netherlands* application no. 8543/79; 8674/79; 8675/79; 8685/79 (1986) at para 39.

³²² *Van Marle and Others v the Netherlands* application no. 8543/79; 8674/79; 8675/79; 8685/79 (1986) at para 39.

³²³ *Van Marle and Others v the Netherlands* application no. 8543/79; 8674/79; 8675/79; 8685/79 (1986).

³²⁴ Application no. 31107/96 (1999).

³²⁵ *Iatridis v Greece* application no. 31107/96 (1999).

³²⁶ Application no. 8589/79; 8589/79 (1983).

value . . . shares held by the applicants were indeed ‘possessions’ giving rise to a right of ownership’.³²⁷

Article 1 Protocol 1’s protection of property interests has been extended to include intellectual property as well. In *Smith Kline and French Laboratories v the Netherlands*,³²⁸ the ECHR accepted that a patent for drugs received under the domestic patent act was a possession for the purposes of Article 1 Protocol 1. The Court even extended Article 1 Protocol 1’s protection of intellectual property to include an application for a trademark registration in *Anheuser–Busch Inc. v Portugal*.³²⁹ The applicant in this case, a beer brewing company, argued that by not overturning the decision of the relevant authorities to deny the registration of their trademark, the Portuguese courts had violated their right to enjoy their possessions. The Court accepted that the application for a trademark fell within the bounds of Article 1 Protocol 1.³³⁰

Although in earlier decisions, rights and interests could be included within the scope and ambit of Article 1 Protocol 1 only if they had vested, the ECHR has now extended the scope of its concept of possession to include delictual claims and legitimate expectations. In *Slivenko and Others v Latvia*,³³¹ the Court stated that “possessions” can be “existing possessions” or assets, including claims by virtue of which the applicant can argue that he or she has at least a “legitimate expectation” of acquiring effective enjoyment of a property right”.³³² This wide approach was confirmed in *Stretch v the United Kingdom*,³³³ where the Court found that an expectation of renewal of a lease entered into with the local municipality was a legitimate expectation and that it qualified for protection under Article 1 Protocol 1. In *Pressos Compania Naviera SA and Others v Belgium*³³⁴ the Court also confirmed that claims arising from negligence are “possessions”. It did go on to hold, however, that not all claims will qualify for protection.³³⁵

³²⁷ *Bramelid and Malmstrom v Sweden* application no. 8589/79; 8589/79 (1983) at para 81.

³²⁸ Application no. 12633/87 (1990).

³²⁹ Application no. 73049/01 (2001).

³³⁰ *Anheuser–Busch Inc. v Portugal* application no. 73049/01 (2001).

³³¹ Application no. 48321/99 (2002).

³³² *Slivenko and Others v Latvia* application no. 48321/99 (2003).

³³³ Application no. 44277/98.

³³⁴ Application no. 17849/91 (1995).

³³⁵ *Pressos Compania Naviera S.A and Others v Belgium* application no. 17849/91 (1995).

2.3 The constitutional concept of property and public law entitlements

Both the European Commission on Human Rights (the “Commission”) and the ECHR have held that the concept of a “possession” in Article 1 Protocol 1 is wide enough to include a variety of public law entitlements. In *Domalewski v Poland*,³³⁶ for example, the Commission held that “rights stemming from the payment of contributions to the social insurance system, in particular the right to derive benefits from such a system - for instance in the form of a pension - can be asserted under Article 1 of Protocol No. 1”.³³⁷ And in *Klein v Austria*,³³⁸ the ECHR held that a pension which a person has contributed to through his or her own effort is included within the meaning of “possessions”. The Court adopted the same approach to those cases in which a person is entitled to claim emergency assistance and the assistance is linked to his or her pension contributions.³³⁹ In both cases, the Court stressed the importance of a direct link between the contribution made and the expectation to receive the benefits.

Despite emphasizing the importance of own effort in pension cases, the ECHR has held that certain welfare entitlements also fall into the concept of a “possession” for the purposes of Article 1 Protocol 1, even where there has been no own effort. In *Ponomarenko v Russia*,³⁴⁰ for example, the applicant was entitled to be provide with housing and a court order had been issued in terms of domestic law confirming this right. The state, however, had failed to enforce the court order for a period of three years. The Court held that the failure to enforce the court order infringed the applicant’s right to the peaceful use and enjoyment of his “possessions” in terms of Article 1 Protocol 1. The Court was faced with a similar situation in *Nagovitysn v Russia*.³⁴¹ In this case, the applicant as a result of his disability was entitled to social benefits which included the provision of a house.³⁴² A court judgment stating that he must be provided with a house had been granted in domestic law, but the state had failed to enforce it for more than three years.³⁴³

³³⁶ Application no. 34610/97 (1999).

³³⁷ *Domalewski v Poland* application no. 34610/97 (1999).

³³⁸ Application no. 57028/00 (2014).

³³⁹ *Gaygusuz v Austria* application no. 48321/99 (2002) at para 121.

³⁴⁰ Application no. 14656/03 (2007).

³⁴¹ Application no. 6859/02 (2018).

³⁴² *Nagovitysn v Russia* application no. 6859/02 (2018) at para 5.

³⁴³ *Nagovitysn v Russia* application no. 6859/02 (2018) at para 15.

The Court in this case also unanimously found that the right to housing in question could be protected under Article 1 Protocol 1 and that the “unjustified delay in the enforcement of the judgment” was a violation of this right.³⁴⁴

Apart from pension benefits and the right to housing, the ECHR has extended the meaning of “possessions” to include interests arising from licenses and permits. In *Tre Traktorer Aktiebolag v Sweden*³⁴⁵ the Court had to determine whether a license to sell various types of alcoholic beverages, including wine, constituted property for the purposes of the Convention.³⁴⁶ It concluded that Article 1 Protocol 1 was applicable in this case because “the economic interests connected with the running of Le Cardinal were ‘possessions’ for the purposes of Article 1 of the Protocol . . . the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company’s business . . . its withdrawal had adverse effects on the goodwill and value of the restaurant . . .”³⁴⁷ In *Fredin v Sweden*³⁴⁸ the Court also found that a permit to extract gravel qualifies for protection as a “possession” and in *Pine Valley Developments Limited and Others v Ireland*,³⁴⁹ the Court found that permission for planning also falls within the bounds of Article 1 Protocol 1.

In light of these judgments, McCarthy points out that “it now seems settled that where legislation provides for a public law benefit, a private property right may emerge, much in line with Reich’s thinking. A possession of that kind may still be removed by the State, but as with any other private property right, such action would have to be lawful, in the public interest, and proportionate”.³⁵⁰ Inasmuch as the Convention interprets “possession” in a broad manner, its protection does not, however, extend to every conceivable interest. Article 1 Protocol 1 does not protect interest that are mere expectations. For example an expectation to inherit as was decided

³⁴⁴ *Nagovitysn v Russia* application no. 6859/02 (2018).

³⁴⁵ Application no. 10873/84 (1989).

³⁴⁶ *Tre Traktorer Aktiebolag v Sweden* application no. 10873/84 (1989) at para 33.

³⁴⁷ *Tre Traktorer Aktiebolag v Sweden* application no. 10873/84 (1989) at para 43.

³⁴⁸ Application no. 12633/86 (1991).

³⁴⁹ Application no. 12742/87 (1991).

³⁵⁰ F McCarthy “Protection of Property and the Europeans Convention on Human Rights” *Property Rights Conference Journal* (2017) 6 at 321.

by the Court in *Marckx v Belgium*.³⁵¹ The Court in this case found that the applicant could not rely on the protection afforded by Article 1 Protocol 1.

3. Germany

3.1 Introduction

The right to property is guaranteed in Article 14 of the Basic Law which stipulates that:

- “(i) Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.
- (ii) Property entails obligations. Its use should also serve the public interest.
- (iii) Expropriation shall only be permissible in the public interest. It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a balance between the public interest and the interest of those affected. In case of dispute regarding amount of compensation recourse may be had to ordinary courts”.³⁵²

The values on which the Basic Law is based play a key role in the interpretation of its provisions. The value of dignity especially plays a central role in this regard. The other values include democracy,³⁵³ social state,³⁵⁴ *Rechtsstaat* (constitutional state),³⁵⁵ republicanism and

³⁵¹ Application no. 6833/74 (1979).

³⁵² Basic Law for the Federal Republic of Germany, official translation published by the Press and Information Office of the Federal Government, Bonn, revised and updated edition June 1994.

³⁵³ W Heun *The Constitution of Germany: A contextual analysis* (2011) at 30. The principle of democracy has been interpreted as referring to the “idea of free self-determination or autonomy” and not just democratic governance

³⁵⁴ W Heun *The Constitution of Germany: A contextual analysis* (2011) at 45. See also DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 50, Kommers and Miller translate the *Lisbon* case where the Federal Constitutional Court stated that the social state is “an essential part of...Germany’s ‘constitutional identity,’ a distinctiveness that cannot be sacrificed to any other value of the Basic Law.” The function of the social state principle is to ensure that the state has the power to interfere with individual rights where it is in the public interest to do so. In other words, the social state principle places a duty on the arms of government to promote social welfare.

³⁵⁵ W Heun *The Constitution of Germany: A contextual analysis* (2011) at 35-41. The *Rechtsstaat* principle encompasses the principles of legality, supremacy of the constitution and the rights to approach the courts for judicial recourse. See also DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 43 where it is further explained that supremacy of the constitution means that any statute which is not consistent with the provisions of the basic law will be deemed both unconstitutional and void. This is expressly articulated in article 19(2) of the Basic Law which outlaws any law or governmental conduct that violates ‘the essential content of [any] basic right’.

federalism.³⁵⁶ These values are regarded as being “the essential core and identity of the Constitution” and as such, they can never be amended.³⁵⁷ The property right, therefore, must be interpreted purposively so as to ensure the realisation of these constitutional goals. As pointed out by Kommers and Miller, the Basic Law is not regarded as being a mere rule book, it does not only seek to protect rights but to also “foster a secure and preferred way of life”.³⁵⁸

When interpreting the meaning of property for the purposes of the Basic Law, the German Federal Constitutional Court has adopted a broad approach which has allowed the inclusion of various intangible property rights including some interests arising from public law. This section will discuss the approach that has been taken by the German courts when interpreting constitutional property and particularly how they have extended this concept to include public law entitlements.

3.2 The constitutional concept of property

The German private law concept of property is a narrow one which provides for an absolute and exclusive property right whose sole purpose is the protection of the individual from any interference with their property rights.³⁵⁹ It is protected in section 903 of the German Civil Code which states that the property holder has the discretion to deal with their thing as they wish and they can even exclude others from interfering with their right of ownership.³⁶⁰ Given that the private law concept of property applies only to corporeal objects, property in a private law sense is viewed as being a relationship between persons with regard to the corporeal objects that they own.³⁶¹

³⁵⁶ D Kleyn “The constitutional protection of property: A comparison between The German and South African approach” (1996) 11 *SAPR/PL* at 406.

³⁵⁷ W Heun *The Constitution of Germany: A contextual analysis* (2011) at 29. See also DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 43.

³⁵⁸ DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 47.

³⁵⁹ AJ van der Walt *The Constitutional Property Clause* (1997) at 47. See also D Kleyn “The constitutional protection of property: A comparison between The German and South African approach” (1996) 11 *SAPR/PL* at 419.

³⁶⁰ German Civil Code English translations. Available at: https://www.gesetze-im-internet.de/englisch_bgb/index.html, accessed on 21 February 2018.

³⁶¹ AJ van der Walt *The Constitutional Property Clause* (1997) at 32.

Notwithstanding the fact that both the German Civil Code and the Basic Law use the same term (*eiigentum*) to refer to property, the German Federal Constitutional Court has rejected the view that “property” in the constitutional sense has the same meaning as “property” in the private law sense. In the *Hamburg Flood Control* case, the Court held that “the notion of property as guaranteed by the Constitution must be derived from the Constitution itself [it] cannot be fixed by ordinary statutes ranking below the Constitution, nor can the range of the guaranteed right be determined on the basis of private law.”³⁶² An important consequence of this approach, the Court held further, is that the constitutional concept of property cannot be restricted to the objects and rights protected under the very narrow private law definition of “property”. Instead, the constitutional concept of property has to be interpreted in a manner that not only protects the individual’s liberty, but also promotes his or her ability to lead a “self-governing life”.³⁶³

The requirement that the object, right or interest should promote the realization of the individual’s freedom will, however, not be satisfied by showing mere economic advantage. In the *Groundwater Cases* the German Federal Constitutional Court held that “[f]rom the constitutional guarantee of property, the owner cannot derive a right to be permitted to make use of precisely that which promises the greatest possible economic advantage.”³⁶⁴ The Court, therefore, will not accept the argument that an object, right or interest constitutes constitutional property merely because it has significant patrimonial benefits for the holder. The protection of property as a constitutional right is evidently more concerned with protecting the individual’s freedom and not the patrimonial value of the object of the right.

Inasmuch as there seems to be an emphasis on individual property rights, the German constitutional concept of property also has a social aspect. As explained in the *Investment Aid Case*:

³⁶² See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 634.

³⁶³ See translation in GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 746.

³⁶⁴ See translation in GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 756.

“The image of humankind in the Basic Law is not that of isolated, sovereign individuals. On the contrary, the Basic Law has resolved the tension between individual and society in favour of coordination and interdependence with the community without touching the intrinsic value of the person.”³⁶⁵

In some cases, the German Federal Constitutional Court has actually relied on the public purpose or public interest to justify the inclusion or exclusion of interests from the ambit of Article 14.³⁶⁶ As Alexander puts it “the nature and social function of certain categories of property is such that exclusive, autonomous individual rights in that property cannot be reconciled with the enormous importance and potential dangers which the private use and exploitation of that property might have for society as a whole”.³⁶⁷ For example, in the *Hamburg Flood Control* case the Court held that because groundwater serves an important public function it cannot be protected as an individual constitutional property interest.³⁶⁸ And in the *Contergan* case the Court found that it was in the public interest to constitutionally protect a private law delictual interest as this would ensure that the compensation fund would be distributed in a just manner and that other victims who were not part of the case would still be allowed to claim from the fund.³⁶⁹

The German Federal Constitutional Court has adopted a wide meaning insofar as the objects, rights and interests protected by Article 14 are concerned. Like many other jurisdictions, the starting point for the constitutional concept of property is the private law notion of property. As such, all the property interests protected under German private law are included within its

³⁶⁵ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 625.

³⁶⁶ AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 131. See also D Kleyn “The Constitutional Protection of Property: A comparison Between The German and South African Approach” (1996) 11 *SAPR/PL* at 409 where Kleyn explains that the focus on individual rights in a consequence of Germany’s history; he states that the property right “was developed as a means of freeing the individual from the bondage of medieval feudalism...It served to counteract the political powers of the landlords and to make individual ownership of land possible, as well as to enable the individual to participate in a free market system”.

³⁶⁷ GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 130.

³⁶⁸ DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 641. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 130. *In casu*, The German Federal Constitutional Court was of the view that an owner of land cannot be said to have a constitutional property right in the groundwater merely because that is the nature of things according to private law ownership. The court further reasoned that, “the definition of property is not the exclusive domain of private law. The institutional guarantee is not adversely affected when public law intrudes to protect and defend aspects of property vital to the well-being of the general public.”³⁶⁸ The court held that because groundwater rights are of a public nature it was therefore important to regulate the use of this public resource, hence, the legislature had operated within its authority when it limited the scope of the rights of the land owner.³⁶⁸

³⁶⁹ See translation in AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 131.

constitutional concept of property. The German courts have however found that constitutional property also includes interests that do not stem from the traditional property right of ownership. In the *Tenant's Right of Occupancy* case, for example, the German Federal Constitutional Court accepted that a tenant's right to lease an apartment falls within the scope and ambit of the constitutional notion of property.³⁷⁰ The Court reasoned that:

- (a) The home is essential for the realization of personal freedom and development and that in the case of a tenant, the right to lease allows the tenant to access this freedom in a manner similar to that of a real right.³⁷¹
- (b) The holder of the right to lease has the exclusive right to use the property without disturbance for the duration of the lease.³⁷²
- (c) The right to lease "has value as an asset".³⁷³

Several intangible interests have been accepted as constituting constitutional property. In the *Thalidomide* case the German Federal Constitutional Court accepted that delictual claims for compensation for victims of pregnancy drugs are protected under the property clause.³⁷⁴ *In casu*, the Court considered that protecting such claims under public law would be in the public interest considering that it was very likely that more victims who had not been part of the delictual claim would come forward; hence, it was important that the compensation be closely monitored by the state to ensure that they are also compensated.³⁷⁵ In the *Schoolbook* case³⁷⁶ it was held that a

³⁷⁰ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 635. In an earlier judgment, *Small Garden Plot* case (1959) the German Federal Constitutional Court found that legislation that limited the power of landowners to terminate plot leases was unjustified; see translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 639. In another case, *Small Garden Plot*, the court also held that a leases right to rent a garden plot constitutes constitutional property; see translation in GS Alexander "Property as a fundamental constitutional right? The German example." (2003) 88:733 *Cornell Law Review* at 639.

³⁷¹ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 635.

³⁷² See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 635 and 636.

³⁷³ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 636.

³⁷⁴ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 640. AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 131. Van der Walt refers to it as the *Contergan* case.

³⁷⁵ See translation in AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 131.

³⁷⁶ BVerfGE, 31 229.

copyright is “property” for the purposes of Article 14.³⁷⁷ And in the *Clinical Trials* case the Court held that a patent protected by the Patent Act is constitutionally protected property.

3.3 The constitutional concept of property and public law entitlements

As the discussion set out above illustrates, generally speaking the constitutional concept of property in Germany encompasses all those rights and interests which are valuable, which have vested in the holder (not mere expectation) and which are concrete rights (not wealth).³⁷⁸

However, where the right or interest in question is a public law entitlements there are additional requirements which must be satisfied before the public law entitlement can be defined as constitutional property. In this respect, the German Federal Constitutional Court has held that the right or interest in question must also be: (a) an exclusionary right awarded to the holder by the state; (b) derived from the property holder’s own effort or input; and (c) that the property right must be held for the purpose of ensuring “holder’s existence (survival)”.³⁷⁹

Applying these requirements, the German Federal Constitutional Court has held that public law entitlements in the form of unemployment benefits,³⁸⁰ pensions³⁸¹ and medical insurance fall into the constitutional concept of property.³⁸² At the same time, however, they have also held that welfare entitlements do not fall into the constitutional concept property because they do not satisfy the additional requirements and especially the additional requirement of own effort or input.³⁸³ As Van der Walt points out, the decision to impose these additional requirements means that the Court will extend the constitutional protection of property only to those public law

³⁷⁷ See translation in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 651.

³⁷⁸ See translation of *Glycol Wine* case in DP Kommers and RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed (2012) at 636 where the German Federal Constitutional Court refused to future business opportunities and a business’s reputation.

³⁷⁹ GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 763 to 764.

³⁸⁰ BVerfGE, 72 9 at 22-25.

³⁸¹ BVerfGE, 53 257 at 308-311.

³⁸² BVerfGE, 69 272 at 304-307.

³⁸³ GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 766. Some academics and judges have proposed that interests such as bursaries and state funded education should also be included within the constitutional concept of property, see D Kleyn “The constitutional protection of property: A comparison between The German and South African approach” (1996) 11 *SAPR/PL* at 422.

entitlements that display the qualities of private property.³⁸⁴ An important consequence of the decision to adopt these additional requirements, therefore, is that it cannot really be said that the Court has embraced the inclusion of public law entitlements within the concept of property as envisioned by Charles Reich.³⁸⁵

The German Federal Constitutional Court in its protection of public law entitlements has not only protected these interests from procedural violations but also from substantive violations; the court will inquire whether the state acted in a reasonable manner.³⁸⁶ Though these rights are protected substantively, “the German Federal Constitutional Court has decided that the public-law rights funded as they are from public money, are relative to the state of the economy in the sense that their monetary value can be amended to suit the states’ financial situation...this principle means that laws and regulations that affect the monetary value or actual calculation cannot be attacked unless... [they also affect] the substance of a concrete right.”³⁸⁷

4. The United States of America

4.1 Introduction

The right to property is guaranteed in the Fifth and Fourteenth Amendments to the Constitution of the United States of America (the “United States”). The Fifth Amendment, which is commonly referred to as the “Takings Clause”, states that:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

³⁸⁴ M Kellerman *The Constitutional Property Clause and Immaterial Property Interests* Unpublished LLD Thesis, Stellenbosch University (2011) at 219.

³⁸⁵ AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) at 157.

³⁸⁶ GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 767.

³⁸⁷ AJ van der Walt *The Constitutional Property Clause: a comparative analysis of section 25 of the South African Constitution of 1996* (1997) at 35.

property, without due process of law; *nor shall private property be taken for public use, without just compensation*".³⁸⁸ (my emphasis)

The Fourteenth Amendment, which is commonly referred to as the "Due Process Clause", states that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws."³⁸⁹ (my emphasis)

Constitutional property in the United States must be understood in light of its core purpose or function. Alexander explains in this respect that in the United States property is viewed as a commodity; that is to say that its core purpose is to guarantee a free market.³⁹⁰ The emphasis, therefore, is on the protection of the freedom of the individual property holder by ensuring that regulatory provisions that affect this freedom are kept in check.

4.2 The constitutional concept of property

Given that the Fifth Amendment obliges the state to pay just compensation only for "private property that has been taken for public use" and that the Fourteenth Amendment obliges the state to follow due process of law only where it deprives a person of "life, liberty or property", it follows that a person who claims the protection of these clauses will have to prove that the state has either "taken" or "deprived" such a person of his or her "property". The constitutional concept of property, therefore, is a threshold question.³⁹¹

³⁸⁸ The Constitution of the United States of America 1787.

³⁸⁹ The Constitution of the United States of America 1787.

³⁹⁰ GS Alexander "Property as propriety" (1998) 77 *Nebraska Law Review* at 668 and 669. Alexander also points out that before the emergence of this view, the United States courts regarded public good as being the important purpose of constitutional protection of property.

³⁹¹ *Board of Regents of State Colleges v Roth* 408 U.S. 568 (1972). See also *Bishop v Wood et al* 426 U.S. 341 (1976) at 343.

Despite the fact that the constitutional concept of property is a threshold question, it has not received as much attention in the United States as it has in other jurisdictions. This is largely because the private law concept of property in the United States is not restricted to real rights in corporeal movable and immovable objects. Instead, it encompasses various forms of intangible objects, rights and interests.³⁹² As a result of the wide definition of the private law concept of property, the United States Supreme Court (the “Supreme Court”) has accepted a wide range of private law rights and interests as constitutional property. These include flowage easements;³⁹³ coal mining rights;³⁹⁴ temporary rights of occupation;³⁹⁵ liens;³⁹⁶ personal rights;³⁹⁷

In addition, the constitutional concept of property has not received as much attention in the United States as in other jurisdictions because the Supreme Court has held that the Fifth and Fourteenth Amendments do not create a new form of property. Instead, they simply protect property that has been created by the common law or by statute law. In *Board of Regents of State Colleges v Roth*,³⁹⁸ for example, the Supreme Court held that:

“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”³⁹⁹

Finally, it is important to note that some intellectual property rights, for example patents and copyrights, are not protected as “property” by the Fifth and Fourteenth Amendments because

³⁹² AJ van der Walt *Constitutional Property Law* 3ed (2011) at 106. Property issue is only dealt with where the court is concerned with where the court is faced with difficult cases which do not fit within the private law notion of property.

³⁹³ *United States v Virginia Electric Power Co* 365 U.S. 624 (1961).

³⁹⁴ *Pennsylvania Coal Company v Mahon et al* 260 U.S. 393 (1922).

³⁹⁵ *United States v General Motors Corp* 323 U.S. 373 (1945).

³⁹⁶ *United States v Security Industrial Bank et al* 459 U.S. 70 (1982).

³⁹⁷ *Logan v Zimmermann Brush Co* 455 U.S. 422 (1981).

³⁹⁸ 408 U.S. 568 (1972).

³⁹⁹ *Board of Regents of State Colleges v Roth* 408 U.S. 568 (1972) at para 577. FI Michelman “Property as a constitutional right: The annual John Randolph Tucker Lecture” (1981) 38 *Washington and Lee Law Review* at 1103. Michelman argues that these existing laws are incapable of providing a comprehensive understanding of the scope and ambit of constitutional property. He further points out that an approach that relies completely on existing law means that the judiciary cannot decide whether the interest in question is of such a nature that it can be protected constitutionally.

they are explicitly protected in Article 1 of the Constitution.⁴⁰⁰ Section 8 of Article 1 provides in this respect that United States Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”.⁴⁰¹

4.3 The constitutional concept of property and public law entitlements

Although the Supreme Court relies mostly on the private law concept of property to decide what sorts of objects, rights and interests should be protected by the Fifth and Fourteenth Amendments, it has also extended the protection of the Fourteenth Amendment (although not the Fifth Amendment) to certain public law entitlements.⁴⁰² These decisions were based partly on article published by Professor Charles Reich in the *Yale Law Journal* entitled the New Property in 1964.⁴⁰³

In this article Reich argued that because interests emanating from public law had become an important source of wealth, there was a need to protect them by recognising them as constitutional property.⁴⁰⁴ In his article, he advocated for both procedural and substantive protection of public law entitlements.⁴⁰⁵ The US Supreme Court has accepted that these interests qualify for protection as “property”, but only under the Fourteenth Amendment and not under the Fifth Amendment.⁴⁰⁶ What this means is that public law entitlements are only protected from unlawful procedural interferences and not unlawful substantive interferences.

The first judgment in which the Supreme Court extended the protection provided by the Fourteenth Amendment to new property was *Goldberg v Kelly*.⁴⁰⁷ In this case the Supreme Court

⁴⁰⁰ A Mossoff “Patents as constitutional private property: The historical protection of patents under the takings clause” (2007) 87 *Boston ULR* at 690-691.

⁴⁰¹ The Constitution of the United States of America 1787.

⁴⁰² GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 767.

⁴⁰³ CA Reich “The New Property” (1964) 73 *Yale LJ*.

⁴⁰⁴ CA Reich “The New Property” (1964) 73 *Yale LJ* at 738.

⁴⁰⁵ CA Reich “The New Property” (1964) 73 *Yale LJ* at 738.

⁴⁰⁶ GS Alexander “Property as a fundamental constitutional right? The German example.” (2003) 88:733 *Cornell Law Review* at 767.

⁴⁰⁷ 397 U.S 254 (1970).

held that a social welfare beneficiary's right to due process had been violated by the termination of his welfare assistance. In arriving at this decision, the Supreme Court held that "welfare benefits are a matter of statutory entitlement for persons qualified to receive the, and procedural due process is applicable to their termination."⁴⁰⁸ The approach adopted in *Goldberg* was confirmed in *Mathews v Eldridge*⁴⁰⁹ where the Supreme Court held that a disability grant fell within the constitutional definition of property for the purposes of the Fourteenth Amendment and, consequently, that the applicant was entitled to a hearing before he could be denied the disability benefit.⁴¹⁰ Unlike the German Federal Constitutional Court, the Supreme Court did not apply the own effort requirement in any of these cases.

Apart from social welfare rights and interests, the Supreme Court has also extended the protection provided by the Fourteenth Amendment to licence holders. In *Bell v Burson*,⁴¹¹ the Supreme Court held that a driving licence held by a clergyman who needed it to perform his duties qualified for protection under the Due Process Clause. In arriving at this decision, the Supreme Court stated that "once licences are issued, as in the petitioner's case, their continued possession may become essential in the pursuit of a livelihood".⁴¹² In such cases, the licence cannot be taken away without that procedural due process required by the fourteenth amendment." And in *Barry v Barchi*⁴¹³ the Supreme Court accepted a horse racing license as constituting property protected by the Due Process Clause. From these cases, it can be concluded that licences will be protected if it can be shown that they are required for the practice of one's profession.

A commercial licence will additionally only be protected under the due process clause if it is held by a private person or juristic person and not when it is held by the state. In *Cleveland v United States*,⁴¹⁴ the Supreme Court found that a video poker license in the hands of the state does not qualify for constitutional protection.⁴¹⁵ It reasoned that licenses that have not been

⁴⁰⁸ *Goldberg v Kelly* 397 U.S 254 (1970) at 263.

⁴⁰⁹ 424 U.S. 319 (1976).

⁴¹⁰ *Mathews, Secretary of Health, Education and Welfare v Eldridge* 424 U.S. 319 (1976).

⁴¹¹ 402 US 535 (1971).

⁴¹² *Bell v Burson* 402 US 535 (1971) at 539.

⁴¹³ 443 U.S. 55 (1979).

⁴¹⁴ 531 U.S. 12 (2000).

⁴¹⁵ *Cleveland v United States* 531 U.S. 12 (2000) at 27.

issued by the state cannot qualify for constitutional property protection as the court does not refuse issuing the licence so as to derive a benefit but only does so for regulatory purposes.⁴¹⁶ As such, the interest in question must be “property” in the hands of the party whose rights have been infringed before it can be protected from unprocedural interferences.⁴¹⁷

The Supreme Court has to date not had the opportunity to decide on the issue of the inclusion of liquor licenses within the protection afforded by the Due Process Clause. Various lower courts in differing states have, however, held that liquor licenses are indeed property protected by the Due Process Clause.⁴¹⁸ American legal commentators propose that the determination of whether a particular liquor license is constitutionally protected should be done on a case by case basis and that courts should examine the rights given to the licensee in relation to a particular license. If the statute gives the holder an interest that has many of the characteristics of property, then, that interest should qualify for constitutional protection.

Although the United States clearly has a very wide concept of property, this concept of property does not, however, embrace all forms of intangible property rights. It does not extend to every conceivable interest. In *Paul v Davis*,⁴¹⁹ the Supreme Court held that “reputation alone, apart from some more tangible interests such as employment . . . [is not] by itself sufficient to invoke procedural protection of the Due Process Clause”.⁴²⁰

5. Conclusion

In light of the discussion set out above it can be seen that constitutional meaning of property depends largely on the core purpose(s) for the protection of property within the particular jurisdiction. In terms of the European Convention on Human Rights, the protection of property within Article 1 Protocol 1 seeks to ensure that states are able to formulate and carry out policies and laws that may interfere with the private property rights when it is in the public interest to do

⁴¹⁶ *Cleveland v United States* 531 U.S. 12 (2000) at 25-28.

⁴¹⁷ *Cleveland v United States* 531 U.S. 12 (2000) at 27.

⁴¹⁸ JJ Leonard “Liquor License – Privilege or Property” (1965) 40(2) *Notre Dame Law Review* 204.

⁴¹⁹ 424 U.S. 693 (1976).

⁴²⁰ *Paul, Chief of Police, Louisville et al v Davis* 424 U.S. 693 (1976) at para 701.

so. At the same time, this article also seeks to safeguard the holder of property from interferences that are carried out in an arbitrary manner.

The ECHR through its purposive interpretation of Article 1 Protocol 1 has extended the meaning of “possession” quite widely. It has extended the protection afforded by this article even to interests that have not vested and interests derived from public law. With regard to the latter, the ECHR unlike Germany and the United States of America has not limited this recognition to interests acquired through own effort; or in the case of licences, to interests that are necessary for the practice of one’s profession. Furthermore, under the EHCR, public law entitlements can be protected against both procedural and substantive interferences. This approach is more in line with Charles Reich’s vision for the protection of public law entitlements within the constitutional notion of property.

Germany’s constitutional property right is interpreted in light of its values, and as such it is also interpreted purposively. Like the EHCR, Article 14 of the Basic Law protects the individual property holder whilst also authorising the state to interfere with property rights where such an interference is in the public interest. The protection that the individual is entitled to as per Article 14, however, is not the protection of the economic value of the interest per se. Instead, the individual’s property interest is protected so as to ensure that they live a self-fulfilling and dignified life. When deciding whether an interest can qualify for protection as constitutional property, the German Federal Constitutional Court has therefore had to assess whether it is capable of enabling the individual to attain self-realisation. An interest may not qualify for protection if it serves a more public interest purpose than a private purpose.

Insofar as public law entitlements are concerned, though the German Federal Constitutional Court has included them within the constitutional concept of property, it has placed additional requirements for their inclusion. A public law entitlement will only be included within the constitutional concept of property if you can exclude another, it has been acquired through your own effort and if it is necessary for your survival. From these requirements, it is clear that welfare entitlements are protected as constitutional property in the German context as they are not attained though own effort. The inclusion of public law entitlements within the constitutional

notion of property therefore only extends to interest such as contributory pensions and medical insurance which are attained through own effort. These interests are protected from both procedural and substantive violations.

The United States has also adopted a very broad constitutional concept of property, but this is not surprising as it has a very broad private law concept of property. Due to the fact that private law, which is the starting point for constitutional property, has such a wide meaning of property, the Supreme Court in its resolution of property disputes has not focused on the interpretation of the meaning of “property”. It has, however, extended the protection of constitutional property under the Due Process Clause and the Takings Clause to various intangible interests including rights such as an easement, which would arguably not be protected under the German constitutional concept of property on the basis that it serves a more public law function. The extension of the American notion of constitutional property is a consequence of property being regarded as a commodity. Constitutional protection of property therefore serves the purpose of ensuring that the property holder’s economic freedom is not interfered with either through unprocedural violations of this right or deprivations that are not adequately compensated.

Constitutional protection of property in the United States has been extended to both contributory and non-contributory welfare interests as well as licences where the licence is necessary for the practice of one’s profession. Inasmuch as the United States of America has extended its constitutional concept of property to include these interests, it has only offered limited protection to holders of such interests. These interest can only be protected under the Due Process Clause and not under the Takings Clause. As such, they are only protected from procedural violations; the holder cannot claim that the state must compensate them where the state has withdrawn such an interest in a manner that satisfies the procedural requirements.

The comparative discussion shows that there is no universal meaning of property. Different foreign jurisdictions have adopted varying approaches to determining whether an interest is included or excluded from their constitutional notion of property. The approach taken in the different jurisdictions is however often informed by the core purpose of the constitutional protection of property as well as other contextual issues. As such the European Court of Human

Rights, the German Federal Constitutional Court and the United States Supreme Court have all reached different conclusions with regard to the kinds of public law entitlements that are included within their constitutional notion of property as well as the reasons for inclusion or exclusion and the kind of protection that holders of such entitlements can be afforded under the property clause.

CHAPTER SIX: ANALYSIS AND CONCLUSION

1. Introduction

The main aim of this thesis is to critically analyse the constitutional concept of property in light of the decision reached in the Shoprite Checkers case. *In casu*, the Constitutional Court found that a liquor license qualifies for protection under section 25 of the Constitution.⁴²¹

The research questions that have been addressed in this thesis are set out in the introductory chapter and they are (a) to set out and discuss the manner in which the Constitutional Court has interpreted and applied sections 25(1) and (2), (b) to set out and discuss the different approaches adopted in Shoprite Checkers and (c) to compare and contrast the different approaches adopted in Shoprite Checkers with approaches in comparable jurisdictions.⁴²² Chapter two of this thesis then gives an overview of section 25; that is how South African courts have interpreted the constitutional concepts of a deprivation and an expropriation, as well as the element of public interest/ purpose.⁴²³

In chapter three, the thesis then deals with the concept of constitutional “property”.⁴²⁴ The thesis in this chapter investigates how the courts have distinguished the constitutional notion of property from its private law counterpart and how the meaning of this concept has been developed beyond the confines of what private law deems as property.⁴²⁵ Chapter four then focuses on the Shoprite Checkers case with particular focus on the three judgments made by the Constitutional Court *in casu*.⁴²⁶ Having dealt with the South African approach to constitutional property, chapter five then investigates the approaches that have been adopted in foreign jurisdictions (European Union, United States of America and Germany) especially with regard to the inclusion of liquor licenses within the constitutional notion of property.⁴²⁷

⁴²¹ See *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC).

⁴²² See Chapter 1 of this thesis.

⁴²³ See Chapter 2 of this thesis.

⁴²⁴ See Chapter 3 of this thesis.

⁴²⁵ See Chapter 3 of this thesis.

⁴²⁶ See Chapter 4 of this thesis.

⁴²⁷ See Chapter 5 of this thesis.

In this final chapter, it will be argued that there was no need for the Constitutional Court to extend the constitutional concept of property to include commercial licenses because these interests are protected under section 22 of the Constitution. This argument's starting point is the insightful analysis of the *Shoprite Checkers* judgment by Van der Walt who makes a number of points which are significant for the purposes of this thesis. Perhaps the most important of these relate to Charles Reich's notion of "new property".⁴²⁸

As we have already seen in Chapter Five, Reich argued that one of the key features of the modern welfare state is that it confers a wide range of public law entitlements on its citizens. Despite the fact that these public law entitlements have become an important part of a citizen's wealth,⁴²⁹ he argued further, the state has a broad discretion to interfere with them. It could, for example, revoke them without notice or a hearing.⁴³⁰ In order to limit the state's discretionary powers to interfere with these public law entitlements, he went on to argue, they should be recognised as property for the purposes of the Fifth and Fourteenth Amendments of the United States Constitution.⁴³¹

In South Africa, and possibly other jurisdictions - as well, Van der Walt pointed out, the debate around the constitutional protection of public law entitlements has been confused by the failure to distinguish between the different categories of rights and interests that Reich included in the notion of "new property". A careful examination of Reich's article and subsequent jurisprudence shows that a distinction may be drawn between at least four categories of "new property", namely: intellectual property rights; personal rights; social and welfare grants that are grounded in own effort; social and welfare grants that are not grounded in own effort; and licences, quotas and permits.⁴³²

⁴²⁸ AJ van der Walt "Constitutional Property Law" *Annual Survey* (2015) at 10-11.

⁴²⁹ CA Reich "The New Property" (1964) 73 *Yale LJ* at 738.

⁴³⁰ CA Reich "The New Property" (1964) 73 *Yale LJ* at 740.

⁴³¹ CA Reich "The New Property" (1964) 73 *Yale LJ* at 740.

⁴³² AJ van der Walt "Constitutional Property Law" *Annual Survey* (2015) at 10.

Intellectual property rights and personal rights, Van der Walt points out further, have been recognised as constitutional property by the Constitutional Court.⁴³³ This is not surprising given that these rights are recognised by the private law and also because they enjoy the characteristics of private law property referred to by Madlanga J in his concurring judgment, namely objective commercial value, transferability and the ability to endure for a long period of time.⁴³⁴

Social and welfare rights that are grounded in own effort, such as salaries, bonuses, housing subsidies and pensions claimed by state employees have also been recognised as constitutional property by the courts, although not the Constitutional Court. In *Transkei Public Servants Association v Government of the Republic of South Africa*,⁴³⁵ for example, the Mthatha High Court held was of the view that a housing subsidy may be regarded as constitutional property. In *Ex Parte Speaker of the KwaZulu-Natal In re Amakhosi and Iziphakanyiswa Amendment Bill of 1995* the KwaZulu-Natal High Court appears to have treated conditions of service relating to payment as constitutional property.

Again, this is not surprising given that these rights usually arise out of a contract of employment and may thus be classified as personal rights. In addition, they also arise out of the state employees own effort. As indicated in Chapter Five, the German Federal Constitutional Court limits the inclusion of public law entitlements within the constitutional notion of property to interests in which one has exclusionary powers, attained through own effort and the interest must be necessary for their survival.

Unlike intellectual property rights, personal rights and social and welfare rights that are grounded in own effort, Van der Walt goes on to point out, social and welfare rights that are not grounded in own effort should not be recognised as constitutional property. This is because, he argues, the “Constitution protects them directly and explicitly under other constitutional headings” such as section 27(1)(c) which provides that “[e]veryone has to the right to have access to social security,

⁴³³ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 10.

⁴³⁴ In his main judgment, Froneman J also refers to the characteristics of private property. According to Froneman J these are that it must be valuable, exist for an indefinite period and capable of being transferred. See *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 68.

⁴³⁵ 1995 (9) BCLR 1235 (Tk).

including, if they are unable to support themselves and their dependents, appropriate social assistance”.

As indicated in Chapter Five, this approach is followed by the United States Supreme Court in respect of intellectual property rights and is constitution with the principle of subsidiarity. This principle provides for a “bottom-to-top approach: the lower level of the hierarchy should in principle exhaust its capacity to contribute in a particular context before the higher level intervenes, either by taking over or providing assistance where the lower level has reached its limit.”⁴³⁶ This principle has also been applied in the South African context, the Constitutional Court has found that where there are “more particular, indirect constitutional norms applicable” then these should be relied on before one can rely on “more general, direct constitutional norms applicable.”⁴³⁷

Although he does not do so himself, it is submitted that the argument made by Van der Walt in respect of social and welfare rights that are not grounded in own effort can also be made in respect of licences, quotas and permits, or at least in respect of liquor licences, namely that they should not be recognised as constitutional property because the Constitution protects them directly under other constitutional headings, namely the right to freedom of trade occupation and profession guaranteed in section 21 of the Constitution (in the case of citizens) and the principle of legality which forms a part of the rule of law guaranteed in section 1 (in the case of non-citizens and juristic persons).

This argument forms the focus of this final chapter. It is set out in two parts. The first part focuses on the right to freedom of trade, occupation and profession guaranteed in section 21 and the second part focuses on the principle of legality. Each part will be discussed in turn.

2. The right to freedom of trade, occupation and profession

2.1 Introduction

⁴³⁶ M Murcott and W van der Westhuizen “The ebb and flow of the application of subsidiarity – critical reflectiions on *Motau* and *My Vote Counts*” (2015) 7 *Constitutional Court Review* at 46.

⁴³⁷ M Murcott and W van der Westhuizen “The ebb and flow of the application of subsidiarity – critical reflectiions on *Motau* and *My Vote Counts*” (2015) 7 *Constitutional Court Review* at 46-47.

The right to freedom of trade, occupation and profession is guaranteed by section 22. This section provides that:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

This right was protected in the now repealed Interim Constitution in section 26.⁴³⁸ The protection afforded by section 22 goes beyond merely ensuring that one’s ability to provide for themselves financially is not affected.⁴³⁹ It also seeks to ensure that the individual lives a life that is “dignified and fulfilling”.⁴⁴⁰ This protection can be interfered with in two different ways. It could be that the person’s ability to *choose* their trade, occupation or profession is affected or a regulation may interfere with the way they exercise their right to choose their trade, occupation or profession freely.

2.2 The scope and ambit of the right

a) *What is meant by the phrase “trade, occupation and profession”?*

Lagrange submits that the phrase “trade, occupation and profession” is “wide enough to cover all forms of economic activity anyone might engage in and should not be read restrictively”.⁴⁴¹ This approach is also supported by Rautenbach who submits that, “The exclusion of ways in which to earn a living because they do not technically satisfy the contemporary definitions of ‘trades’, ‘occupations’ and ‘professions’ could unnecessarily open up opportunities for arbitrary exclusion and would, in any case, most probably serve no practical purpose”.⁴⁴² In *City of Cape Town v AD Outpost*,⁴⁴³ the Cape High Court was also of the view that any economic activity that enables one

⁴³⁸ The Constitution of the Republic of South Africa, 1993.

⁴³⁹ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 465.

⁴⁴⁰ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 465.

⁴⁴¹ R Lagrange “Economic activity rights” in H Cheadle and D Davis *South African Constitutional Law: The Bill of Rights* (2013) at 17-2.

⁴⁴² IM Rautenbach “The Right to Choose and Practice a Trade, Occupation or Profession – the Momentous and Meaningless Second Sentence of Section 22 of the Constitution” (2005) 4 *TSAR* at 854.

⁴⁴³ 2000 (2) BCLR 130 (C).

to earn a living is protected under this clause.⁴⁴⁴ There is clearly, much support for a wide interpretation of the economic interests that can be protected under this clause.

Commercial trading licenses would also qualify for protection under this clause as they are required for the practise of some trades. Moreover, the Constitutional Court has dealt with a case which shows that these licenses are indeed protected under the right to freedom of trade, occupation and freedom. In *S v Lawrence*,⁴⁴⁵ The Constitutional Court considered whether statutory prohibitions related to a grocer's wine license violated the appellants' rights to freedom of trade, occupation and profession.⁴⁴⁶

b) *What is meant by the term "citizen"?*

From the term "citizen" it is clear that this right can be relied on by natural persons who are South African citizens. High Court judgments have, however, found that this right is only applicable to natural persons.⁴⁴⁷ In *City of Cape Town v AD Outpost (Pty) Ltd and Others*⁴⁴⁸ the Judge was of the view that "section 22 introduces a Constitutional protection to be enjoyed by individual citizens as opposed to juristic bodies...It is not a provision which should be extended to the regulation of economic intercourse as undertaken by enterprises owned by juristic bodies which might otherwise fall within the description of economic activity."⁴⁴⁹

2.3 The standard of review

Where it is argued that the state has violated one's right to freedom of trade, occupation and profession, the court in assessing whether there has been such a violation has often started by distinguishing between two types of violations. That is, legislation that interferes with one's

⁴⁴⁴ *City of Cape Town v AD Outpost* 2000 (2) BCLR 130 (C) at para 59.

⁴⁴⁵ [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176.

⁴⁴⁶ *S v Lawrence, S v Negal; S v Solberg* [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 at para 2.

⁴⁴⁷ *City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 (2) BCLR 130 (C) at 142. See also *JR1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) at 928 in this case, the High Court did not, however, dismiss the case on this basis.

⁴⁴⁸ 2000 (2) BCLR 130 (C).

⁴⁴⁹ *City of Cape Town v AD Outpost (Pty) Ltd and Others* 2000 (2) BCLR 130 (C) at 142.

choice and legislation that interferences with the manner in which one practices their trade.⁴⁵⁰ Interference with the choice or practice of a trade, occupation or profession can only be done through a law which applies generally and is both “accessible and precise”.⁴⁵¹ Also, the legislation in question must only interfere with the choice or practice of a trade, occupation or freedom where this is in the public interest. This basically means that the legislation that regulates the choice or practice of a trade cannot do so arbitrarily.

In cases where the violation of the right to freedom of trade, occupation and profession results interferes with one’s choice of trade such as were a commercial license is withdrawn, leaving the holder of such a license incapable of practising his choice of trade, the court applies the stricter reasonableness test.⁴⁵² This test for reasonableness is derived from the limitations clause.⁴⁵³ In cases where the interference only regulates the trade in question, the regulation will be subjected to the lower level rationality test to determine its constitutionality.⁴⁵⁴

2.4 The argument

In light of the points set out, there appears to be no doubt that the phrase “trade, occupation and profession” is broad enough to include commercial licences and specifically liquor licences. Given this fact, it is submitted that in terms of the principle of subsidiarity it is not necessary to classify a liquor licence as constitutional property and the constitutional validity of the ECLA should have been tested against the provisions of section 21 rather than section 25.

In this respect, two points may be made.

⁴⁵⁰ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) at para 65.

⁴⁵¹ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 468.

⁴⁵² *South African Diamond Producers Organisation v Minister of Minerals and Energy NO and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) at para 65. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at 68.

⁴⁵³ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) at para 65. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at 68.

⁴⁵⁴ *South African Diamond Producers Organisation v Minister of Minerals and Energy NO and Others* [2017] ZACC 26; 2017 (10) BCLR 1303 (CC); 2017 (6) SA 331 (CC) at para 65. See also *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at 73.

First, that in his main judgment Froneman J acknowledges that a liquor licence promotes the goals that underlie section 22. He thus appears to implicitly accept that a liquor licence may be protected by the provisions of section 22. He states in this respect that, in order for an interest to qualify for constitutional protection of property, the court must ascertain whether it is such that it is necessary for the achievement of self-realization. In the case of a liquor licence holder this self-fulfilment requirement will be satisfied if the holding of the license is necessary for the “running a business as work that forms part of “one’s identity and constitutive of one’s dignity”? If it is, then, on the strength of the close correlation between the holding of the licence and the fundamental right to choose one’s trade or vocation, a finding that it is property for the purposes of section 25(1) is likely.”⁴⁵⁵

Second, although the standards of review that apply when a person claims that his or her section 22 rights have been infringed appear to be similar to those that apply when a person claims that his or her section 25 rights have been infringed,⁴⁵⁶ there are a number of reasons to apply section 22 rather than section 25. Inasmuch as section 25 and section 22 both have at their low end the test for rationality, these provisions, however, have different goals which could lead to the courts applying differing tests even when faced with the same set of facts. Applying section 25 would also avoid the difficulties encountered by the courts in dealing with the issue of “property” and it would give the courts the opportunity to contribute to a deeper understanding of the right to freedom of trade, occupation and profession.

Apart from the reasons given above, there is another important reason for excluding liquor licences from the definition of constitutional property and thus testing the provisions of the ECLA against section 22 and not section 25, namely that the freedoms guaranteed in section 22

⁴⁵⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 61.

⁴⁵⁶ As discussed above, where the right to freedom of trade, occupation and profession has been infringed, the court will consider the impact of the regulation(s) in question: if the infringement takes away the choice of trade, occupation or profession, the court will apply a stricter test, but if the infringement only affects the practice of the trade, occupation or profession of choice it will apply the lower level test for rationality. Froneman J in formulating the inquiry for arbitrary deprivation actually uses this approach which he extracted from *Affordable Medicines* a case decided on the basis of the right to freedom of trade, occupation and profession. In this regard, he found that the Court had to apply the rationality test since the regulations in question had not taken the holder’s right to choose their trade, occupation or freedom, but had only sought to regulate the practice of the trade. Natural persons’ commercial licences are therefore adequately protected under the right to freedom to choose one’s trade, occupation or profession.

are not granted to “everyone”. Instead, they are restricted to “citizens”. If liquor licences are included in the constitutional concept of property, then the decision taken by the drafters of the Constitution to restrict the freedoms guaranteed in section 22 to citizens only could easily be undermined. If a non-citizen or juristic person cannot successfully rely section 22, then a non-citizen or juristic person cannot rely on section 25 to achieve the same goal.

The fact that non-citizens and juristic persons cannot rely on section 22 or section 25 does not mean, however, that they do not enjoy any protection. This is because they can rely on the principle of legality.

3. The rule of law and the principle of legality

3.1 Introduction

The principle of legality is rooted in the supremacy clause of the Constitution which states that “[t]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.⁴⁵⁷ The principle of legality therefore applies to *all* law and *all* state actions. This would include laws which interfere with any commercial interests held by any person including juristic persons.

The rule of law is one of the founding values of the Constitution; in section 1(c), the Constitution states that one of the founding values of the Constitution is “[s]upremacy of the Constitution and the rule of law”.⁴⁵⁸

3.2 The scope and ambit of the principle of legality

In terms of the rule of law, all law and actions taken by the state must be rational.⁴⁵⁹ That is to say that; it must seek to achieve a legitimate public interest.⁴⁶⁰ The requirement for rationality is, however, the minimum requirement but the rule of law in other instances demands more than just

⁴⁵⁷ See section 2 Constitution of the Republic of South Africa, 1996.

⁴⁵⁸ The Constitution of the Republic of South Africa, 1996.

⁴⁵⁹ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 11.

⁴⁶⁰ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 11.

a rational link.⁴⁶¹ In some instances, a law or action of the state will comply with the rule of law if it is not only rational but also non-arbitrary and procedurally fair.⁴⁶²

The Constitutional Court explains the rule of law in *Pharmaceutical Manufacturers*⁴⁶³ where it states that:

“it is a requirement of the rule of law that the exercise of public power by an executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”⁴⁶⁴

In some cases, the courts have resolved matters on the principle of legality without actually evaluating the substantive issues and only considering whether the legislature or state body acted within the powers conferred upon it.⁴⁶⁵ In other cases, this principle has, however, been interpreted wide enough to allow the court to evaluate substantive issues.⁴⁶⁶ This wide approach has only been applied to cases dealing with the right of access to courts as well as cases which focus on “the law as a dispute resolution mechanism” – procedural fairness aspect of the principle of legality.⁴⁶⁷

From the above argument, it flows that the commercial licenses held by natural persons are best protected under the more specific clause which is the right to freedom of trade, occupation and profession. This clause, however, appears to limit its protection to natural persons and thus would not protect the commercial licenses held by juristic persons. I argue that commercial licenses held by juristic persons are also adequately protected by the constitutional principles of legality and the rule of law and thus should not be protected under the property clause.

⁴⁶¹ I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 12. See also R Kruger “The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a cause for concern?” (2010) 13 *PER/PELJ* at 484.

⁴⁶² I Currie and J de Waal *The Bill of Rights Handbook* 6ed (2013) at 12. See also R Kruger “The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a cause for concern?” (2010) 13(3) *PER/PELJ* at 484.

⁴⁶³ [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.

⁴⁶⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 at para 85.

⁴⁶⁵ R Kruger “The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a cause for concern?” (2010) 13 *PER/PELJ* at 15 and 17.

⁴⁶⁶ R Kruger “The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a cause for concern?” (2010) 13 *PER/PELJ* at 12.

⁴⁶⁷ R Kruger “The South African Constitutional Court and the Rule of Law: The Masethla Judgment, a cause for concern?” (2010) 13 *PER/PELJ* at 16-17.

3.3 The argument

As pointed out above, even though non-citizens and juristic persons cannot rely on section 22 to protect their liquor licences, they can still rely on the principle of legality. A non-citizen or juristic person who is a holder of a license can argue that the state cannot pass laws or act in a manner that is arbitrary with regard to their interest. As a minimum standard, the state is only allowed to interfere with such interests where this is done so as to achieve a legitimate public purpose. Depending on the circumstances, the Court might also look into substantive issues to determine whether the regulations in question comply with the rule of law. As such, though commercial licenses protected by juristic persons would be adequately protected by the Constitution by means of the rule of law and the principle of legality.

4. A re-assessment of Moseneke DCJ's judgment

4.1 Introduction

Out of all three judgments, Moseneke DCJ's judgment fits best with the arguments set out above. In addition, as Van der Walt points out, Moseneke DCJ is the only one who fully appreciated the radically regulated nature of licences. For these reasons, his judgment is the one I would support. Moseneke DCJ found that the grocer's wine license held by Shoprite Checkers did not constitute constitutional property. In this respect, he argued that:

"It is needless, I think, to characterise Shoprite's grocer's wine licence as constitutional property. The same outcome may be arrived at without deciding the difficult and fluid question whether it is property. It should suffice to test the challenged provisions for rationality. In that event, one simply asks whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait. In substance the arbitrariness enquiry here would, in process and substance, be no different from the arbitrariness enquiry under section 25(1)."⁴⁶⁸

The Deputy Chief Justice also pointed out that foreign jurisdictions have adopted different stances with regard to the protection of public law entitlements within the constitutional notion

⁴⁶⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 94.

of property.⁴⁶⁹ He pointed out that in Germany, though the courts had extended the constitutional notion of property to include welfare entitlements, they did not include all forms of welfare entitlements within their notion of constitutional property.⁴⁷⁰ South Africa, had to exercise the same caution according to the Deputy Chief Justice, the extension of the constitutional concept of property has to “be seen through the lenses of our history and constitutional scheme”.⁴⁷¹ In the South African context there was no need to extend the constitutional concept of property to include liquor licenses.⁴⁷²

The reasoning behind Moseneke’s view that liquor licenses need not be protected as constitutional property in the South African context was that:

“Some jurisdictions have opted for an elastic notion of “property” in order to protect interests that are otherwise open to executive or legislative abuse. Our Constitution is different. It provides us with the widest possible protection of fundamental rights and freedoms. It guarantees an impressive range of socio-economic entitlements. What is more, all laws and conduct must be consistent with the Constitution and are open to judicial scrutiny. We boast of administrative justice protections that are truly expansive and meant to police and curb executive excesses. Our jurisprudence need not convert every conceivable interest, with or without commercial value, as a few other jurisdictions have done, into protectable property.”⁴⁷³

Moseneke DCJ was of the view that inasmuch as liquor licenses are public law entitlements they are quite different from other forms of entitlements and that these differences should be taken into account when deciding whether they should be regarded as constitutional property. Unlike other forms of public law entitlements, liquor licences were regulated more heavily because of the socio-economic challenges that can result from “access to and use” of liquor.⁴⁷⁴ It was therefore important to ensure that this regulatory function of the legislature, which is an inherent

⁴⁶⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 110.

⁴⁷⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 113.

⁴⁷¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 115.

⁴⁷² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 113 and 115.

⁴⁷³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 115.

⁴⁷⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 118-120.

feature of a liquor license, was not significantly interfered with by giving the holder strong protection under the property clause.⁴⁷⁵ Moreover, a very wide concept of constitutional property would not only “impermissibly limit the legislative competences of the provinces” but it would also result in a tighter...understanding of deprivation and arbitrariness.”⁴⁷⁶

Over and above this, the nature of liquor licenses disqualified them from inclusion within the constitutional concept of property, per Moseneke DCJ.⁴⁷⁷ A liquor license could not be protected as “property” because:

- (a) it is a “bare permission”;⁴⁷⁸
- (b) it can be withdrawn or altered by the administrator;⁴⁷⁹
- (c) it is “never absolute” and it is “never for the taking”;⁴⁸⁰
- (d) the holder of the license may become unsuitable to hold it;⁴⁸¹
- (e) it is not freely transferrable;⁴⁸² and
- (f) it does not vest in its holder.⁴⁸³

In his minority judgment, Moseneke DCJ argues that by resolving this matter on the basis of the rationality principle, the Constitutional Court would have reached the same outcome without the difficulties of deciding on the issue of property. He argued that “the inquiry into arbitrary deprivation in substance is no different from the enquiry into rationality of the impugned

⁴⁷⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 125.

⁴⁷⁶ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 125.

⁴⁷⁷ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁷⁸ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁷⁹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁸⁰ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁸¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁸² *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 122.

⁴⁸³ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 123.

statute.”⁴⁸⁴ Like the arbitrary deprivation enquiry, the rationality test also seeks to establish that the relevant legislation has a legitimate public purpose.⁴⁸⁵

4.2 The principle of subsidiarity

Moseneke DCJ’s judgment shows an appreciation of not only the “unique nature of licences” but also the unique nature of South Africa’s constitutional context.⁴⁸⁶ Moseneke DCJ makes a good point that where the Constitution through other rights gives adequate protection to a particular public law entitlement, then, the notion of constitutional property need not be extended to include such an entitlement. Charles Reich in arguing for the inclusion of the various forms of public law entitlements within the American constitutional notion of property, based his argument on the lack and inadequacy of the protection that these entitlements had under the American Constitution. The South African Constitution, as correctly pointed out by Moseneke DCJ, offers adequate protection to holders of commercial licenses. As such there is no need in the South African context to extend the constitutional concept of property to include commercial licenses.

4.3 Radically regulated interests

Van der Walt points out that unlike Moseneke DCJ, Froneman J and Madlanga J failed to take into consideration the “unique nature of licences as radically regulated constitutional property.”⁴⁸⁷ Though commercial licences display some characteristics of traditional property and though all property is regulated, Van der Walt submits that “not all property is subject to the same kind of intensity of regulatory interference and amendment – a qualification that makes all the difference and is therefore crucial in case like this.”⁴⁸⁸ He was also of the view that when determining the inclusion of licenses within the constitutional notion of property courts should avoid placing

⁴⁸⁴ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 129.

⁴⁸⁵ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) at para 129.

⁴⁸⁶ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 6-7.

⁴⁸⁷ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 10.

⁴⁸⁸ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 10.

them under the broad and misleading category of “new property”.⁴⁸⁹ Instead, they should consider the nature of the license and determine whether the license in question needs to be protected under the property clause.⁴⁹⁰

With regard to the nature of licenses Van der Walt stated that:

“licenses (like many other forms of private property that is subject to extensive or radical wall-to-wall regulatory control) are particularly prone to what may be described as regulatory-regime changes – in other words, large scale, comprehensive amendments of the regulatory scheme of which they form part and from which they derive. Generally speaking, property that is wholly derived dependent on, or significantly limited by regulation, is not insulated against such regime changes – provided that the regime change is rationally justifiable, implemented fairly, and, in particular, softened by a reasonable set of transitional provisions. However, depending on a mixture of the particular features of the regulatory schemes of which it forms part, a particular licence can nevertheless vest in the beneficiary more or less clearly at a determinable point of in time, be more or less insulated against unilateral and arbitrary regulatory amendment and termination, and be more or less insulated against unilateral and arbitrary amendment and termination, and be more or less insulated freely transferrable and commercially valuable. Depending on the variations based on these considerations, specific interests should preferably be protected under section 25 or in terms of administrative justice.”⁴⁹¹

5. Conclusion

The interpretation of the meaning of property is a complex matter. More so, when it comes to public law entitlements. The failure of the Constitutional Court in earlier decisions to lay building blocks for the interpretation of the meaning of property, when it expanded the meaning of property, by engaging fully with this issue also contributed to these challenges. It was not until the decision in *Shoprite Checkers* that the Constitutional Court fully engaged with the issue of the meaning of constitutional property. Though the Court found that commercial licenses are constitutionally protected property, the Court was torn into three with regard to the approach to be used to interpret the meaning of “property” in a constitutional sense.

⁴⁸⁹ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 11.

⁴⁹⁰ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 11.

⁴⁹¹ AJ van der Walt “Constitutional Property Law” *Annual Survey* (2015) at 11.

It is submitted that the Constitutional Court did not, however, need to extend the constitutional concept of property to include commercial licenses. In line with the principle of subsidiarity, commercial licenses which are essential for the practice of one's trade must instead be protected under the most specific right which is the right to freedom of trade, occupation and profession. Though this right does not extend to juristic persons, commercial licences held by juristic persons are constitutionally protected through the rule of law and the principle of legality. These constitutional principles and the right to freedom of trade, occupation and profession adequately protect commercial licenses and they would result in the same outcome reached in Shoprite Checkers but without the challenges that arose from the determination of whether these interests are "property" for the purposes of section 25.

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